COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
Date: May 6. 2025
CT- 2024-010

Sarah Sharp-Smith for / pour
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OTTAWA, ONT. | # 60

PUBLIC

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 16 OF 29

May 6, 2025

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INDEX

Tab	Description	Page No.
VOLUME 1		
A.	Notice of Motion dated May 6, 2025	1
B.	Notice of Constitutional Question dated February 14, 2025	19
C.	Affidavit of Ron Zember sworn May 2, 2025	37
1)	Exhibit A – Annual Report of Google Inc. for the year ended December 31, 2007	48
2)	Exhibit B – Annual Report of Google Inc. for the year ended December 31, 2008	156
3)	Exhibit C – Annual Report of Google Inc. for the year ended December 31, 2009	264
VOLUME 2		
4)	Exhibit D – Annual Report of Google Inc. for the year ended December 31, 2010	372

Tab	Description	Page No.
5)	Exhibit E – Annual Report of Google Inc. for the year ended December 31, 2011	463
6)	Exhibit F – Annual Report of Google Inc. for the year ended December 31, 2012	556
7)	Exhibit G – Annual Report of Google Inc. for the year ended December 31, 2013	657
VOLUME 3		
8)	Exhibit H – Annual Report of Google Inc. for the year ended December 31, 2014	751
9)	Exhibit I – Annual Report of Alphabet Inc. and Google Inc. for the year ended December 31, 2015	842
10)	Exhibit J – Annual Report of Alphabet Inc. for the year ended December 31, 2016	955
11)	Exhibit K – Annual Report of Alphabet Inc. for the year ended December 31, 2017	1048
VOLUME 4		
12)	Exhibit L – Annual Report of Alphabet Inc. for the year ended December 31, 2018	1145
13)	Exhibit M – Annual Report of Alphabet Inc. for the year ended December 31, 2019	1238
14)	Exhibit N – Annual Report of Alphabet Inc. for the year ended December 31, 2020	1337
15)	Exhibit O – Annual Report of Alphabet Inc. for the year ended December 31, 2021	1438
VOLUME 5		
16)	Exhibit P – Annual Report of Alphabet Inc. for the year ended December 31, 2022	1534
17)	Exhibit Q – Annual Report of Alphabet Inc. for the year ended December 31, 2023	1627
18)	Exhibit R – Annual Report of Alphabet Inc. for the year ended December 31, 2024	1725
D.	Affidavit of Laura Pearce dated May 5, 2025	1825
1)	Exhibit A – Ipsos Press Release dated February 5, 2025	1833
2)	Exhibit B – Léger's 2024 Reputation Report	1839
3)	Exhibit C – Google Canada 2023 Economic Impact Report	1856

Tab	Description	Page No.
4)	Exhibit D – Forbes' 2025 Best Employers in Canada	1891
5)	Exhibit E – LinkedIn Top Companies 2025	1897
VOLUME 6		
E.	Affidavit of Corinne Lester dated May 1, 2025	1912
1)	Exhibit A – Request for Information dated March 6, 2013	1919
2)	Exhibit B – Notice of Motion Regarding Section 11 Order dated December 12, 2013	1925
3)	Exhibit C – Commissioner of Competition Position Statement dated April 19, 2016	1929
4)	Exhibit D – Notice of Inquiry dated January 5, 2021	1945
5)	Exhibit E – Letter from Competition Bureau Legal Services dated July 9, 2021	1947
6)	Exhibit F – Notice of Application Regarding Section 11 Order dated October 12, 2021	1950
7)	Exhibit G – Section 11 Order dated October 22, 2021	1954
8)	Exhibit H – Excerpted Letter to Competition Bureau Legal Services dated January 20, 2022	2009
9)	Exhibit I – Letter from Competition Bureau Legal Services dated December 1, 2023	2015
10)	Exhibit J – Letter from Competition Bureau Legal Services dated December 8, 2023	2017
11)	Exhibit K – Notice of Application Regarding Section 11 Order dated January 31, 2024	2020
12)	Exhibit L – Section 11 Order dated February 12, 2024	2024
13)	Exhibit M – Excerpted Letters to Competition Bureau Legal Services dated April 15, 2024 and April 22, 2024	2060
14)	Exhibit N – Excerpted Letter to Competition Bureau Legal Services dated April 29, 2024	2065
15)	Exhibit O – Excerpted Letter to Competition Bureau Legal Services dated May 28, 2024	2068
F.	Expert Report of Rupert Younger dated May 6, 2025	2072
G.	Expert Report of Professor Keith Hylton dated May 6, 2025	2110
VOLUME 7		
H.	Affidavit of Mary DeCaire dated May 5, 2025	2195

Tab	Description	Page No.
1)	Exhibit 1 – *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, S.C. 1889, c. 41	2235
2)	Exhibit 2 – Excerpt of *The Criminal Code*, 1892, 55-56 Victoria, c. 29	2239
3)	Exhibit 3 –*Combines Investigation Act*, S.C. 1910, c. 9	2245
4)	Exhibit 4 – *Board of Commerce Act,* S.C. 1919, c. 37	2259
5)	Exhibit 5 – *The Combines and Fair Prices Act, 1919*, S.C. 1919, c. 45	2275
6)	Exhibit 6 – *In the Matter of the Board of Commerce Act and the Combines and Fair Prices Act*, 1921 CanLII 399 (UK JCPC), [1922] 1 A.C. 191 (PC)	2287
7)	Exhibit 7 – *Combines Investigation Act*, S.C. 1923, c. 9	2295
8)	Exhibit 8 – *Combines Investigation Act*, S.C. 1960, c. 45	2308
VOLUME 8		
9)	Exhibit 9 – Economic Council of Canada's Interim Report on Competition Policy dated July 1969	2322
VOLUME 9		
10)	Exhibit 10 – Lawrence A. Skeoch and Bruce C. McDonald, "Dynamic Change and Accountability in a Canadian Market Economy: Proposals for the Further Revision of Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs" dated March 31, 1976	2576
VOLUME 10		
11)	Exhibit 11 – Law Reform Commission of Canada, "The Jury in Criminal Trials (Working Paper 27)" dated 1980	2950
12)	Exhibit 12 – Excerpt of the Royal Commission on Newspapers dated July 1, 1981	3129
13)	Exhibit 13 – Minister of Consumer and Corporate Affairs, "Competition Law Amendments A Guide" dated December 1985	3227
VOLUME 11		
14)	Exhibit 14 – 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*, S.C. 1986, c. 26	3314

Tab	Description	Page No.
15)	Exhibit 15 – Excepts of *House of Commons Debates*, 33-1, Vol. 8 from April 7-10, 1986	3405
16)	Exhibit 16 – Excerpt of *Debates of the Senate,* 33-1, Vol. 3 from April 17, 1986, June 10-11, 1986 and June 17, 1986	3564
17)	Exhibit 17 – Excerpt of *House of Commons Debates*, 33-1, Vol. 9 from April 25, 1986 and May 27, 1986	3580
18)	Exhibit 18 – Excerpt of *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, 33-1, No. 44 from April 30, 1986	3587
19)	Exhibit 19 – *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, 33-1, No. 46 from May 7, 1986	3612
20)	Exhibit 20 – *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, 33-1, No. 47 from May 14, 1986	3633
VOLUME 12		
21)	Exhibit 21 – *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, 33-1, No. 48 from May 28, 1986	3678
22)	Exhibit 22 – Excerpt of *House of Commons Debates*, 33-1, Vol. 10 from June 2, 1986 and June 5, 1986	3725
23)	Exhibit 23 – *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, 33-1, No. 50 from June 11, 1986	3780
24)	Exhibit 24 – *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, 33-1, No. 51 from June 17, 1986	3799
25)	Exhibit 25 – *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, 34-3, No. 1	3808
VOLUME 13		
25)	Exhibit 25 Continued - *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, 34-3, No. 1	4047
VOLUME 14		
25)	Exhibit 25 Continued - *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, 34-3, No. 1	4285

Tab	Description	Page No.
VOLUME 15		
26)	Exhibit 26 – Bureau of Competition Policy at Consumer and Corporate Affairs Canada, "Competition Policy in Canada: The First Hundred Years" (CCAC No. 189 10262 E 89-10) dated 1989	4523
27)	Exhibit 27 – Margaret Smith, Law and Government Division, "Mergers and Abuse of Dominant Position: Legal Aspects", first published in January 1991, revised September 10, 1998	4614
28)	Exhibit 28 – Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess., 37th Parl., 2001-2002 (assented to June 4, 2002), S.C. 2002, c. 16	4639
29)	Exhibit 29 – Competition Bureau, "Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the *Competition Act*)" dated July 2001	4684
30)	Exhibit 30 – *Competition Act*, R.S.C., 1985, c. C-34, as it existed in 2002 following the passing of Bill C-23	4731
31)	Exhibit 31 – Excerpt of *House of Commons Debates*, 37-1, Vol. 137, No. 54 from May 3, 2001	4864
32)	Exhibit 32 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Science and Technology from October 4, 2001	4876
VOLUME 16		
33)	Exhibit 33 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Science and Technology from October 16, 2001	4911
34)	Exhibit 34 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Science and Technology from October 17, 2001	4973
35)	Exhibit 35 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Science and Technology from October 23, 2001	4997
36)	Exhibit 36 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Science and Technology from October 24, 2001	5046
37)	Exhibit 37 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Science and Technology from November 6, 2001	5084

Tab	Description	Page No.
38)	Exhibit 38 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Science and Technology from November 7, 2001	5152
39)	Exhibit 39 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Science and Technology from November 27, 2001	5189
40)	Exhibit 40 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Science and Technology from December 4, 2001	5223
41)	Exhibit 41 – Excerpt of *House of Commons Debates*, 37-1, Vol. 137, No. 125 from December 5, 2001	5258
42)	Exhibit 42 – Excerpt of *House of Commons Debates*, 37-1, Vol. 137, No. 127 from December 7, 2001	5263
VOLUME 17		
43)	Exhibit 43 – *House of Commons Debates*, 37-1, Vol. 137, No. 128 from December 10, 2001	5276
44)	Exhibit 44 – Excerpt of *Debates of the Senate*, 37-1, Vol. 139, No. 86 from February 5, 2002	5338
45)	Exhibit 45 – House of Commons Standing Committee on Industry, Science and Technology, “A Plan to Modernize Canada’s Competition Regime” dated April 2002	5347
46)	Exhibit 46 – James Travers, “Hope for airline competition”, published in the *Toronto Star* on April 23, 2002	5496
47)	Exhibit 47 – Sixteenth Report of the Standing Senate Committee on Banking, Trade and Commerce dated May 2, 2002	5499
48)	Exhibit 48 – Excerpt of *Debates of the Senate*, 37-1, Vol. 139, No. 114 from May 8, 2002	5503
49)	Exhibit 49 – Bill C-19, *An Act to amend the Competition Act and to make consequential amendments to other Acts*, 1st Sess., 38th Parl., 2004 (first reading November 2, 2004)	5511
50)	Exhibit 50 – Screen capture showing the status of Bill C-19 (2004) taken on May 2, 2025	5524
51)	Exhibit 51 – News release issued by the Government of Canada, “Minister of Industry Tables Amendments to Strengthen the Competition Act” dated November 2, 2004	5526

Tab	Description	Page No.
52)	Exhibit 52 – Excerpt of *House of Commons Debates*, 38-1, Vol. 140, No. 25 from November 16, 2004	5534
53)	Exhibit 53 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology from November 18, 2004	5550
54)	Exhibit 54 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology from December 2, 2004	5575
55)	Exhibit 55 – Susan Heinrich, "Sears case wake-up call for industry. Things will only get tougher if Bill C-19 passes as written", published in *Financial Post* on January 25, 2005	5600
56)	Exhibit 56 – Legal opinion titled "Bill C-19's proposals respecting Administrative Monetary Penalties", provided by Peter W. Hogg, Q.C. to Diane J. Brisebois, President and Chief Executive Officer of the Retail Council of Canada dated March 8, 2005	5604
57)	Exhibit 57 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology from March 9, 2005	5611
58)	Exhibit 58 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology from March 23, 2005	5634
59)	Exhibit 59 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology from April 6, 2005	5655
VOLUME 18		
60)	Exhibit 60 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology (Meeting 54) from October 6, 2005	5678
61)	Exhibit 61 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology (Meeting 55) from October 6, 2005	5705
62)	Exhibit 62 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology from October 25, 2005	5732

Tab	Description	Page No.
63)	Exhibit 63 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology from October 27, 2005	5757
64)	Exhibit 64 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology from November 2, 2005	5779
65)	Exhibit 65 – Bill C-73, *An Act to amend the Telecommunications Act (No. 2)*, 1st Sess., 38th Parl., 2004-2005 (first reading November 14, 2005)	5795
66)	Exhibit 66 – Rita Trichur, "Competition Act changes will erode Charter rights, retailers warn; Say it will hurt rivalry in marketplace", *The Globe and Mail* (November 14, 2005)	5814
67)	Exhibit 67 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology from November 22, 2005	5817
68)	Exhibit 68 – Transcript of the Proceedings of House of Commons Standing Committee on Industry, Natural Resources, Science and Technology from November 24, 2005	5844
69)	Exhibit 69 – "Constitutional Opinion on Administrative Monetary Penalties Proposed for the Telecommunications Act" by Peter W. Hogg and Kenneth E. Jull dated June 6, 2006	5867
70)	Exhibit 70 – Report by the Government of Canada Competition Policy Renewal Panel titled "Compete to Win: Final Report – June 2008" dated June 26, 2008	5881
71)	Exhibit 71 – Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess., 40th Parl., 2009 (assented to March 12, 2009), S.C. 2009, c. 2	5910
VOLUME 19		
71)	Exhibit 71 – Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess., 40th Parl., 2009 (assented to March 12, 2009), S.C. 2009, c. 2	6066

Tab	Description	Page No.
VOLUME 20		
72)	Exhibit 72 – Excerpt of *House of Commons Debates*, 40-2, Vol. 144, No. 11 from February 9, 2009	6464
73)	Exhibit 73 – Excerpt of *House of Commons Debates*, 40-2, Vol. 144, No. 12 from February 10, 2009	6470
74)	Exhibit 74 – Excerpt of *House of Commons Debates*, 40-2, Vol. 144, No. 14 from February 12, 2009	6479
75)	Exhibit 75 – Transcript of the Proceedings of House of Commons Standing Committee on Finance (Meeting 6) from February 23, 2009	6484
76)	Exhibit 76 – Transcript of the Proceedings of House of Commons Standing Committee on Finance (Meeting 9) from February 23, 2009	6496
77)	Exhibit 77 – First Report of the House of Commons Standing Committee on Finance dated February 24, 2009	6506
78)	Exhibit 78 – Excerpt of *House of Commons Debates*, 40-2, Vol. 144, No. 20 from February 27, 2009	6509
79)	Exhibit 79 – Excerpt of *House of Commons Debates,* 40-2, Vol. 144, No. 21 from March 2, 2009	6517
80)	Exhibit 80 – Excerpt of *House of Commons Debates*, 40-2, Vol. 144, No. 23 from March 4, 2009	6530
81)	Exhibit 81 – Excerpt of *Debates of the Senate*, 40-2, Vol. 146, No. 16 from March 5, 2009	6534
82)	Exhibit 82 – Fifth Report of the Standing Senate Committee on National Finance dated March 12, 2009	6552
83)	Exhibit 83 – Excerpt of *Debates of the Senate*, 40-2, Vol. 146, No. 19 dated March 12, 2009	6555
84)	Exhibit 84 – *Competition Act*, R.S.C., 1985, c. C-34, following the passing of Bill C-10	6588
85)	Exhibit 85 – Competition Bureau, “Annual Report of the Commissioner of Competition for the year ending March 31, 2009”	6712
86)	Exhibit 86 – ”Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition” dated May 13, 2009	6779
87)	Exhibit 87 – Competition Bureau, “Annual Report of the Commissioner of Competition for the year ending March 31, 2010”	6783

Tab	Description	Page No.
VOLUME 21		
88)	Exhibit 88 – Competition Bureau, “Annual Report of the Commissioner of Competition for the year ending March 31, 2012”	6845
89)	Exhibit 89 – Competition Bureau, “Lower Prices More Choice – Annual Report of the Commissioner of Competition for the year ending March 31, 2013”	6889
90)	Exhibit 90 – Competition Bureau, “The 4 Cs of Competition – Compliance, Communication, Collaboration, Canadians – Annual Report of the Commissioner of Competition for the year ending March 31, 2014”	6918
91)	Exhibit 91 – Competition Bureau, “For a Competitive Playing Field – Promoting compliance for the benefit of Canadian Consumers – Annual Report of the Commissioner of Competition for the year ending March 31, 2015”	6959
92)	Exhibit 92 – Competition Bureau, “Corporate Compliance Programs” dated June 3, 2015	6997
93)	Exhibit 93 – Competition Bureau, “Staying Competitive in a Changing World Protecting and Promoting Competition for the Benefit of All Canadians – Annual Report of the Commissioner of Competition for the year ending March 31, 2016”	7090
94)	Exhibit 94 – News release issued by the Competition Bureau, “Competition Bureau completes extensive investigation of Google” dated April 19, 2016	7129
95)	Exhibit 95 – Position statement issued by the Competition Bureau, “Investigation into alleged anti-competitive conduct by Google” dated April 19, 2016	7134
96)	Exhibit 96 – Screen capture from X of a post from the Competition Bureau dated April 19, 2016	7150
97)	Exhibit 97 – Competition Bureau, “Building a More Competitive and Innovative Canada – Annual Report of the Commissioner of Competition for the year ending March 31, 2017”	7152
98)	Exhibit 98 – Competition Bureau, “From Bread to Banking: Driving Competition and Innovation in Canada – 2017-18 Annual Report”	7170

Tab	Description	Page No.
99)	Exhibit 99 – Competition Bureau, "Driving Competition for Canadians – 2018-19 Annual Report"	7200
100)	Exhibit 100 – Report by the Competition Bureau "Our Year in Action Safeguarding Competition in a Digital World – 2019-2020 Annual Report"	7224
101)	Exhibit 101 – News release issued by the Competition Bureau, "Competition Bureau obtains court order to advance an investigation of Google" dated October 22, 2021	7247
VOLUME 22		
102)	Exhibit 102 – Screen capture from X of a post from the Competition Bureau dated October 22, 2021	7252
103)	Exhibit 103 – Competition Bureau, "Championing competition in uncertain times – 2020-21 Annual Report"	7254
104)	Exhibit 104 – Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess., 44th Parl., 2021-2022 (assented to June 23, 2022)	7275
VOLUME 23		
104)	Continued Exhibit 104 – Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess., 44th Parl., 2021-2022 (assented to June 23, 2022)	7520
105)	Exhibit 105 – Competition Bureau, "Guide to the 2022 amendments to the *Competition Act*" dated June 24, 2022	7721
106)	Exhibit 106 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 65 from May 5, 2022	7733
107)	Exhibit 107 – Transcript of the Proceedings of House of Commons Standing Committee on Finance from May 26, 2022	7739
108)	Exhibit 108 – Fourth Report of the Standing Committee on Finance dated May 31, 2022	7775
109)	Exhibit 109 – Fourth Report of the Standing Senate Committee on Foreign Affairs and International Trade dated June 2, 2022	7782
110)	Exhibit 110 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 81 from June 3, 2022	7785

Tab	Description	Page No.
111)	Exhibit 111 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 82 from June 6, 2022	7797
112)	Exhibit 112 – Second Report of the Standing Senate Committee on Banking, Trade and Commerce dated June 6, 2022	7811
113)	Exhibit 113 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 83 from June 7, 2022	7814
114)	Exhibit 114 – First Report of the Standing Senate Committee on National Security and Defence dated June 7, 2022	7818
115)	Exhibit 115 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 84 from June 8, 2022	7821
116)	Exhibit 116 – Transcript of the Proceedings of the Standing Senate Committee on National Finance from June 8, 2022	7827
117)	Exhibit 117 – Eighth Report of the Standing Senate Committee on Social Affairs, Science and Technology dated June 9, 2022	7865
118)	Exhibit 118 – Fourth Report of the Standing Senate Committee on Indigenous Peoples dated June 10, 2022	7868
119)	Exhibit 119 – Excerpt of *Debates of the Senate*, 44-1, Vol. 153, No. 53 from June 14, 2022	7871
120)	Exhibit 120 – Excerpt of *Debates of the Senate*, 44-1, Vol. 153, No. 58 from June 22, 2022	7876
VOLUME 24		
121)	Exhibit 121 – “Charter Statement – Bill C-19: An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures” tabled in the House of Commons on June 3, 2022	7898
122)	Exhibit 122 – Transcript of the Proceedings of the House of Commons Standing Committee on Finance from May 19, 2022	7923
123)	Exhibit 123 – Transcript of the Proceedings of the House of Commons Standing Committee on Finance from May 24, 2022	7950
124)	Exhibit 124 – Fifth Report of the Standing Senate Committee on Legal and Constitutional Affairs dated June 9, 2022	7985
125)	Exhibit 125 – Sixth Report of the Standing Senate Committee on National Finance dated June 21, 2022	7988

Tab	Description	Page No.
126)	Exhibit 126 – News release issued by the Competition Bureau, "Important amendments to the *Competition Act* come into effect" dated June 24, 2022	7991
127)	Exhibit 127 – *Competition Act*, R.S.C., 1985, c. C-34, following the passing of Bill C-19	7996
128)	Exhibit 128 – Competition Bureau, "Building a more competitive Canada – 2021-22 Annual Report"	8140
129)	Exhibit 129 – Competition Bureau, "A new era for competition – Driving affordability and economic growth 2022-23 Annual Report"	8160
130)	Exhibit 130 – Submission by the Competition Bureau "Examining the Canadian *Competition Act* in the Digital Era" dated February 8, 2022	8182
VOLUME 25		
131)	Exhibit 131 – Submission by the Competition Bureau "The Future of Competition Policy in Canada" dated March 15, 2023	8293
132)	Exhibit 132 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 219 from September 18, 2023	8393
133)	Exhibit 133 – Bill C-352, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess., 44th Parl. (first reading September 18, 2023)	8397
134)	Exhibit 134 – Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess., 44th Parl., 2022-2023 (first reading September 21, 2023)	8405
135)	Exhibit 135 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 222 from September 21, 2023	8416
136)	Exhibit 136 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 223 from September 25, 2023	8424
137)	Exhibit 137 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 225 from September 27, 2023	8441
138)	Exhibit 138– Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 228 from October 3, 2023	8461
139)	Exhibit 139 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 230 from October 5, 2023	8475

Tab	Description	Page No.
140)	Exhibit 140 - "Charter Statement – Bill C-56: An Act to amend the Excise Tax Act and the Competition Act" tabled in the House of Commons on October 16, 2023	8525
141)	Exhibit 141 – Competition Bureau, "Bulletin on Amendments to the Abuse of Dominance Provisions" dated October 25, 2023	8531
142)	Exhibit 142 – Canadian Chamber of Commerce, "Written Submission for the Study of Bill C-56, the *Affordable Housing and Groceries Act*" dated November 2023	8569
143)	Exhibit 143 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 247 from November 6, 2023	8577
144)	Exhibit 144 – Thirteenth Report of the House of Commons Standing Committee on Finance dated November 29, 2023	8589
145)	Exhibit 145 – *House of Commons Debates*, 44-1, Vol. 151, No. 254 from November 23, 2023	8593
VOLUME 26		
146)	Exhibit 146 – *House of Commons Debates*, 44-1, Vol. 151, No. 259 from November 30, 2023	8655
147)	Exhibit 147 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 262 from December 5, 2023	8726
148)	Exhibit 148 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 265 from December 11, 2023	8743
149)	Exhibit 149 – Fifteenth Report of the Standing Senate Committee on National Finance dated December 13, 2023	8772
150)	Exhibit 150 – Excerpt of *Debates of the Senate*, 44-1, Vol. 153, No. 171 from December 13, 2023	8775
151)	Exhibit 151 – Excerpt of *Debates of the Senate*, 44-1, Vol. 153, No. 172 from December 14, 2023	8787
152)	Exhibit 152 – Rachel Aiello, "NDP agree to help pass Liberal 'affordable housing and groceries' bill in exchange for amendments", *CTV News* (November 17, 2023)	8798
153)	Exhibit 153 – Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess., 44th Parl., 2022-2023 (assented to December 15, 2023), S.C. 2023, c. 31	8802
154)	Exhibit 154 – *Competition Act*, R.S.C., 1985, c. C-34, following the passing of Bill C-56	8815

Tab	Description	Page No.
155)	Exhibit 155 – Competition Bureau, "Guide to the December 2023 amendments to the *Competition Act*" dated December 18, 2023	8960
156)	Exhibit 156 – Excerpt of *House of Commons Debates*, 44-1, Vol. 151, No. 274 from February 2, 2024	8968
157)	Exhibit 157 – News release issued by the Competition Bureau, Competition Bureau expands its investigation into Google's advertising practices" dated February 29, 2024	8980
158)	Exhibit 158 – Screen capture from X of a post from the Competition Bureau dated February 29, 2024	8985
159)	Exhibit 159 – Written submissions of Matthew Boswell, Commissioner of Competition, to the Chair and Members of the House of Commons Standing Committee on Finance dated March 1, 2024	8987
160)	Exhibit 160 – Transcript of the Proceedings of the House of Commons Standing Committee on Finance from April 18, 2024	9000
VOLUME 27		
161)	Exhibit 161 – Notes for an address by Matthew Boswell, Commissioner of Competition, "The new era of competition enforcement in Canada" dated September 26, 2024	9045
162)	Exhibit 162 – Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess., 44th Parl., 2021-2022 (assented to June 20, 2024), S.C. 2024, c. 15	9062
VOLUME 28		
162)	Continued Exhibit 162 – Bill C-59, An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023, 1st Sess., 44th Parl., 2021-2022 (assented to June 20, 2024), S.C. 2024, c. 15	9354
163)	Exhibit 163 – Transcript of the Proceedings of the House of Commons Standing Committee on Industry and Technology from June 3, 2024	9610
164)	Exhibit 164 – Transcript of the Proceedings of the House of Commons Standing Committee on Industry and Technology from June 10, 2024	9641

Tab	Description	Page No.
165)	Exhibit 165 – Transcript of the Proceedings of the House of Commons Standing Committee on Industry and Technology from June 12, 2024	9670
166)	Exhibit 166 – Transcript of the Proceedings of the House of Commons Standing Committee on Industry and Technology from June 17, 2024	9695
167)	Exhibit 167 – Nineteenth Report of the House of Commons Standing Committee on Industry and Technology dated June 17, 2024	9714
VOLUME 29		
168)	Exhibit 168 – News release issued by the Competition Bureau, “Competition Bureau wins deceptive marketing case against Cineplex” dated September 23, 2024	9717
169)	Exhibit 169 – Webpage of the Competition Bureau, “Specific areas of enforcement by the Bureau” last modified October 24, 2024	9722
170)	Exhibit 170 – Screen capture from LinkedIn of a post from the Competition Bureau dated September 23, 2024	9811
171)	Exhibit 171 – Screen capture from X of a post from the Competition Bureau dated September 23, 2024	9813
172)	Exhibit 172 – Screen capture from LinkedIn of a post from the Competition Bureau dated November 28, 2024	9815
173)	Exhibit 173 – News release issued by the Competition Bureau, “Backgrounder: Competition Bureau sues Google for anti-competitive conduct in online advertising in Canada” dated November 28, 2024	9817
174)	Exhibit 174 – Screen capture from X of a post from the Competition Bureau dated November 28, 2024	9825
175)	Exhibit 175 – News release issued by the Competition Bureau, “Competition Bureau sues Google for anti-competitive conduct in online advertising in Canada” dated November 28, 2024	9828
176)	Exhibit 176 – *Competition Act*, R.S.C., 1985, c. C-34, as it existed as of May 5, 2025	9834

This is Exhibit “33” 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
CHAMBRE DES COMMUNES
CANADA

INST COMMITTEE MEETING

Notices of Meeting include information about the subject matter to be examined by the committee and date, time and place of the meeting, as well as a list of any witnesses scheduled to appear. The ***Evidence*** is the edited and revised transcript of what is said before a committee. The ***Minutes of Proceedings*** are the official record of the business conducted by the committee at a sitting.

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October 16, 2001

Minutes | Evidence | Meetings (INST)

Meeting 38 | Meeting 39

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Tuesday, October 16, 2001

• 0908

[*English*]

The Chair (Ms. Susan Whelan (Essex, Lib.)): I'm going to call the meeting to order.

Bill C-23, an Act to amend the Competition Act and the Competition Tribunal Act, is the reason we're here this morning. We do have a number of housekeeping items, which we can either do now or we can save until the end of the meeting. It's in the hands of the committee. If everyone's going to stay until the end of the meeting, we can wait.

We have a number of budgets we were going to review and we are going to talk about some future business. Let's keep it until the end of the meeting; we have witnesses waiting.

We're very pleased to welcome here this morning, from the Public Policy Forum, Ms. Anita Mayer, the vice-president; and appearing on his own behalf as an individual, we have Mr. George Addy, a lawyer from Osler, Hoskin and Harcourt.

I propose that our witnesses begin with opening comments, hopefully not too much longer than five minutes.

There are detailed presentations that I hope you've already received and read. We'll then go to what I'm sure will be a quite interesting round of questions.

So we'll begin with Ms. Mayer.

Ms. Anita Mayer (Vice-President, Public Policy Forum): Thank you.

I thank you for inviting me to speak before you today.

[*Translation*]

Thank you for inviting me to speak before you today.

[*English*]

As you probably already know, in the summer of 2000, the Public Policy Forum was mandated by the Competition Bureau to conduct consultations on proposed amendments to the Competition Act and the Competition Tribunal Act. It's in the context of that consultation that I'll be making my statement today. I do not intend to comment on the proposed legislation currently being considered, but only to explain the consultation process that we undertook and that formed the basis for the policy proposals. I will explain the mandate we received, the process we undertook, and its results.

• 0910 

As a brief reminder of who the Public Policy Forum is, we're a not-for-profit, non-partisan organization aimed at improving the quality of government in Canada through better dialogue between government, the private and the third sectors, and the labour movement. We have over 150 members drawn from all these sectors.

Our members share the conviction that a healthy public administration is essential to the quality of life of Canadians, as well as to competitiveness in a global economy.

I'll go on to the consultations themselves. Our mandate in these consultations was to consult widely with all interested parties across Canada on the changes to the Competition Act and the Competition Tribunal Act as proposed in the four private members' bills that were then before this committee: Bill C-402, Bill C-438, Bill C-471, and Bill C-472. The then Minister of Industry, John Manley, had asked us to undertake these consultations in the hope of reaching a consensus on the proposed changes as a foundation for a government bill. Our goal for the consultation process was to encourage dialogue and search for common ground on the principles underlying the proposed legislative amendments, rather than on the technical application of those amendments.

We undertook a four-step process. In April 2000, a discussion paper prepared by the Competition Bureau was placed on our website, and interested parties also had access to information on the members' bills, the acts already in place, and the Competition Bureau. Letters were sent—approximately 2,000, I believe—to stakeholders and interested parties across Canada to invite them to submit written comments on the legislative amendments. We were inviting ideas and concerns, not legal briefs.

[*Translation*]

We posted each submission, about a hundred in all, on the Public Policy Forum website. We also completed and posted on our website an analysis and a summary of written comments.

[*English*]

The analysis and summary document was then used to inform the participants at a series of round tables held in August and September 2000. A dozen round tables were held with participants invited from consumer and trade associations, SMEs, large businesses, all levels of government, labour organizations, and not-for-profit organizations, and separately, tables were held with experts in competition law from among the legal, law enforcement, and academic communities.

In order to facilitate an open and frank dialogue, all discussions took place on a not-for-attribution basis and participation was limited to approximately 15. Some of them were a bit smaller than that. A summary of discussions for each individual round table was prepared and posted on our website. Finally, we prepared a report to the commissioner summarizing both the written submissions and the round tables in December 2000. The report was also posted on our website.

I know I have only five minutes and it was a 60-page report, but I'll try to summarize it as briefly as possible.

In our report, we sought to reflect all the points of view that were expressed concerning the principles underlying the proposed legislation in a balanced way that did not assume any particular position. The forum never took a position on these amendments. For each of the principles, we showed where there was common ground and where divergent points of view were expressed.

There are two parts of the report I would like to outline for you in particular.

First, there are some general observations on some of the aspects of the Canadian and global economy that were raised by the participants and influenced their reactions; and second, I'll give you a brief summary of the level and nature of support for each of the seven principles.

In terms of general observations, one of the things that affected how the participants reacted was the changing market structure. Obviously, it's changed a lot since the first Competition Act was enacted, and many of our participants, in particular the SMEs, were inclined to believe competition legislation should be geared to control new forms of dominance in the market. Others pointed out that the Competition Act, as a framework legislation, is considered to apply equally to any anti-competitive behaviour. Others also stated that competition legislation is intended to protect competition, rather than competitors, and that it appeared that competition is actually quite vigorous.

[*Translation*]

Information technology is changing ever more rapidly every aspect of business. People, especially in the larger enterprises, expressed concerns, particularly about the negative impact the amendments could have if the new technological components of business transactions were not taken into account.

• 0915

Globalization and harmonization. A number of our participants stressed the need for Canada to harmonize its policy with that of its trading partners, in particular, the United States and Europe, to ensure that by amending the Canadian policy, we don't reduce the competitiveness of Canadian firms or the attractiveness of doing business in Canada.

[*English*]

One of the most challenging aspects of this consultation for us was a sense of desperation expressed by small business owners, who have very strong concerns about their continuing ability to compete in the marketplace. There was even some fear expressed that their participation might bring reprisals from larger enterprises on which they depend for their continued existence.

On the other hand, we were also made aware of a sense of frustration among the larger enterprises, who fear that changes to competition legislation would impede their ability to compete on a global scale. The very large enterprises in particular are focused entirely on competing with their business peers. They see strategies that will support their position as necessary to ensure vigorous competition, even though the result may be to remove smaller competitors from the market.

During the consultation, these very divergent viewpoints on the meaning of competition translated into a wide gap in understanding between big business and SMEs and discussions that sometimes seemed at cross-purposes.

There were also discussions on the role of SMEs in the economy. SMEs often view themselves as the backbone of the economy since they form the lion's share of the business community and are traditionally seen as a source of innovation.

We were even reminded that part 1, "Purpose and Interpretation", of the Competition Act, specifically addresses the protection of small and medium-sized business.

However, from their point of view, attention now seems to be focused on the meld between globalization and the knowledge economy and on the means of fostering the sectors of the economy that are most active in these areas. SMEs expressed concern that their needs would be neglected if the primary aim of amendments to competition legislation was to ensure Canada's competitiveness in the global arena.

Public understanding of competition legislation. Another challenge for us was that competition policy is an essential aspect of doing business and of our country's economic health. Yet a lack of understanding of the intent, scope, and limits of competition legislation among most of those who are affected by it—in particular, the SMEs—became very clear to us during the consultation process.

That posed two challenges for us. The first was in obtaining the participation of business representatives who were not lawyers charged with overseeing competition issues. This included even some of the leaders of some of the larger companies. They felt they were not well versed enough in competition legislation to express their opinions.

A second challenge was in ensuring that the intent and limits of the proposed legislative amendments were understood and in maintaining the focus of discussion on these specific issues.

However, we believe that in the total scheme of the consultation process a satisfactory balance was obtained, both in terms of participation and areas of discussion. This was obviously the first time that SMEs, big business, and all these organizations were invited to consult with each other about competition legislation.

Finally, to come to a summary of the discussions of the seven principles themselves,

[*Translation*]

let's take, first, Bill C-402. Given the difference of opinions about the proposal to amend the Competition Act by adding to the non-exhaustive list of anti-competitive practices under section 78 examples of such anti-competitive behaviour specific to the retail industry, in this case, we determined that a consensus was not likely, even if the wording were changed.

[*English*]

On Bill C-438 there was a large degree of support expressed by participants with respect to the proposal to prohibit sending deceptive contests by mail or by any other system of delivery, on the condition that the proposed amendment encompass the Internet more specifically so as to include electronic mail.

Facilitating cooperation between competitive authorities, Bill C-471. The proposal to provide a legislative basis whereby Canada would enter into agreements with other jurisdictions to enhance international mutual cooperation in the enforcement of non-criminal competition law received significant but qualified support from participants. It was qualified in the sense that there were concerns about confidentiality—protecting voluntarily provided information, for example, and ensuring that this information did not extend beyond the parties to whom it was sent. We determined that the initiative to enhance international cooperation could move forward provided that this area of confidentiality and certain operational issues were addressed.

• 0920 

On private access, the proposal to permit individuals to have access on their own behalf to the Competition Tribunal for refusal to deal, exclusive dealing, tied selling, and market restrictions evoked divided views. We determined that consensus on this proposal could be achieved on condition that strategic litigation could be prevented.

[*Translation*]

Cost awards, references and summary dispositions. The participants generally accepted, in principle, the proposed amendments to broaden the Competition Tribunal's powers to include cost awards, summary dispositions and the use of references to allow for an early

determination of some key issues, as this was perceived as improving the Tribunal's process. They also proposed other improvements.

[*English*]

Cease and desist powers. The proposal to introduce cease and desist powers to allow the commissioner of competition to deal with abuse of dominance was largely opposed on the basis that they did not believe the commissioner should have this power. However, there was general support for an interim relief power to be exercised by a judicial authority in respect of abuse of dominance, and a number of practical alternative procedures that could be explored were also suggested.

Facilitating strategic alliances and improving the investment climate. A desire for modernization of the Competition Act's provisions in relation to the conspiracy provisions was expressed. The two-track approach suggested in Bill C-472 was attractive to the majority of the participants in spite of their apprehension about particular aspects of this proposal. However, because these provisions are key to the act and because of the complexity of the issues involved, participants felt that more discussion, analysis, and consultation were needed to amend the conspiracy provisions of the act.

We believe that the consultation process we undertook provided the Competition Bureau and the Minister of Industry with valuable information on legislative changes that were being proposed. We made every effort to ensure that all interested parties were allowed adequate opportunity to express their ideas and concerns, and that our final report to the commissioner reflected all points of view as well as common ground that had been established.

[*Translation*]

I'd be glad to answer your questions.

[*English*]

I'd be glad to answer your questions.

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

I'm going to turn it over now to Mr. Addy, please.

Mr. George N. Addy (Individual Presentation): Thank you, Madam Chair. And thank you to the members of the committee for allowing me to address you today.

The Competition Act and its policies is an area that's near and dear. I've been working in the area for most of my working career in essentially three capacities: first as a lawyer and now again as a lawyer; secondly in the bureau itself running the merger branch and then eventually as head of the Competition Bureau; and thirdly as a businessman with a major telephone company in Canada ensuring compliance with the act. So I bring to my remarks today that perspective. I'm here to speak on my own behalf. I'm not representing any particular constituency before you today.

I've provided the clerk with copies of my submission.

[*Translation*]

A French version has also been provided to the clerk. I'll be glad, in due time, to answer any question committee members may have and to respond to their concerns in either official language.

[*English*]

My submission is broken into three parts. As to the written paper, in view of the time I'll just skim through the front part.

The first part deals with some comments on Bill C-23 as it currently exists and what I think are deficiencies, albeit not irreparable deficiencies. The second part of my submission addresses some additional provisions that the committee may or may not wish to consider adding. They are not currently in Bill C-23. The third part of the submission is a clause-by-clause appendix to the document. When you have the time—I know time is precious for you—and you proceed with the study of the bill, there is a clause-by-clause commentary attached to the back of the document.

I'll just focus my remarks today on the first part, namely the comments on Bill C-23 as presently structured. In that regard, let me first start with the mutual legal assistance regime. I believe the mutual legal assistance regime is a very good thing, so much so that in 1995 when I was in Mr. von Finckenstein's position in dealing with Minister Manley, we attempted to include mutual legal assistance in the earlier round of amendments. Due to the intervention of the Schreiber case and the uncertainty in the law, we had to shelve those provisions from that round. So I'm very glad to see it surface in this bill.

• 0925 

You may find that most of the comments you'll hear address outbound information, if I can use that terminology. It's very important to recognize that mutual legal assistance regimes are exactly that, mutual. A cornerstone to these agreements is reciprocity.

It's very important, and I think worthwhile, for Canada to have that type of regime in place, because Canadians can be victims of foreign-based, anti-competitive activities. We want to have the tools available to address those and get the evidence for them. I'm a very strong advocate and supporter of the regime.

That being said, let's not lose sight of what we're talking about here. We're talking about—in the scheme as currently drafted—court-ordered compulsory action directed at Canadians at the request of a foreign government.

It's important to understand that all competition laws are not the same. All competition authorities aren't equally independent from various influences. In my view, one of the flaws of the bill is that they've taken the approach in the mutual legal assistance scheme that civil practices should be dealt with as if they were criminal. In other words, the commissioner should be entitled to go to the court and get a search warrant, use compulsory process, and compel production of information and documents without notice ever being provided to the victim of that order.

My main concern, frankly, with respect to the mutual assistance scheme as set out in the bill is what I consider to be that lack of balance. We are, after all, talking about civil practices. We are, after all, talking about using compulsory process against Canadians in relation to a request

from a foreign government that may or may not be well founded.

I've constructed in my submission an example—a hypothetical example, I stress—involving Bombardier, and a complaint from the Brazilian authorities, and how that might be treated under the scheme as presently drafted. When you have an opportunity to review the example, I think you'll agree with me that it highlights the due process gap that I feel exists in the scheme as presently crafted.

Intervention by government for compulsory process should not be undertaken lightly. Even though from the competition perspective I might personally view some foreign conduct as offensive, given my love of competitive markets and the policies in the area, if it comes to a tradeoff between compromising the rights of Canadian individuals and companies or possibly allowing some foreign anti-competitive activity to continue in a foreign jurisdiction, I would let the foreign anti-competitive activity continue. I would not compromise the due process rights, which I think are core to our Canadian system, particularly for civil practices.

This isn't criminal law. This is dealing with issues that may be offensive, but we don' know and the other state doesn't know yet; they need to look at the evidence. It would not be considered criminal law; otherwise we'd be dealing with it under the Mutual Legal Assistance in Criminal Matters Act, which applies to criminal behaviour.

This notion of due process is not foreign. It's surfacing with increasing frequency in formal instruments signed and developed by the Government of Canada. The FTAA agreement has several clauses where due process and transparency are specifically included. It's on that basis that I think we need to address the issue of due process in the MLA, or the mutual legal assistance scheme.

The second issue with the MLA involves confidentiality. I read the transcript of Mr. von Finckenstein's examination or testimony here a week or so ago, and I differ with him as to whether section 29 requires modification. When we looked at this scheme in 1995 and went through the public consultation round, there was a recognition on my part at that time that section 29 needed amendments.

If I understood, and if Mr. von Finckenstein has been reported accurately in the transcript, he is indicating that section 29 is a difficult section to deal with, and therefore we shouldn't deal with it now.

• 0930 

I don't think that's the right approach, frankly. Section 29 does not—underline "does not"—protect all information in the commissioner's or the bureau's hands and it does not—underline "not"—cover all information that may potentially be shared with a foreign authority.

From all my experience, I strongly recommend that the committee deal with that. There is a chill there, and it will, combined with the *ex parte* nature of some of the provisions in the bill, compound a chilling effect with respect to parties dealing with the bureau. Frankly, the tradition of the bureau is to seek voluntary cooperation from the parties as much as possible, and on that basis I think we need to address section 29 as well.

The other part of the MLA arrangement that is a bit troublesome, frankly—and I detail that in my submission—relates to existing agreements. Section 30.3—and as I read it, the draft treaty that Mr. von Finckenstein tabled here last week—indicates that the scheme doesn't affect any ongoing relationships. I would urge the committee to consider that if indeed the objective is to design a comprehensive code for information sharing, which is I think the way the commissioner has characterized it, then let's do that, and any agreements that are inconsistent with the MLA arrangement should be prohibited.

In summary, on the MLA side, I would suggest that the flaws are that *ex parte* applications are the norm, not the exception, and that's a violation of due process. Foreign requests are accepted without an allegation of breach of foreign law. That's in the bill, although I see that there was a clause to that effect in the draft agreement. It would be nice to have that reflected in the legislation as well.

There's no requirement for notice to the intended target. There's no requirement for an oral hearing to deal with objections. There's no right for a party who receives one of these search warrants or due process orders to have access to the underlying request that's in the commissioner's hands. I think that's a flaw as well. There is only a very limited right of appeal.

Lastly, there's no specific requirement in the process that, on a request by request basis, somebody ask the very fundamental question, is it in Canada's interest to respond to this request? That's done in other jurisdictions. There's some overriding legislation in the U.S. on national security that covers it.

Now, very briefly—and I know I'm droning on here, Madam Chairman—let me make a couple of other comments on some other sections of the bill.

On section 103.1, the interim order provision, this also is done on an *ex parte* basis. Fundamental to Canadian legal jurisprudence is that injunctive relief is an exception, not the norm, and in an exceptional case in civil matters I think notice should be given, and *ex parte* should not be the norm.

If there are circumstances that warrant applying on an *ex parte* basis, so be it, but that should not be the norm. In my experience in seeking orders from the courts and tribunals, it takes a few days for the bureau to get this thing together in any event—to get the affidavits and the pleading drafted. Ask them to give notice at the same time they're working on these.

The consent agreement—the changes to sections 105 and 106—I think goes too far one way. There are definitely some procedural issues to deal with on the consent order process. This process improvement, if I can characterize it that way, I think goes too far by eliminating any opportunity for third-party intervention by your constituents with respect to a draft order.

The Americans have dealt with this issue. They have a publication period where people can file comments and you get out of... It's sort of the middle ground: you eliminate all the procedural baggage around the tribunal process, but yet there is an opportunity for public input. They've done that in the U.S. under the Tunney Act, and I'd suggest we adopt a similar procedure here.

With reference to the tribunal—and this is the last section of the bill I'll comment on; that's concerning sections 105 and 106 again—I think the amendments to section 124.2 provide that the parties and the commissioner can apply to the tribunal for determination of an issue, or the

commissioner can apply on his own for the determination of a question of law or other interpretation by the tribunal.

• 0935

I think individual parties should also have the right to go and ask the tribunal for a ruling on a procedural or substantive interpretation issue; that a unilateral right to seek guidance from the tribunal on an issue, which will expedite processes in my view, should not be limited to the commissioner.

[*Translation*]

This concludes my opening remarks, Madam Chair. I'd be glad to answer your questions. Thank you.

[*English*]

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

We're now going to turn to questions.

Mr. Penson, please.

Mr. Charlie Penson (Peace River, Canadian Alliance): Thank you, Madam Chair, and I thank the witnesses for being here this morning.

Mr. Addy, it seems as if we're getting more into the international scope in competition law. Would it not be better to work within the framework of the WTO to get some type of international standards for competition law, so that for foreign governments or foreign competition agencies there would be some sort of measure putting everybody under the same standard, which might put a process in place that would address your concerns on this due process matter?

Mr. George Addy: The issue of harmonizing competition laws has been on the agenda of governments and competition authorities for a while now. A lot of work goes on around the OECD on that matter, and I think there's been some significant progress. Fifteen years ago you might have had a dozen countries, if that, that had competition laws. Now there are well over 100, so there is progress on that front. But standards differ, and getting people to agree on a common standard is very difficult and time consuming.

My concern with adopting a WTO-type process, frankly, is that process will take over, as opposed to the realization of substantive change. I think the efforts underway now with the OECD, the global competition initiative, and the global competition forum—which is a forum of competition authorities that meet on a regular basis to discuss core principles and harmonization—represent the way to go. I'd be frankly concerned, if you flip it over to the WTO, that it will be lost in process for decades.

Mr. Charlie Penson: Well, it seems to me that's the way we're moving more and more as there's more international competition. If there's anti-competitive behaviour, there's anti-competitive behaviour. The more we can get some kind of structure around this, the better chance there would be of dealing with some of your concerns.

Let me just ask you a question regarding due process. I'm sorry I haven't read your submission in advance. You've used some examples. But you're concerned that there may be a fishing expedition to get information that would give an edge to a foreign competitor: is that basically it?

Mr. George Addy: On your first question, countries don't even agree what anti-competitive practices are. There isn't even agreement amongst all the countries on what conspiracy or price fixing means. While some may notionally or nominally have competition laws in place, don't be under the misapprehension or misunderstanding that there's consensus on even some of the very core elements of competition law.

Mr. Charlie Penson: Can I just stop you there and ask you the question: wouldn't it be better where there is consensus, among whatever number of countries it exists, to at least have them start the process and let others join on?

Mr. George Addy: In effect, that's what's happening now. You have a series of bilaterals amongst countries that have competition laws, and they're going into trilaterals or a network of bilaterals. There is that core, and we're evolving towards a mutual, multilateral understanding of what competition law should do and be. So I think we're working that way. It's just that if you jump immediately to the WTO process, it would be lost.

With respect to the second part of your question on due process, that's exactly my concern. My concern is that a foreign-based request may be used for purposes I wouldn't consider to be legitimate. I've constructed an example in my paper involving the airframe business and Bombardier and a complaint in Brazil. I've demonstrated in that example the implications for seeking that order: the order being served on the company here, documents being sent abroad without an opportunity for the victim in my hypothetical scenario, Bombardier, having an opportunity to challenge the very emission of the order because there's no notice. The first time they'll hear about it is when the commissioner's representatives walk into the office on Monday morning saying we're seizing these documents. That's the due process for it.

• 0940 

Mr. Charlie Penson: But even if they get notice, isn't the problem still the same?

Mr. George Addy: Then, at least, they're at the table, in front of the issuing judge, saying we need some protections here; we need more information from Brazil to ensure that is a legitimate request, that there is a proper basis.

As you know, there are legal thresholds in our legislation, reasonable belief, and so on. At least they will be at the table, when compulsory process is about to be foisted on them, to say the scope of this request is too broad; we'll provide you the information on these questions or these issues, not those; that's competitively sensitive, and we need to have some more assurances and guarantees of how they'll be handled. Or that's third-party data, one of my suppliers' information; how come you're taking stuff from my desk from one of my suppliers?

Mr. Charlie Penson: My last question—

The Chair: I'm going to have to move on.

Mr. Charlie Penson: —is a short one. On the private right of access issue, isn't it the same concern, that there may be frivolous actions or actions that try to undermine a competitor through getting information that they may not be able to get otherwise?

Mr. George Addy: Private access is a big issue. I'm in your hands, Madam Chair, do you want me to deal with that issue now? I suspect it will be raised by other members.

The Chair: If you can address it briefly...

Mr. George Addy: I'll try.

The Chair: He is already over his time. I'll give you 60 seconds to answer his question, and then I'll move on.

Mr. George Addy: Okay, great.

An hon. member: Way to go, Charlie.

Mr. George Addy: The short answer to your question is yes, strategic use of private access is a concern.

The Chair: Thank you.

Mr. Lastewka, please.

Mr. Walt Lastewka (St. Catharines, Lib.): Thank you, Madam Chair.

Ms. Mayer, I want to tackle the area of the larger enterprises competing globally to the detriment of the small businesses. I'm having a hard time understanding why we can't have it both ways. Could you enlarge on that?

Ms. Anita Mayer: That's a difficult question. I'm not sure I can answer that.

What we were told is that some of the practices that larger enterprises undertake are the same as their competitors undertake. So in fact, it's not anti-competitive from their point of view.

I can't go into detail about what those practices are, because they weren't explained to me in detail at the meetings, but these are the types of practices that allow them to be competitive on a global basis but in fact may have detrimental effect on their smaller competitors. They are saying, since they are competing with their peers and this is practice that's normally accepted among all the peers, it's not anti-competitive.

Mr. Walt Lastewka: I'm looking for examples of that.

Ms. Anita Mayer: I'm sorry, I can't provide you with any examples. We weren't given examples. People were not speaking about specific practices; they didn't want to reveal.

Mr. Walt Lastewka: I'm very interested, then, in a comment you made on small and medium-sized businesses in the economy. There were divergent views about the role of SMEs in the economy. Could you explain the divergent views?

Ms. Anita Mayer: Most of the SMEs consider themselves to be, as I said in my report, the backbone of the economy, since they form a large part of the economy and are traditionally seen as a source of innovation.

Some of the bigger businesses are saying that used to be true, but it's no longer so. Many of the innovations are coming now from larger enterprises. From their mergers, from their acquisitions, from the way they now function in business, they are the ones who are providing a lot of the innovations that are happening, and trying to protect smaller businesses just on the basis that they are the source of innovation is no longer true.

Mr. Walt Lastewka: I have a divergent view, then, on the large businesses, very much so.

If you could provide any other information on those two questions, I'd appreciate it. I'd be interested in receiving information from the larger companies that the view of the small businesses is not true any more. Those don't seem to be my findings, and I come from large business.

• 0945 

On the other item, on the global situation, could you go back to your notes, or could anyone provide information? Here's an example that we're required to do globally at the insistence of small business. I would really like to see those examples.

Ms. Anita Mayer: I will take a look at my notes.

Mr. Walt Lastewka: On the other items, Mr. McTeague is going to read a couple of them.

Mr. Dan McTeague (Pickering—Ajax—Uxbridge, Lib.): Mr. Competition to you, sir.

Mr. Walt Lastewka: I'll stay away from a couple of his trampled areas.

Under private rights of access to competition, under Bill C-472, you made some remarks, in fact a number of them, that things could be done. I didn't see any information saying it was to preferably be done in this manner, as a result of all your workshops.

> We determined that consensus on this proposal could be achieved on condition that strategic litigation could be prevented.

Could you expand on that? What are the pluses and minuses of the dangers you are trying to prevent? It will help the committee.

Ms. Anita Mayer: The concern was that larger enterprises in particular would use private access as a way of causing harm to their competitors. They would use it as a way to get information on their competitors plans. It would be a way of delaying a process, for example, if some of their competitors were looking at a merger. They would use strategic litigation to try to force the merger not to happen in a timely manner. Those were the types of concerns they were expressing.

Mr. Walt Lastewka: Thank you.

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

[*Translation*]

Mr. Bergeron, please.

Mr. Stéphane Bergeron (Verchères—Les-Patriotes, BQ): Thank you, Madam Chair.

First, I'd like to thank the witnesses for their presentations this morning and for answering our various questions.

My first question is for Mr. Addy. In the brief you submitted, you state that, as Competition Commissioner, international cooperation to enforce the law was always one of your priorities.

I noticed earlier that, as you were answering one of Mr. Penson's questions, you did stress that, at the international level, the definition of unfair or anti-competitive practices is not exactly the same everywhere and that it varies a lot from one country to the next. You ask a very relevant question, I think, in when you write in your brief:

> no one ever asks the question: Is it in Canada's best interests to respond to this particular request?

It is recognized that, generally, in the area of competition or international trade, Canada's interpretation of the rules is much stricter than that of other countries and so, our foreign trading partners are often more lenient and more open. It's the case, for instance, of such anti-dumping measures as countervailing duty.

In Canada, we find it very difficult to react to that type of situation. It's probably the same when it comes to competition. So I'd like to ask you a couple of questions about private access and the strategic litigations that could follow, to compare with what's being done elsewhere in the world. I believe you spent a lot of time in consultations and discussions about that with your counterparts in other countries when you were the Commissioner.

So what would you recommend that would allow us to take both relevant and necessary measures without hindering the Competition Tribunal in his work?

Mr. George Addy: I'll be happy to answer that. I could also provide the clerk with my recommendations if he doesn't have them yet. When the law I was responsible to enforce in 1995-96 was modified, an advisory panel was established. By the way, some of the amendments proposed at the time were dealing with this issue of private access to the tribunal. A number of meetings I attended then dealt with that.

• 0950

I actively participated in discussions about the measures that could be taken to prevent the strategic use of that type of right. I would suggest you read the report submitted in March 1996 by Mr. Ratushny, who chaired the advisory panel. If you wish, I'll provide copies to the clerk.

In this document, as in the discussions we had at the time, all kinds of issues were raised. Often, in Canada, in discussions about private access, we compare with what is done in the United States. We hear in the news about orders or decisions awarding billions of dollars. That's not what we had in mind in 1995, and I don't think that's what Bill C-472 is about either. First, I'd like to note that, in any case, there should not be any monetary compensation.

Second, applicants should not be able to ask for and obtain an order other than when the Commissioner applies for it.

Third, it has been suggested that, in those circumstances, an applicant be required to get the Tribunal's approval before bringing an action on the right of private access.

It was also suggested to restrict the provisions in the act to which this right could apply. There are a number of ways to limit the strategic use of litigation. Essentially, we have to determine what is the purpose of this private access power.

Frankly, in 1995, it was a question of money. We did not see any reason why the taxpayer should finance a dispute between two multinationals. Rather, we thought they could do it themselves.

Today, I believe the underlying principle to the right of access is rather that small and medium businesses should have a way to seek remedies and have some assurances that their claims are going to be dealt with and heard in a reasonable manner by the Commissioner.

The question is whether the right of access is the best way to fill the gap, if we recognize there is indeed a gap. There might be other ways to do that, for instance, require the Commissioner to issue reports or to respond to claim within a certain time limit.

So I always come back to this fundamental question: why do we want to introduce this remedy? When we have answered this question, we'll have to see whether there are other ways to fill the gap or deal with the problem as it is perceived.

[*English*]

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

We're running out of time here. We do have another group of witnesses scheduled to start, so I'm going to have to ask people to try to be a little briefer in their questions and in their answers. That last round took seven minutes just with one question and one answer.

Mr. McTeague, please.

Mr. Dan McTeague: Thank you.

Mr. Addy, good to see you again. Thank you, Madame Chair, and thank you, Mr. Lastewka.

Mr. Addy, I'm going to go to you very quickly. You have a considerable amount of experience in the area of private right of access. In fact, I think it's fair to say that you may have begun the ball in this area with your works as early as 1994.

I understand there had been earlier workings on that, but this issue, which has been kicked around the country, and certainly among members of the bar, and certainly among the various business communities for several years now, has been now crystallized into a form of legislation. There'll be a motion here before the members soon on the question of translating what is the private access contained in Bill C-472 into Bill C-23.

Given your background, given your knowledge of Bill C-472 and the safeguards that are within it... You alluded to the fact that some people like to compare private access to the United States and the slippery slope. I'm sure we'll be hearing from individuals who'll again try to present that as an argument. There are two or three restrained areas that we have contained this bill in, in terms of dealing with private access. Are the restricted areas just that? Given that they're limited to significant safeguards, what are your objections, if any?

Mr. George Addy: If I understand the bill, Mr. McTeague, it's limited to two provisions in the act, 75 and 77.

Mr. Dan McTeague: Correct.

• 0955

Mr. George Addy: I always go back, as I was mentioning to Mr. Bergeron, to the fundamental issue as to why you want that relief in place. My concern is that you may be creating a relief on the expectations that parties will use it. I'm not convinced they'll use it, and I'm not convinced they'll use it because of the cost of litigation, to be quite candid.

A small business person who wants to initiate a private access, a claim, before the Competition Tribunal, is going to face significant legal expense. There have been some studies done by the bureau as to how much it costs to prosecute a case before the tribunal and the figures are in the millions of dollars.

And so I get back to the issue as to what is your objective in introducing the relief? I think there may be alternative tools that would better suit your constituency if that's your target constituency. But to the extent that you do proceed with it, safeguards that will mitigate the possibility of strategic litigation are highly recommended.

Mr. Dan McTeague: And, Mr. Addy, in your experience as director, were there occasions where you were not able to detect potentially anti-competitive harms that didn't have a broad public interest that may have nevertheless been a question of a dispute between two parties, for which the concern you have of significant legal expense might have been put aside to the question of whether I could survive...

There are the comments that have been made by other members here, and certainly Mrs. Mayer's remarks, with respect to small businesses not necessarily always being able to exercise a certain future. Is it possible that during your time and the time subsequent to that... because we have comments here as well from other commissioners, directors, to the effect that this isn't the end of the world. More importantly, if the object here is to create a greater body of case law in this country, why would there be those who would object to this notwithstanding the cost?

Mr. George Addy: To answer the question about whether I was aware of a case while I was director, I can't recall any that would fit within your scenario.

But it's important again to recall that the nature of the legislation is it is framework legislation to protect the market interplay between various businesses regardless of size. And part of that is it really is a battle. To the victor go the spoils of the market. And the competitive process contemplates entry and exit of businesses. So the fact that a particular business may be pushed out of the market by a competitor isn't necessarily a sign that it's anti-competitive. It may be that the competitor has a more innovative product or is more in tune with the customer so—

Mr. Dan McTeague: Shouldn't the tribunal—

Mr. George Addy: —we just have to be careful of that balance. That's my concern.

The Chair: Last question.

Mr. Dan McTeague: Wouldn't you be concerned, Mr. Addy, that the tribunal isn't aware of whether that anti-competitive activity occurs or not, and that maybe, just maybe, there are opportunities here to demonstrate that people have access to institutions? But more importantly, the tribunal, which has very few contested cases before it, may have an opportunity to determine otherwise. Would you not want to take that to a further step in the interests of ensuring that there is no anti-competitive harm occurring in this country?

Mr. George Addy: I think increasing the workload of the tribunal and the jurisprudence from the tribunal is an excellent thing.

The Chair: Thank you.

Thank you very much, Mr. McTeague.

Mr. Strahl, please.

Mr. Chuck Strahl (Fraser Valley, PC/DR): Thank you, Madam Chair, and thanks to the witnesses for coming today.

When Mr. von Finckenstein came and gave his testimony he also brought with him a sample of the bilateral agreement that might be entered into, possibly, if we had another country that wanted to do that with us. Mr. Addy, did you have a look at that sample bilateral agreement? You were mentioning that you felt this is the way it inevitably has to go, a country-by-country as opposed to a broad-based thing. Is that bilateral agreement, that sample, the kind of thing that covers your concerns?

Mr. George Addy: There are two parts to answering your question, Mr. Strahl.

Yes, I have had a look at it very briefly. And I'm not in a position to provide you with detailed comments on it.

In what I have seen, the agreement has addressed a couple of issues that I raised in my brief. For instance, in clause 1 it requires that the requesting party cite the specific competition law issue and provision of its act. That's in the draft, but it's not in the bill. And I'm saying we should make sure this surfaces in the bill so we don't lose that.

But some of the concerns I have with the bill are mirrored in the draft as well. For instance, that the draft agreement would not displace any existing agreements between the competition authorities. I still have a fundamental issue with that. If we're designing a code, let's use it for all information flow between the agencies, as opposed to just the information flow that's triggered by the compulsory production process.

• 1000

Mr. Chuck Strahl: Okay.

Mr. George Addy: But I can look at it and send comments in to the clerk at a later point, if you feel that would be useful.

Mr. Chuck Strahl: I think it's useful in the sense that I share Mr. Penson's concern that what we seem to be entering into is a series of bilateral agreements, especially on the international aspect of this, and that, as you said, not everybody thinks the same way we do about

competition. So you have a whole collage of efforts and various amounts of efficacy, I'm sure, around the world. On those bilateral agreements, it just seems to me that if that's the way it has to go, it's very important that we get that right.

The other thing I'm curious about is that you had asked the question, is it in Canada's best interest to respond? Once you enter into a bilateral agreement, it's not really up to us to pick and choose. It's like any international agreement, trade war, or trade agreement; you can't pick and choose once you enter into an agreement. That's what the agreement is for. You can't say, like Bombardier, why don't we just, hands down, protect Bombardier at every single possible step because, what the heck, it's every man for himself, so to speak. Once you enter into an agreement, that's just not possible.

Mr. George Addy: I guess the answer to that is, it depends what's in the agreement. The agreement may provide some relief on that basis.

The U.S. has several agreements... and I apologize, I forget the name of the legislation, but it has, in effect, a national security interest cloak. It covers everything the country does. Even in merger review, there's always that escape clause, if I can use that term, that overriding consideration that has to be brought to bear on everything, from merger filings to prosecutions to information exchanges.

My concern in this bill was, once the AG has determined that the requesting party has substantially similar laws, once the treaty has been entered into, that national interest check doesn't occur again, by my reading of the legislation. I think there's a gap there that we might want to address.

Mr. Chuck Strahl: You used the example of Bombardier, which is a good one, because of course it has been in the news and it's trendy.

You also mentioned that the lumber agreement could be used. That's more of interest to me, being from British Columbia, and the fact that I used to be in that industry.

Again, the United States has, I would think, fairly well-developed laws with which we'd be able to find bilateral agreement—and probably one of the first countries, since they're our major trading partner—but if that national interest clause or some senator seeking re-election down in the States can just trump the whole thing by bringing in a vexatious bill or anti-trade-dumping law, and it seems they can bring in almost anything at any time to override the competition aspect of it, what protection do we have? We try to be competitive, we try to play by the rules, but as soon as it gets into an election campaign or another problem, it's all out the window.

Mr. George Addy: That's why I think it's important to maintain some flexibility on our side.

Mr. Chuck Strahl: Yes.

Mr. George Addy: Maybe the process in responding to that question is, if it's the Attorney General, for example, who's given that task, if there are concerns on their part, they should enter into some discussions with the requesting state to ensure that our interests are protected. That may be the response.

Mr. Chuck Strahl: Thank you.

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

Mr. Savoy, please.

Mr. Andy Savoy (Tobique—Mactaquac, Lib.): Thank you very much, Madam Chair. I'll be very quick.

Thank you very much for your presentations.

Ms. Mayer, regarding your summary of discussion of the seven principles, I would like some clarification on the cost awards and summary dispositions. You say "Several other alternatives for improvement were also suggested." Could you expand on that briefly?

Ms. Anita Mayer: I will have to go to my report. I don't remember it all by heart.

• 1005

Some of the participants wanted to expand it. For example, that proposed section 124.1 of the original proposal should apply to all mergers or proposed mergers and not just to notifiable transactions. Another suggestion, for example, was that other parties in addition to the commissioner should be able to ask for references or bring references or allow both parties to bring a reference to the tribunal. Some even suggested a third party with an interest in the hearing should be able to also bring a reference or be allowed to intervene.

In terms of cost awards, there was a suggestion that the tribunal be given the power to order the posting of security of costs. Another suggestion was to add criteria or a schedule of costs to make sure it doesn't get out of hand.

In terms of summary dispositions, an alternative proposed was to include lay members in the decision-making, not just judicial members.

Mr. Andy Savoy: Thank you very much.

In the PPF, what type of representation did you have from SMEs versus large corporations? What percentage would you say?

Ms. Anita Mayer: Probably about half and half.

Mr. Andy Savoy: About half and half.

Ms. Anita Mayer: Altogether. In some cases, we maybe had a few more SMEs than larger companies. In other cases, it was the opposite, depending upon which part of the country we were in. But I think in general it was about half and half.

Mr. Andy Savoy: Fairly good representation then.

Ms. Anita Mayer: Yes.

Mr. Andy Savoy: Third question. When you're talking about facilitating strategic alliances in improving investment climate, you talk about the two-track approach being attractive to the majority of participants in spite of their apprehension about particular aspects of the proposal. Could you expand on that briefly?

Ms. Anita Mayer: The two-track approach was the civil approach as opposed to the criminal approach. The concerns were about what would be criminal and what would be civil. They had concerns about where things would be placed eventually if there was a two-track approach.

Mr. Andy Savoy: Thank you, Madam Chair.

The Chair: Thank you, Mr. Savoy.

Mr. Rajotte, please.

Mr. James Rajotte (Edmonton Southwest, Canadian Alliance): Thank you, Madam Chair.

Thank you very much for coming in today.

I do want to follow up on the issue of private access. I'm not sure if I heard you correctly, Mr. Addy, but you said this is a decision for the committee to make. You didn't seem to want to get too involved in suggesting whether or not this should be in Bill C-23. You probably have more experience with competition and the Competition Bureau than anyone on this committee. If I could just ask you again, are you in favour of including some form of private access in Bill C-23?

Mr. George Addy: I'm on the record, Mr. Rajotte, in 1995 as advocating private access. I don't think there's any doubt on that.

Mr. James Rajotte: You do mention that there are alternative tools that could be used. Could you expand on what alternative tools you favour?

Mr. George Addy: The issue goes to why you want to think about private access today. In 1995, the concern I had was expending taxpayer dollars to fight a battle that is essentially a complaint between two multinationals. Why should the taxpayer pay for that? We were constrained for resources. That was the genesis for pushing in 1995.

The issue today, as I hear it, is that we want to create a tool for SMEs to be able to ensure that their complaints are dealt with. Either there's concern that the commissioner is not looking at them, or they're given a low priority, or they don't have a broad, national, public issue attached to them, and somehow there's a gap.

What I was suggesting in my response to Mr. Bergeron was that if the issue is concern about the cost implications of private action to a plaintiff, perhaps you might want to think about other tools, such as some process that would force the commissioner to issue a formal decision as to why a complaint is not being taken to the tribunal, and to do that within a fixed period of time, so that the small business individual at least knows what the commissioner thinks about it and that his or her complaint has been dealt with.

Mr. James Rajotte: You mean a formal written response from the commissioner.

Mr. George Addy: Yes.

Mr. James Rajotte: One of the things that is often mentioned is increasing the resources for the bureau itself. How much would that alleviate the concerns of people in terms of having the right of private access?

Mr. George Addy: When you're running an enforcement agency like that, you're always faced with prioritizing your work, and the prioritization involves a whole bunch of factors. Which case has the broadest public interest component? Which case is very significant from an economic impact? What case will lead to some clarification of the law that we need some clarification on? The resources will help, but I'm not sure it'll get at your problem or your concern.

• 1010

Mr. James Rajotte: This is a tough question. Do you know offhand what percentage of cases brought forward to you as commissioner went forward to the tribunal?

Mr. George Addy: I couldn't tell you as a percentage, but the number of contested cases, applications before the tribunal, are very, very few—one or two a year probably.

The Chair: Thanks very much, Mr. Rajotte.

Mr. Drouin, very briefly, please.

[*Translation*]

Mr. Claude Drouin (Beauce, Lib.): Thank you, Madam Chair.

Mr. Addy used Embraer and Bombardier as an example and raised an issue that was brought to my attention by my colleague here. When a foreign state has to describe the alleged behaviour and to clarify which provisions of the laws of that foreign state have allegedly been violated and the reasons why it is believed that people in Canada were involved, the person named in the search warrant should have access to this documentation. Could you tell us what the current situation is and what's the best way to deal with all this. Could you go over that again?

Mr. George Addy: The person against whom the order is sought should have access to the documentation. The way I read the bill, he or is not entitled to see those documents. When a request is sent by a foreign state or a foreign agency, I would hope there would be a letter or some other document describing the facts and the reasons for the request. The bill doesn't provide for the person who is the subject of the order request to see this document, especially before the order is issued.

In my hypothetical case, when the Canadian company knows that non legitimate reasons lurk behind a competition case and suspects that this process is being used for other purposes, if it were at least notified that a search warrant has been requested, it could go to the judge and say that upon reading the documentation produced by Brazilian company X, Y or Z to support its request, it's clear that it's not true. At least, the company would be up to par when the order is...

Mr. Claude Drouin: It could at least present its arguments.

Mr. George Addy: That's it.

Mr. Claude Drouin: Thank you.

[*English*]

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

We do have to move on. Very briefly, Mr. Addy, you say your one question is whether or not Canadian interests are being protected. Who would make that decision? Are you suggesting it would be the tribunal?

Mr. George Addy: When we discussed this issue in 1995, and if I recall a consensus out of the consultation process there, Madam Chair, the consensus was that it should be the Attorney General—this is not to criticize the commissioner, whoever that might be, but to ensure a third-party check. The mandate of the commissioner isn't really to protect the public interest of Canada. The mandate is what's in the Competition Act and the public interest may actually go beyond that. In 1995 the suggestion was that it would be the Attorney General.

The Chair: Thank you very much.

I appreciate both Ms. Mayer and Mr. Addy being here this morning and providing their briefs and comments. If you have any further comments throughout the process, please submit them to the clerk and the clerk will circulate them. We may have some questions for you as the hearings go on.

We're going to suspend now for about five minutes as we change witnesses. We have four more witnesses joining us. Again, thank you very much.

• 1014

• 1024

The Chair: I'd like to call the meeting back to order, please. I would ask the witnesses and members to take their seats.

Mr. McTeague.

Mr. Dan McTeague: I seek the committee's indulgence. I have provided every member of the committee with a background as well as two proposals for amendments to Bill C-23, one giving effect to the provisions contained in C-472 dealing specifically with the private right of access, and the other on a less controversial point concerning access to the commissioner for referring competitive issues sector by sector to the Canadian International Trade Tribunal. Both of those are with every member of Parliament for discussion purposes.

• 1025

This document should have been already released, Madam Chair. The clerk is now providing copies as we go through this. There's nothing strange or sinister about this, Madam Chair, I can assure you. It contains everything that is in C-472. If there are any further questions, Madam Chair, I'd be willing to entertain them. This is simply the first start stage—

The Chair: Mr. McTeague, I'm not going to take any questions at this time. I'm just allowing you to table your amendments and discussion—

Mr. Dan McTeague: That's fine.

The Chair: —to allow people to know what it is you wish to discuss, or what you're proposing. I'm sure there'll be questions as time goes on.

We are going to return to our witnesses now.

We have before us, from the Canadian Chamber of Commerce, Ms. Nancy Hughes Anthony, the president and chief executive officer, and Paul Crampton, the chair of the Competition Law and Policy Task Force, from Davies, Ward and Beck, Barristers and Solicitors. From the Toronto Board of Trade, we have Mr. James Musgrove, who is also a lawyer. From the Retail Council of Canada, we have Mr. Peter Woolford, the vice-president, policy analysis and government relations. And from the Canadian Survey Research Council, we have Mr. Ken Deal, the president.

I propose that everyone do opening comments in about five minutes so that we can move to questions, because there are many questions at this committee. That being said, I'll turn to the Canadian Chamber of Commerce.

Ms. Hughes Anthony.

Ms. Nancy Hughes Anthony (President and Chief Executive Officer, Canadian Chamber of Commerce): Thank you very much, Madam Chair, and good morning.

The Canadian Chamber of Commerce is pleased to have this opportunity to submit comments on Bill C-23. I hope the members of the committee have the brief

[*Translation*]

—you have it in French and in English—

[*English*]

with summary comments, which has been distributed to you. We will not read that brief. We will just highlight some of the important findings in it.

[*Translation*]

You no doubt know the Chamber of Commerce. It's Canada's largest and most representative business association. It speaks for approximately 170,000 members, 80 percent of which are SMEs, through some 350 local chambers located in every province and territory and all federal constituencies.

The Chamber of Commerce considers that the Competition Act, which defines many of the rules of our economy, is one of the key pillars of Canada's economic framework legislation.

[*English*]

When we last appeared before you in May 2000 we endorsed the efforts of this committee to search for ways to improve the Competition Act. Things can always be made better, and certainly the Competition Act is no exception.

However, any changes to the Competition Act have a tremendous impact on the economy. The chamber is prepared to work constructively with this committee, with the Competition Bureau, and with the minister in the ongoing substantial efforts that will be required to develop and refine ideas for improving the act.

In this regard, we understand there will be a round table in the coming months. We look forward to participating in that round table to discuss future potential amendments to the act.

The consultative process that led to Bill C-23 was designed to identify consensus matters that could be the subject of a government bill. From the chamber's viewpoint, the amendments proposed in Bill C-23 correctly reflect the consensus that was achieved during the Public Policy Forum's consultation process last year. Accordingly, as I have stated in writing to the minister, the chamber is broadly supportive of Bill C-23 being passed into law in its current form as presented to the committee.

Having said that, following my few comments my colleague Paul Crampton will outline some constructive suggestions that we believe would improve the bill, as well as some ideas for the process for making future amendments to the bill. Before I turn the floor over to Mr. Crampton, I'd like to very briefly touch on the issue of private access to the Competition Tribunal, since it is now within the scope of this committee to consider.

When we appeared before you last May, and in our written submissions to the PPF last June, we were unable to take any position on the subject of a potential right of private access to the Competition Tribunal. You may recall we simply stated the proposal to create such a right had attracted strong feelings within the chamber on both sides of the issue.

We have continually invited input from our membership regarding our work related to potential amendments to the Competition Act. We have made our submissions and committee testimonies available to our membership and have requested input from our members while developing these positions.

• 1030

What I can tell you from this experience is that we have not received a groundswell of support for the introduction of private access. In fact, we have not received any support for this proposal at all. We have heard from numerous members who are strongly opposed to it.

This is not to say that this represents a conclusive statement from our entire membership on the issue. What it does express, Madam Chair, in my view, is that this does not appear to be an urgent priority among our small and medium-sized members. They are concerned with many other issues, particularly at this difficult time in the economy, and there is no consensus within our membership in support of private access to the Competition Tribunal.

[*Translation*]

I would like to underscore that the Canadian Chamber of Commerce is your strongest ally in your efforts to strengthen the Competition Act and ensure more efficient and effective competition rules and enforcement for Canada's small and medium sized enterprises. We are deeply committed to this goal and openly offer our help to this committee, the bureau and the minister in any initiative aimed at achieving this goal.

[*English*]

I must stress, though, that the chamber is unconvinced that the right of private access is the best instrument to help achieve this goal. We are concerned about the many potential negative ramifications that could result from its implementation, and examples of some of those are in our brief before you today.

We believe there are numerous alternative approaches that may better address SME concerns. For example, the federal government could consider increasing resources to the Competition Bureau, as was mentioned earlier, creating an SME fast-track branch within the bureau that can concentrate specifically on small business. Introducing a mechanism by which the bureau would be required to provide a written response, which I believe was also raised earlier, would be another suggestion. Also, decriminalizing certain provisions of the act while reinforcing the abuse of dominance provisions could be considered.

So there is a host of ideas, Madam Chair, that have come forward, but our position continues to be that the time is not right for the creation of the right of private access to the Competition Tribunal.

The Canadian chamber therefore urges this committee to exclude private access from this round of Competition Act amendments. We propose that private access, along with other suggestions that may be put forward by the chamber or other groups, be the subject of discussion for a potential future round of amendments.

With this introduction, I'd like to turn to Paul Crampton, who is the chair of our Competition Law and Policy Task Force. He will touch briefly on specific comments on Bill C-23.

Mr. Paul Crampton (Chair, Competition Law and Policy Task Force, Canadian Chamber of Commerce): Thank you, Madam Chair and honourable members. I'd like to echo Nancy's thanks at having been provided with this opportunity to appear before you and express our views on Bill C-23.

At the outset I'd like to say the chamber is quite pleased that your interim report recognized that the overriding objective of the act is to protect and promote the process of competition, as opposed to specific competitors. You may be interested to note that the PPF also found there was broad agreement that the act as framework legislation needs to be consistent in protecting and fostering competition rather than protecting competitors, and that's relevant to something I'm going to come to in a few moments.

In terms of our specific comments on Bill C-23, let me say first that, with respect to international enforcement cooperation, the bill has addressed many of the concerns we and other stakeholders had identified in relation to Bill C-471. For example, it's a lot clearer that the proposed framework is limited to civil matters. The framework also contains in section 30.01 many of the safeguards and protections that we and other stakeholders suggested be part of any scheme authorizing the exchange of information between the bureau and its foreign counterparts. The bill also includes virtually all of the protections currently included in the framework for enforcement cooperation in respect of criminal matters.

However, there are two particularly noteworthy remaining shortcomings in the bill as it relates to the exchange of confidential information between enforcement authorities. First, it doesn't address information already in the possession of the commissioner. Typically, parties would

supply an awful lot of information to the commissioner, pursuant to either merger filing obligations, for example, or the standard process of preparing a submission to the Competition Bureau, together with voluminous appendices in support of the submission.

• 1035

A lot of that information is supplied voluntarily, and the bill doesn't address voluntary information whatsoever. So we believe the absence of treatment of voluntarily supplied information and the absence of treatment and protection of information already in the commissioner's possession are two particularly noteworthy shortcomings that should be addressed.

You should also be aware that the bill raises a significant issue regarding the nature of the confidentiality protections in the act. The bill would require the Minister of Justice to be satisfied that the protections in the confidentiality laws of the foreign state, with which Canada proposes to enter into the type of agreement contemplated by the bill, are substantially similar to the protections afforded by Canadian laws. However, the nature of the protections provided in Canadian law, and specifically in section 29 of the act, has been the subject of considerable debate for a long time, going back to when Mr. Addy initially launched the review of the act in 1995.

There's a serious debate within the legal and business community regarding the scope of the protections in section 29. So if the benchmark for ascertaining whether an agreement meets the requirements of Canadian law is section 29, then section 29 itself is fundamentally flawed.

The bureau may say, we don't have any problem with the meaning of section 29; we know what we think it means, so we're not going to have any difficulty assessing whether the laws of a foreign state provide substantially similar protections. The problem is that a significant segment of the Canadian public does not agree with the commissioner's interpretation of the meaning of section 29, and it should be resolved once and for all.

Regarding temporary orders, our most fundamental concern with Bill C-472 has been addressed. That concern is related to the fact that the commissioner, who is the investigator, was also going to be the adjudicator when it came to issuing the orders. Bill C-23 addresses this issue, and we're quite pleased that it does.

However, the bill doesn't address certain other deficiencies that were identified with Bill C-472, as it related to temporary orders. This gets back to my comment about protecting competition versus competitors.

In proposed paragraphs 103.1(2)(b) and 103.1(2)(c), the bill would permit an order to be made if the tribunal simply found that a person was likely to be eliminated as a competitor, was likely to suffer significant loss of market share—which happens every day, any time a significant initiative is implemented by a competitor—was likely to suffer a significant loss of revenue, or was likely to suffer other harm that couldn't adequately be remedied by the tribunal. These are all focused on the impact on the competitor, without any reference at all to the impact on competition.

We submit that these specific paragraphs ought to be deleted. If they were deleted, this would leave a straightforward and appropriate test to be satisfied, which is whether injury to competition that cannot adequately be remedied by the tribunal is likely to occur. This is the

test that the bill offers in proposed paragraph 103.1(2)(a).

There are a couple of other shortcomings with the bill, as it relates to temporary orders. It precludes a right of appeal from the issuance of a temporary order, and it allows temporary orders to be made without any notice whatsoever to a party who is going to be the subject of the order. This raises a lot of the same due process issues Mr. Addy identified, in connection with the exchange of enforcement information.

In terms of the proposals to streamline the Competition Tribunal's process, our only comment is that the provision in proposed subsection 124.1(2) should be extended to persons who are the subjects of inquiries. In our view, it's just not right to provide the commissioner with the ability to refer a matter of interpretation, process, practice or procedure to the tribunal without providing the same right to a person. It's difficult to believe that anybody could object to giving a person, who is the subject of an inquiry under an act, the right to go and clarify the meaning of the law he's being investigated under. So we think that needs to be cleaned up. We made the same comment on the earlier bill last year.

On a more positive note, we're broadly supportive of the provisions that would create a new offence, in respect of the deceptive use of the mail system or the Internet.

• 1040

We're also supportive of the proposal to create, in proposed section 124.1, a statutory framework for the issuance of binding advisory opinions.

Very briefly, in terms of the process for making future amendments, we believe that ideally it should have the following five basic stages.

First, it should begin with the laying before Parliament of this committee's final report.

Second, the government should issue a detailed white paper reflecting the principles in your report.

Third, there should be a detailed consultation process that would not be confined to two or three months, the way the PPF process was initially articulated. It should be at least a six-months-to-a-year process, to make sure that organizations such as the chamber can go out, consult their members, circulate drafts, get comments back, and ultimately wind up with a position to submit.

Fourth, the draft bill should be prepared and circulated to some experts, as in the case of Bill C-20 and Bill C-23. But our suggestion would be that instead of getting 12 hours' notice to comment on the bill, we should be given a little more notice. Finally, the committee should hold hearings.

So in a nutshell, the process would start and end with this committee, but it wouldn't happen entirely within the committee. We think if the process last year taught us anything, it is that you need significantly more consultation and debate. There's a broad range of people out there in society and in the economy who believe that the risks associated with hasty amendments to the act are just too great; therefore we need something a little more substantive.

Thank you very much.

The Chair: Thank you very much, Mr. Crampton. That was a little longer than five minutes, so we'll try to get back to our schedule here. I think we should also all be aware that the Competition Act is an ever-evolving process. Everyone's been on notice that Bill C-23 was coming before this committee for months now, not 12 hours.

I'm going to turn to Mr. Musgrove from the Toronto Board of Trade, please.

Mr. James Musgrove (Lawyer, Toronto Board of Trade): Thank you very much, Madam Chair, members of the committee. I will attempt to be closer to five minutes. We'll see how I do.

You have my brief and I won't refer to it in detail.

The Toronto Board of Trade represents about 9,000 businesses located in Toronto and has taken an interest in competition law as an important piece of—

The Chair: Mr. Musgrove, your brief is in English only, so we won't circulate it until it's translated. If anyone submits an English-only brief, it has to be translated before it's circulated to all committee members. So I apologize for that.

Mr. James Musgrove: I apologize. You will have it shortly. I won't read it, but you can look at it at your leisure.

This is important legislation. It sets the ground rules for our economy. It is our industrial policy, and it's important to get this right. That's why the Toronto Board of Trade takes an interest and is very pleased to be here today to express its views to you and to have a dialogue with you.

I propose to say a word about the process issues. I propose to then say a word about four specific sections of Bill C-23: proposed section 53, the deceptive contest provisions; the foreign information sharing provisions; the interim injunction provisions; the tribunal process provisions; and then, at the end, a very brief word about private access.

With regard to process provisions, the Toronto Board of Trade agrees entirely with the Chamber of Commerce that it is an optimal process, and we encourage it.

Turning to the four matters within Bill C-23, starting with proposed section 53, the deceptive contest provisions, we have two concerns. Certainly, the Board of Trade is as happy as anyone else to avoid deceptive contests. They do our members no good. But one is a wording provision.

The wording in proposed subsection 53.1 says if the notice gives the impression you have won, will win, or will win on meeting a condition and all of the other provisions, then it's unlawful. That is typically how standard promotional contests are set up, if your name is drawn. I know that's not what's intended, but that is a risk. I've been told an amendment will be introduced to change the language. I hope it is.

I would encourage this committee to endorse that amendment, to avoid that technical problem, and also in its report to say that this provision is not intended to catch the standard draw—that it's perfectly straightforward—nor is it designed to catch answering a skill-testing question, which is required by the Criminal Code.

• 1045

It is designed to capture misleading scams. That's clearly what it is intended to capture. I think the amendment, which I understand the bureau would bring forward, should address that problem, and I encourage the committee to endorse it.

More broadly, however, if the advertising material for a contest, for a promotion, is misleading in a material respect, it is already unlawful. There's no doubt about that. Whether the bureau effectively enforces that or not, I don't know. I know they do enforce them under the existing law—and you may take the view "not effectively". I don't have a view. But if that is the concern —we've heard before about enforcement resources—there may be an answer here.

What concerns me is not that deceptive contests not be attacked; they should be. They can be attacked under the existing law, and a specific amendment will invite the court at some point to think they must have intended something else, not just a straightforward, misleading representation about whether you've won a contest and how valuable your prize is, that sort of thing. So that is my concern with that provision. That is the Toronto Board of Trade's concern and the concern of other organizations, like the Association of Canadian Advertisers. As to prohibition on deceptive representations about contests, there's no debate.

Regarding information sharing with foreign antitrust officials, I endorse again the Chamber of Commerce's view here. I point out specifically that it is in the interest of the enforcement of Canadian competition law, not only international arrangements, that section 29 of our act be strengthened, because if it is not, if the bureau can share information it receives voluntarily from people, freely, then people will stop supplying the bureau with as much information as they previously have. That is just a logical conclusion to reach, and that will make the enforcement of the Canadian act more difficult, which is contrary to the goals sought to be achieved.

There is no logical reason, in my view, that section 29 ought not to provide the same level of protection to voluntarily provided information as for information obtained pursuant to compulsory process. There's no logical argument that it should not be. If that protection were given, there would be no disincentive for people to cooperate with the bureau and help them with their inquiries in that regard.

With regard to the interim injunction powers, the Board of Trade is supportive of granting these powers—supportive of granting them to the tribunal, not to the commissioner him or herself. In fact, this committee may want to have a look at whether the airline powers are now more appropriately given to the tribunal rather than the commissioner, because the parallel is there.

We also endorse the particular comment made by the Chamber of Commerce that the test as to lessening of competition in the first section of the provision is correct, but the secondary tests of injury to a competitor are not the right tests. This is a law designed to protect competition, not particular firms. As Mr. Addy said this morning, the process is that some firms win and some firms lose. The injunction power should be there, but the test should be injury to competition, not injury to competitors.

With regard to the tribunal process issues, again, I can save a little bit of time by endorsing what Mr. Crampton has already said. I want to emphasize one point he made about the right of the commissioner to refer matters of process, of interpretation, without there being a

respondent there, without there being a respondent agreeing, and without there even necessarily being an actual proceeding or dispute.

I submit this is a potentially dangerous provision, because what you then have is one half of an argument before the tribunal, arguing the act should be interpreted generically in this way. I'm very persuasive when I'm the only one arguing, but if I have an opponent, I usually lose. There's a value to that process, and if you have only one side of the case being put on the interpretation of an important provision of the act, the tribunal will hear half the case. They may or may not appoint a friend of the court to make the argument on the other side, but it's not the same as a motivated party with an actual interest in the outcome making the argument.

Whenever a matter is referred to the tribunal—and I strongly support the right of the tribunal to hear matters on referral; I think it will speed things up and make it more efficient—there should be two parties. And it seems to me the right to refer things should be reciprocal. Either party should be able to refer it.

Those are the four aspects of Bill C-23 we want to speak to specifically, but broadly stated, the Board of Trade is in support of Bill C-23. We have these particular concerns, which we urge you to consider.

• 1050 

Private access is part of your mandate and it has failed through the Public Policy Forum process to achieve a consensus. I submit that is because this is a difficult matter upon which reasonable people can and do differ.

There are a couple of concerns we have about private access. One is the practical type of concern, that it's just not a practical remedy because of its cost, etc., for small businesses; that no matter what the safeguards are, it can and will be used strategically; that it will cost respondents literally millions of dollars, so it will cost the applicants millions. It will also cost the public purse a fair bit, because the commissioner will take an interest in some of these and intervene, or consider intervening, and investigate them. The tribunal process itself is not inexpensive. So there are many costs to private parties and to the public purse.

But more importantly than those practical matters, I submit, are the consequences on the economy generally. This private access provision will apply to vertical conduct—refusal to deal, tied selling, exclusive dealing, those kinds of vertical arrangements essentially between suppliers and distributors.

While that kind of vertical conduct typically does not injure the economy—occasionally it does, and that's why the provision is there—it does, of course, injure particular competitors; therefore, those competitors may wish to bring private remedy to save their business. It's perfectly understandable. As a result of having the power to do that, we'll have proceedings brought where the injury is private.

But the other side of the coin is if you can't conduct the conduct, if you can't pursue it, or if you are inhibited because you know these kinds of proceedings can and will be brought from time to time and you therefore don't undertake the arrangements, then injury to the economy at

large occurs. But it is diffuse. It is imprecise. It is unspecific. There is no single victim to come forward to make the case, to complain, to bring political pressure, to bring a legal case; yet we're all poorer for it.

The kind of thing I have in mind is that we'll have fewer package deals or bundling of products together for fear of tied-selling proceedings. We'll have fewer distributor terminations for fear of refusal-to-deal proceedings. We'll have fewer contractual distributor arrangements. In other words, you'll just do it in-house—you won't engage a separate contractor—to avoid all of those kinds of complaints. There will be fewer exclusive-dealing arrangements, because the risks of changing those arrangements or of those arrangements going sour have just increased with private access at the margin.

The Chair: Mr. Musgrove, I'm going to have to stop you there, because we're really taking way too much time with the presentations this morning, so you're—

Mr. James Musgrove: Thank you very much, Madam Chair.

The Chair: Thank you very much. You tried, but you're already at ten minutes, so I'm going to let you expand during question period, if you don't mind.

I'm going to turn to Mr. Woolford now, from the Retail Council of Canada.

Mr. Peter Woolford (Vice-President, Policy Analysis and Government Relations, Retail Council of Canada): Thank you, Madam Chair. I really will try to keep to five minutes.

[*Translation*]

I'm sorry, I only have the English version of our brief. There was quite a lively debate among our members, and this is why I can't provide you with a copy of our brief in the two official languages this morning. It's because the issue of private access stirred up an interesting debate among our members.

[*English*]

I'd like to introduce briefly the Retail Council of Canada. We represent around 9,000 members across the country, both large and small. In fact, the great majority of our members are independent retailers running their own stores. We have an interest in this because the liveliness of competition in the marketplace, especially in retailing, is one of the hallmark features of our industry.

Let me talk very briefly to two provisions of the bill, and then talk about private access and a little bit about process.

With respect to deceptive contests, we applaud the government's effort to move against the fraud artists who use the cover of business to effectively defraud Canadians of their money, and we'd like to see them driven from the market. We support the amendment. We have some concerns, I believe, that were identified by the commissioner and again mentioned this morning that it be clarified this is oriented toward fraudulent practices, and we support the amendment with the changes suggested by the commissioner of competition.

With respect to temporary orders, again we support giving the tribunal the power to make these temporary orders with respect to the civilly reviewable provisions of the act. We would again suggest that for the process to be fair, these orders not be issued *ex parte*, but that the party in consideration be given notice and be given the opportunity to make its representations as well, for some of the reasons that were discussed here just a few moments ago.

• 1055 

Again, as most people do, we view the act as protecting competition rather than competitors, and for that reason we would recommend the removal of proposed paragraphs 103.1(2)(b) and (c), focusing the test instead on competition alone and not on the impact on private competitors.

Let me turn briefly to the issue of private access. As I said, we have had a lively discussion amongst our members on this issue. I know there has been quite a lively public discussion on this matter. It's our sense that we do not yet have a consensus on this matter, and we would benefit from some further discussion in order for the parties to achieve this.

We would suggest also that in the course of this discussion the debate go beyond sections 75 and 77 to at least consider, here at the committee or elsewhere, the implications for the act of whether it should be extended to other sections at some point in the future. Once you start opening sections to private access it answers the question in principle as to whether the commissioner should be the single entry point into the tribunal. Some of the broader implications should be looked at when that decision is being made.

Let me turn briefly to the process for amending the act. We certainly do support the government's incremental approach to changes to the act. We feel this is a responsible and sensible way to go on changing such an important piece of framework legislation. We would recommend that this committee consider the amendments in Bill C-23 expeditiously and report back to the House of Commons as quickly as possible.

We would suggest that any other changes, including those dealing with private access, go through a thorough discussion, similar to what has happened in Bill C-20 in the previous Parliament.

In addition to having a discussion of amendments amongst the various marketplace parties, we think there is some value in inviting those parties to participate with the government in the policy development phase as well. Once the government has decided upon the policy directions, it can then draw upon the experience and knowledge of marketplace parties for the detailed writing of the policy for consideration by Parliament.

Madam Chair, those are my opening remarks. We'll be glad to take any questions.

The Chair: Thank you very much, Mr. Woolford. That was less than five minutes.

I'm going to go to Mr. Ken Deal, the president of the Canadian Survey Research Council. Mr. Deal, please.

Mr. Ken Deal (President, Canadian Survey Research Council): Thank you, Madam Chair and honourable members.

The Canadian Survey Research Council is pleased to appear before the committee as it reviews Bill C-23. The CSRC serves as an umbrella organization to bring together all the varied interests in the market research and survey research community, including companies that supply and conduct survey research and organizations that use the findings from those research studies.

One of the pillars of the CSRC's mandate is to protect the good relationship that exists between market and survey researchers and the public. As such, the CSRC strongly supports the provisions of this bill dealing with deceptive contests and hopes the committee's review will result in swift legislative action. The CSRC suggests, however, that Bill C-23 could go further to protect Canadians from all forms of deceptive solicitations, not just deceptive contests.

When the privacy rights of Canadians are infringed upon, as they are with deceptive contests, mistrust amongst the public is generalized to all legitimate industries that rely on unsolicited communications to conduct their affairs. For market and survey researchers, privacy rights set the parameters of professional conduct for the industry. Researchers have fostered a relationship of trust with their respondents. This trust speaks to the quality of the information researchers collect; hence, the better response rates are for researchers, the more likely it is that corporate and public leaders will make decisions based on people's true and accurate opinions.

Unfortunately, the good relationship researchers enjoy with the general public is increasingly seen as a conduit for deceptive means of solicitation. When unscrupulous marketers abuse privacy rights, mistrust is created amongst the public for all unsolicited communications, regardless of their legitimacy. Generalization sets in to prejudice everyone.

For this reason, the CSRC believes Bill-23 should be amended to address all forms of unscrupulous marketing. If mistrust encroaches on the relationship market and survey researchers enjoy with Canadians, it will taint the quality of information collected. This can lead to situations where policymakers, for example, base their decisions on data that does not accurately reflect Canadian attitudes and opinions.

In 1999, strict provisions were added to the Competition Act that go a long way to deter deceptive telemarketing practices, but by telephone only. At the time, there was an immediate need to deal with fraudulent telemarketers, an illicit practice costing Canadian businesses millions of dollars per year. Building on the work already accomplished, the CSRC asked the committee to consider amending the act to recognize that solicitation practices continuously evolve. Yesterday it was deceptive telemarketing; today it is deceptive contests. Broader provisions would not be burdensome in any way to legitimate industries; however, they would go a long way to protecting the public.

• 1100 

The market and survey research industry has its own steps to curtail deceptive solicitation practices within its industry by enshrining the principles of privacy and fair business practices in the way it interacts with Canadians. In 1994 the CSRC created the survey registration system to keep track of market and survey research projects being conducted in Canada and to provide the public with information through a toll-free number. For the first time the public has access to a mechanism to attest to the veracity of a given research project and to ensure that personal information is being used for research and not unscrupulous selling purposes. The system also receives complaints—very few of those—and works to resolve public concerns.

Deceptive solicitation practices, however, go beyond what an industry can control. They damage legitimate businesses and their ability to perform important functions for Canadian commerce. Much has been done by government and by industries to put an end to deceptive solicitation. Bill C-23 will help by prohibiting one area of fraudulent solicitation—deceptive contests. Broader stipulations in the Competition Act could go much further by putting an end to all occurrences of deceptive solicitation, regardless of the means and medium by which they are perpetrated.

In conclusion, I have three points. The market and survey research industry recognizes that a balance must exist between the need to interact with Canadians and respect for a person's right to privacy. While the CSRC supports Bill C-23, notably in its provisions to protect the privacy of Canadians, it believes that the act could go further to respond to the public concern in the area of deceptive solicitation. The CSRC asks that the committee seize the opportunity presented by this current review to put an end to all occurrences of deceptive solicitation regardless of how they are perpetrated and which media is being used.

I wish to thank the committee for considering my submission today on behalf of the Canadian Survey Research Council.

The Chair: Thank you very much Mr. Deal.

Now we're going to turn to questions. I have many questions. I remind people that the rounds are supposed to be five minutes. That means shorter questions and shorter answers will allow more questions to be asked.

Mr. Penson, please.

Mr. Charlie Penson: Thank you. I'd like to welcome the panel this morning... a good discussion, trying to fine-tune Canada's competition law, which is a worthy goal.

I am a little concerned that some people think you can substitute healthy competition in the marketplace with heavy competition law. It seems to me that the more competitors we have, the better chance there wouldn't be any need for competition law, so those conditions need to exist.

We heard in the earlier panel that there's a lot of misunderstanding about what the laws governing competition are in Canada. Mr. Musgrove identified an area in the airline industry where we have seen some exemptions in the past. Some of the people at WestJet are saying, well this competition policy doesn't work for us anyway.

There are lots of ways of getting around problems that are not addressed by competition law. I'm concerned that we tend to mislead people into thinking we can substitute competition law for the marketplace.

Mr. Musgrove, you identified the airline industry as a problem area. WestJet are saying, essentially, that there are many ways of driving out competition, whether through prices or extra capacity thrown on... From what I'm reading, they're saying this doesn't work for us anyway, so we just have to rely on the marketplace, because there isn't the kind of protection needed. What's your response to this?

• 1105 

Mr. James Musgrove: My first response is my comment about airlines. The commissioner in the airline business can make orders himself or herself. I think that's wrong. I think it would have been wrong in Bill C-23. It's not in Bill C-23. Instead we have an expedited process for the tribunal to make an order. I think it is the right process. In the airline business it should be set up that way too.

Turning to the substance of the airline question, I don't purport to be knowledgeable about the industry. Obviously, it's a peculiar situation because we have one dominant carrier in Canada. We have very significant barriers to entry into the business. Many of them are made by government.

My initial view of the right answer to the airline situation is, I think, the same as the commissioner of competition. If we reduce some of the barriers for foreigners to fly in Canada, we will have more competition in the air.

I'm not an expert on the airline industry. There are many people who know a great deal about the airline industry. We have a dominant player. We have fringe players. It's a very difficult situation.

An obvious way to address it, in the marketplace rather than in the courtroom, is to reduce government restrictions so there can be more participants in the marketplace. Whenever you can have more competitors, as you say, rather than more competition law, it's a better answer, with all other things being equal, in my view.

Mr. Charlie Penson: In terms of overall business in Canada, does anyone on the panel have an estimate as to what portion of the business would actually fall under, or use, competition policy that is already there? I would think it's a small amount.

To respond to Mr. Musgrove, my point, again, is to let the market decide. Take the restrictions off. There would be the possibility of more players being involved who could certainly look after some of this area rather than rely on competition law.

The Chair: I think Mr. Woolford would actually like to answer.

Mr. Peter Woolford: Thank you, Madam Chair. I think you still do need the law in a number of areas.

For example, there were the amendments this morning dealing with deceptive contests. In the marketplace, you do have individuals who are not there to do business. They are there to commit crimes against Canadians in the guise of doing business. The competition law serves a very valuable role in helping the government to attack that kind of behaviour.

Mr. Charlie Penson: Isn't it already a criminal act?

Mr. Peter Woolford: You can proceed with it under fraud, I would suppose. I think it's useful to have.

I was going to go on. In the deceptive practices area, there are lots of civil instances where companies will push the edge of the law and step over it. Again, having a clearly established set of rules and requirements in that area is very useful for the legitimate competitors who want to stay responsible.

Mr. Charlie Penson: It's an interesting area.

The Chair: Thank you, Mr. Penson.

I have Mr. Crampton. Then I'm going to have to move on.

Mr. Charlie Penson: Are we finished, Madam Chair? I had another question.

The Chair: You are out of time. I'm going to have Mr. Crampton answer your last question, then we have to move on.

Mr. Crampton.

Mr. Paul Crampton: Thank you. My sense is there might be a bit of a misunderstanding as to what the Competition Act does. The Competition Act is supposed to achieve the objective of allowing the marketplace to work. I think to a large degree it's very successful. In some cases, the process of competition may lead to a dominant firm, in which case you need provisions on abuse of dominance. Persons may decide to compete less effectively than the market would dictate, so you need provisions addressing conspiracies.

Mr. Charlie Penson: Has it worked in the airline industry?

Mr. Paul Crampton: I think the commissioner has correctly identified the fundamental problem with the airline industry. There is a government barrier to competition in the form of a restriction on the ability of foreign carriers to enter into Canada and compete. It's the main problem. People are wrestling with how to fix it in a second-best way. The best way is to open up the market and let the market do what it does best.

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

Mr. Volpe, please.

Mr. Joseph Volpe (Eglinton—Lawrence, Lib.): Thank you very much, and welcome to all the panellists.

• 1110 

Madam Anthony, when you were giving us a presentation on the membership you consulted, you pointed out that of the 170,000 members, only 34,000 are not small businesses. You didn't give us an indication of the breakdown and the response from the two sectors. What was the response among the 34,000 who are not small businesses but I guess are identified as large businesses?

Ms. Nancy Hughes Anthony: I could give you a little detail on how we consult with our members, because our members are so broad and diverse.

Mr. Joseph Volpe: No. Could you just give me the answers? I know we're pressed for time.

Ms. Nancy Hughes Anthony: Sure.

We have a competition law and policy committee, of which Mr. Crampton is the chair, that involves any member who wants to have a discussion on anything the committee chooses to raise. As I mentioned in my remarks, every two weeks we put out a bulletin for our members

on all the issues we're working on. At least five or six times, since last May, we put out information on Competition Act amendments and how we are working on them. We invited people to contact us and express their interest. We had no response from the general membership contact.

Mr. Joseph Volpe: The 80% of membership.

Ms. Nancy Hughes Anthony: It is somewhat unusual. If you put out a call to action on border issues or something like that, you will get a response.

As I said in my remarks, I don't think this is a definitive consultation with every single member who belongs to the Canadian Chamber of Commerce. The people who responded, largely through our competition law and policy committee, the ones who sought to be involved in the PPF process, were more opposed to the idea of private access. We did not have anyone on the positive side.

Mr. Joseph Volpe: Did they come from the 20% or 80% of the membership? That's what I'm trying to get at.

Ms. Nancy Hughes Anthony: I would have to go back, Mr. Volpe, and find out exactly who sat on the committee.

Mr. Joseph Volpe: Did we survey those people? If we did, can we get the breakdown on which of the two groups responded to a request to comment on Bill C-472?

Ms. Nancy Hughes Anthony: Sure. I would ask, through the chair, how can I be helpful on this? What is the purpose of such an investigation? I'd be happy to do it.

Mr. Joseph Volpe: The purpose is to get a sense of where your membership is coming from and what segment of the membership is interested. I made a note earlier that it didn't seem to me small and medium-sized businesses would be terribly concerned about competition from a level playing field. A level playing field really is someone who is their size.

Ms. Nancy Hughes Anthony: As I said in my remarks, I don't have any groundswell that says to me small and medium-sized businesses have this on their radar screen.

Mr. Joseph Volpe: I wouldn't be surprised. It's why I asked you the question on where the responses came from.

Ms. Nancy Hughes Anthony: Yes.

Mr. Joseph Volpe: If you didn't get the groundswell of response, you're confirming my sense of the reaction.

I'm sorry to be cherry-picking. If I take some of the comments that have come forward, injury to competition and not injury to competitors should be the test. I think it was Mr. Musgrove who indicated it. Small and medium-sized businesses are all too happy to be in competition. They welcome competition because the ultimate objective of the competition is obviously to attract a greater buying public. Without it, no one's going to be in business.

From the responses we've been getting this morning, and from Mr. Crampton, as well, the ones who have the capacity to crimp the competition are those who fall in the 20% of your membership, not in the 80% of your membership. It's why I'm trying to get a handle on the

breakdown of the responses you've been getting.

Ms. Nancy Hughes Anthony: I think it is fair to say, through the chair, I'd have to go back again and look at exactly who was involved at each step of the way and went to which consultation. Small businesses did not pick this up as an issue. They did not bring this forward as something with which they were concerned.

We had a recent annual meeting in Winnipeg in September. This is not a subject people were raising or saying their members were on the warpath about. I think there are many other issues at the moment that are affecting small business very seriously. This is not one that seems to be at the top of people's list of priorities.

• 1115

Mr. Joseph Volpe: To come back to my fundamental basis—

The Chair: This is your last question, Mr. Volpe.

Mr. Joseph Volpe: Yes.

The fundamental basis for all questions regarding competition is the impact on the consuming, buying public. So it may not register as an issue for those who are in the business of providing that service, but it is an issue for the consuming, buying public.

A colleague opposite just gave us an indication of the impact of one competitor, Air Canada, versus a smaller competitor, WestJet. I realize this isn't the forum to discuss all of that, but I hope you get a sense of what drives the question. That is, you're telling me you don't have a sense of what 80% of your members may be saying, and you're representing to me—and I hope you'll dispel this inference I've drawn—that the 20% of your membership that is big business, and may have some interest, are the ones that have actually given you a sense of how to contribute to this process.

Ms. Nancy Hughes-Anthony: But if you look at what I said this morning, I firmly believe there should be continuing consultation and discussion, particularly with small and medium-sized enterprises, about how to ensure that they feel included in the provisions of this particular act.

I'm saying, though, that as a practical matter, the issues that are dealt with under Bill C-23 are important ones to get on with, and I would urge the committee to do so. It would have the support of the chamber, subject to a few friendly suggestions. Let's have a good discussion about whether it really is private access that is the desired mechanism, or are there other things we can do that would improve SME access? That would be my suggested approach.

The Chair: Thank you very much.

I'm going to have to move on to Mr. Bergeron, but I do want to remind the witnesses that that's one of the discussions we are having, a good discussion on private access. We have no intention of hurrying up Bill C-23 if there is not the opportunity to provide a discussion on private access. I want to clarify that.

[*Translation*]

Mr. Bergeron.

Mr. Stéphane Bergeron: Thank you, Madam Chair. I'd like to thank our witnesses for their presentation and for being here today.

I'd like to ask a couple of questions to Ms. Nancy Hughes Anthony. First, I do note that, in general, you support the bill's various provisions. I do note too that you have concerns about the provisions dealing with private access, although I'm not sure to always grasp the reasons of those concerns.

I'd like maybe to ask you a question about a point you raise on pages 5 and 9 of the English version of your brief. I know it's for future consideration, so to speak, and that you are suggesting a process for making future amendments to the act and eventually introduce these proposed modifications, but I would still like to hear your comments on this.

First, you say on page 5:

> Decriminalize the provisions of the act relating to predatory pricing, price discrimination and price maintenance,

Does this mean you suggest also amending the Criminal Code?

Ms. Nancy Hughes Anthony: No, it does not mean at all modifying the Criminal Code. Maybe, I'll ask Mr. Crampton to comment also. In some provisions of the act, the test or the standard that has to be met is so strict that it's very difficult to get convictions. It requires a lot of time and it costs a lot of money. Maybe it's not something that can be done overnight, but it might be considered, I think. Could we find a way of improving the efficiency of the act in some areas, for instance, by replacing a criminal conviction by an administrative penalty?

May I ask Mr. Crampton to follow up?

[*English*]

Mr. Paul Crampton: We recognize that some of the issues, perhaps the most important issues with which this committee has been wrestling over the last few years, have all come back to predatory pricing, abuse of dominance, and how to deal with situations that arise in an expeditious and an effective manner.

• 1120 

So we're saying, rather than creating a right of private access for which the case doesn't appear to have been demonstrated, and for which there doesn't appear to be a demand from the people in whose benefit it has been offered as a possible solution, rather than creating that framework, let's look at other ways to solve the problem.

One of these ways is to decriminalize some of the pricing practices, because it's very difficult for the commissioner to establish contraventions of those provisions on the criminal burden of proof. So if you decriminalize those practices and rely on the abuse of dominance provisions, first of all, the commissioner would benefit from a lower burden of proof, and secondly, if you beef up the abuse of dominance provisions—for example, by inserting an administrative penalty—then you would still have that deterrent effect that is currently in the criminal law. It would be shifted over to the civil matters provisions. Then if you also reduce the burden in the abuse of

dominance provisions to simply require the same test that's in the predatory pricing provisions, which is simply to demonstrate a substantial lessening of competition, without having to show control or substantial control of the market, I think you would have a provision that was effective and would address the concerns of SMEs and their ability to get effective relief, especially with these new temporary order provisions, on an expeditious basis.

[*Translation*]

Mr. Stéphane Bergeron: I must say you reassure me, Mr. Crampton, because the way I read this, I thought you wanted to relax the provisions of the act dealing with predatory pricing, price discrimination and price maintenance, to make them more permissive.

I have to tell you that, at the last committee meeting, I happened to have a discussion with the Competition Commissioner about the price of gas, which demonstrated clearly, in a way, the importance of a piece of legislation such as the Competition Act. I also mentioned how difficult it might be for the commissioner to take any action in such matters. So, you don't suggest to make the act more permissive, but rather to use an alternative, so that the commissioner can step in.

[*English*]

Mr. Paul Crampton: Exactly. If you look at the history under predatory pricing, price discrimination, promotional allowances, there have been very few convictions in the entire history of these provisions, which I believe have been around since 1935 and 1951 respectively. So we're trying to create a tool that works, as opposed to a tool that looks good on the books but doesn't work and isn't really available to help SMEs.

Another alternative that Nancy mentioned in her remarks is to create a process like they have in France, where the authority actually has to give reasons why it's not proceeding with enforcement action in response to a complaint. The chair of that Conseil de la concurrence in France stated at a conference here—which is something Mr. McTeague has quoted in a recent paper of his—that before they introduced this provision, people viewed the competition law as something that could simply be used against them. Now they view it as something that they can actually use as a tool to help them compete.

Based on that experience, we thought something similar could be done in Canada. So that's one of the solutions. The other one, of course, is to increase the bureau's resources.

When the commissioner appeared before you the other day, he stressed that he was underfunded, certainly relative to other agencies around the world. He was close to the bottom of the list on a per capita basis, or whatever other measure you want to use. I think those were the terms he used.

If you increase the bureau's budget, the funds at the bureau's disposal, the bureau can take these cases that it says right now it's not able to take, even though nobody has ever seen a study or any kind of statement stating that there had been *x* cases that we haven't been able to take because we haven't had private access.

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

I'm going to move on to Mr. McTeague, but I'm just going to remind members that we're scheduled here until noon. I have on my list about nine people who want to ask questions, and we have about 35 minutes.

Mr. McTeague, please.

• 1125

Mr. Dan McTeague: Thank you Madam Chair.

Thank you for being here today. I know many of you personally and over previous engagements on the issue of the Competition Act. In fact, I've seen many of you at many of the conferences that have been held specifically on the issue of private access.

I don't think it says a lot that there have been dozens of consultations. I'm looking back to the initial consultation in 1995, in which the Canadian Bar Association, the national chamber, as well as some other large businesses were opposed. I'm looking at the Fordham conferences, the annual competition law section, continuing legal education, and I get the impression there may be a misunderstanding on your behalf in the sense that you perhaps do not believe members of Parliament have the capacity to review these issues, try to find consensus, and try to come up with their own definition of what might be the best test to ensure all people enjoy the Competition Act.

Mr. Musgrove took some time to explain what was in Bill C-472, but I find, Madam Hughes Anthony, in your commentary and in the brief you put forward you have some fear. I'm looking at it here, and you say, from a reverse angle, what happens if a company brings an action against a small, innovative upstart aggressively looking to increase its market? You go on to say the cost of defending an action... Can you tell me why it is possible, in the case of the Canadian Chamber of Commerce, that there is an insistence on not trying to address the safeguards that have been put into Bill C-472, which organizations have known about for at least a year and a half and for which there has been plenty of commentary? Take, for instance, Mr. Crampton's comments with respect to Frédéric Jenny—the equivalent of our competition commissioner here in Canada—who at a previous conference thought it rather amazing that we didn't have private access in this country.

What is it about your process, with groups of individuals who are very much a part of the bar, that is so steadfastly opposed to this, while at the same time ignoring the safeguards that are clearly in Bill C-472, which you know about?

Ms. Nancy Hughes Anthony: Madam Chair, I'll just respond.

I don't think, Mr. McTeague, you are correctly interpreting my remarks to the committee. I said we could not arrive at any consensus within the chamber membership, and that the comments that have come forward, the ones that have been presented, have been more to raise problems and difficulties. As I said, we don't have, at the moment, any companies saying they have to have this, that this is important for them.

What I'm saying to the committee is, let's give this some more time. Let's put this into a consultative forum and examine this and other measures that could respond to the concern, which I know you have, that small and medium-sized businesses do not feel included in the process. And I sympathize with that concern.

The two issues that have been raised, as noted in our brief, are certainly with respect to the cost and the complexity of these hearings. Perhaps you have other information, but certainly the cost and complexity of going before the tribunal has been raised as one obstacle.

Mr. Dan McTeague: Madam, why would you think there's a concern about the cost, when there already is in Bill C-23 the ability to screen out in advance cases that do not appear to have merit, power to award costs, and power to summarily dispose of them? That's currently in the act. You're not answering my question.

Ms. Nancy Hughes Anthony: The second point I was trying to get to—and I think I'd like to ask Mr. Crampton to comment—is the issue of the safeguards, because that is something that has been raised with this committee, the fact that private access would be encompassed within a limited series of actions. I think a lot of our members who have responded are still concerned about that.

Mr. Dan McTeague: Do your members know about the safeguards? Have you communicated that to them in the bulletins you've sent over the past few months?

Ms. Nancy Hughes Anthony: Could I ask Mr. Crampton to respond to that?

The Chair: Certainly.

Mr. Paul Crampton: We did circulate our initial submission, the speaking points we presented in our appearance last May. I believe those were widely circulated. At that point, we weren't able to take any position because we thought there would be a large number of people from the SME community that would be in favour of this, so we showed up and said—

The Chair: Mr. Crampton, are you talking about the appearance in May 2000 before this committee—not last May, but a year and a half ago?

Mr. Paul Crampton: Yes, I'm sorry.

• 1130

We circulated those comments and highlighted the pros and cons. We indicated the safeguards were there, and still, we didn't get the support. So in my capacity as chair of the committee I've taken the devil's advocate position sometimes. I've actually said, "Look, we have these safeguards. What's the problem?" People have still come back, Mr. McTeague, to the absence of support, the fact that it would cost $1 million, so the very people who are supposed to benefit from this wouldn't benefit from it—

Mr. Dan McTeague: Mr. Crampton, you're not answering my question either.

Mr. Paul Crampton: —and the fact that there are alternatives—

Mr. Dan McTeague: I'd like a straight answer to this. Have you included, with your membership, the safeguards that were contained in Bill C-472, which have been on the docket now since April 2000?

My final question deals with why there is an insistence by your organization on trying to compare Bill C-472—the private right of access in a restrained fashion—with the U.S. model, when other models like Australia's are more appropriate. Can you tell this committee why it's

important for you to try to create an image of what this bill is that clearly doesn't exist? Why the perception? Why the desire to do this?

Mr. Paul Crampton: Nobody's trying to create any perception. As I said, we started off with a neutral position. We genuinely wanted to get the concerns identified. We wanted to get input, and the only input we got was on one side. Now all we're saying is that we don't think this consensus you're apparently looking for, which was the reason for the process of referring this bill after first reading—

Mr. Dan McTeague: Mr. Crampton, your brief—

The Chair: Mr. McTeague, let Mr. Crampton finish. Thank you.

Mr. Paul Crampton: We're simply saying that consensus doesn't exist right now. We're happy to continue to try to see if that consensus can be met, but right now it doesn't seem to exist.

The Chair: I have a suggestion here. Why don't we have the chamber provide us with a copy of what you submitted to your members, and that way we can answer this question. If that's possible, Mr. Crampton, what you circulated to them—

Mr. Paul Crampton: Sure.

The Chair: —and then if there are further questions, Mr. McTeague will have to submit them in writing.

Mr. Dan McTeague: Madam Chair, I have a question for you.

The experience of the United States indicates this would be a highly probable consequence of introducing the private right of access. I agree with asking Mr. Crampton to do that, but more importantly, they have submitted to the committee here a document that clearly says we should compare what we're doing right now to the United States.

The Chair: Well, Mr. McTeague, as you're aware, we are going to have witnesses from Australia. We have agreed to do that, and the chamber has their opportunity to put evidence before us. But we are going to have the discussion on private right of access here, and it won't be in the future. I'm going to remind the chamber one last time of that, so we can move forward.

Mr. Strahl, please.

Mr. Chuck Strahl: Thank you everyone for coming today.

This right of private access may not be something there's consensus on, but as you say, we are going to have to deal with it, so we are trying to find out if there is a way to address this concern about strategic litigation. I do share the chamber's concern on that. We have to make sure strategic litigation doesn't happen. It could be used against the very people it's trying to protect.

Just looking at the Public Policy Forum—and I put this to the chamber, especially—when I look at who's opposed to private action and who supports it, I see that against it are Imperial Oil, Irving Oil, Petro-Canada, Shell Canada, the Canadian Petroleum Producers Association, and the Canadian Petroleum Products Institute. They're all against it.

In favour of it are the Independent Retail Gasoline Marketers and the Association Québécoise des Indépendants du Pétrole.

Those who oppose it are the Canadian Association of Broadcasters. Those who support it are the Canadian Cable Television Association. The Canadian National Railway is opposed to private actions. The Shipping Federation of Canada supports it. Chapters Inc. bookstore opposes it. The Canadian Booksellers Association supports it. Microsoft and Air Canada oppose it. The Canadian Federation of Independent Business supports it.

When I look at the first blush, there's no consensus there. But when I rattle off that list, there's pretty much a picture there to me. The bigger the company, the more they're opposed to it. The associations, including some that represent small businesses, seem to support it. I'm not sure if you're just not getting input from small folks, because that's certainly what came out in the Public Policy Forum. I just wondered if you have a comment.

• 1135

Ms. Nancy Hughes Anthony: I guess that's why we're here today, saying to you that there is no consensus.

Perhaps your committee, in the course of its deliberations, will be able to bring more of a consensus forward. But we are telling you, in a very straightforward manner, as a result of our polling of our membership, here's what we got. We got some objections, and we have listed those, in general, in the brief we put before you today.

The chamber is here before you today saying precisely there is no consensus. It's clearly an issue on which people have different views, and some of the views we have culled are in the brief before you. Perhaps that's all the more reason to lay out in a detailed consultative process —and perhaps that's what your committee is going to be doing over the next number of weeks and months—all of the pros and cons, before we leap to the conclusion that this answers all of the concerns that different businesses have. You are going to be exploring other national models. A lot of the reaction we had, quite rightly said, is in reaction to the American model.

Mr. Chuck Strahl: I share your concern about finding the safeguards to make sure the right to private action doesn't harm the very people who are trying to get access to it. We have to find those safeguards. I don't disagree with you. I'm just saying that from what I've seen so far, the bigger the outfit, the more they're against it.

The other question I have is a process one. Apparently the chamber wrote a letter to the minister saying they supported Bill C-23, but they were unable to persuade the minister to not refer Bill C-23 to this committee until after second reading. They wanted it referred after. They said if it was referred before second reading, they might have to withdraw their support.

Why would the chamber consider withdrawing their support, just because it is referred before second reading? Why not wait to see what the product is before saying that process is so offensive that you'll withdraw your support, before you even see what we come back with.

Ms. Nancy Hughes Anthony: I don't mean that the process is offensive. I just mean that in this new process, which is new to all of us, we support the contents of Bill C-23 the way we see it, with a couple of friendly amendments. We don't know what other amendments will be added

during this particular process. We're appearing before you today, and on this date we can say we support it. If in three weeks' time you have six other amendments, we do not know if we will support them until we see them.

So it's just a question of saying that when it comes to the issues in Bill C-23, we think they are very good and useful things that should be done to modernize the act, so we're very supportive of them. Whatever else comes up in the course of your hearings we'll have to reserve our judgment on.

The Chair: We issued a news release saying exactly what the committee would be doing. I've sent that to all the witnesses who are appearing so they will be aware of that. We have pretty much limited the scope of what we've agreed to deal with, as a committee, to Bill C-23 and private access.

Mr. Crampton.

Mr. Dan McTeague: I have a point of order, Madam Chair.

I have a copy of the *Financial Post* article of October 12, in which Ms. Hughes Anthony is quoted as saying:

> If, as we understand is likely to be the case, amendments are proposed to create a right of private access to the Competition Tribunal, the Chamber will be forced to withdraw its support for the bill.

Madam Chair, I think some of these comments border on contempt of Parliament and this committee.

The Chair: Mr. McTeague, I'm not going to entertain that right now.

Mr. Crampton, please.

Mr. Paul Crampton: Mr. McTeague's intervention was timely, because I believe that's how you put it in your letter, Nancy, if I remember correctly.

We didn't say we would withdraw support for the bill if it were referred before second reading. We simply said we would have to withdraw our support for the bill if private access were added, because at that time we were aware that a significant portion of the chamber's membership was not supportive of private access.

• 1140

Mr. Chuck Strahl: Thank you.

The Chair: I'm finding this all very confusing. We have a position that we're not supportive, yet we say there's no consensus. We don't know how many members have responded; now it's a significant number. So I'm finding your position a little bit strange, Mr. Crampton. But I will go on to further questions.

Mr. Lastewka, please.

Mr. Walt Lastewka: Most of my interventions have already been asked, except I was still questioning the Chamber of Commerce's viewpoint. It seems to me there is a large and small business debate going on. Mr. Volpe, in his questioning, tried to get a better definition. Mr. Strahl brought out what was said during the policy forum.

I think it's important for the chamber to decide, with their members. I realize 20% are large members, and I'm not sure how much influence they have over the 80%. We're trying to get down to what is right for the law to be, not who has the most influence.

I'm getting the perception from your remarks that the larger businesses have much more influence in the chamber. I may be wrong. But I also recognize that small businesses themselves have a difficult time responding to things because that takes money, and they get left out. I don't know what additional work you're doing to be able to satisfy both sides of your membership.

I would really like to know who is opposed to it and why. If we can get to the reasons why they're opposed to it, then maybe we will need to do additional work before we make any amendments, and so forth. So I'm really looking to the reasons why people in your organization are opposed to it.

Ms. Nancy Hughes Anthony: On the consultation process, you're quite right, Mr. Lastewka, in pointing out that larger companies have the wherewithal to speak possibly louder than smaller companies. It's quite correct. That's why we are coming to you today and saying we recognize that there is an issue of SME access. We fully recognize that.

We have not got the response we would normally get on an issue from our smaller members. Do we need to go back to them? Do we need to go back ten times or fifty times? I would say this is an ongoing and continuing process.

Those who have spoken up, I would agree with you, tend to be larger companies or experts in competition law. They are the people who are quicker with the interventions.

In our brief before you today, we have given precisely the reasons we have collected so far against private access. As I mentioned, they largely deal with the cost and complexity of that. They start on page 4 of our brief. The cost and complexity were definitely the primary concerns that were raised.

Mr. Walt Lastewka: I'm not going to buy that. I want to know the reason in the competition why they're opposed. I hear what you're saying about the cost, but what is the reason? What are they trying to avoid?

• 1145

Ms. Nancy Hughes Anthony: I think the other issue, as was laid out here, is this question of possible strategic behaviour. To what extent can these provisions cast a chill on transactions in the economy? Is that a desirable outcome?

The question then was raised, is access to the tribunal the right instrument to achieve an SME involvement or are there some better ways of doing this?

That is where we are. We are in the middle of our consultation.

Mr. Walt Lastewka: Okay. Let me get Mr. Musgrove up here.

The Chair: Last question.

Mr. Walt Lastewka: I'm not sure. You're a part of the Chamber of Commerce, correct?

Mr. James Musgrove: I'm here representing the Toronto Board of Trade.

The Chair: Yes, but you're a member.

Mr. Walt Lastewka: You're part of the chamber?

Mr. James Musgrove: Yes, that's correct.

Mr. Walt Lastewka: Is there some hesitancy?

Mr. James Musgrove: No. I'm sorry. I thought you were confusing my... I'm not here today with them, but I am a member.

Mr. Walt Lastewka: I'll ask you exactly the same question.

Mr. James Musgrove: All right.

Mr. Walt Lastewka: You only had to deal with 9,000, not 170,000.

Mr. James Musgrove: Yes.

Mr. Walt Lastewka: So you must have had discussions with some small businesses.

Mr. James Musgrove: No. I would be misleading you to say that. We had a discussion at our business legislation committee, of which I'm the vice-chair. Beyond that, there has not been a consultation within the Toronto Board of Trade, and it would be misleading to tell you there has been.

Mr. Walt Lastewka: I appreciate your honesty up front. I would hope that, after this meeting, you could go back and try to determine what the large, the medium, and the small businesses would be saying and how they could be affected if the right of private access were allowed.

Mr. James Musgrove: If I may, let me address the point, about which I said a word or two in my opening remarks.

It's not surprising to me that you have large businesses with some concerns about this. It's not at all surprising. They perceive themselves as the respondents in applications against them, potentially. It's not surprising that people who think they might wish to use these provisions might be in favour of them. It's not surprising to anyone in this room, I don't think, that such would be the case. Why would it be?

The question I think this committee has to struggle with, and that we all have to struggle with —because I opened my remarks by saying this is a difficult point upon which reasonable people can, and do, differ—is what's best for the Canadian economy? There's not an easy answer.

I have articulated, I think, in my opening and in the brief that will be circulated later, the reasons why I think there is danger to it. But it is, and will continue to be, a difficult and important point.

I've articulated the reasons. I don't think this committee should be worried about who will use it, who will benefit from it, and who won't benefit from it. The question is, will the Canadian economy benefit from it? I have significant fear that it will not, that it will suffer from it. Certain people will be winners and certain people will be losers, whatever changes you make. That's my theory.

Mr. Walt Lastewka: I understand what you're saying, but as a parliamentarian—

The Chair: Thank you, Mr. Lastewka. I'm going to have to move on.

Mr. Walt Lastewka: I get cut off quite quickly by the chair.

The Chair: All right. Okay.

Mr. Penson, please.

Mr. Charlie Penson: This right of private access is one that seems to be troubling a lot of people. I'm looking forward to more debate on this, and more consultations.

My colleague and I were just talking about, first of all, whether the penalties involved are enough to offset any strategic litigation damages that might occur. The other issue is that SMEs generally are a little slow to react, because they're busy out there every day trying to make their businesses work and don't have people dedicated to that area.

There are possibilities that some small firm—we were just talking here—that has some hi-tech advantage could also be hurt by a large company that wants to obtain that kind of information. I think we need a lot more consultation on this and a good public airing to see if people really understand the implications of this legislation.

Any reaction to that, Ms. Anthony?

Mr. Paul Crampton: I'd be happy to respond to it.

First of all, your last observation is something that came out of our own internal consultations, that the SMEs themselves could be victims of this.

In terms of your specific question, there's not a provision for damages; there's a provision for recovery of costs if you win. But of course if you're the respondent in one of these applications —and the respondents, for the most part, are the people opposed to this provision—your attention or strategic focus is going to be shifted to these proceedings. The impact on your business is going to be far more costly than is reflected in just your legal costs, which you may get back if you win.

• 1150 

The costs to people who are going to be on the receiving end of these private actions are going to be significant, and I guess that's why they're opposed to it. We're simply saying there are a number of people who are opposed to it, and we don't see a lot of people who are supportive of it.

Mr. Charlie Penson: Mr. Crampton, my point was more to ask, isn't there a possibility that through this kind of strategic litigation knowledge might be gained by competitors that would really have a serious effect on the business, one that could not be offset by just the recovery of

damages or the costs of winning the case?

Mr. Paul Crampton: Oh, there's that as well, absolutely.

The Chair: Thank you. Thanks very much, Mr. Penson.

Mr. St. Denis, please.

Mr. Brent St. Denis (Algoma—Manitoulin, Lib.): Thank you, Madam Chair. Thank you for being here.

With your indulgence, I'm going to change directions a little bit. I invite any of you to answer, but it is on a point raised in the chamber's presentation about confidentiality. I'm going back to one of the things that's a very important issue, the mutual legal assistance issue. Mr. Addy in his presentation talked about it, and you've made reference to it as well.

In your comments, I guess it would be on page 7, you state that under Bill C-23 the Minister of Justice is required to make sure that confidentiality provisions in the foreign state are similar to those that prevail under Canadian law. But you question the nature of the protections provided by Canadian law. So I wonder if somebody could somehow characterize what those difficulties are as you see them.

You make a blanket statement there, just to repeat myself, where you indicate concerns about the nature of the protections provided by Canadian law. If we're going to require the Minister of Justice to look at another state to see what protections they have, but you say you have problems with what those protections are here, it's a house of cards where we're building this thing on some unstable foundations. I'm wondering if you could characterize again the nature of those protections as you see them.

Mr. Paul Crampton: I'd be happy to.

The principal area of disagreement between the business and legal communities and the Competition Bureau with respect to section 29 as it now stands is in relation to the ability of the commissioner to exchange confidential information in his possession with a foreign enforcement authority. The business and legal communities for the most part take the position that, as they interpret section 29, the commissioner cannot disclose information to a foreign enforcement authority for the purposes of advancing a Canadian investigation.

The Competition Bureau takes the opposite position, and so does the Department of Justice. That shouldn't come as any surprise. But there is a real debate among experts in this field as to whether section 29 does or does not permit that disclosure.

There's another area of uncertainty. It's perhaps more an area where people would really like to see section 29 amended once and for all to cover confidential information, because the vast majority of information businesses provide to the Competition Bureau is provided on a voluntary basis. The commissioner has made a statement—it's his May 1995 statement—that says he will accord to information voluntarily supplied to him the same protections as are in section 29. The rest of us are just saying "Well, if that's his position, if that's his practice, why not enshrine it in section 29? It's not going to change anything."

Those are really the two areas mentioned in the brief.

Mr. Brent St. Denis: I'll help the committee with its timing, Madam Chair, and pass with that. Thank you.

The Chair: Thank you very much, Mr. St. Denis.

[*Translation*]

Mr. Drouin, please.

Mr. Claude Drouin: Thank you, Madam Chair. Ms. Hughes Anthony, gentlemen, thank you for being here this morning.

Mr. Crampton, among the measures suggested this morning by the Canadian Chamber of Commerce to help SMEs and take their concerns into consideration, you mentioned the establishment of a fast-track branch within the bureau, that can concentrate on the concerns and complaints of the SME community. Don't you think it's a bit inconsistent with your argument that the Competition Act should protect competition, not competitors? Isn't there a contradiction?

• 1155

Mr. Paul Crampton: I'm sorry, I didn't quite understand the question.

Mr. Claude Drouin: Among the four measures you suggest, the second one, which deals with the establishment of a branch...

All right?

Mr. Paul Crampton: Yes, fine. Thanks for the clarification. I'm going to answer in English, if you don't mind.

[*English*]

No, we don't think so. We think that if the competition commissioner and the Competition Bureau keep their eyes focused on the task of preserving and promoting competition, then the fact that SMEs have this new fast-track process to bring concerns to their attention is not inconsistent with that focus.

We're not suggesting that the bureau act to protect specific competitors; we're suggesting that the bureau take the concerns of SMEs into account in determining whether competition is likely to be prevented or lessened substantially. We feel that if the bureau has an affirmative burden of having to respond in writing to explain why it's not taking any action, then the instances of potentially good cases being ignored or just not rising to the top of the priority heap will be reduced. The legitimate cases that are out there may get more attention.

These alternatives we're suggesting, by the way, are not mutually exclusive. There could be two or more of them in a package.

[*Translation*]

Mr. Claude Drouin: Regarding the bill's provisions about confidentiality, particularly the confidentiality of the information voluntarily supplied to the Competition Bureau, you mention that you are concerned that type of information might not be sufficiently protected. Did any proceedings take place since these arguments have been presented? Is it a concern or do you have facts you could tell us about to demonstrate a breach of confidentiality and the harm it may have caused?

[*English*]

Mr. Paul Crampton: I can tell you that the Competition Bureau has been very good about protecting all information in its possession, including voluntarily supplied information.

The problem is that on the business side, people ask their counsel what protection their information is going to get. People are very concerned about their information getting into the hands of competitors or appearing in a Competition Tribunal other than in an in camera hearing.

I've come across, personally, several examples of where I was encouraging the client to give information to the bureau so that the bureau could satisfy itself that there wasn't likely to be a problem, but the client was very nervous about providing that information to the bureau because voluntarily supplied information is not protected under the Competition Act.

What we're suggesting is that if you put that explicit protection in the act, people will be less reluctant to give information to the Competition Bureau. And that will improve the enforcement of the Competition Act because the bureau will get the information it requires much more quickly without having to resort to formal process.

[*Translation*]

Mr. Claude Drouin: Essentially, there was no particular problem, but you want to strengthen the existing provisions to guarantee confidentiality, right?

[*English*]

Mr. Paul Crampton: The problem is that some people haven't been giving the information to the bureau that they otherwise would have given. That is a real problem.

[*Translation*]

Mr. Claude Drouin: Thank you.

The Chair: Thank you, Mr. Drouin.

[*English*]

Ms. Torsney.

Ms. Paddy Torsney (Burlington, Lib.): Thank you.

On a completely separate issue, Mr. Deal, I'm very happy to have your support on the issue of the game cards.

I think your point about increasing the value of the other survey information and the other advertising information that comes to our door is absolutely valid. It was funny, though, as we created the private member's bill in the first place, Canada Post didn't seem to get that point. Are there other things we should be including in this round or in another round that you think would enhance the survey information and the role it plays in our communities?

Mr. Ken Deal: Our primary concern is that the current bill focuses on telephone deceptive solicitation. There are other media of course that are used for this process that is against Canadians. Our focus is there.

Contests are one component, but deceptive solicitation can take a number of different focuses, and some of this has already been covered by the bills in terms of selling under the guise of marketing research and fundraising under the guise of marketing research. These are all positive steps that we certainly respect and value highly. The main component here, as I mentioned, was the different media that are being used.

• 1200

Ms. Paddy Torsney: If you have specific examples, good and bad, of what's appropriate and what's inappropriate, it would be very helpful to have those. Certainly as the bill was being developed as a private member's bill, I was flooded with examples, good and bad, of game cards. And I'm one of those people who answers those little surveys on products used because I think it's fascinating.

My second question is to the chamber. On page 5 of your presentation, you talk about alternative approaches that may better address the SME concerns, and you've outlined four different ones. Have those been widely consulted on? Are they supported? Could they be included at this time in the bill with your support or not?

Ms. Nancy Hughes Anthony: I think these are ideas that have been raised, that have been discussed. Particularly within our committee, we have not done specific, widespread consultation on these alternatives, and I would submit that there could be other ideas as well that others may want to bring forward. So these are preliminary.

Ms. Paddy Torsney: So what's the process on consulting on these within your organization, and can it be done in a timely fashion so that there are alternatives to what other people are proposing on private access?

Ms. Nancy Hughes Anthony: Sure. Once again I go back to the fact that we are in a process that, for us, is different.

Ms. Paddy Torsney: Big deal.

Ms. Nancy Hughes Anthony: Yes, I know. If the committee can explain to us, for example, how much time it plans to take or... is there some guidance?

Ms. Paddy Torsney: Here's a question for you. Sorry to interrupt. I'm picking it up for my colleagues. By Christmas, can you have consulted on these?

Ms. Nancy Hughes Anthony: Absolutely.

Ms. Paddy Torsney: Thank you. Lastly, it's a challenge for all of us: people who disagree call our office, people who agree don't call our office. So somehow you're going to have to issue a warning or a demand to your members that either they care and respond or they don't care and respond, and things will be changed whether they like it or not. We have elections. That's how we figure out if people ultimately cared or didn't care.

Ms. Nancy Hughes Anthony: I understand that, and that is why the chamber is coming forward to you today with the facts as we have them today.

Ms. Paddy Torsney: Right. I appreciate that. If you could get us the consultation on this round, on the things that you're proposing in here, that would be helpful.

The Chair: Ms. Torsney, I want to clarify something for the record. Our intention is to try to hear the number of witnesses who have requested to appear before the break in November, and come back after the break in November, and not at Christmas time, to go to clause-by-clause. So with all due respect to your suggestion "by Christmas time"... This committee did do an interim report a year and a half ago that had a very active study on private access. The chamber has had a year and a half to consult their members, and I had asked them if they had more information to please provide it to us in writing. That's what this process is about. There's also been a report that dates back to 1994-95 that Mr. Addy referred to today.

So private access has been discussed for many years in this country and—

Ms. Paddy Torsney: Just to interrupt the chair, on the schedule we have I don't see clause-by-clause on here until after November. To rephrase the question, can we have a response in a month?

Ms. Nancy Hughes Anthony: Sure.

The Chair: I have one last person. Mr. Savoy, you wanted to ask a couple of questions?

Mr. Andy Savoy: Quickly, yes.

Thank you very much for attending today. I was interested when, in response to Mr. Strahl's question, you said you were basing your responses on a polling of our membership. I find that quite interesting. Those were your exact words, "a polling of our membership". Generally a poll is representative of a subgroup, as Mr. Deal would know, and there's a certain margin of error. I wonder what your margin of error would be on this poll of your membership.

Ms. Nancy Hughes Anthony: I'm sorry, Mr. Savoy, I don't think I ever said "polling of membership", because we don't—

Mr. Andy Savoy: I wrote it down. You said it exactly. Anyway, regardless—

Ms. Nancy Hughes Anthony: We don't work on the basis of polling. There are many issues of concern to our membership that we deal with at any given time.

Mr. Andy Savoy: You must have meant something else. I wrote it down, but anyway, we'll move on.

Is it possible to get a list of respondents to your survey?

• 1205

Ms. Nancy Hughes Anthony: Could I clarify again, Madam Chair? This is not a survey; this is not a poll. We have a committee. I'm certainly happy to give you the composition of that committee and who's on that committee. I've agreed to also give you the information we sent out to all of our membership, and when we did, and what we did.

Mr. Andy Savoy: Okay.

Ms. Nancy Hughes Anthony: In the course of responding to that, we can also give you where we have other opportunities for our membership to bring forward issues. For example, at our annual meeting, this was just not an issue on the front burner for many small businesses.

I'm very happy to give you this. But as Ms. Torsney suggested, we should also spend some time on whether there is an opportunity to look at consultation on other concrete proposals, which you will be doing in your committee. I'd be happy to do that as well.

Mr. Andy Savoy: Thank you.

On my second item, as Mr. McTeague said, you mentioned that you focus on the U.S. situation in dealing with your members.

Have you looked at Australia? Have you informed the members of the successes we've seen in Australia?

Ms. Nancy Hughes Anthony: I'm not sure about that.

Paul, do you have an answer to this?

Mr. Paul Crampton: No. The subject has come up on our conference calls, but I can't say we've informed the membership at large.

Mr. Andy Savoy: It's been around since 1974 and 1976. You've had ample time, I would assume, in a year and a half, to look at other systems. So you haven't looked at Australia.

Mr. Paul Crampton: No. Where we're coming from—and this is what Nancy's trying to articulate—is that we have informed the membership at large that this is an issue. We've shared our presentation to the committee in May of 2000. We've asked them several times for their input. We've invited them to be part of these conference calls we organize from time to time. And they're just not coming.

You're coming back and saying, well, go back and remind them again, and we're happy to do that, but—

Mr. Andy Savoy: No, no, what I'm saying is did you look at Australia with your committee? Did you say, we think we should be fairly objective in what we look at here, so let's look at the U.S., but let's look at Australia also?

Mr. Paul Crampton: We have spoken about the Australian experience in our conference calls. Certainly in the wake of the June conference, when we had a call to discuss the Australian commissioner's intervention, and that of Mr. Jenny's from France. That didn't have any particular—

Mr. Andy Savoy: No impact.

Mr. Paul Crampton: —impact on people who were opposed, and it didn't lead to any new people coming out of the woodwork in favour. So—

The Chair: Mr. Savoy, I'll let you continue, but to clarify, we do have a number of other witnesses who will be appearing in the coming weeks, the Canadian Federation of Independent Business in particular. A number of their members would also be members of the Chamber of Commerce. The CFIB has a different position. They may have done a different type of survey. Those members who did not respond—

Mr. Andy Savoy: Madam Chair, all I'm trying to clarify is whether they looked at the Australian example. That's all I'm asking. It's a simple question.

The Chair: Okay.

Mr. Andy Savoy: I understand the situation, thank you.

Moving on to something else very quickly, if I have time, Madam Chair...

The Chair: Please be brief.

Mr. Andy Savoy: Briefly, then, the PPF, who were here earlier, talked about consensus on the proposal for private...

[Editor's Note: Technical difficulty]

...competition that strategic litigation could be prevented.

Do you think strategic litigation can be prevented? How would you respond to the safeguards in Bill C-472 and Bill C-23 right now?

Mr. Paul Crampton: We have discussed these safeguards explicitly, as I mentioned earlier. In my capacity as chair, and in the absence of someone articulating the other side of the argument, I have presented the devil's advocate view: here are the four safeguards, why isn't the proposal good enough? And people have still expressed a strong concern about the scope for them to be victimized by strategic litigation.

You may step back from it all and say, well, why would this be? I can't read their minds, but I can say there are several people out there—a significant number of people—who continue to believe that these four safeguards are not enough, that they will be victimized by strategic litigation that will divert their attention from their business, that they will be harmed through the imposition of significant legal costs and diversion of management resources, etc.

And these are merely concerns we're sharing with you. We're not coming out and saying the chamber is opposed to private access. We're coming here and saying that based on our consultations with our membership so far, there doesn't appear to be a consensus. If the objective of these hearings is to determine whether a consensus can be achieved or exists right now, we can say, well, it doesn't exist right now, at least not within our membership.

• 1210 

As for whether it can be achieved, these exact same four safeguards were in Bill C-472, and

people still had strong concerns with Bill C-472. So if all this amendment contemplates is to bring back the same proposal as was in Bill C-472, then I don't think a consensus can be achieved on Bill C-472, at least not within our membership.

This is simply relevant information that we're bringing to you.

The Chair: Okay. We're going to have to stop there.

Mr. Andy Savoy: Thank you.

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

I want to thank all the witnesses for being here today. It's been a very interesting discussion. As well, I would refer all the witnesses to our interim report, chapter 7, on private access. If they have any comments they'd like to make on that, they can submit those to us in writing.

We may have some further questions that we will send to you and ask for your responses. We did delve into one topic more than any other. It's been a very interesting discussion today. I'm very pleased.

We're now going to move as a committee, briefly, to budgetary matters. The witnesses are dismissed.

I've been advised that members have a number of commitments in the coming minutes. Are we prepared to simply go ahead with the budget that has been proposed?

Madam Torsney.

Ms. Paddy Torsney: I move that the budget move forward as proposed.

The Chair: For your clarification, we're doing this because there is a liaison committee meeting scheduled for 1:15 p.m. today. We don't get much notice when the times for those meetings are scheduled. I apologize for that. But budgetary matters may come up, and if we don't have our requests in there, we'll be seen as not having asked for any dollars. So I do apologize for that.

Mr. Volpe.

Mr. Joseph Volpe: I want some clarification.

You have seven members travelling. I imagine that's four and three. If we wanted to make accommodations for other parties, we ought to go to five and four.

The Chair: It's actually three Liberal Party members and four members of the opposition who would be travelling. Is that not correct?

The Clerk of the Committee: Madame Chair, it's one member per party, including the chair and the government vice-chair. So that's exactly what the chair has said.

Mr. Joseph Volpe: Okay.

Mr. Dan McTeague: It's a scenario that's worse than what we had thought.

The Chair: We have Mr. Penson first.

Mr. Charlie Penson: I'm wondering if in the budget there is a provision to raise the matter of MP points for travel. Are we going to get that consideration or not?

The Chair: It's international travel, so it wouldn't apply.

Mr. Charlie Penson: So we can't use any of our—

The Chair: You can't use your MP points for international travel. The only thing you possibly can do is use Aeroplan points.

Mr. Charlie Penson: That's what I'm asking.

The Chair: I'm not sure everyone has those, but we could investigate it further to try to reduce the costs.

Ms. Torsney.

Ms. Paddy Torsney: The only provision I would like to see is that the Washington trip include all the members, not just some of the members. I appreciate the cost issues on the Helsinki-Frankfurt-London trip, but on the Washington trip there's a good reason for all of us to participate.

The Chair: We'd have to almost double the amount then for the Washington trip, which would probably be about $70,000.

We'd have to set for a maximum. I'm trying to anticipate the meeting this afternoon.

Ms. Paddy Torsney: I appreciate that.

It's the flights and the per diems and the accommodations that are at issue on the budget. How many more members of the committee are there?

The Chair: There are 16 members. So if we were to double it, we probably could live within that amount.

Ms. Paddy Torsney: That's right. Let's do that, then.

The Chair: We'll say $75,000 then.

Mr. Walt Lastewka: That's not double.

Ms. Paddy Torsney: Well, it is almost in fact, because it's an additional six.

The Chair: It's an additional nine members.

There are only seven members travelling right now, plus the clerk and the researcher. So there will be an additional nine members. We'll just say $75,000 to give us a ballpark figure.

We don't know what's going to happen at liaison committee. We have some parameters still to work out there because a number of committees will be travelling. There's a large demand on the funds available, so if the industry committee would like to travel, I'd like them to be aware of the fact that we are asking for money, so that when decisions are made we're not excluded.

Mr. Joseph Volpe: It's a wonderful idea.

It should be a minimum of $65,000, because that'll cover 16. If you're going to stick to that formula for seven plus three, then $80,000 is good enough. It should be a lot more.

The Chair: Should it be $75,000 or $80,000?

Ms. Paddy Torsney: It should be $75,000 on the Washington trip and $80,000 on the other one.

Mr. Joseph Volpe: I think $75,000 is too much on the Washington trip. We'll probably only need $65,000, but go with $70,000. You're only increasing it by 60%, not 100%.

The Chair: Okay.

• 1215 

Mr. Joseph Volpe: On the $80,000, I think with the numbers here, you only have seven members going. You should have more. Increase it by the appropriate amount. I think it's going to cost you an additional $6,000 per member, if you use the same formula for everyone.

The Chair: Are you suggesting more members should be travelling?

Mr. Joseph Volpe: I think so.

The Chair: How many more are you suggesting?

Mr. Joseph Volpe: Let me not speak for the government side, because it's not my role. If you wanted to maintain the balance you have in committees and the House, you ought to have at least five and four. It would mean at least another two members.

The Chair: Another two members?

Mr. Joseph Volpe: I don't want to exclude members. I'm suggesting, at the very least, you increase this by $12,000 to make it $92,000.

The Chair: Mr. Lastewka.

Mr. Walt Lastewka: Madam Chair, on another item, I think Chuck is on the committee. Why do we have to put per diems here? If we're not on this trip, we're in the House. Isn't this supposed to be a net?

Ms. Paddy Torsney: It'll cost a fortune to eat breakfast in London.

Mr. Walt Lastewka: You still get per diems, right?

Ms. Paddy Torsney: No.

Mr. Chuck Strahl: You can't claim the per diem here if you're overseas.

Mr. Joseph Volpe: That's right.

Mr. Walt Lastewka: Right.

Mr. Chuck Strahl: This is to cover your costs overseas.

The Chair: Not everyone has the ability in their budget. First of all, we may travel when the House is not in session.

Mr. Walt Lastewka: I see.

The Chair: We could actually travel. You may not have worked it into your budget. Do you get what I'm saying?

Mr. Walt Lastewka: Okay.

The Chair: Is everyone in agreement?

Mr. Bergeron.

[*Translation*]

Mr. Stéphane Bergeron: Generally speaking, Madam Chair, I have no objection at all, but I'd just like to clarify one thing. From what I see here, no interpreters are planned for either the Washington trip or the European one, so...

[*English*]

The Chair: It's in number 4 or 5. I think it's number 5.

[*Translation*]

Mr. Stéphane Bergeron: Okay. All right! I was looking at the list of participants. That's fine then. So they'll be hired there.

[*English*]

The Chair: Mr. McTeague.

Mr. Dan McTeague: Madam Chair, short of Mr. Lastewka and yourself, I've been on this committee too long, some would suggest. In my time here, we've never travelled. I understand this is one of the reasons why we're making an attempt to do so.

Ms. Paddy Torsney: It's just because it is there.

Mr. Brent St. Denis: Build it and they will come.

Mr. Dan McTeague: I think an attempt ought to be made to reflect to the greatest degree possible the membership of the committee in its entirety. It is probably more important than simply going after one or two. I understand and appreciate we won't be able to break up a trip to Finland, Germany, or London. There will obviously be some who will want to go and cannot. Some members who have an interest in this will not be able to go.

Madam Chair, it might be possible to canvas the opinions of the members beforehand. We can then determine what resources will be required should those members want to attend.

The Chair: Mr. Penson.

Mr. Charlie Penson: Madam Chair, in the interest of trying to keep the costs down, I don't mind Mr. Volpe's suggestion.

Could we have a compromise where half the members essentially could travel to Washington and half could travel to Europe? You don't have to take the whole committee to both places.

We did it with Foreign Affairs a couple of times. We had meetings afterward to discuss what we heard from each committee. It would keep the numbers down a little bit and therefore keep the costs down. I think it might make our chances of travelling, and getting our budget approved, a little better.

The Chair: Okay.

Mr. Strahl.

Mr. Chuck Strahl: I hadn't thought of that specific idea, although I think it has some wisdom. It allows everyone to travel a little bit.

I'm concerned about going there with two budgets as high as $80,000 to $100,000. You would know from sitting on the liaison committee. In my experience, it's likely going to either get turned down there or at the House leaders' meeting. They just see it as too much. I think you should give them something that can be done.

Maybe the suggestion of Charlie's is good. I understand the five and four thing. I think maybe it's reasonable. Half and half might sell better. You have to sell it.

The Chair: I actually would agree with you, Mr. Strahl. I would think the chance of travelling to Washington is greater than travelling overseas at this time period, especially with the regulatory framework study we're talking about doing.

• 1220

Do I go in with a budget for half the committee for Washington, knowing we may only travel to Washington? Do I do what Mr. Volpe, or someone, suggested earlier and take the full committee to Washington, leaving half the committee for the following trip?

I think it may be our best chance for now.

Mr. Brent St. Denis: It's the best.

The Chair: You're right. It will have to come to all the House leaders. Then we can always reconsider, once we have some feeling from the liaison committee on what they have to say.

Ms. Paddy Torsney: Then our extra pull is Mr. Strahl, who is on the committee.

Mr. Chuck Strahl: No, I'm not.

Ms. Paddy Torsney: Oh, darn.

The Chair: Okay. Is everyone in agreement?

Mr. Joseph Volpe: It's $70,000 and $92,000.

The Chair: Yes, $70,000 and $92,000. The operational budget is $60,000. Are we all in agreement?

Some hon. members: Agreed.

The Chair: Thank you very much. We'll see you this afternoon.

This is Exhibit “34” 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
CHAMBRE DES COMMUNES
CANADA

INST COMMITTEE MEETING

Notices of Meeting include information about the subject matter to be examined by the committee and date, time and place of the meeting, as well as a list of any witnesses scheduled to appear. The ***Evidence*** is the edited and revised transcript of what is said before a committee. The ***Minutes of Proceedings*** are the official record of the business conducted by the committee at a sitting.

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October 17, 2001

Minutes | Evidence | Meetings (INST)

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Wednesday, October 17, 2001

• 1531

[*English*]

The Chair (Ms. Susan Whelan (Essex, Lib.)): I call the meeting to order.

We're here today pursuant to Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

We have with us, from the Canadian Trucking Alliance, Mr. Graham Cooper, the senior vice-president, and Mr. Ron Lennox, the vice-president of regulatory affairs.

It appears there is a long line-up of witnesses trying to get through security downstairs, so that is something I guess we're just going to have to deal with in the coming days.

If we can hear your opening comments and not hold you up any longer, that would be all right.

Mr. Ron Lennox (Vice-President, Regulatory Affairs, Canadian Trucking Alliance): Thank you very much.

Thank you very much for providing the Canadian Trucking Alliance with the opportunity to speak here this afternoon. I'll start with just a little bit of background on exactly who we are and who we represent.

The Canadian Trucking Alliance is a federation of Canada's provincial trucking associations. Our headquarters is based here in Ottawa. We have offices across the country. Through the provincial associations we represent somewhere in the order of 4,000 motor carriers in Canada of all sizes—everyone from the very small companies to large multinational trucking enterprises.

The trucking industry itself is a very competitive industry on its own. There are somewhere in the order of 13,700 freight carriers in the country. In addition, there are somewhere in the order of 40,000 independent owner-operators. Most of our members fall into the for-hire carrier category. We generate somewhere in the order of $20 billion in freight revenues each year, but only about 80 or so carriers, according to Statistics Canada, have revenues in excess of $25 million per year.

During the 1991 to 1999 period, concentration levels in the trucking industry in Canada actually decreased. Carriers earning more than $25 million had a lower share of total industry revenues in 1999 than they did in 1991, while those earning less than a $1 million showed a slight increase over that 10-year period.

As Bill C-23 was referred to the committee prior to second reading we understand that the committee is free to study and amend any part of either act, including the possible introduction of clauses that are not already included in the bill. To that end, CTA would like to focus its comments on the issue of private right of access to the Competition Tribunal, for provisions that deal essentially with private matters between buyers and their suppliers, namely refusal to deal, tied selling, market restriction, and exclusive dealing.

• 1535 

Under current Canadian law, only the Commissioner of Competition has standing to make application for civil review before the Competition Tribunal. No private right of application exists. It is our further understanding that clauses purporting to address this matter were contained in a private member's bill, Bill C-472. That bill served as one of the foundations for Bill C-23. However, the clauses relating to private right of access were not incorporated into Bill C-23, when introduced by the Minister of Industry earlier this year.

CTA believes that the private right of access provisions that were contained in Bill C-472 strike the appropriate balance between promoting competition, and safeguards to prevent strategic or frivolous litigation. Private right of access would deal with those situations primarily between buyers and sellers that were largely private and would otherwise not likely be picked up on the radar, or be an efficient use of the resources of the Competition Bureau. We believe this would help level the playing field, particularly for small business.

In conclusion, it is our understanding that several other jurisdictions have private access provisions in their competition laws. Further, we understand that only in the United States have there been problems associated with strategic litigation, but in other jurisdictions private right

of access seems to have provided an effective avenue. Consequently, we urge the committee to consider changes to Bill C-23 to allow for private access to the Canadian Competition Tribunal.

Thank you very much.

The Chair: Thank you, Mr. Lennox.

Our other witnesses have now joined us, so we'll proceed with opening statements from the other witnesses. Then we'll move to questions all together.

We have with us from the Canadian Independent Petroleum Marketers Association Mr. Bob MacMinn, the executive vice-president, and Mr. Dave Collins, the president. I'm not sure which one is doing the presentation.

Mr. Bob MacMinn (Executive Vice-President, Canadian Independent Petroleum Marketers Association): I'll read.

Thank you, Madam Chair, members of the committee.

My name is Bob MacMinn. I'm executive vice-president and policy adviser for CIPMA, the Canadian Independent Petroleum Marketers Association. I have Dave Collins with me here today. Dave is the president of CIPMA, and also the vice-president of Wilsons Fuels in Halifax, Atlantic Canada's largest independent gasoline retailer. As a point of clarification with CIPMA, I'm the paid one; he isn't.

CIPMA represents independent petroleum marketers in the Canadian petroleum industry. Our members are all in the downstream area of the business. Simply put, we're the local gas stations and home heating oil distributors. All of our members are small to medium-sized Canadian businesses. Membership includes some names you may or may not recognize, such as Olco Petroleum, Acme Petroleum, Mr. Gas Limited, NOCO Energy, and Wilson Fuels, to name a few.

Our organization exists to represent petroleum marketers' issues. Independent marketers today represent approximately 12% to 13% of the Canadian petroleum products business. I might add that this is down dramatically from the early 1990s, when independent marketers comprised over 25% of the market.

Independent marketers are important to competition in that they can, when permitted to flourish, provide competition at the wholesale level of the petroleum business. We have the ability to switch suppliers relatively easily, and as a result, if there are enough of us, refiners are forced to compete with each other in Canada, thereby lowering wholesale prices and ultimately the retail prices consumers pay.

CIPMA believes strongly that we are entitled to purchase product in a competitive environment. While that is often taken for granted at the consumer level, it has often been overlooked at the wholesale level. A failure to do so weakens competition. After all, the wholesale buyer is just a more empowered consumer.

CIPMA has actively supported changes in Canadian competition law. CIPMA, formerly IRGMA, supported Bill 402 and Bill 472. We participated at the industry committee hearings into the Competition Act and the Competition Bureau, and were major stakeholders consulted during the public policy forum meetings that formed some of the foundation for Bill C-23.

We fully support Bill C-23, as presented at first reading, and support the additional amendment, as proposed, to give limited rights of access to the Competition Tribunal. Members of CIPMA are philosophically opposed to limiting anyone's access to a court of competent jurisdiction, namely the Competition Tribunal.

• 1540

We believe the proposed amendments are a very limited first step toward modernizing Canadian competition law. Other jurisdictions have seen fit not to limit access to the courts—namely Australia, Great Britain, France, and the United States.

In the U.S., antitrust actions can be brought forward by private firms, the federal trade commission, the justice department, and state attorney generals. The Canadian process, whereby the Commissioner of Competition acts as the sole gatekeeper to hear complaints, investigate, and later submit them to their tribunal, needs restructuring.

Private right of access would, in our view, motivate firms away from any anti-competitive activity and free up the Competition Bureau's investigative efforts.

We are told that opponents to private access fear the potential for abuse, in the form of strategic litigation. Quite frankly, we see this as an attempt to derail the committee from modernizing the Canadian competition law. Large firms that have come down against private access have abundant experience and capability to deal with all forms of litigation. In fact, our members are only too familiar with large firms threatening some form of legal action. It is a fact that exists in Canada today. These changes will not add to that burden.

Furthermore, adequate safeguards exist in Bill C-23 to prevent this activity. Those safeguards include that the tribunal has no power toward damages, can make summary dispositions, award costs, and give references.

I might add that in the highly concentrated Canadian downstream petroleum business, a decision to launch an action against one's suppler would be weighed very carefully. As the options for alternative supply are extremely thin, only the most egregious behaviour would even be considered to be worthy of jeopardizing your supply line.

As an organization, we applaud the minister for bringing forward this important legislation, and fully support the amendment introducing private right of access.

Thank you.

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

We are now going to turn to the

[*Translation*]

Association québécoise des indépendants du pétrole. Mr. Blouin.

Mr. René Blouin (Chief Executive Officer, Association québécoise des indépendants du pétrole): Thank you, Madam Chair.

Members of the committee, first of all allow me to introduce Pierre Crevier, who has accompanied me. Mr. Crevier is President of Pétroles Crevier and a member of the Economic Affairs Committee of the Association québécoise des indépendants du pétrole, referred to as AQUIP.

First of all, we want to thank you for giving us this opportunity to present our position on possible amendments to the Competition Act. We are making this presentation on behalf of the members of AQUIP, which represents Quebec-owned undertakings active in the importing, distribution and retail sale of gasoline, heating oil and lubricants. Retail sales by such Quebec businesses total more than one billion dollars every year.

The presentation that we made to this committee in March 1999 remains very relevant. We will avoid duplicating its contents in order to keep our presentation today short, but we urge you to look back at our earlier submission to get a better sense of the various facets of the oil and gasoline market as it operates in Quebec. We will simply repeat that Bill C-235, under consideration at that time, remains in our opinion the appropriate legislative measure required for banning unfair trade practices based on loss leaders, which undermine true competition of benefit to consumers.

However, we want to note that Quebec's Loi sur la Régie de l'énergie (Quebec Energy Authority Act), which forbids the setting of prices at the pump that are lower than the purchase cost, recently added to this minimum price the value of retailer operating costs, in order to put a stop to a price war in the Quebec City region. The Régie determined that these price wars were socially and economically harmful. Its ruling upholds the claims of independent dealers, as you can see from the press release appended to this presentation.

Our presentation today deliberately avoids legal theory, focusing instead on the concrete effects of these legislative proposals in the oil and gasoline sector.

For independent oil and gasoline undertakings in Quebec, Bill C-472, which would amend Bill C-23, is definitely a step in the right direction for those who want competition to flourish in ideal conditions.

Mr. Pierre Crevier (Member of the Economic Affairs Committee, Association québécoise des indépendants du pétrole): While in general we are pleased with the content of Bill C-472, we would like to begin by voicing some concerns we have about clause 77.1(1), which would close access to the Competition Tribunal except in situations of "usual trade terms". We put it to you that suppliers of petroleum products would only have to illustrate that they cannot supply products because of abnormal trade conditions to stall access to the Tribunal.

• 1545

We propose instead that the new provisions for access to the Tribunal provide for markets where trade terms are not usual. For example, should there be a relative shortage, supply should be provided to all undertakings on a prorated basis, in keeping with the way that the market usually operates. If, for instance, the amount of product available makes it possible to respond to only 80% of normal needs, the majors and the independents should each be able to obtain 80% of their regular supply. In this way, both types of undertakings would be subject to the same conditions and none would be forced into bankruptcy because of a lack of stock. Given the uncertain international situation at the moment, such a situation might easily arise.

Furthermore, rationing should not result in non-renewal of supply contracts on the pretext that the market situation is abnormal. On the contrary, we must ensure that abnormal market situations do not cause the elimination of efficient oil and gasoline businesses by depriving them of supply.

We therefore propose that the words "on usual trade terms" be withdrawn from the bill. In this way, the new provisions would also be applicable in ordinary circumstances, where they could be particularly useful.

We will take advantage of the question period to expand on our proposal with concrete situations illustrating the need for effective recourse in the event of abnormal situations. These risk destabilizing the market to the advantage of vertically-integrated oil and gas undertakings that are at one and the same time producers, distributors and retailers.

Mr. René Blouin: Lastly, we consider that all initiatives that make it possible to simplify the judicial process should be vigorously supported, and this is the case with Bill C-23, with Mr. McTeague's amendment. It must always be borne in mind that small and medium-sized businesses do not have the financial means or technical resources required to fight legal battles that drag on for too long. Access to justice must remain a central concern of our elected representatives. There can be no doubt that the bill will help to achieve this goal, although we are all aware that much remains to be done.

The proposals before you constitute a step in the right direction, and we hope that Parliament will follow up on them subject to the amendment we have suggested. Thank you.

The Chair: Thank you very much.

[*English*]

We're now going to move to questions and we're going to begin with Mr. Penson.

Mr. Charlie Penson (Peace River, Canadian Alliance): Yes, thank you. I'd like to welcome all the panellists here today.

The question I would have for each group that's represented is have you asked the competition commissioner to hear specific cases that he has turned you down on? Has he denied you access, in other words?

Mr. Graham Cooper (Senior Vice-President, Canadian Trucking Alliance): Not in our case, no.

Mr. Dave Collins (President, Canadian Independent Petroleum Marketers Association): I can speak to that. My name is Dave Collins and I'm vice-president of Wilson Fuel Company.

Back in 1994 and 1995 we made two submissions to the competition commissioner at that time, not Konrad von Finckenstein. We showed them where a major oil company was endeavouring to force us into price compliance on certain pricing practices we had on the street. We're a very low-cost operator.

What we found is that this company, namely Petro-Canada, had taken the price of product to a price that at the time was 10¢ a litre below the cost of crude oil and left it there. They had an individual call my dealer, and then they parked one of their trucks on the mall parking lot where we were and said "Unless you stop...". Of course, you never got any attribution for this, but the Petro-Canada truck was parked in the mall in front of my station and they said it must be stopped or this below-cost pricing would continue.

• 1550

We documented all this and we took it to the commissioner. At that time we met with the chief of the enforcement branch, a gentleman named John Bean, and he said there was no case because we weren't put out of business. He also went on to say, "Mr. Collins, competition can be rough." I said, "What would it take for you to bring forth an action?" And one of the investigators said, and I quote, "Typically, we need a smoking gun, a dead body, and a confession is helpful."

Mr. Charlie Penson: So, Mr. Collins, this would be the type of case that you would like to bring if there were a private action system available.

Mr. Dave Collins: Correct, because it's very localized in nature, and I think, which I didn't fully appreciate at that time, a one-off event in Halifax just doesn't cut it here in Ottawa.

Mr. Charlie Penson: So in your view, are there a number of cases that would be pending and pent-up that would come before the tribunal in the event that private access was offered?

Mr. Dave Collins: I think you would probably see an initial flurry and the tribunal would have to deal with that, but I think it would settle out. I get up every day trying to get new customers, not trying to decide who I'm going to go out and sue, to put it bluntly. And that event has now passed. I wouldn't drag up the past, but going forward, it would be nice to know I could do that.

Mr. Charlie Penson: I have another question. I have limited time, so I would just like to ask the other group if they have also experienced the same problem.

[*Translation*]

Mr. René Blouin: As you know, Mr. Penson, we represent undertakings that do business in a local or regional market. Our understanding of the way the Competition Bureau works is that it is more concerned with issues affecting the Canadian market as a whole. I think that this view was confirmed by the Commissioner who, in testimony before you, explained that he had neither the time nor the means to look at those kinds of issues, and that was why he was in favour of private access to the Competition Tribunal.

[*English*]

Mr. Charlie Penson: My follow-up would be that a number of people have cited Bill C-472 as a way to achieve this private access, but are you aware that in the penalties under Bill C-472 there would be damages, the possibility of costs awarded in frivolous cases or cases where those who bring them would lose, and also the possibility of the tribunal tossing it out? Does that satisfy your concerns? In other words, right now the competition commissioner makes that

decision on whether to hear a case or not, but the tribunal will also have the power under Bill C-472's provisions to have summary disposition, which essentially means to toss it out. Does that satisfy you?

Mr. Dave Collins: Certainly. I think it allows us an access to a court of competent jurisdiction. Right now you go to a bureaucrat and lay it out, and if he so chooses or feels good that day he'll move forward. It's not as rigorous as the legal system, where there has to be some merit as to whether to toss it out or not. I think I have much more faith in the legal system than I do in a bureaucrat. In terms of my experience with them, I've mentioned the Petro-Canada case, and I had another case with Irving Oil Limited, and that one didn't go very far either.

I think it would be a step forward to be heard in front of a legal mind, yes.

Mr. Charlie Penson: With the anticipated number of cases that might come in a flurry—I think is what you described—it may still be a while to get to the tribunal. In the case of Air Canada on their seat sale, I think it was WestJet Airlines that asked the competition commissioner to hear this case. It went to the tribunal, and now you may know that this has been set back an additional six months, and the reason is these turbulent times.

I'm suggesting there's no perfect world out there, and people like WestJet Airlines are finding that to be the case, even though they got access to the tribunal.

Mr. Dave Collins: I agree. At least they had access. At least they have access, sir.

[*Translation*]

Mr. René Blouin: Mr. Penson, if I may, I can tell you what happens in Quebec as an example. There is legislation protecting competition in the petroleum sector, as you know, and we have access to an administrative tribunal which is called the Régie de l'énergie. Of course, going to the Régie de l'énergie is expensive and time-consuming. However, it is one option that we have.

• 1555

Although it is true that regional or local businesses do not necessarily have the financial means to seek this type of recourse, when we join together and we agree to divide up the costs among the members of an association, then these recourses become very feasible. For example, I can tell you that, despite the costs involved, we are currently doing this for the second time in Quebec.

[*English*]

Mr. Charlie Penson: Thank you.

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

I'm now going to turn to Mr. McTeague.

Mr. Dan McTeague (Pickering—Ajax—Uxbridge, Lib.): Thank you, Madam Chair. I have a couple of questions.

I want to thank all of you for being here today. I wish we had an opportunity to talk a little bit about the security on the Hill here.

In the context of Mr. Penson's comments with respect to WestJet, I thought it was rather interesting that it took a year before WestJet was able to actually get its case to the tribunal. It was only because of the *force majeure* incident of September 11 that we now see the tribunal at least delaying the outcome.

I want to talk to you specifically, if I could,

[*Translation*]

to each of the people here, not only about the way they have experienced the situation, but also about the remedies that are currently contained in Bill C-23, with the amendment that I have proposed. These are the actual words used in my previous Bill C-472.

[*English*]

Right now the current types of remedies that are available are basically injunctive in nature. If one wants to seek some kind of compensatory response, they would have to get leave of the tribunal and of course go higher to receive those under the proposal.

I'm wondering if any of you have given any thought to the possibility of damages, given that there may be a discovery by the tribunal that wasn't otherwise detected, as Mr. Collins has pointed out perhaps in his instance.

We have a very narrow focus of just four areas: market restriction, exclusivity, tied selling, and refusal to deal. The questions I would ask of all of you here are, is that enough? Should there be more? Ought we to be able to give examples of where you have been subjected to potentially anti-competitive situations that fall in one of those four categories? Do you believe that we should also, as a committee, be looking at the idea of damages beyond what we have here today before us?

Mr. Dave Collins: Personally, and also on behalf of the CIPMA board, which we consulted prior to coming here, I think, as Bob said earlier, we philosophically rile at the fact that this is an aspect of the judiciary that we're denied access to. So I think what we would like to see is full private right of access to all aspects of the competition law. That way, at least if we're wrong then we'll be wrong and we'll have to live with it. But the reality is that I don't think any of us plan to run off and sue our suppliers just because we don't like the colour of their eyes. It's an expensive undertaking. But more in terms of just dollar outlays to lawyers, it's the time that it takes away from your business. That's really the hard part for most people to understand. I don't get up every day and say, hour one of the day, who are we going to sue?

The reality of the day is we tend to be people who occasionally worry about having been sued. I've been sued by pretty much all the major oil companies on some issue or another, and I'm also happy to say they've always lost. But the reality is that we, as a small business, have been been subject to strategic litigation. That is a tool big business uses on small business to either force them into compliance or to discipline them in some way or to slow down their progress. So I would like simply to have access to the courts on anti-competitive activity.

Mr. Dan McTeague: On that very point, Mr. Collins, we have heard from witnesses who have come forward, particularly those who represent, in a cross-represented way, the Canadian Chamber of Commerce and the Canadian Bar—and we will certainly hear from others—who have suggested that rather than this being an opportunity for small business to access something that might illustrate competitive harm, it would be used against them, and they

wouldn't have the resources to defend themselves, and notwithstanding of course that the summary disposition is there. Are you not afraid? Is there any merit to what they're suggesting, that somehow they are concerned for your safety and your future?

Mr. Dave Collins: No. I'm pretty sure Exxon can take care of themselves.

I don't think we've ever seen an anti-competitive case brought in any jurisdiction by a larger firm against a smaller firm. By its nature, it's smaller firms that require the protections the competition law has.

• 1600

I think the reality of it, and the reason the law exists, is that typically, the smaller firms are the more efficient players. In many cases, there are various tactics used to make that smaller player less efficient, to try to drive their costs up to make them less of a competitive threat. Those are what we see in the business; those are what we deal with, and that's what we would like assistance with in getting off our back.

My feeling is if you put private right of access in, a big business, realizing there is a strong possibility, if their behaviour is indeed anti-competitive, that they'll face a judicial review, won't behave that way. As I said, I think the pent-up flurry will dissipate right away, because I don't think the big businesses will then behave the same way. It'll change the behaviour right away.

Mr. Dan McTeague: To what extent have you consulted members within your organization to discuss a private right of access that is, in all admission, a very restrained form of private access, which is being suggested here today? Is it simply a group of you, one or two, who do a conference call—as we heard yesterday from witnesses—as a means of plumbing the tens of thousands of members they have, or have you talked to some of your dealers, some of your friends, representatives, enemies, whatever the case may be?

Mr. Dave Collins: In our group we have a barely hierarchical kind of structure, so we talked to all of our members, and they in turn, before they gave us an answer, would have talked to their various dealers and the principals in their companies to make sure it came forward. All of them said, "David, this is really just a no-brainer. We just want access to a judicial body to take matters forward if indeed some problems were to arise."

Mr. Dan McTeague: Mr. Cooper.

Mr. Graham Cooper: Our situation is somewhat analogous. We represent, as Mr. Lennox mentioned in his opening comments, approximately 4,000 carriers directly across the country. We indicated to them a couple of weeks ago that we had taken a look at Bill C-23 and the previous provisions under Bill C-472 and felt that this was something worthy of support, for a couple of reasons, not the least of which, and perhaps the most important—and I would echo as well what Mr. Collins has said—being that the mere fact of having a right of private access may act as a deterrent to anti-competitive behaviour, or at least one would hope. The majority of our constituency, of course, tend to be small businesses, so they view having that safety valve, if you will, as being a positive step.

Mr. Dan McTeague: In that context, Madam Chair, my final question is that the Canadian Chamber of Commerce today referred to that as a sort of discipline and a chill on investment. Notwithstanding the confusion over what their consensus was, I'm just wondering, do you see

this private right of access, in a very limited and restrained way, as a chill on investment in Canada for your members?

Mr. Graham Cooper: Frankly, no. There may be some other context that I'm unaware of behind that comment. I suppose if large companies who are looking to invest in Canada and intend to participate in anti-competitive behaviour realize there may be some restraint on them, then perhaps that would be some sort of limiting factor on investment. But perhaps those are the kinds of companies we don't want investing in this country anyway.

Mr. Dave Collins: We have an affiliate that manufactures oil-fired furnaces. We export a lot of what we make into the United States. As a new entrant into that business, we have all the protections of the American law, and it's a really growing aspect of our business. People accept our products. We don't get hit with the same kinds of behaviours, the below-cost selling bouts. In fact, in our case, it's really nice to have those protections, the same sorts of laws.... Give us the American laws and we'll grow, I guess is the simplest way. We'll invest in Canada. Right now, as a small business, if you want to start something up, the American market is far more interesting to enter, not only because it's a bigger market and there are greater incomes, but you have less risk with trying to deal with the low-cost selling.

• 1605 

I don't think we've seen a dearth of companies coming in. Take a look at your best buyer if you're Wal-Mart. It's the wild west show here with respect to competition in Canada—the deepest pockets win. So if you're an American firm, you can come across the border and price anybody you want out of business, and carry on.

So I think it's quite the opposite. I think it will encourage domestic investment. I know in our business it's going to encourage domestic investment.

The Chair: Thank you very much.

Thank you, Mr. McTeague.

[*Translation*]

Mr. Bergeron, go ahead.

Mr. Stéphane Bergeron (Verchères—Les-Patriotes, BQ): Thank you, Madam Chair.

First of all, I would like to thank the witnesses for accepting our invitation and coming here today to talk to us about this proposal to reform the Competition Act.

Indeed, I think that we are fortunate to have the opportunity to discuss this issue with you, especially because the gasoline price increases of the last few months have, in my opinion, thrown some new light on the importance of legislation like the Competition Act in such a situation, for the general public.

From listening to the presentations, I gathered that for both the Canadian Independent Petroleum Marketers Association and the Association québécoise des indépendants du pétrole, one of the aspects that may raise a problem—although, generally speaking, you seem to agree with most of the provisions of Bill C-23—is the one that limits access to the Tribunal to

situations where there are "usual trade terms". You would prefer having access to the Tribunal in all situations, which could, in your case, deprive independent petroleum businesses of their supply. That's fine, as far as that goes.

However, you have no doubt realized, given the questions asked by our colleagues so far, that parliamentarians seem to be concerned about the possibility that such a change in the proposed text might give rise to abuses and, possibly, to bottlenecks as far as access to the Competition Tribunal is concerned.

So, what do you think about the possibility that there might be abuses and, perhaps, bottlenecks, if access to the tribunal were extended to any situation that might have the effect of depriving you of your supply of petroleum?

Mr. René Blouin: First, I will tell you that I do not think there is a danger of bottlenecks or abuses because, as you know, this is not the type of action that can be initiated recklessly, if only because of the costs and efforts that would be required on the part of our organizations. We do not have the means to launch frivolous cases. Therefore, it has to be for something very serious. It has to be a case that is supported by facts, and we have to have the evidence that will allow us to support our cases before the tribunal. If the initiative was immediately recognized as being frivolous, I think that the tribunal would not even accept it. However, it is very important to have this type of recourse available, and I will ask Mr. Crevier to explain, in concrete terms, why it is so important.

There have been situations in the past, in Quebec, where we could have used a tool like this. It was not possible and this led to unacceptable situations. I will ask Mr. Crevier to at least give you an overview of some concrete cases that arose.

Mr. Pierre Crevier: This happened some time ago, but we still remember that, after the first oil crisis in 1972, at the end of our contract renewals, there were three out of four suppliers who did not renew contracts with our members, saying that they did not have any more product available. However, their retail network was operating at full capacity at that time. In fact, we managed to sign a contract with a fourth supplier, but two or three months later, that company had to be sold because there was not enough supply for all our clientele.

There was a second oil crisis in 1979, and the situation repeated itself with a national supplier. It decided to get out of the Quebec wholesale market and, overnight, it refused to renew a single contract with its clients, who then had to struggle to locate supplies left and right, at much higher cost than the competition. This is the kind of thing that can happen. We need more rapid, direct access to the Tribunal in order to settle problems such as this.

Mr. Stéphane Bergeron: I believe that this is something we should examine closely. The cases that you refer to seem to speak volumes. A few minutes ago, I heard my friend Mr. Penson refer to provisions that were contained in Bill C-472 to allow the imposition of compensatory measures in frivolous or improper cases. However, in order to reassure some of my colleagues, would you be prepared to have such a guarantee or such a provision included in Bill C-23, for the specific purpose of avoiding improper or frivolous cases?

• 1610 

Mr. René Blouin: If we keep in mind our experience with those things in Quebec—because we now have legal mechanisms we can use—it is impossible to launch frivolous cases of that nature. If you knew what legal measures this involves, will all the legal fees, research and effort it requires of an organization, you would understand that no respectable board of directors would ever accept to launch frivolous cases because, first of all, it would be an entirely useless expenditure of energy and money and, secondly, because it would lose the case. In such cases, we try to build jurisprudence in order to improve the situation. Pursuing frivolous lawsuits would be almost suicidal for companies like ours. Thus, this is not only excluded from our planning, but it would even be stupid because we would be harming our own productivity.

So, I cannot exactly conceive how provisions like those could lead to frivolous lawsuits to the point of overwhelming the courts with untenable cases. I think that this is an invalid hypothesis because we have neither the means nor the intention of—

Our organizations are respectable. We have been there for decades; in our case, it has been 40 years. The companies we represent are serious business. In Quebec, we represent Couche-Tard, we represent Sonic, we represent Pétroles Crevier Inc., we represent Pétro-T. I even have forgotten some of them. I do not want to forget some, but I could name an entire list for you. Thus, our organization does not represent frivolous companies. We do not act in a frivolous way, and I think that this kind of view is unrealistic and will not get us anywhere.

Mr. Stéphane Bergeron: You understand, Mr. Blouin, that I did not necessarily mean the enterprises you represent with your association, but, obviously, if this kind of provision were ever introduced—

Mr. René Blouin: Other companies will not be able to afford that. A small company cannot do that all by itself.

Mr. Stéphane Bergeron: I find the arguments convincing. Now, I would like to come back to the case raised by Mr. Crevier a few moments ago. I know that this does not directly concern the Competition Act, although such situations could conceivably lead to unfair competition. It was also pointed out that a probable or possible solution to our problems of these past months caused by the increase in gasoline prices would be to split oil-refining operations from distribution. Do you think that this should eventually be considered by Parliament?

Mr. René Blouin: The kind of law you mention is quite widespread in the United States, it is called the divorcement law. This kind of law will even forbid the participation of multinationals in the retail market. In Connecticut, for instance, this has been banned since the late 70s. There are less stringent, but similar, laws that forbid a multinational that has a gas station location in a city from having another one within less than four or five miles to ensure diversity in competition.

Of course, this kind of law is efficient in preventing amalgamated companies from using the profits they make in refining and on the crude-oil market to temporarily deprive retailers of their profits, eliminate companies that have no refineries and then take over the market, as happened in California. And what is happening in California now? In the United States, it is the state where consumers pay the highest prices, and the Government of California just carried out a broad public investigation. One of its main conclusions was that independent companies

must be reintroduced into the market to ensure a revival of competition, because a handful of refiners in control of the market have now raised prices to the highest level in the United States.

• 1615

Mr. Stéphane Bergeron: Mr. Blouin, you just mentioned the fact that Quebec sets a minimum price. Other observers have raised the possibility of eventually setting a maximum price. How do you react to this proposal?

Mr. René Blouin: When Quebec first did that, it was following the example of some 20 American states which have this kind of law, some of them more stringent than the law in Quebec.

Let us take, for instance, the law in Wisconsin, to the south of Ontario. This law bans the sale of gasoline below the price at the refinery loading ramp, plus taxes, plus transportation, plus 9.18% of the total I just mentioned, the price at the ramp, plus taxes, plus transportation. The retailer's operating costs are also included. No one is allowed to sell below that price.

In Quebec, a person cannot legally sell below the cost at the refinery loading ramp, plus taxes, plus transportation from the refinery to the gas station. If there is a crisis in some region, we must appeal to the Régie de l'énergie. If it judges that the situation is unacceptable and that multinationals are waging an unfair price war, it can add a percentage of operating costs it has determined to ensure that in that region, independent companies are not pushed out of the market and so competition can survive.

We had a case like that last year. We went before the Régie de l'énergie, and we won our case. The Régie de l'énergie handed down a decision that included the value of operational costs for a three-month period and it did not accept the arguments that the multinationals introduced in opposition to our request.

[*English*]

The Chair: Thank you.

[*Translation*]

Mr. Stéphane Bergeron: Would it eventually be possible to establish a maximum price?

Mr. René Blouin: As I see it, there is a maximum price in Quebec. The law has provided for a maximum price. However, it is much more difficult for a government to apply this. With laws like the ones I mentioned, namely the laws in the United States or in Quebec, you have a known base for price-setting. What kind of maximum price can you impose? Will you leave a margin for retailers? What will you set as a maximum price? This takes political decisions which are more arbitrary and more difficult to implement. If the law forbids selling at a loss, everyone knows the rules and knows what to expect if they do not follow them.

[*English*]

The Chair: Thank you very much.

We're going to move on to Mr. Lastewka, please.

Mr. Walt Lastewka (St. Catharines, Lib.): Thank you, Madam Chair.

I wanted to get a better understanding from the Canadian Trucking Alliance. I think you started your remarks saying you're the sum of the provincial trucking associations under the Canadian trucking banner. Is that correct?

Mr. Ron Lennox: That's correct. We represent seven provincial and regional trucking associations, those being the Atlantic provinces, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia, the provincial trucking associations from across the country. Individual carriers don't belong to the alliance directly. They belong to one of the provincial associations. We represent their views on national issues.

Mr. Walt Lastewka: I wanted to make sure it was straight in the minutes.

You mentioned that in some cases private access has benefit and elsewhere it does not. I wasn't sure what your thoughts were on how and where it worked, and how and where it didn't work.

Mr. Ron Lennox: I guess the place we looked to was the United States. In our view, it's an area where it's not working as well as it should. They have a rule of treble damages. It's not something we had supported or do support in our submission.

If the situation arose here in Canada, under legislation passed by Parliament, I would think it would mean a bit of a rush to the Competition Tribunal for exactly the wrong reasons. It would be the strategic litigation type of situation that of course we're trying to avoid.

Mr. Walt Lastewka: Mr. Collins, do you belong to the Chamber of Commerce?

Mr. Dave Collins: No, we don't. We belong to the Truro Chamber of Commerce. I think that's how it comes through on the Canadian Chamber of Commerce.

Mr. Walt Lastewka: When the Truro Chamber of Commerce asked for input, did you give your input on it?

Mr. Dave Collins: We didn't receive a request for input.

Mr. Walt Lastewka: Did you receive anything from the national Chamber of Commerce?

Mr. Dave Collins: No.

• 1620

Mr. Walt Lastewka: Mr. Blouin, in your remarks you mentioned some examples. Could you table some of the examples you were going to mention under questioning? I want to ask you now for some examples.

[*Translation*]

Mr. René Blouin: Examples of what?

[*English*]

Mr. Walt Lastewka: I thought you mentioned in your testimony that you would give examples under questioning.

Mr. René Blouin: Yes, we did.

Mr. Walt Lastewka: You did.

Mr. René Blouin: Mr. Crevier did when he explained in 1972 he had to quit business because he had no supply. He had problems in 1979 too.

Mr. Walt Lastewka: Any other examples?

[*Translation*]

Mr. René Blouin: Any further examples, Pierre?

Mr. Pierre Crevier: There are examples that do not apply so much to the non-renewal of contracts as to product allocation at certain times when the product was not accessible in Montreal because of the winter cold. There were shortages, and they had to set an 80% quota. We are convinced that during the 80% cut, the major company retailers were still working at full capacity, without suffering from these cuts.

At those times, we had to reduce our clients' inventories. We were fortunate that these were only brief periods of a week or two in the two cases I mentioned. In the first case, the problem was caused by cold weather on the St. Lawrence River. In the second case, it was the January 1997 ice storm in Quebec. I do not know if you are aware of this, but in January 1997, there was an ice storm and supplies had to be rationed. In both cases, our supply was reduced, but we are sure that the multinationals were still running their heating oil and gas station retail networks at full capacity.

[*English*]

Mr. Walt Lastewka: Why do you think the larger corporations and companies are against having the right to access?

[*Translation*]

Mr. René Blouin: We have experienced that in Quebec, and you must always keep that in mind. The large oil companies, particularly in the past few years, have been making money ever since the oil prices went up, and they always use the money to try to drag out legal procedures as long as they can, hoping that we will run out of steam along the way, because legal procedures are extremely expensive. For example, the first time we went before the Quebec Régie de l'énergie, the first hearing cost our association $350,000. Why was it so expensive? It was so expensive because the lawyers for the multinationals just kept on going, one after another, somewhat like parliamentarians at the end of the session, filibustering and ensuring that the debate would be so long that we wouldn't have the money to keep on going much longer and that we would have to give up along the way.

You see, as long as they have recourse, it suits them to do this. The more recourse they have, the more it suits them to do this. And the more money they have to keep us from exercising our rights, the more they will use it. These tactics are part of this line of reasoning, and I am

not surprised that they are opposed to this kind of recourse. When it comes down to it, what do they have to fear?

[*English*]

Mr. Walt Lastewka: Anyone else?

The Chair: Would anyone else like to respond?

Mr. Dave Collins: I think they fear it's an extra amount of accountability for their businesses.

Mr. Walt Lastewka: Do they view it as if there could be a lot of frivolous accusations?

Mr. Dave Collins: I think they would like the committee to believe that.

I think the problem is it will force them to be more accountable in the way they conduct their business than they have in the past.

• 1625

Pierre talked about some issues with respect to restrictions on supply. These have been going on for ages. In fact, this year, with Superior Propane, there were a number of restrictions placed on when we could load fuel from the Imperial Oil rack.

I could go into great detail, but some time ago Imperial Oil sold their propane loading rack in Halifax to Superior Propane under the understanding that Esso could sell through that rack to other customers such as ourselves. That proceeded along this year until we picked up a couple of large accounts from Superior Propane, and then our ability and our loading times at that rack were severely curtailed, so that actually getting access to those products became exceptionally difficult simply because they denied us the time to get our trucks in underneath the rack to load. We've now compensated by going all the way to Quebec City and bringing propane back from there.

Right now, would that get the light of day with the competition commissioner? No. It's a little local issue, and you solved it and it's over with. But we would like private right of access. I don't think Superior Propane would behave that way if they knew they had to face the potential of us proceeding directly on private right of access. I think they would have conducted themselves differently and I would never be talking about it today.

Mr. Walt Lastewka: Thank you.

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

Mr. Strahl, please.

Mr. Chuck Strahl (Fraser Valley, PC/DR): Thank you. This has been very interesting testimony. I'm enjoying this as an alternate to what we had the other day.

Mr. Collins, you mentioned that basically you were told you needed a corpse, a smoking gun, and a few other things in order to get a response out of the tribunal.

Mr. Dan McTeague: The bureau.

Mr. Chuck Strahl: Okay, the bureau.

Did you get a written response when you applied before, when you were turned down?

Mr. Dave Collins: Yes. After the meeting I got a very dry letter saying they've declined to take up the issue.

Mr. Chuck Strahl: They don't give you a list of reasons?

Mr. Dave Collins: None whatsoever.

Mr. Chuck Strahl: I think I know the answer to this, but maybe as a discussion point.... There was some discussion from the former commissioner suggesting that he was in favour of a right to private access, but at the very least, we needed to look at other alternatives, one of them being to demand a written response, with the reasons, within a certain timeframe, to people who have applied, like you. Would that satisfy your concerns? Is that a step in the right direction, or just a kiss-off from someone who doesn't really want to get into it?

Mr. Dave Collins: I prefer the latter. I think the problem is that you have someone who currently acts as a gatekeeper to a part of the justice system. For the competition law, there's one court of competent jurisdiction, and that's the Competition Tribunal. You have a gatekeeper, and he says he's interested or not interested in this. But it's not going to do anything for you, because he'll make up a reason why he doesn't want to do it.

Mr. Chuck Strahl: All right, but a crown prosecutor does that in the justice system. You bring evidence, you bring a charge against somebody for something, and they look at the evidence and say they don't think there's enough to proceed and here's why. They might not tell you why, but the argument is that sometimes there's litigation that is vexatious or frivolous.

So if you had answers in writing, with reasons, from the commissioner, from the gatekeeper, would that go some way toward looking after that concern, not just getting blown off with a simple form letter but getting at least not a ruling, but a well-documented explanation?

Mr. Dave Collins: Sure.

I think they're mixing the criminal and civil there. On a criminal case, that's fairly clear; that is what a prosecutor does. But what we're talking about here in competition law is civil matters. This is company versus company, and why we have a bureaucrat in there saying yes, it is, or no, it isn't....

I don't think we want to abdicate their role with respect to criminal conduct. What we're talking about today with Bill C-23 and with the rights to private access are simply civil matters. I don't understand why the committee wants to prevent two companies from dealing with it where we deal with all other civil matters.

Mr. Chuck Strahl: I don't think the committee wants to do that; maybe the permission—

Mr. Dave Collins: Yes. Or why you don't give us permission to do that.

• 1630 

Mr. Chuck Strahl: Part of the presentation was about the effectiveness of the Quebec law in fighting, in this case also, petroleum refiners throwing their weight around, and that it was very effective. It was very specific to the petroleum industry, as you've already mentioned. It talked

about the price, plus the taxes, the cost of distributing it, and so on.

Is it possible that we should be asking all the provincial governments to enact similar legislation? Is that a more effective way? Is it more reasonable or more cost-effective perhaps?

The concern is that it costs $1 million or more to go through the commission. Would it be better to go through provincial legislation?

[*Translation*]

Mr. René Blouin: Well, we are not constitutional experts; we are here to defend our companies. When the time came to get legislative provisions that had to do very specifically with the powers of Quebec, we went to Quebec City. Now, since we are discussing these issues here, I suppose that these are issues that come under federal jurisdiction. Let's leave it to the constitutional experts to determine which level of jurisdiction should apply in this case. If it should be the federal level of jurisdiction, well, I think it should apply.

Don't forget one thing: the legislation that was passed in Quebec and the legislation that was passed in several American states has to do with sales prices and cost prices; we wanted to ensure that there would not be any unfair competition. However, we are talking about supply today, which is a different matter.

Why is it that in the oil sector, there is more government intervention in the United States than in other sectors of the economy, where we are seeing more of a deregulation? It is simply because the oil industry is the only sector of the economy where the same companies extract the raw material from underground and refine it. The manufacturers control 95% of the wholesale market and 80% of the retail market, at least that is the case in Quebec. You don't have that kind of situation in other industries.

For example, hardware stores do not have iron mines and do not manufacture their hammer heads. They are retail distributors, as are our members. We compete with the people who supply us at the same time. That is why we have to have at least some guarantee both for sales prices, so that there isn't any cross subsidization between upstream and downstream, and for supply, so that they don't turn off the tap on us, which would bankrupt our companies.

[*English*]

Mr. Dave Collins: Many of our members operate in other provinces. I don't think we want to deal with one provincial law in one province, and another provincial law in another province, on a matter that logically—this is competition law—is federal in nature and cuts across a lot of industries. So I don't think we want to see anything unique with each province.

When you see unique provincial pieces of legislation coming up, that's because there's a crisis of competition in that province. So when you've seen provincial legislation such as the Quebec law, or those of Newfoundland or Prince Edward Island, that's actually a stunning indictment of the failure of the competition law, that the provinces are actually bolting and using their constitutional authority to preserve and encourage competition in their markets.

The Chair: To clarify, the Supreme Court has ruled that the competition law falls under the trade and commerce power and is under federal jurisdiction. That's why we're dealing with it here today.

Mr. Chuck Strahl: I don't dispute it at all.

The Chair: Okay.

Mr. Chuck Strahl: I just wondered about the efficacy of—

The Chair: Before you move on, I want to know if Mr. Lennox or Mr. Cooper have anything to add. No?

This is your last question, Mr. Strahl.

Mr. Chuck Strahl: Okay, thank you.

My last question is just on the legislation itself.

Is everyone satisfied with the protection or the provisions in the legislation as far as the secrecy or confidentiality of the information that would go forward to the Competition Bureau or to the tribunal is concerned? Are you satisfied that won't be used in some way against you, if you get into the middle of this mess?

Mr. Dave Collins: Yes.

Mr. Graham Cooper: I believe it's satisfactory.

[*Translation*]

The Chair: Mr. Blouin?

Mr. René Blouin: There is no problem.

[*English*]

Mr. Chuck Strahl: Thank you.

• 1635 

The Chair: Thank you very much.

Mr. McTeague, did you have another question?

Mr. Dan McTeague: Yes, Madam Chair, and it's going to be a very brief one building on what Mr. Lastewka asked.

Mr. Cooper, Mr. Lennox, Monsieur Blouin, and Monsieur Crevier, are you part of any type of chamber or board of trade? Are there members within your organization who are members of a board of trade or chamber of commerce?

Mr. Graham Cooper: In our case, Mr. McTeague, we as an organization are not part of a board of trade or chamber of commerce. It's quite possible that some of our members may be, because we do represent, as I mentioned earlier, 4,000 members.

Mr. Dan McTeague: Okay.

[*Translation*]

Mr. Blouin.

Mr. René Blouin: I would say that most of our members belong to their local chamber of commerce and generally speaking, the local chambers of commerce defend small businesses. We do not belong to the Chambre de commerce du Québec nor to the Canadian Chamber of Commerce because these organizations defend the big companies first and foremost. It's understandable. They are the members that provide them with the most money and they are the most influential, and that can be seen from all the positions that they take.

In Quebec, the local chambers of commerce defend us vigorously, and on a regular basis, unlike the large chambers of commerce, which always adopt the position of the large oil companies.

Mr. Dan McTeague: Did the position taken yesterday by the Canadian Chamber of Commerce and its other comments not reflect the concerns of your members or their position on private access?

Mr. René Blouin: They certainly didn't. We have been fighting for years, trying to get the legislation to allow us to exercise our rights. Every time legislation appears, we support it. Sometimes we even try to have it created. Obviously, our members are completely in agreement with this kind of legislation.

[*English*]

Mr. Dan McTeague: Finally, I just want to be certain, because this will come back to you time and time again as people who represent small and medium-sized enterprises, are you comfortable and do you accept or reject the view that private access, as it is currently written and contemplated in Bill C-472, will create an unusual, onerous monetary burden on all of you such that it will be impossible for you to get that access to begin with? Is this a valid assumption by those who have made this position and who will certainly be coming before the committee to again apparently speak on your behalf rather vicariously?

Mr. Dave Collins: When a company fights for its life, most of the resources it has left will fight for it. Most small entrepreneurs have a lot of passion and drive. I don't think that they won't use every available alternative. If they run out of money, it's not just happening to one of them; it's happening to a whole collection of them. They'll band together. We've seen that time and time again. Look at us as trade associations. Why are we banded together? It's to lower our costs, to be heard. The same thing will happen with the Competition Tribunal.

[*Translation*]

Mr. René Blouin: Mr. McTeague, our association deals directly with small companies. They do not operate like big companies do. We deal directly with the executives. When the executives feel that they should turn to the courts, but do not feel able to do it themselves, they systematically ask their association to do it for them. They want to pool their energy and money so that they can bring these matters before the courts. That is what we do.

The money issue must always be taken into consideration. It discourages frivolous applications to the courts. We are able to organize and get together to use the legal means that are available to us when we are dealing with a serious situation.

[*English*]

Mr. Dan McTeague: Thank you.

The Chair: Mr. Cooper.

Mr. Graham Cooper: Let me just add one further thought to the good points that have been raised by the other gentlemen. The issue of cost and time is clearly important, and if there were a crisis situation such as Mr. Collins referred to, no doubt there would be some joining of resources. But apart from that, if we assume for a moment there will not be hundreds of companies and organizations dashing to the tribunal, the fact that there is this right of private access is in itself an important factor. I think that's what we, as representatives primarily of small business, are in favour of at this point.

The Chair: Thank you.

Mr. Rajotte, please.

• 1640 

Mr. James Rajotte (Edmonton Southwest, Canadian Alliance): Thank you, Madam Chair.

I'll try to be brief here. Most of my concerns and questions have been answered.

One of the comments that struck me—and I forget which witness said this—was that when a case was brought forward to the competition commissioner years ago, the commissioner's response was that he had neither the time nor the means to pursue such cases. Is there a concern at all at the Competition Tribunal that such a backlog will develop that they will not have the time or the means to address cases?

Obviously, being able to dismiss frivolous cases constitutes a necessary safeguard, but there will be many genuine cases brought forward. Is that a concern of any of your associations?

[*Translation*]

Mr. René Blouin: I would say that courts and tribunals are there so that people can use them. Once a lawsuit becomes serious, the tribunal's duty is to hear it. If the Competition Tribunal needs a few more resources, it will obtain them to meet the requirements of the act.

Furthermore, you must not think that the Tribunal will be flooded with applications of this nature. There will not necessarily be countless serious applications of this nature, and it will be up to the tribunal to determine whether they are frivolous or not.

[*English*]

Mr. Bob MacMinn: Our view is that would have to be a bridge we would cross when we came to it. Our understanding is that nine cases have been tried since the formation of the tribunal, so perhaps the resources there are underutilized now.

The Chair: Mr. Lennox or Mr. Cooper?

Mr. Graham Cooper: We're certainly not experts in the field. I would only suggest to you that if the commissioner himself is proposing that right of private access may be the solution to the problem, he's certainly much more knowledgeable in this issue than I am, so maybe there's

something to what he's saying.

Mr. James Rajotte: One other concern was brought forward yesterday, ironically, by an association largely representing large businesses. One of their arguments is that the private right of access may actually favour large corporations or big business, because they would use it as a means to actually try to eliminate competition.

I believe, Monsieur Blouin, you mentioned how companies use the legal process to drive out competitors, and you talked about one hearing which cost $350,000. Now, this is an argument the other side of the argument is using, and I just want to give you an opportunity to respond to it. Will this be a situation where large companies use private right of access against their smaller competitors?

[*Translation*]

Mr. René Blouin: No, that is not possible. The current bill simplifies the procedure. It will no longer be necessary to first go before the Competition Bureau and then before the Competition Tribunal. One step is being done away with. In serious cases, which are not frivolous, this will be one less step for us, a very expensive step. When we appear before the Competition Bureau, we have to use lawyers and prepare files, and that is another step. So the way I see it, this bill will streamline the procedure and make it less expensive.

[*English*]

Mr. James Rajotte: So it would be less expensive than it is now?

[*Translation*]

Mr. René Blouin: Yes.

[*English*]

Mr. James Rajotte: Those are all my questions. Thank you.

The Chair: Thank you, Mr. Rajotte.

I want to thank the witnesses very much for being with us today. We do appreciate your time. We apologize for any delays you had getting into the building, but that's something we'll be living with, I'm sure, for some time to come.

We look forward to meeting with you again in the future. If you have any further comments as we continue our hearings on Bill C-23, please don't hesitate to send them to us via the clerk.

We're going to allow you to leave now and we're going to continue as a committee. We have some other business.

[*Proceedings continue in camera*]

This is Exhibit “35” 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
CHAMBRE DES COMMUNES
CANADA

INST COMMITTEE MEETING

Notices of Meeting include information about the subject matter to be examined by the committee and date, time and place of the meeting, as well as a list of any witnesses scheduled to appear. The ***Evidence*** is the edited and revised transcript of what is said before a committee. The ***Minutes of Proceedings*** are the official record of the business conducted by the committee at a sitting.

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October 23, 2001

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STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Tuesday, October 23, 2001

• 0904

[*English*]

The Chair (Ms. Susan Whelan (Essex, Lib.)): I'm going to call the meeting to order. The order of the day is Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

We are very pleased to have with us this morning the Business Council on National Issues. Appearing will be Mr. John Dillon, the vice-president and legal counsel.

From the Canadian Bar Association, we have Mr. Tim Kennish, the chair of the national competition law section, and we have Joan Bercovitch, the senior director, legal and governmental affairs.

We also have appearing as individuals, Professor Tom Ross from the University of British Columbia, and Mr. Howard Wetston, the vice-chair of the Ontario Securities Commission.

What I propose is that we would have opening statements from everyone and then move to questions together. If a question is not directed to you but you would like to comment, you can signal to the chair and then I'll acknowledge it.

We're going to begin in the order I've listed, with Mr. Dillon, please.

Mr. John Dillon (Vice-President, Legal Counsel, Business Council on National Issues): Thank you, Madam Chair.

I must open with a bit of an apology. Our president, Thomas d'Aquino, was hoping to be here today, but as you know, our appearance was rescheduled from next week, and unfortunately he had a number of other commitments. We tried to reschedule, but that wasn't possible, so I will be doing a solo act this morning.

It's a great pleasure to be here this morning and present the views of the Business Council on National Issues on the subject of Bill C-23.

• 0905 

As my organization suggested to the Standing Committee on Finance shortly after the terrorist attacks on September 11, Canada has entered a period of national crisis and great economic uncertainty. The federal government faces urgent new demands to ensure the security of Canadians even as a slowing economy reduces expected tax revenue.

At times like these, improvements in the regulatory environment take on even greater importance than usual because they offer a means of significantly strengthening Canada's economic performance without the need for vast new spending programs. By the same token, it is vital to ensure that any changes in competition policy do not add to the business cost or reduce the competitiveness of Canadian enterprises. Especially in troubled times like these, Canada's goal must be to ensure that its competition policy framework works effectively to the advantage of both Canadian companies and consumers by encouraging rather than deterring business investment.

On the whole, Canada's competition legislation has worked reasonably well since its rather substantial overhaul in 1986. Nonetheless, the pace of change in the marketplace is constant, and competition law, along with other economic framework policies, must keep pace if Canada is to continue to offer an attractive location for investment and a sound foundation from which business can compete internationally.

Indeed, such policies must support the ability of Canadian companies to maintain and increase the pace of their innovation in order to succeed in this dynamic international arena. Changes to the Competition Act should facilitate rather than inhibit the kind of strategic alliances and new business arrangements the companies will need to operate effectively in the global marketplace.

The BCNI has participated in and supported the process of reform of Canada's competition legislation going back to the major amendments in 1986, as I mentioned. More recently we have participated in the consultations undertaken under the auspices of the Public Policy

Forum, and we believe their findings, for the most part, reflect where there is consensus on necessary changes to the act. In that spirit we think the changes proposed in Bill C-23 represent a balanced package of necessary amendments.

In the interests of time this morning, Madam Chair, because, as I indicated, we are generally supportive of Bill C-23, I will limit my comments today to two subjects.

The first has to do with what is referred to in the act as "mutual legal assistance". That is the ability of the Competition Bureau to share information with the competition authorities in other jurisdictions. Again, we support the general thrust of this amendment to improve the ability of the bureau to gather and share information related to competition matters that may cross international borders. However, we are concerned that there is not an adequate and specific protection for confidential business information, particularly where it has been supplied voluntarily to the Competition Bureau.

We understand that in his appearance before you the commissioner suggested that the intent is to protect the confidentiality of such information; therefore we see nothing wrong with making this an explicit requirement in section 29 of the act.

The other key issue that I know is of considerable interest to this committee is that of private access to the tribunal. Of course, this idea has been under discussion for some considerable time, but we're not convinced that a compelling case has been made for establishing a right of private access. In a fundamental sense we believe that access to the tribunal should be limited to those cases where it is necessary to protect the public interest in competition and that the bureau and not private parties should be the judge of that test.

We recognize that suggestions have been made, for example, in Mr. McTeague's Bill C-472, to try to ensure that only deserving cases are brought before the tribunal by private parties. However, we are concerned that some parties may be tempted to use the legislation not to promote competition, but only to seek tactical advantage in commercial negotiations or to otherwise hinder legitimate competitors.

It is questionable whether sufficient procedural safeguards could be instituted to protect against misuse by means of strategic litigation. Rather than improving competition, the right of private access could actually be used to inhibit it. It has been suggested that a right of private access would better enable small businesses to pursue remedies against unscrupulous competitors. However, we question whether such a provision would actually serve the interests of small business. The requirement to litigate and prove such cases can obviously be time consuming and expensive. The bureau's own research suggests that few cases could be brought before the tribunal at a cost of less than $1 million, thereby taking this remedy out of the reach of most small and even medium-sized companies.

We do think there are alternatives that could help small business in these cases. If in fact the bureau has been unable to bring forward otherwise meritorious cases due to a lack of resources, then the resources available to the bureau and to the commissioner could be increased to allow them to more fully examine these kinds of cases.

Where a complaint of anti-competitive behaviour has been brought by a small business and the commissioner subsequently declines to proceed with the case, he or she could be required to give written reasons for not proceeding. Other witnesses before you have already made other

suggestions as to how the concerns of small and medium enterprises could be accommodated in this sense.

I'll stop there.

Thank you, Madam Chair and members of the committee, for your attention.

I'll be happy to answer any questions you might have.

• 0910

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

I'm now going to turn to the Canadian Bar Association, and I believe Ms. Bercovitch is going to start.

[*Translation*]

Ms. Joan Bercovitch (Senior Director, Legal and Government Affairs, Canadian Bar Association): Thank you, Madam Chair.

On behalf of the Canadian Bar Association, I wish to thank you for this opportunity to appear before the committee.

As you know, the Canadian Bar Association brings together more than 37,000 lawyers from across Canada. We have as two of our goals to perfect the law and the administration of justice, and what we will be saying here today reflects these objectives.

[*English*]

Our brief will be presented by Mr. Tim Kennish, who is a lawyer in Toronto practising in the area of competition law. He's the chair of the association's competition law section, which has been very active in law reform initiatives over many years. Mr. Kennish will present our brief and also take the questions directed to the CBA.

Mr. Tim Kennish (Chair, National Competition Law Section, Canadian Bar Association): Madam Chair and hon. members, the national competition law section appreciates this opportunity to comment on Bill C-23.

The bill addresses many of the concerns we've previously expressed concerning the four private members' bills considered in the Public Policy Forum. It therefore represents a significant positive step in the right direction. We do have continuing reservations about certain of the provisions, including the treatment of confidential information, both generally and in the context of international mutual legal assistance, within the scope of Bill C-23.

We're also concerned about the excessive breadth of, and indeed the need for, the special provisions that are contemplated concerning deceptive prize notices. We have comments to make regarding the potentially excessive scope of the new provisions for registration of consent agreements whereby they purport to extend beyond the remedies you could obtain in contested proceedings.

In regard to the expanded authority of the tribunal to issue interim orders in civil matters other than mergers, our concerns relate to the fairly low threshold for issuing such orders and the lack of adequate procedural fairness. If time permits, I'd like to comment also on the private access as well.

We apologize that our full commentary has not yet been translated. It is in the process of being translated for your use and it will only be possible to highlight our specific comments this morning. I direct you to the full text of our submission on specific wording and so on.

Dealing first with international mutual legal assistance, our section recognizes the need for increased international cooperation in the law enforcement of international anti-trust in an era of increased globalization of business, and we recognize that it's in the Canadian public's interest to facilitate this. Currently, we do not have this in the civil area, and it's desirable that this be provided for, particularly as in many other countries they treat much of the competition law as civil matters as opposed to criminal law. So there is a need for the civil in that for effective international enforcement.

We do have significant concerns in the context of Bill C-23 in that neither it nor section 29 of the Competition Act provides satisfactory protection of confidential information. First, there's a need to expand the coverage and to clarify the confidentiality provisions of section 29, specifically to cover all voluntarily supplied information given to the bureau. That isn't currently protected by section 29, although it's a stated bureau policy to extend its protections to that kind of information. I would mention that a very significant volume of the information the bureau receives in its work in connection with investigations is provided voluntarily because parties tend to try to cooperate, with with a view to resolving issues.

• 0915 

This is now particularly important, the concern about confidentiality, in the context of international mutual legal assistance because the reciprocity is limited to cooperating with countries whose laws are substantially similar in regard to confidential information. The Canadian law, as I said, in section 29 does not cover voluntarily supplied information. I think it is otherwise desirable to clarify the scope of section 29.

The second point I would make is that confidentiality protection should also extend to information already in the possession of the bureau and not merely to what it is a foreign state may be requesting to be obtained by court order. That isn't currently provided for in the bill, and I think that should also be covered.

In regard to mergers, many states, such as the U.S.A., typically do not permit the sharing of information in regard to mergers. Confidential information in the merger context tends to be extremely sensitive, dealing as it does with current business strategies, competitive planning, and economic projections. We also know that some foreign states tend to be unreliable in protecting confidences from competing state-owned enterprises, local competitors, and merger opponents.

We urge the adoption of a rule similar to that of the U.S.A., one that would preclude the sharing of merger information except pursuant to agreed waivers. Because they want to get clearance of their mergers, parties tend to have an interest in providing waivers to those reviewing agencies in which they have confidence that the confidentiality will be protected.

In regard to deceptive notices of winning a prize, the section considers that the existing law respecting misleading representations is adequate and addresses the concerns that appear to be exemplified by these provisions. We have included in the brief you will eventually see an appendix that iterates a number of the recent successful prosecutions and enforcement actions against the promotional scams that are the target, we think, of this kind of provision. We also don't think there is a sufficiently established basis for special provisions in this area. This is in contrast to telemarketing, where there was a study done and where it's well recognized that solicitations received by telephone can create a more pressured environment than would be the case where they come through the mail or are seen over the television or on the Internet.

I would say as well that the proposed provision is cast in extremely broad terms, such that we've concluded it would prohibit many standard promotional contests that are now considered innocuous, such as those you are familiar with, ones major oil companies run. The reason for this is that most contests provide for the option of entering through the purchase of a product, although they don't require it. Typically, you don't have to buy the product to enter, but one does have the option of doing so, and a lot of people do enter that way. It's also typically a condition of being awarded a prize that you satisfy some requirement either through random selection, a skill-testing question, or both.

As a consequence, we would say that virtually all standard promotional contests will be caught, not just those that start off with a tag line such as, "Congratulations, you're 94 years of age and you've just won $2 million." We accept that it probably wasn't the government's intention to have that breadth of application, but it is a serious issue because it's criminal legislation.

I want to move on to the registration of consent agreements. We agree that the existing consent process has been unsatisfactory virtually from its inception. It is uncertain in its operation, time-consuming, and costly. We support the need for reform in this area and generally support the provisions of Bill C-23 providing for the registration of consent agreements.

• 0920 

It is not the only way to have done it. For example, in the U.S.A. the Truth in Lending Act procedure is an alternative, but we're generally supportive.

We also think the bureau or the commissioner is in the best position to determine when a case ought to be settled, having regard to all the factors that bear on that kind of a decision, just as he has the discretion initially to decide whether to bring a case or not.

Our major reservation relates to the fact that it appears, as the bill is presently drafted, the parties could have an order reached by agreement that extends beyond the scope of the remedies that could be obtained in a contested proceeding and ordered by the Competition Tribunal. We don't see why that should be the case, and we are also concerned that it may lead to parties being pushed to settlements that go beyond what they would have to accept in a contested result.

A final point with regard to consent agreements is that we think there should be filed with the application or with the registered agreement a statement of grounds and material facts in support of the agreement that would anchor the circumstances in which the agreement was entered into, such that if there were material changes later, there would be a basis for determining when it would be appropriate to rescind or bury the order.

On the matter of interim orders, we do generally support the broadening of the tribunal's powers to issue interim orders prior to the commissioner actually filing an application with the tribunal. We consider a way to do this that would be better than what is suggested in the bill would be to expand section 100 of the act to extend it to other civil matters. This would preserve the right of getting notice. One of the problems we have with the bill as it presently stands is that it doesn't appear that the commissioner would have to have a reasonable belief that the grounds exist for making your first point.

There is also not a requirement that there be a substantial lessening or prevention of competition likely to result from the activity sought to be enjoined. There need only be some competitive harm, and that could be harm to a competitor. There may not be harm to competition as such or it may not be substantial, whatever the harm is. It doesn't provide for notice to the parties against whom the order would be made. We're concerned about a lack of procedural fairness inherent in that because a violation of the order could have penalty consequences for parties affected. We think it's appropriate that the affected parties should have the right to get notice and to make representations about the order being made before it is made.

If time permits, I will just add a word on private access, just to set out where we stand on this. We have incorporated in our brief, the one you will get, our comments to the Public Policy Forum on the provisions of Bill C-472 that deal with this. There is no unanimity on the desirability of these provisions; within the CBA we are pretty split on the subject. However, notwithstanding the lack of consensus about whether there is a need for this kind of reform, I think there's an agreement that it's important that there be provisions to deter abuse of strategic litigation and that the parties who can bring an application for relief should be limited to those who are directly and substantially affected, not merely those who allege that they are. They should be directly and substantially affected, rather than just directly affected.

• 0925 

We also think that if the refusal-to-deal provisions of the act are going to be amenable to this private access, we need to add a competitive-effects test to section 75 of the act to ensure that it applies where there is competitive harm. There is not such a provision in the legislation today, and although the Competition Bureau, I think, administers on the basis that they'll only bring an application where there is, once third parties are involved one couldn't assume that would be the case. Therefore, the need for a competitive-effects provision to go into the law, if it's going to allow private access, I think is demonstrated.

Thank you for your time. I'd be very pleased to answer questions at the appropriate occasion.

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

We are now going to turn to Professor Thomas Ross.

Professor Thomas W. Ross (Individual Presentation): Thank you very much, Madam Chair. Honourable members, it's a great pleasure for me to be here to speak to you about my views of the contents of Bill C-23.

Let me begin by making clear I am just appearing for myself—these are my personal views—and by offering something also of a disclaimer. Although I work in the area of competition policy much of the time, the elements of Bill C-23 do not by and large constitute areas I've

done my own detailed research in. So in forming these views I'm building on ideas often created by colleagues and interpreting them myself. Nevertheless, I hope my views will be useful to you.

I have done some work on section 75, refusal to deal, and that will feature prominently in my remarks a little bit later.

I will not make really any comment on the "deceptive notices" provisions, because that is particularly far removed from the areas I work on, which are more related to pure competition policy as opposed to consumer protection issues.

Let me begin by making just a few remarks. I believe you have my written notes and can see somewhat more detail there, so I'll go over just some of the highlights quickly as it pleases the committee.

Starting with some of the provisions for new powers for the Competition Tribunal, I should say maybe generally that I think the contents of Bill C-23 will make a very nice set of additions to Canada's competition policy arsenal. I think by and large these really are going to be very useful improvements.

My personal campaign has been towards seeing amendments to section 45. There are other things that are coming up, I'm sure, later, which I'd be pleased to talk to you about at another time. But I think the changes in Bill C-23 are also very useful.

With regard to the new tribunal powers, I think the temporary orders or interim orders power for the tribunal is a good idea. I think it is appropriate—although this may be more a legal than an economic question—for this power to be with the tribunal as opposed to the commissioner, which is what is done with subsection 104(1) for the airline industry. I like it being with the tribunal.

I share the concern that Tim Kennish expressed on behalf of the CBA. I would like it to be a requirement that before an order issue the tribunal be concerned about a loss of competition, not just a threat to a competitor. If it were possible to insert in there that the tribunal must be concerned that the loss of a competitor would result in a lessening of competition, I'd feel a little more comfortable about it.

Madam Chair, I think I noticed in transcripts that you put what I considered a good question to the commissioner: if we did get these temporary orders, would we still need the new subsection 104(1), which puts this kind of power in the commissioner's hands with regard to the airline industry? I don't see that we would. It would seem to me to make a lot of sense to get rid of that and let this new power be applied uniformly across industries in Canada.

Summary dispositions and cost awards seem like good ideas, particularly if we see ourselves as paving the way eventually to some kinds of private access. This is to allow the tribunal, in the words of the commissioner, to control its process a little more.

I think it's possible, although I don't want to push this too hard, that we might want to allow cost awards in somewhat more cases than is provided for in Bill C-23. I'll come back to that a little bit later as well.

The idea of the ability to make references to the tribunal, I think, will be very helpful. Quite often these disputes drag on because the parties just have different views about how the tribunal will come down on one fundamental issue. To the extent that can be cleared up earlier, perhaps a resolution can be achieved with less time and less expense. That completes my remarks on the new tribunal powers.

• 0930 

With respect to the automatic registration of consent orders, that also seems like a good idea to me. There has been concern raised that the consent-order process has not worked the way we intended—not that I was a drafter of it, but that we observers intended or hoped—where the tribunal would, by and large, approve consent orders, interfering only in the most extreme circumstances. The tribunal saw fit to use its powers to reopen these things a little more readily than we had hoped, and that of course sent a chill through the community. People are much less willing to go with the commissioner to the tribunal on consent orders.

I don't quite know how to do it—and this is, I suppose, for legal scholars to struggle with—but in a perfect world there would still be some opportunity for review of these under extraordinary circumstances, the way we hoped there would be. I would like to think there is some safety valve in the case where a deal has been worked out between the commissioner and the parties that perhaps didn't accurately reflect the realities of the marketplace—maybe because the commissioner's staff was overworked, or missed some important bits of information, or whatever. I'm not quite sure how to put that in.

I'd like to make a few remarks about the new provisions to allow the commissioner to issue binding opinions. I've heard, and I suspect that this committee has heard as well, from some small business people—I don't know why they came to me—who have approached me very concerned about these provisions. They're worried about large businesses basically getting *carte blanche* from the commissioner to beat up on them and their having no recourse because the commissioner has issued a binding opinion saying this particular practice—this tied selling or whatever—is okay.

Now, there are two ways to interpret this. One is that the small firms would just like protection. They would like to use the competition law to tie the hands of bigger businesses to give themselves a bit of a competitive advantage. We don't need to do that for them.

But there's another interpretation, which I think is kinder to them and maybe closer to the mark. That is that they would like to be certain their interests are taken into account when these opinions are rendered, so that the commissioner will.... This may be more of an enforcement point than it is actually a point related to the drafting of the law, but they do, I think, have a right in some sense to be heard, so that the effects on them of a clearance of some activity—a tied sale, for example—are considered.

I think there is some worry that these opinions are going to be kept confidential and secret until they're suddenly published. At that point it's too late. They're going to have been left out, and the effects on them, which the commissioner may never really have appreciated, will be unconsidered.

Maybe this is more advice for enforcement than it is for the drafting of the legislation, but I am hopeful that if this provision comes to be, the commissioner will take every action to become as fully informed about the implications of issuing these opinions as possible, even to the extent of

consulting with competitors—and small business competitors among them. And if the parties looking for the opinion object to the publicity associated with that, the commissioner should just say "Well, that's fine. You're not going to get a binding opinion."

With respect to mutual legal assistance, there's more a legal than an economic issue. It does make sense in the sort of globalization we're going through to cooperate internationally. We've seen the benefits of international cooperation in the crackdowns on these international cartels. We need the same kind of cooperation on the civil side, particularly with respect to mergers. International merger review is really getting to be something of a mess for the companies involved. To the extent we can ease the burden and facilitate the process by allowing a better cooperation between the anti-trust agencies, we should do it.

• 0935 

I'll close with my remarks about private access, particularly with reference to the provisions contained in former Bill C-472.

We certainly have much less anti-trust enforcement in Canada than they have in the United States, where they've got two agencies, states' attorneys general, and private actions. The majority of anti-trust actions in the United States are private, propelled by the ability to get triple damages.

We definitely don't want to copy the American model, but I think a good case can be made—and I've been persuaded of this over the last few years; I didn't necessarily believe it at first—that we could use more enforcement, and that probably some of it should come on the private side.

A lot of what pass as competition cases are really rather like private contract disputes between the parties. I notice this particularly with reference to the refusal-to-deal provisions, in which I did a little work. It's not that they're not really competition issues; it's just that the benefits are so concentrated and so private, as opposed to being public, that it makes a lot of sense for the parties to pursue this themselves, particularly if they can't persuade the commissioner struggling with limited resources to take it on and make it a priority.

I think the bill starts at the right places. I think section 75 on refusal to deal and section 77 on tied selling and market restriction and exclusive dealing, are the right places to start with private action.

That, however, is subject to one very important qualification, which Tim Kennish mentioned as well. Please don't give private access to section 75 until there is a competitive-effects test. There is nothing in the law right now that says competition has to be harmed by the refusal. A business person, if private access were granted without any amendment, could simply decide that he or she wants to become a distributor of some company and could try to use the Competition Act to pry out distribution, even when they never had it before and when there might be a perfectly good business justification for refusing to provide distribution to that firm.

So I think private access on section 75 makes a lot of sense, but on a revised 75, which includes, like section 77, a lessening-of-competition test.

That doesn't mean the bureau would never take cases under these sections. If a practice is starting to become widespread, the bureau might want to take a case to clear up the law, to make a point, to save people a lot of expense of going through multiple private actions. And there may be some cases where a large number of small firms are affected by an action that individually can't really justify supporting a private action, but the commissioner on their behalf might want to take up their case.

There is a concern about whether there would be a strategic use of the law, something that I think does happen in the United States—firms trying to use the law to beat up on more efficient rivals. But I doubt this is going to be a problem. First of all, there are no provisions for damages, not even single damages. You'll have to pay your own costs, and the tribunal does have the authority to dispose of these cases rather quickly, at least given the other provisions in Bill C-23.

So I'm not particularly worried about strategic use of the law. In fact, my guess is it won't actually be all that much use. We've had private actions allowable since the mid-seventies on the criminal side, and there's been very, very little activity there—and there they can get damages. So my guess is there won't be a lot of action.

In fact, you might even want to consider at some point allowing the recovery of costs in these cases. If you're successful arguing that you've been harmed by a refusal to deal and it violates section 75, it might be reasonable to consider awarding costs.

Eventually you might want to also consider expanding the right of private access to section 79, to the abuse-of-dominance provisions, but I think it's probably wise not to go there just yet. That's a very broad provision that covers lots of not-very-well-defined actions. I think holding short at section 75 for now is probably the right thing to do.

Madam Chair, that concludes my remarks. I'll be happy to answer any questions.

The Chair: Thank you very much, Professor Ross.

We're now going to turn to the Honourable Howard Wetston.

Mr. Howard I. Wetston (Individual Presentation): Thank you, Madam Chair and members of the committee. Thank you for inviting me today.

Madam Chair, I'm not sure if the members of the committee and yourself would like to know why I'm here. Basically the views I present today are my own. Although I am vice-chairman of the Ontario Securities Commission, they don't represent the commission's views. I couldn't get the commission together to decide whether this is the right way to go or not.

• 0940 

By way of background, some of you know that I was Commissioner of Competition from 1989 to 1993. I took a leave of absence and went to the Federal Court for five and a half years, then decided that securities regulation was where my heart was. That's where I am today.

I have spent a considerable amount of time in this area, although it's not recent. My last major experience in competition law and policy was in 1993. That doesn't necessarily mean, however, I don't have an opinion about some of these matters.

I'm going to briefly discuss private access. I have reviewed Bill C-23 and have followed the work of this committee very carefully, but I thought I would restrict my comments to this area because it seems to be quite controversial.

In preparing for my appearance today, I read a number of the submissions and transcripts of these proceedings. I just want to say that I recognize the context in which these issues have been advanced. I think a lot of very thoughtful work has been done, but as Hemingway said, let us not confuse motion with action.

Basically, my advice today is that action is necessary. I believe this committee was right when it concluded, in its interim report in June 2000, that amendments to the Competition Act may be advisable in order to create rights of private action before the Competition Tribunal. I certainly think it's time.

The debate for private access in Canada has been discussed, in one form or another, for over 30 years. It started with the Economic Council of Canada in 1969. I wasn't part of that, but I certainly joined the debate shortly after that.

I believe the approach in Bill C-472 is very cautious, but quite sensible. It's quite sensible because Canada is ready for such a remedy—our economy is ready for such a remedy. Justice requires that private participants have access to the Competition Tribunal. You could have private access somewhere else, but there's no reason why you shouldn't have it at the Competition Tribunal, given the nature of its expertise.

I've long reflected on how much competition law enforcement we can tolerate in our country. We like to compare ourselves to the United States. We compare ourselves to the OECD countries and invariably ask our questions: "How much competition law can we tolerate? How much enforcement can we tolerate in our society?"

In my opinion, the private access provisions will be very beneficial because they will broaden the scope of competition, whether it be by public officials or by private parties before the tribunal. My personal view is that there is little enforcement of vertical restraints of trade in Canada, and there never has been.

Just by way of background, I was the deputy director of competition when the NutraSweet litigation was followed in the tribunal. I filed the Chrysler case. I filed the Xerox case. Unfortunately, I filed the Southam case. A win in this area doesn't mean it's a good thing or a bad thing, for obvious reasons—it's public policy.

But just because there is not much enforcement of vertical restraints of trade does not mean there is compliance with the law. I have a great concern that we don't know whether there's compliance with the Competition Act in Canada, because of the lack of enforcement in this area.

I don't believe there is anything to deter anti-competitive behaviour in our economy from vertical restraints of trade. I say that for many of the reasons this committee is well aware of: costs; the failure of the Competition Bureau to be able to take these cases because of resources; they're not interested; the issue isn't big enough; it doesn't cut across enough provinces; or it's not national enough. Whatever the reason, in my opinion, there is no deterrence.

If there's no deterrence from vertical restraints of trade, then some business will suffer. It may be big business on occasion and it may be small business on occasion, but the point is, we don't know. That is why we need to empower businesses to be able to take actions of their own before the tribunal and make their cases.

From the point of view of the rule of law and justice in our society today, we should empower business to do that. It is not just public officials who should be the gatekeepers in competition matters today. I don't believe we're at that stage in the development of our economy, and I think it would be regressive if we didn't have this opportunity in our legislation today.

• 0945 

Let me move on from the speech and give you some of the reasons why I think private access is good. I know and read a lot about the cost of litigation and strategic litigation. This is not new. Just by way of background, you should know that the Ontario Securities Commission has just drafted a bill that we have sent to the Minister of Finance in Ontario. The minister hasn't agreed to pursue this particular bill or amendment, but it's an amendment to the Securities Act that is similar to what we're talking about here today.

The amendment would give investors in the secondary market the right to sue any public company for making misrepresentations about the company. The amendment has been designed with a gatekeeper mechanism. It would require leave of the court. There are loser-pay cost provisions. I know this sounds familiar to you, because many of the same kinds of issues are in Bill C-472. So I just wanted to give you an idea that we're facing a similar kind of situation in the secondary market with respect to continuous disclosure.

In my opinion, this boils down to the public interest. What does the public interest require? It requires private access, but it's not just about competition and it's not just about private business; there are larger issues that need to be considered in the context of these amendments. It's the public interest in broadening the scope of competition in our markets.

The act was amended 15 years ago. I joined the bureau at that time. I believe the Government of Canada should amend the act now to include such provisions. The work of this committee might be most useful, however, in studying the design of the amendment to address concerns that have been raised.

I believe the committee could propose and design a bill that would take into account the various concerns that various stakeholders have. You've done some of that in Bill C-472, and you've done some of that in your interim report. You've reflected on those concerns, but there's more you can do.

I just toss these out for your consideration. I'm not necessarily recommending any of them. Besides requiring leave of the tribunal and providing only for injunctive relief, loser-pay cost rules, and summary judgments, which I think you're contemplating, you could also require that the parties have very limited discovery. You could reduce the discovery opportunities by the parties. You could limit discovery. The litigation bar would be upset about that, but you could limit it.

You could also have no discovery, although you'd probably hear a lot of screaming if you did. You could require agreed statements of facts on every possible issue the parties could agree upon, and you could have a pre-hearing conference tribunal member ensure that the parties

agreed on as much as possible in order to limit the issues, or the facts at issue, in the hearing.

You could limit the number of witnesses. You could restrict the witnesses. You could say that by the rules of practice of the tribunal—which I know, of course, the litigation bar would oppose enormously—you could limit the number of witnesses.

You could also limit the number of experts. Vertical restraints of trade require a great deal of economic analysis, but you don't need four or five expert witnesses like Tom Ross. You could have one or two and you could limit them. He'd be the best one.

You could confine the hearing. You could also limit standing. Frankly, I'm not even sure if you'd want to give the commissioner standing. If he chose not to proceed with the matter, you could let the private parties proceed with the matter; let the Competition Tribunal deal with the matter. They would decide those matters in the public interest. The standard would be competition, but they're a public interest tribunal—the Federal Court of Canada, Appeal Division, in Superior Propane stated that. So you could do that.

You could include a three- or four-month time period in which to conclude these hearings. If you brought the action, it would have to be concluded in three months or four months, from beginning to end.

There are a number of things you could do. You could also build in a five-year review. You could say that in five years you want a report from the Commissioner of Competition on the merits or success of private access in Canada. Is it being used? Is it being used strategically? What are the costs? You could build that into the legislation as a bit of a safeguard, so the public would know that the government is going to look at this new area to determine whether it's beneficial or not.

• 0950 

Thank you very much, Madam Chair.

The Chair: We're now going to turn to questions and begin with Mr. Penson.

Mr. Charlie Penson (Peace River, Canadian Alliance): Welcome to the panel this morning. There has been some good discussion and some excellent suggestions on how to improve Canada's competition law and effectiveness. I'd like to explore that area a little with you—how effective our competition law is. Should there be exempted areas to competition law in the economy? The airline industry was some of that...some of our trading enterprises, regulated industries, and so on.

The other area I'd like to explore, especially with Mr. Wetston, who seems to suggest that the private access should be simply a civil matter, is why we would want to limit witnesses, limit time. Wouldn't there soon be some body of evidence at the Competition Tribunal and some case history so that companies and individuals wanting to take actions would soon see where they were going. And if it is a complex case, it may require six months. Why would you want to put in artificial barriers if that's the case?

If we have time, I'd also like to explore the competition commissioner's powers versus a tribunal. Is it in the right balance?

The Chair: Who do you want to start with, Mr. Penson?

Mr. Charlie Penson: I would like to ask each of the witnesses about the effectiveness of Canada's competition law, which was my first question, in terms of exempted areas.

The Chair: I'm just wondering if we could ask each of you to comment on the first question and we'll see how the time goes. Who wants to go first?

Mr. Kennish.

Mr. Tim Kennish: I believe the regulated conduct principle, which excludes from the purview of the bill, more or less, those areas of business activity that are subject to some other dynamic than competition, should be outside the scope of the bill. I think the bill is a general application. Competition is a strong and compelling rationalizing principle that helps protect the public and creates efficiency, so I'm opposed to unnecessarily taking out industry from its coverage as a matter of principle. I recognize there are other dynamics.

Prof. Thomas Ross: I'd be happy to offer a few words as well. Recognizing what Tim Kennish said, there are, in general, interests in exempting from the Competition Act areas of the economy that are otherwise regulated the way we have in the past regulated telephone pricing and electricity pricing. Apart from that, most competition experts, and perhaps I should speak more for economists than lawyers, would not approve of opening up the Competition Act to special provisions for this industry or that industry.

First of all, it seems to me you have a choice. You can say competition will be our regulator or we will put in place a proper regulatory structure for an industry. And you should do one or the other. If you've decided that competition is your regulator, there should be no special provisions for that industry. The problem that you introduce when you create special provisions is that you create an industry looking for special provisions. If banking has special provisions, and now transportation has special provisions, then the next industry that's in a little bit of trouble wants a little break so that they can collude or do whatever they want. They want their special provisions.

Sometimes you might decide that competition isn't going to work as the regulator of economic activity in the way we used to think for utility pricing, for example. Fine. Set up a regulatory process that's transparent and has clearly defined objectives. If you said this is an area that's like the rest of the economy, subject to regulation by competitive forces, then the law should be applied to that industry as it is to all others.

Mr. Charlie Penson: Mr. Ross, sorry to interject, but the airline industry comes to mind because it would be half in and half out.

Prof. Thomas Ross: Right. It's a little tricky to say whether or not some industries are regulated. There are aspects of the airline industry that are still regulated. Our general view used to be that we were going to let competition be the regulator of air fares, at least in the southern part of the country, with perhaps some consideration for the north. Now we have special provisions for the airline industry in there, which a lot of us feel nervous about and we would just as soon they come out.

• 0955

The Chair: Mr. Dillon.

Mr. John Dillon: In reference to the general question about how well our competition laws are working, as I indicated in my brief opening comments, we believe that on the whole the law is working relatively well.

I obviously would disagree, to some extent, with Mr. Wetston's obvious concern with respect to the degree of enforcement and his supposition that there may not be compliance with the law, or that we simply don't know. I'd like to hear some specific examples, because certainly in our viewpoint the law is working reasonably well.

There are certainly questions about the resources available to the commission, as I said earlier. There are always choices that any authority has to make in terms of which cases it pursues or chooses not to pursue in terms of the general pursuit of competition. We remain to be convinced that there's anything fundamentally wrong with enforcement of the law in Canada.

Mr. Charlie Penson: What about the question, Mr. Dillon, of whether there should be exempted areas?

Mr. John Dillon: I don't have a lot to add to the comments that have already been made by Mr. Kennish and Mr. Ross. We haven't gotten into this area in great detail within our organization. We do believe the Competition Act is a law of general application. As Mr. Ross suggested, regulation may be appropriate in certain instances. Obviously the airlines are a particularly difficult case at this time. Generally we believe that competition is the way to deal with these things and not through special provisions.

The Chair: Mr. Wetston.

Mr. Howard Wetston: I'd be more than happy to have a debate with BCNI anytime about the workings of the law, but that's not the purpose today. So I would invite them anytime for that purpose.

Basically in answer to your question, I think my colleagues are right. One should appreciate that there are still so many regulated areas in our economy in which competition policy still does have some role, but that role is changing and it has changed over a number of years. Even in the securities industry there's a role for competition policy despite the enormous amount of regulation.

With respect to exempted areas, obviously airlines are very much on the minds of people today. The airline industry and its history has been subject to so much governmental involvement that it has really led to what I think is an industry that has gone through a number of industrial organizational changes that have been as a result of, to a great extent, government policy. Foreign ownership is the best example of that.

We have created an industry here that makes it very difficult for it to compete in the manner we expected. Basically exempting it would not be purposeful and would be very much out of step with other countries. I don't think it would be in our public interest to do that.

Mr. Charlie Penson: Somebody has mentioned—and I'm not sure if it was you—the state-trading enterprises when it comes to international competition law and the difficulty there. We have our own state-trading enterprises in Canada that we don't have access to information for. How would you see that matter being resolved in terms of the international aspect of cooperation and competition law?

Mr. Howard Wetston: I didn't really reflect on that today. The manner in which Bill C-23 is addressing it seems sensible. I'm not sure what you're getting at.

Mr. Charlie Penson: Let me give you the Canadian Wheat Board as an example.

Mr. Howard Wetston: Yes. It's highly regulated so the scope for the application of competition law is limited. Telecommunications is quite regulated, but not as regulated as before, so the scope is greater.

Mr. Charlie Penson: My point being, though, if we're concerned about other countries having state-trading enterprises where we can't get access, don't we have the same concern here? That's what I'm getting at.

Mr. Howard Wetston: I think that's valid.

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

We'll move on to Mr. Lastewka, please.

Mr. Walt Lastewka (St. Catharines, Lib.): Thank you, Madam Chair.

I want to spend my time on the section under private access, and I want to go to the Canadian Bar Association and Mr. Kennish.

First of all, I want to thank all the contributors for their testimony this morning.

• 1000

Mr. Kennish, I really appreciate your report. Many times I'm not quite sure where the bar association stands when they finish their report, but I thought your report was very clear for us. That's why I want to spend my time just on the private access portion, where you had mentioned there is no consensus. I'd like to hear from you the two sides and some of the points they were making for and against private access.

Mr. Tim Kennish: I'd be pleased to respond.

The bar, as you can imagine, represents a variety of viewpoints on something like this where it might be seen as an opportunity for practice development, but I think more high-minded members of the bar are genuine in their difference of views about whether they think it will be a positive benefit.

On the side of people who are skeptical about the case being made for reform, there's a sense that to the extent that it's being seen as something that the small and medium-sized enterprises could access, where they're not getting the attention of the bureau because their particular interests are too small or are below the radar screen, or whatever, the way in which the tribunal has operated makes it unlikely in the minds of many that it would be extensively used, due to cost considerations, time, and the cumbersomeness of their process. I think Howard Wetston's suggestions for further reform of the provisions are a reflection of the concern that you wouldn't get expeditious treatment, and it wouldn't be extensively used.

The other side, of course, in opposition, is a view expressed by Mr. Dillon this morning that even with all the bells and whistles wrapped into the legislation to prevent strategic litigation, it still wouldn't be possible to stamp it out completely.

I think those are the principles in opposition, and in fact in our report we have gone through the pros and cons.

On the pro side, I think there's a feeling that where there is a wrong, there ought to be a remedy, and the bureau has limited resources. By necessity, it's having to focus its attentions on things that have more pervasive effects, such as mergers, cartels, and matters in other areas, and it's of necessity going to be the case that the smaller matters won't get their time and attention. There's going to be more discipline on competitors in the marketplace if in fact individual parties see that they could be held accountable by the other actors in the marketplace who their actions are affecting.

While we haven't done a nose count on this, this has been an issue that has been part of the debate and discussion around competition law reform for several years, and the bar has had a split right down the middle on this point every time. But as I say, notwithstanding this agreement, there is agreement that if you're going to proceed with it, there are some safeguards that need to be built in, and we've included comments on that in the brief.

Mr. Walt Lastewka: Thank you, Madam Chair.

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

[*Translation*]

Ms. Girard-Bujold.

Ms. Jocelyne Girard-Bujold (Jonquière, BQ): Thank you, Madam Chair.

Gentlemen, Madam, I appreciate the views that you have articulated on a number of the provisions contained in the bill currently before you. What is of particular interest to me, however, is section 45 of the act, the provision dealing with conspiracy.

Mr. Ross, in your testimony of May 4th, 2000, you stated that you had paid particular attention to section 45, the one that deals with conspiracy.

• 1005 

You know that for over a year now, all areas of Canada have seen incredible increases in the price of gasoline. At the present time, the situation seems to have cooled down for some reason or other. In my own region, we have established a citizens' committee. We have called this committee the Coalition to protect Fuel Consumers. As you yourself have done, I have filed two complaints with the Competition Bureau under section 45. I asked the Competition Bureau to do away with the word "unduly", since the presence of this word in the act prevents the Bureau from launching any investigation in the absence of written or oral evidence.

Mr. Ross and the other witnesses have done research in this area, and I would like to hear from them, as well as from the former commissioner. You have been involved both in investigations and in research, and I would like to ask you this. We are presently considering new procedures, new ways of doing things under section 45. What changes should we bring about in order to protect consumers and prevent any potential collusion between oil companies?

[*English*]

The Chair: Professor Ross, I'll allow you to answer the question if you wish, but I do want to remind members that we are talking about Bill C-23 and private access and that we have decided not to go into the other areas outside of this. But I will allow this question if you're willing to answer it.

Prof. Thomas Ross: Certainly.

I have done work on section 45, and in fact, by some lucky coincidence, my co-author is sitting beside me. Tim Kennish and I have written on section 45, proposing a new approach to that section that would do two things.

First of all, it would take out the word "unduly" to make it easier to secure convictions for pure price-fixing cases, which are unnecessarily difficult now.

The second element of our proposal is to create a second civil track for strategic alliances and joint ventures, where firms that are competitors are getting together for possibly some quite legitimate purpose—to open new markets, to create new products, to do research together. We don't want them to get caught up in this criminal prohibition. It may be that we don't like their agreement and think it's anti-competitive, but it's a different kind of agreement than a price-fixing agreement, and we think it deserves a different kind of hearing, more like a merger process, where they can make arguments about efficiencies and things like that.

So I do think the time is right for section 45 reform, and I hope this committee will take that up sometime soon.

[*Translation*]

Ms. Jocelyne Girard-Bujold: Madam Chair, I would like to get back to the section dealing with personal access.

Mr. Wetston mentioned that Hemingway used to say that you should not confuse mere motion with action. I quite agree because the simple fact of our moving on this does not necessarily mean that we're doing something to bring about a change for the better.

You also say that this is a good time to amend the act with regards to private access. And you mentioned that we should not leave it to government officials to determine the private access procedures to be set up under the new guidelines. I wonder if you would elaborate on that for us.

[*English*]

Mr. Howard Wetston: I'm not sure that in the few minutes I have I could develop it much more than I had suggested, except to say that my belief in the need for private access stems from many of the reasons that your committee has heard.

Basically, I think the arguments I have heard over the years are the same, and they're quite tiring. They don't represent any new thinking about our economy or about the legal status of the participants in our economy. They don't represent any new thinking with respect to the performance of the tribunal—of which there has been a lot of criticism, but it hasn't been given much of a chance to perform. To some extent, it started out perhaps badly with Palm Dairies, which I participated in, and from that day forward, the tribunal's legacy has perhaps not been the best.

• 1010

But basically, a number of issues I've raised about safeguards are doable and achievable. They're in the public interest. I see no reason why only public officials should be able to pursue these kinds of actions. Indeed I agree with Tom Ross when he says section 45 deserves to have, and should have, some very serious amendments, because we are offside with many other jurisdictions who do have this, like Australia, the United States, and the U.K.

For us to only have criminal price-fixing provisions, proven through a very difficult criminal process—which I'm very familiar with because I started my career as a prosecutor in this area and know how tough it is to get a conviction.... And the charter does not help. It's a wonderful document, but it doesn't help get convictions in this area. So the result is that we need to refocus our attention in the competition area to reflect the reality of our marketplace.

I'm not sure if I've helped you with this response, but I believe that is the case today.

The Chair: Mr. Dillon also wishes to reply.

Mr. Dillon.

Mr. John Dillon: Thank you, Madam Chair.

Obviously, Mr. Wetston has opened up a very broad area with some of his comments. I want to put a couple of comments on the table, and I'm sure we'll get back to this.

In our view of the world, competition is in fact increasing, looking at the way most global companies have to operate in this marketplace. There's a significant debate over whether the competition legislation we have today actually works in terms of ensuring that Canadian-based companies can compete on a global scale. I appreciate that this is not part of the mandate of this particular committee today, either, but we can have a legitimate and lengthy debate about the state of competition law and its enforcement in Canada, and I'm sure Mr. Wetston and I will do that after today.

It is important to recognize that we're talking about changing the system here. Our members and I feel quite strongly that opening up our competition legislation to more litigation is not necessarily going to help either Canada's economy or our competitiveness. This is a fairly fundamental issue. And I'm sorry if Howard's getting a little tired of these arguments, but I don't think the reality has changed. This is not an employment program for lawyers, at least I certainly hope it's not—and I say that as a member of the bar, or a recovering lawyer, as I sometimes call myself—nor is it necessarily a case....

There's been a great deal of discussion in this committee and elsewhere on how the tribunal has never really been used to its full extent, how there's a need to bring more cases before the tribunal. This too is a legitimate area for discussion and debate. The issue is whether we want to do this through means of private access, which could open it up to a lot of private parties who are not really interested in promoting competition. That is the real crux of the issue, and I'm not sure we have the answers today.

The Chair: Thank you.

Thank you very much, Madam Girard-Bujold.

I am going to turn to Mr. McTeague now.

Mr. Dan McTeague (Pickering—Ajax—Uxbridge, Lib.): Thank you, Madam Chair.

Indeed, Mr. Dillon, this committee has more than amply discussed changes to the Competition Act. What is before us...with the help of the clerk, I'd like to ensure that the members who have come here today as witnesses—and I thank them for that—have a copy of the proposed changes contained in Bill C-472 dealing with private access.

Professor Ross, you stated in your brief—and I'm reading from what I read here. As it now stands:

> Bill C-23 grants the tribunal a new set of important powers that in many ways seems to be laying the groundwork for an eventual private right of access.

I want to thank you and commend you for that observation. Many witnesses have yet to allude to this fact.

Do you believe that Bill C-23 would be somewhat incomplete without the inclusion of private action?

Prof. Thomas Ross: There's certainly a lot to commend in Bill C-23 as it is, without private access.

But as I reflected on it over the last weeks preparing for this appearance, many of the items it includes are not really terribly important without private access. Some of the controls the tribunal will have over its process may, I suppose, be useful without private access, but that seems to be what's really going to use them.

• 1015 

I agree with Howard Wetston. The time to move on private access is here. You have a bill that's going to do this in a measured, careful way, with very limited opportunities for strategic use of the process.

I haven't really discussed this with my legal colleagues, but one other point I didn't mention before is that it would seem to me that if a firm actually did aggressively use strategic litigation supported by private access, it could in turn be subject to an action under section 79, if it were a dominant firm seeking to protect its position by use of strategic initiatives.

The bill will look a little incomplete. It's like it's all set up for the big show and then it's not there.

Mr. Dan McTeague: Professor Ross, I remember looking at some of the transcripts from an earlier committee—Madam Chair, with your indulgence—from 1985 in which the same kind of concerns were raised about the special remedies under 36, and that the sky would fall and that of course business would come to a screeching halt and there would be a chill on investment.

I'm looking again at all these words that tend to come back 10 or 15 years later, and I'm rather interested in the commentaries made by some who, despite the restraint that has been put into Bill C-472 or the amendment you see before you, still contend that this will be a sop to business and investment.

It seems to me that the Canadian Bar Association would be chomping at the bit with the opportunity of more litigation, if I take seriously what Mr. Warren Kinsella has said in a recent press release, that the real winners would be the litigation lawyers.

Mr. Dillon and Mr. Kennish, the Australian model has been around for some time. Before it was implemented in the 1970s, was there this kind of pre-private right-of-access trauma expressed as vividly as some have done here in the past or as you've just done? Is the sky really going to fall if we proceed with this, Mr. Dillon, and would this not have provided you with an opportunity to maybe expand your membership from the 150 largest companies in this country?

Mr. John Dillon: First of all, I don't think anyone is suggesting the sky is going to fall, and I certainly reject that characterization.

I can't speak for what might have been said to this committee or others in 1985 or what might have...in fact I'm not familiar with the situation in Australia. I am familiar with the input and concerns consistently raised by our members over the years with respect to.... I appreciate that Bill C-472 as it then was has a number of improvements over what would have been discussed in the past and is a legitimate and fair attempt to try to put in a number of safeguards that would answer some of the questions.

We have discussed this. I have discussed it with a number of people in the business community and within our membership and they're not convinced that this is sufficient. The reality is that if a large company, or indeed a small company, wants to use this, presumably it can build some kind of a case to get beyond the summary disposition. Companies are going to employ the lawyers needed—some of whom Mr. Kennish referred to—to help them build a case and they're going to get beyond the bar of a summary dismissal by the tribunal. Similarly, they're not likely to be terribly deterred by cost awards, since they're ready to pay a great deal of money to have people put this case together for them.

So if someone is determined to use this...and that is the concern, and as has been suggested, it is the case to some extent in the United States that the damage awards and the treble damage awards there provide a significant additional incentive for people to take these cases. Some of these cases are used for strategic purposes in the United States without companies necessarily looking to monetary compensation at the end of the day, but simply to cause havoc for competitors.

This is the concern, and after many discussions I don't see it dissipating.

Mr. Dan McTeague: Mr. Dillon, if you then take the view that there probably can be no safeguards that would make your membership happy, would your membership then be comfortable with a status quo that, as Mr. Wetston has very eloquently pointed out, may very well prevent certain anti-competitive activity from occurring that we can't detect and that we can't enforce? Is your membership not concerned that the reverse may very well be true?

Mr. John Dillon: That's certainly not what they're telling me.

I want to make clear that I'm not saying there is absolutely no safeguard that could ever deal with the situation.

• 1020

Mr. Dan McTeague: It's just bizarre, Mr. Wetston, that so many other countries have one form of private access or another. You, of course, and I know that others...I don't think you wish to characterize what we're doing here as the American system, but it's interesting to note that someone always tries to refer to what we're attempting to do here as being the American system.

What does this say when, on the one hand, the Business Council on National Issues is advocating a level playing field between ourselves and the United States, saying that Canadian businesses, small and large, should get on board as they have in the past—I think that's a very good policy—but on the other hand wants to maintain an act that for all intents and purposes may exclude a number of people from either participating effectively in the competitive process or at the very least be provided with some modicum of justice, let alone enforcement?

The Chair: Is that for Mr. Dillon or Mr. Wetston?

Mr. Dan McTeague: Mr. Dillon.

The Chair: Okay. You said Mr. Wetston.

Mr. Dan McTeague: Sorry.

Mr. John Dillon: There are differences between us, at least on some items.

Mr. Dan McTeague: Mr. Wetston can answer it just as well, if he wishes.

Mr. Howard Wetston: I thought I was invited here by the committee, not by BCNI, Mr. Dillon —

Some hon. members: Oh, oh!

Mr. Howard Wetston: —but I'd be happy also to respond to your question, Mr. McTeague, if I could.

Mr. Dan McTeague: Thank you, Mr. Wetston.

Mr. John Dillon: I'm sorry, I didn't mean to suggest that you were.

First of all, I'm not sure we are at all suggesting that this is the American system or that we need to be worried about all of the things that have happened in the United States. In fact, we clearly consider Canada to have a competitive advantage because it is less litigious than the United States. We don't happen to believe an excess of litigation is actually either necessary or helpful to Canadian business and competitiveness.

There may very well be legitimate concerns about small business and its access to this. As I said in my opening comments, we should be looking at what kinds of provisions can be included to ensure that meritorious cases small businesses want to bring forward can be dealt with, whether or not we do this through increasing the resources available to the bureau and imposing a duty and an obligation on the commissioner to respond in writing with the reasons why a complaint brought forward by a small business will not be proceeded upon.

Witnesses before your committee have made other suggestions on how to deal with this. There are means for dealing with legitimate complaints and we should be looking at those. I'm not convinced private access is the way to do it. I'm not convinced most small businesses will have

the resources to bring these cases forward in the first place.

The Chair: Thank you, Mr. Dillon.

Mr. Wetston, please.

Mr. Howard Wetston: I'll try to give the committee a sense of what goes on in this area. This is an area involving vertical restraints of trade primarily. That's all you've recommended, with the exception of abuse.

I would agree with my colleagues; you need to fix the refusal-to-deal provision. It really was intended to be a lessening of competition provision, but there's many a slip between cup and lip sometimes when it goes from the policy table to the drafting table and into the House. I believe you might find that this was the case in the early debates. But something happened along the way—just like the preamble of the Competition Act got kind of fixed up along the way so that it doesn't mean a lot any more.

This is not just about small business and big business. Exclusive dealing in market restrictions very much depends on whether the restraint's upstream or downstream. It very much depends on whether you've got an exclusive dealing arrangement that might affect a competitor upstream, too large competitors, or it might affect the downstream suppliers or retailers, smaller competitors.

You can still have market restrictions that will affect the downstream competition issue. You can have exclusive dealing arrangements that affect upstream competition issues. Tom Ross knows this very well from an economic and analytical perspective. You get inter-brand competition upstream. You get intra-brand competition downstream. It's a complicated area from the point of view of sorting out what's going on.

But basically it goes on every day—in franchise agreements, in licensing arrangements, in supply arrangements in market-restricted areas. It goes on every day. It's the fabric of how our economy functions, more so than mergers and acquisitions in many ways, because it's everyday business we're talking about here.

• 1025 

If you think about the picture of what's going on here and you ask yourself what you want to do.... You want to give private parties access. Why do you want to give them access? Because you want to ensure, if they have a valid complaint...whether or not it proves to be a substantial lessening of competition, which requires a sophisticated market-power analysis. It requires Tom Ross to get on the witness stand and demonstrate there's market power and there has been a lessening of competition, and for Tim Kennish to argue that point legally. That's what it requires.

It must be understood, if you're talking about a small business that has gone to the Competition Bureau...don't think for a minute they haven't spent time, money, and resources, and have hired lawyers. Think about the energy and concern that somebody who's on the other end of a refusal-to-deal situation, as in the supplier who was refused parts by Chrysler, has to deal with. Now that was a small parts supplier, although it may be fairly large in terms of Montreal business. It was relatively small in relation to Chrysler. That person will pursue the

complaint and spend his or her time and money, retain an economist maybe, retain an MBA to help out, retain an accountant, retain a lawyer, and then find there's nowhere to go because the Competition Bureau has decided it's not a case they should pursue—and maybe validly.

There's no hidden agenda here. It may be valid. Maybe it doesn't lessen competition substantially. Maybe it's not a large enough case. Maybe they don't have the resources. Maybe it's not a priority, and they don't pursue it. Where does that person go? Where does that business go? In my opinion, you go to the tribunal and you have a hearing. You put the safeguards in and you know that justice has been done, and that's important.

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

Mr. Martin, do you have any questions?

Mr. Pat Martin (Winnipeg Centre, NDP): Yes, I do, Madam Chair. Thank you for the opportunity and thank you, guests, for being here.

I'm sorry, as a substitute for the regular member of the committee I missed the first two briefs, although I've tried to pick up the general gist through the exchanges that have been going on with the panel.

I'm interested as a lay person in this area, as most Canadians are, and when we think of regulatory competition or whatever, it's usually the issue that Madam Girard-Bujold raised, which is in terms of gas prices. But I understand there's an agreement on the committee that we won't dwell on that, so I won't use my time on that issue.

I'm also concerned, though, with the point Mr. Ross made, that either you have a regulatory regime in an industry sector or you say that competition will be our regulator.

There are a lot of Canadians who feel that in an era of deregulation—an era of 15 or 20 years of systematic deregulation, largely taken from the wish list of the BCNI and implemented—competition as regulator has, in fact, failed them. There's a growing hue and cry amongst lay people, people who are neither lawyers nor economists—householders—that they want more, if not more regulation in industry sectors, at least a competition system that's effective and accessible, that deals with day-to-day issues of working people and families. They want to be comforted that they're not being gouged or ripped off by some...conspiracy, I suppose, is the way you would put it.

I watch the American model as well, and I noticed in Mr. Ross' brief he deals at length with a couple of points. There's a growing feeling in the States that maybe there's too much anti-trust enforcement—largely due to private actions—to the point that it has the reverse effect, that it might be impeding competition, that many of these claims are laid not to expand or enhance competition, but to have the reverse effect.

I guess my question was partially answered. Even Mr. Dillon is saying nobody's looking to replicate the American model, which is probably the most litigious in the world. But by the same token, it seems to be the trend to harmonize with American business.

I would ask Mr. Dillon and then others to comment on where the business round table in the U.S. stands on their current anti-trust regulations or the number of private access challenges they have.

• 1030

Are they taking active steps in Congress to harmonize more with the Canadian model so they're not burdened so much with what they consider to be nuisance complaints?

The question to others would be, should we take steps down the road toward increasing private access? How do we shield ourselves from getting to be that court of nuisance, as it seems to be in the United States?

The Chair: Mr. Dillon.

Mr. John Dillon: I'm not sure I can give you a terribly specific answer to your question, because I'm not in touch on a regular basis with U.S. business organizations and organizations like the business round table on these issues.

I do know, as has been mentioned, there are significant concerns in the United States with respect to the amount of litigation, not just in the anti-trust area but in a number of other areas as well, and the multiplicity of enforcement agencies leads to considerable costs and complications. I do believe there is some movement for reform, but I'm afraid I can't give you any specifics about that.

Mr. Pat Martin: Fair enough.

Anybody else?

The Chair: Mr. Kennish.

Mr. Tim Kennish: I would say the U.S. courts have a long tradition of dealing with these issues. Their law is, by comparison to ours, very stable. I don't see or hear much in the nature of a major discussion on reform, particularly in vertical issues that are the subject of private access.

There are some things that do constrain private actions in the U.S.—for example, you can't bring a private proceeding to restrain a merger. There's a great concern that strategic behaviour could interfere with that, and it has not been permitted.

There's also the indirect-purchaser rule. Generally the law in the U.S. prevents an indirect purchaser from effectively collecting damages from someone who has established, through any competitive agreement, a higher price upstream. But they do have treble damages there, which is something we obviously don't have here in our civil recoveries.

Just to comment further—and it goes back a bit to Mr. McTeague's question—on our proposed private access provision, one of the concerns our members sometimes state is that they think the proposed access will not be really useful to small and medium-sized enterprises because of the costs, the slowness of process, and the limited remedies available, but it will likely be used by parties who have more financial resources and larger business interests. So it may miscarry in terms of what it was intended to achieve.

To go back to the U.S., my impression—and I haven't cited this extensively—is that the great plethora of cases in the private area are in the vertical terminations of distributorships and that sort of thing. A lot of litigation is in that area. So who knows whether it will be an active area for enforcement or not.

The civil provisions that are planned to be connected with private access are somewhat limited, as Mr. Wetston has observed—exclusive dealing, tied selling, refusal to deal. The big civil provision that isn't proposed at this time to be connected with private access is the abuse of dominance. If you look at the track record of the Competition Bureau, that's where they have been most active and successful in enforcing the law. And arguably, that's the most important area, because the parties that are challenging their practices are sitting in a dominant position in their industries and can do the most damage. That's perhaps the area where you'd expect the bureau would continue to be active.

Sorry, those aren't particularly focused comments. They're just observations that relate to your topic.

The Chair: Professor Ross, did you have anything to add?

Prof. Thomas Ross: No, probably not, but I'm a professor, so I'll say something.

Voices: Oh, oh!

• 1035

Prof. Thomas Ross: I will just speak to the point Mr. Martin made, that there is a perception in some quarters that deregulation has failed ordinary people in Canada and in the United States, and perhaps as well in Europe. I think that's a bit unfair, but I concede that there is some evidence. We're certainly worried about the state of the airline industry in Canada now, which is one that we deregulated more than 10 years ago.

There's a lot of concern about California's experience with electricity deregulation, which I do want to say is California's mess; we don't have to go there. If we wanted to, we could deregulate in a lot more sensible way than California did. But that's a story for another day, or week, or month.

But I think there are some successes with deregulation as well. I think some aspects of the telecommunications deregulation has been good. Some broadcast deregulations have probably been good and we can make some progress I think in the other areas as well. And when you do deregulate, it does mean that you have a larger role for competition policy. You're handing things over to the competition agency and then saying, okay, we're done trying to control prices in this market, competition's going to do it, so you're the agency that has to keep your eyes on this.

And that makes it that much more important to keep the changes to the Competition Act up to date, to keep it nimble, and flexible, and responsive to the needs of Canadian businesses and consumers. So I think the package in Bill C-23 is a very nice start; moving on to changes in section 45 will be great as well. I commend this committee for its interest.

The Chair: Mr. Wetston.

Mr. Howard Wetston: I think it's a very good question. From my perspective I think it's important to look at regulation and competition as complements, not as substitutes. I think there are many sectors in which that is very much the case. I think that's the reality of our marketplace, and it's not terribly different in many other economies.

I do believe, as Tom indicated, there have been some successes, but I think the reality of how we want our marketplace to function from the point of view of competition policy is not easy to describe.

My experience with foreign firms in Canada—and we all realize that foreign firms have a huge presence in Canada, and it's growing—is that the acquisition of Canadian firms is a continued phenomenon. There's not much we can do about it, but it's a reality. But we do want to keep Canadian jobs, and we want to continue to have an increasing standard of living. We want Canadian productivity to go up even if there's foreign ownership.

My experience with foreign firms is they want two things in Canada—besides the opportunity to become monopolists, which everybody likes to do, but they like to do without violating competition laws; grow their business, so to speak. They want effective laws. They come to Canada knowing they're coming to a country in which there are effective laws. They want to be able to come to a country in which they know securities commissions are enforcing securities laws, and there's a lot of complaints about that.

They want to know that there's an effective anti-trust law in place, because sometimes they may have to use it. And that's a reason for them coming, not a reason for them not to come. They want to know that they're coming into a country in which they have access to courts and tribunals where appropriate, because that's what they're accustomed to, particularly if they come from the United States, or Australia, or New Zealand, or the U.K., or Europe. That's what they want. So I don't think we should be too concerned about amendments to the Competition Act that look a little like what other countries may have, provided we have the safeguards because of concerns with respect to the kinds of things we have talked about.

One of the biggest concerns in our capital markets today is liquidity. What's going on? It's moving to the south, moving to the United States. How are we going to keep it in Canada? It's no different from maintaining an airline industry in Canada and maintaining a vibrant telecommunications industry in Canada. The framework laws though have to work. And if they don't work and they're not effective, I don't think we're going to get the kind of investment we're looking for.

The Chair: Thank you.

Thank you very much, Mr. Martin.

I'm going to turn it over to Ms. Torsney, please.

Ms. Paddy Torsney (Burlington, Lib.): Everyone seems to be describing the private access provisions as small business using them to go against bigger business. Is it not possible that big businesses could go against each other and spend an awful lot of time on this? And is it possible that big business can go after small business with it?

Perhaps somebody could elaborate on how that would happen, because I would have great concerns about this. If it's going to be hard enough for a small business to launch a case against a big business, God forbid, if a big business comes after a small business, they have a heck of a lot more resources. Everyone seems to be talking up here, but what are the specific sectors in which people actually envision using some of the provisions of private access?

• 1040

Mr. Dillon, some of your member companies operate on both sides of the border, and I would think it would be easier for them in terms of dealing with the head office, especially if it's in the south, if they have the same or similar laws in both places. I can't imagine that if they're already dealing with it in the U.S. it would be much harder for them to deal with it in Canada. Would you respond to that.

Mr. John Dillon: Let me take that last question first.

As I tried to indicate earlier, I think most companies operating in Canada would want to have the advantages of the Canadian system and not the disadvantages of the U.S. system. So companies headquartered in the United States may be familiar with and indeed practise with the U.S. system, but are not necessarily in favour of it. And if there's a way to avoid that in Canada, so much the better.

But to answer your first question, I think that is a legitimate concern. Our expectation, and the concern many of our members have, is that it would be used by larger companies to basically harass their competitors, not in the interests of the general public interest in competition. That's why we think the commissioner and the bureau should be the ones to make that judgment. But simply to pursue their own private interests.... And, yes, for the most part, it would be larger companies that would have those resources, and it also is quite possible they could use it against small companies.

As I said earlier, there is a legitimate interest in trying to find the safeguards, but I'm assuming that people would not launch these cases unless they've hired sufficient talent to help them build a case that at least gets them past the original hurdle of not having it summarily dismissed by the tribunal when proceeding with the case. So if they're skilled enough to do that, then it's the only control over it and they can very much pursue their own private interests. That is the concern, and they could use it against small companies, very definitely.

The Chair: Mr. Kennish, did you wish to add anything to that?

Mr. Tim Kennish: Yes, thank you.

Well, it would be a law of general application, so it could be accessed by any member of the public. Large companies could seek to pursue those remedies. I think the hope is that sham and strategic litigation would be pre-empted through the safeguards that are built into the legislation. I think it's accepted that from the initial time the private access provisions were first discussed, there have now been embroidered onto the proposals a number of safeguards that go a long way to dealing with those concerns.

The Chair: Professor Ross.

Prof. Thomas Ross: I'll just add a couple of things.

As Tim Kennish said, since it is a law of general application, it could presumably be used by a large firm against a small one, but there are two things about that. First of all, to the extent that the law is meant to protect against a lessening of competition, a big fish going after a small one is going to look rather ridiculous probably, and is going to be subject to summary

disposition, I would think, with costs probably. And a policy of doing that, I would think, by a large firm could be actionable under section 79 as an abuse of dominance if a firm really decided it wanted to develop a reputation of being a bit of a bully using the anti-trust arsenal.

The Chair: Mr. Wetston.

Mr. Howard Wetston: You should know, there is law to that effect. That's the Laidlaw case, in which the tribunal specifically decided that, as an anti-competitive act with strategic litigation, it was specifically one of the act's...conduct, as I recall. I can't remember if I filed Laidlaw or not, but I remember the case.

A voice: And you won that one.

Mr. Howard Wetston: There aren't many wins in this area.

I think your point is a very valid point of taking it from the treetops and looking at what goes on. You're talking about certain specific kinds of activity here. Let me try to describe it a little bit if I can.

I think Tom is absolutely right. If we're worried about big firms taking on little firms, if a little firm is going to have to go to the Competition Bureau and spend the time, and money, and resources there, it may as well spend the time, and money, and resources at the Competition Tribunal. At least it would have control of its own case instead of coming into the bureau and trying to convince one of the commerce officers they have a problem. With all due respect to the bureau, they may be very talented but they have a lot to do.

• 1045 

You will get large firms taking on large firms in this area, not large firms taking on small firms. You will get small firms trying to take on large firms, and there will be a resource problem, but we can't satisfy everything. They are going to have to spend time and money and energy anyway, and believe me, if they're on the other end of the major refusal to supply, they're out of business. Make your choice. They're out of business, or they're going to have to take some action. Where are they going to go?

If there isn't a substantial lessening of competition or going back to the same scenario, it's not a priority for the bureau. It's not a significant case because it doesn't cut across provinces, it's not national enough in scope, it's too local, or whatever, and that individual has lost recourse. I think recourse is an important part of the rule of law in our country, and if you don't have access, you might take it to the normal courts, but that's a whole other complicated problem.

You can have large competitors having a reduction in competition at the upstream level, where you have exclusive dealing arrangements. It's not just downstream suppliers that are affected as you would think in a resale price-maintenance scheme or sometimes in a refusal-to-supply or refusal-to-deal scheme. I think it's important to understand that it's not just a question of big companies and little companies; it's big on big, it may be small on small, and it may be big on small. There are a number of combinations here. I think Tom's absolutely right. If a large company takes on a smaller company, I can't imagine that the tribunal wouldn't carefully look at that in a summary way.

Ms. Paddy Torsney: The reason I asked is partly that on Sunday we met with the independent grocery manufacturers. They said that they certainly think the Competition Act is important to them as a tool, but they weren't very happy with some of the applications.

For example, on the one hand they would look at all of Nova Scotia instead of Pictou County in one case and look at Mississauga instead of all of Ontario on the other. Their complaint is, I think, that in some cases the bigger companies get away with things because they can make things look a lot better, or they can compete to make things look a little different in different markets. I can imagine that in certain markets, where perhaps there aren't some of the big dominant players, they could go against some of the independents or some of the smaller companies.

The Chair: This is your last question, please, Ms. Torsney.

Ms. Paddy Torsney: The last question relates to the fact that having dealt with all the phone calls, Mr. Kennish, from all those people who dealt with those game cards, I can tell you they are a bad thing. I'm glad no one actually took too many swipes at that section of the bill. It is a problem in the country when people get things that say they've won something yet the people do not fully appreciate what the costs of collecting are. We do need to have some changes there.

Mr. Tim Kennish: If I may, I'd just like to add in response that our point is simply that we think that the net is too—probably unintentionally—broad. There needs to be a bit of restriction so it will apply to the kind of things you're concerned about and not to the straightforward game you get at your gas pump, where there's simply an offer to permit you to participate in something, there's a skill-testing question, names are selected at random, and you can enter without buying something.

Ms. Paddy Torsney: You're absolutely right. There's no intention to do that, and I don't think it does do that. I think the greatest concern was people having to pay $35 to collect a $2 prize or no prize, and not being aware of the obligations they would enter into by dialling a 1-900 number or what have you.

The Chair: Thank you, Ms. Torsney.

I'm going to turn to Mr. Rajotte, please.

Mr. James Rajotte (Edmonton Southwest, Canadian Alliance): Thank you, Madam Chair, and thank you very much, witnesses, for your presentations this morning.

I want to start with Mr. Wetston and follow up on something Mr. Penson was talking about—namely, understanding why you recommend limiting private access. You talked about requiring the parties to have limited discovery, requiring agreed statements of facts, limiting the number of witnesses or restricting the witnesses, and limiting the number of people who have standing, even the commissioner. I was just wondering if you could expand on why it is you are making these recommendations.

• 1050

Mr. Howard Wetston: When I sat on the Federal Court of Canada, I was tired of sitting at six-month trials. That may be part of the reason.

I'm not making that recommendation because I think it's necessarily something I would put in the bill. What I was saying, sir, is that I think you could design provisions that might go towards reducing the costs, because I know that's a concern. I was simply flagging some possibilities, recognizing that whenever you do something like that, you do restrict the opportunity for a full evidentiary development of the case.

I want you to understand that I think the facts at issue in many of these cases are often quite clear. It sometimes comes down to a couple of issues, and the couple of issues may involve difficult economic concepts like what market power may exist or what market definition you're looking at to determine whether this will substantially lessen your competition.

I think there are better ways of doing it than, for example, what happened with Superior Propane. There were 70 witnesses who were called, including a lot of lay witnesses. I don't know the reason the commissioner would do that. I'm sure it was very justified, but I don't think you need to do that in a private access case.

My suggestion is that we look, for example, at the European Union. There they do a full merger review from beginning to end in four months, so there are other regimes in which limitations are provided in order to have timely disposition. We don't do that.

When I talk about discovery, I still believe discovery is a wonderful tool. It's a great tool for getting admissions in civil cases and for fact-finding in civil cases. But if you believe this is a part of the public law, in part being enforced by private prosecutors, then I'm not sure why you want to have full and open discovery as you might in a purely civil case in the courts.

It's just a suggestion. It may not be one that you like, but you might be able to limit the discovery, for example, in a pre-hearing conference with one of the tribunal members by deciding you only need three days of discovery on several issues and knocking counsels' heads together to get that agreement. It's just that thought I'm providing you with.

The Chair: Mr. Dillon

Mr. John Dillon: I just have a quick follow-up to that. One of the concerns that's been raised with respect to the ability to use this for strategic litigation is exactly that concern—namely, that companies that want to find out more about their competitors will get discovery through this process. I'm not necessarily suggesting that Mr. Wetston's proposal is going to solve that problem, but that is a big part of the problem.

Mr. James Rajotte: Actually, that's where I was going. In your exchange with Mr. McTeague you said that the safeguards that were in Bill C-472 were not substantive enough, but you seemed to indicate that there were safeguards you had in mind that would safeguard private access. I'm just following up on this. Would Mr. Wetston's suggestions be enough, or do you have other ones?

Mr. John Dillon: The reality is that we have debated this, as I'm sure Mr. Kennish and his colleagues have within the CBA, and so far we haven't been able to come up with a set of safeguards that would satisfy people in this respect.

As I understood Mr. Wetston, what he was suggesting was to limit discovery so as to limit the costs of bringing these actions, which is obviously one of the concerns of private business. However, it doesn't get, as I said, to the fundamental concern about people who are bound and

determined to use this for strategic litigation to get more information on their competitors; this will be a form of compelled disclosure.

Mr. James Rajotte: So you don't have any safeguards at this point.

Mr. John Dillon: Not at this point, no.

The Chair: Thank you, Mr. Rajotte.

Mr. Howard Wetston: If I may, can I offer a suggestion on that point?

Discovery proceedings are not simply random exercises in getting anything you want. You can ask the question, but counsel will tell his client not to answer it. If there's a dispute, you go before the court or the tribunal, and a decision is made as to whether you need to answer the question. There just may be areas you can't get into because you're not going to get into those areas that have nothing to do with the issue.

There are ways of handling it. I'm not saying it's perfect. Our system is not perfect. What we're talking about is the adversarial system; that may be the problem, but we want to preserve it. If you want to preserve the adversarial system and still provide an opportunity for access, then there are trade-offs. I agree with Mr. Dillon. It's not perfect, but I think it's better than not having the access provision.

The Chair: Mr. Kennish, you wanted to respond.

Mr. Tim Kennish: I'd just like to wrap up with one further thing. I think that most people would acknowledge that in today's environment, without changes to the way in which the Competition Tribunal operates, the expectation would be that if you were going to bring a private access case in a contested situation, you're looking at a year before you get a remedy and are probably well into several millions of dollars in costs in pursuing that kind of relief.

• 1055 

I think that's in part what Howard is getting at. He's not necessarily anxious to abandon ship on the rule of law, but there is a cost in terms of expeditiousness of proceedings and in terms of the ability to get justice, if that's what you want, given the limitations on resources. You know, is the game worth the candle?

The Chair: Mr. Wetston, do you want to say something else?

Mr. Howard Wetston: It might help the committee if I could make one other comparison here.

First of all, we're not talking about the criminal law. We're not talking about respondents having to make a case or having the full panoply of charter rights in a proceeding. We're not talking about making full answer in defence.

The reason we're not talking about making full answer in defence is that there's no quasi-criminal proceeding here like we have under the securities law, where an individual comes before the commission on market manipulation or insider trading, or some form of securities act violation in which we give respondents the full panoply of procedure. We would not cut them off, because it's important for them to make full answer in defence.

That's not what this is about. It's a reviewable trade practice, and parties should have the opportunity to go and the tribunal and the law should have the means to preclude frivolous actions and long, drawn-out proceedings that are not in the public interest. So I'm simply reminding the committee that this is the kind of thing we're talking about here.

We're not talking about liability in civil cases either.

The Chair: Mr. Rajotte, do you have one more question?

Mr. James Rajotte: Professor Ross, you talked about section 75, refusal to deal. You said it should include a competitive-effects test. Then when you were discussing proposed section 103.1, you said to focus on protecting competition, not on protecting competitors, and you indicated that the conditions that were in there could actually be good, clean, but tough competition.

That's a tough question for the committee, which I've tried to ask as many witnesses as I can: How do we distinguish between good, clean, but tough competition and anti-competitive behaviour?

I don't know if you have a simple, good answer to that or whether there are alternative criteria you suggest we put in the bill to replace this set of criteria.

Prof. Thomas Ross: You're quite right. There's not an easy answer for when competition is too tough or when it crosses the line and becomes unfair.

In general, economists want to see efficient markets, prices close to the costs, allowing for reasonable returns for investors, and things like that. We consider competition good when prices stay down more or less permanently, close to their level of costs. We consider it to be perhaps excessive if there's a temporary dip that is only meant to eliminate some competitors so that, later, prices can come up.

My specific thought on proposed section 103.1, for example, which relates to the interim orders, was that proposed subsection 103.1(2) does suggest that the tribunal could make an order if there is, under proposed paragraph 103.1(2)(a), "injury to competition that cannot adequately be remedied". That's okay, because it mentions injury to competition. But my concern is proposed paragraph 103.1(2)(b), which just says "a person is likely to be eliminated as a competitor"—stop.

If I had my preference, that would continue a little bit to say "with the likely effect that competition would be lessened". So if you just knocked somebody out but there's 100 other people, that's no reason for an order; but if you've knocked somebody out and there's only two, maybe there is a reason for an order.

Similarly with proposed paragraph 103.1(2)(c), which actually, in some sense, is more problematic:

> a person is likely to suffer a significant loss of market share, a significant loss of revenue, or other harm that cannot be adequately remedied by the Tribunal.

Well, competition does that to people. It knocks down their market share and hurts their revenue sometimes. But if we stuck a line in there, saying "with the likely result that competition was lessened", I'd feel a little bit more comfortable.

Mr. James Rajotte: Can you tell that in even a short period of time, one to three years? If, say, you have four big players in a market and you lose one, won't it take three to five years to determine the effects on competition?

• 1100

Prof. Thomas Ross: Obviously, if it's for an interim order, you have to make a pretty quick judgment. But it at least helps rule out some really silly cases where, as I say, you have 100 competitors and some small guy is complaining, and he's going to get knocked out, but there's lots of other competition. Then you just don't grant an order in a case like that.

It is true that benefit of the doubt should maybe go in favour of granting the order. If it looks plausibly like there could be a lessening of competition, then that's fine, you can have your full hearing to see whether there should be a more permanent order.

These are difficult questions. It's the kind of thing I get asked when I provide advice to the bureau, in many cases: How badly is competition going to be hurt in a case like this, when we go from four firms to three?

You have to look at a whole bunch of things, like how easy is it for new people to enter? What's the history of competition in this industry? Have the firms been aggressive toward one another in the past? How easy is it for imports to come in?

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

I'm going to turn now to Mr. Bagnell.

Mr. Larry Bagnell (Yukon, Lib.): Just before I start, I would like to say that I agree with my colleague here on the game cards. In fact, I want to not widen the net, but make the existing provisions even more stringent to catch the problem she's talking about.

Related to regulation, I'm one who thinks regulation doesn't really work that well, when you have 20%, or 30%, or 40%, or 50% increases in price and inflation is at 3%. That's why I think competition has to be made to work well.

I just want an short answer. I'm curious about process. Mr. Kennish and Mr. Ross, basically you work full time in this field. Did you provide any earlier input into this process? Did you get a chance to provide input to the people developing this, the bureaucrats? Because you work so much on this, in my opinion, it might be useful.

Mr. Tim Kennish: On Bill C-23?

Mr. Larry Bagnell: Yes.

Mr. Tim Kennish: No, not personally, but some of these ideas have been floating around for some time, and we have commented on prior iterations of this.

Prof. Thomas Ross: Basically, it would be the same answer for me. In my own professional work, I've written a little bit on section 45, certainly, but also section 75, on refusal to deal, but I didn't provide any formal input into this process at any stage.

Mr. Larry Bagnell: Okay.

We've had a couple of hours of the standard position, so I want to play devil's advocate for a second.

My first question is on resources available to the bureau, in the context that, if there are not enough resources available to the bureau, and the existing system with the tribunal catches the major or the most serious issues, or if private access on average would have less serious issues, if the major issues can't all even be dealt with, then if you opened it to private access and diluted the seriousness of the issues that could be dealt with at all, because there aren't enough resources, wouldn't that make less effective the reduction of anti-competitive behaviour?

Prof. Thomas Ross: I'm not sure I quite understand the question. You're asking if.... I think many of us do believe that the bureau has been under-resourced over the last several years, particularly since the new act, which gave them a whole lot more to do without the people to do it, without the resources to do it.

Your concern seems to be, if we provide private access, this will somehow drain resources away from important cases. Is that your view?

Mr. Larry Bagnell: Yes. If there's not enough to start with, then maybe even fewer of the important cases would be done.

Prof. Thomas Ross: If the bureau's budget stayed the same and it didn't have to particularly respond to requests, if it could more expeditiously off-load—I suppose I should choose that word carefully—some of the responsibilities for enforcement to private parties, that, in a sense, preserves more resources for the big cases. So I would think that should actually help.

Mr. Tim Kennish: If I may add, I think the bureau is under-resourced, but a good deal of their enforcement effort is unavoidable yet dedicated to merger review, which is part of their process.

One of the difficulties is the fact that we haven't had any change in the thresholds for review since the legislation became effective in the mid-1980s. That has been proposed, but it hasn't happened, partly because of resource limitations.

• 1105 

As for the other areas, I think everybody would agree that cartels, and abuse of dominance, are of a higher order of magnitude than some of these other matters, important though they may be. It's not surprising to me that the bureau has moved in the direction it has, with control of merger abuse and enforcement of cartels as its primary objectives.

In past position papers, particularly on private access, the bar has argued—and I think they got tired of arguing—that there ought to be more money to fund the bureau's work. If they have a job to do, they shouldn't be constrained by lack of resources. But I think that isn't being pushed any longer, because it seemed to be playing very well.

The Chair: Thank you.

Mr. Wetston.

Mr. Howard Wetston: In September, I gave a paper with Tim at the Canadian Bar Association in which I compared the Securities Commission's budget with the bureau's, and ours is about double.

Touché.

The Chair: Mr. Dillon.

Mr. John Dillon: I think the issue of under-resourcing has been discussed. Our organization doesn't have a formal position on that issue, but I think it's acknowledged by a number of people in the business community.

I want to deal with your particular concern, because if this private access goes ahead, as I understand it, presumably most people would take their case to the bureau first...and only if the bureau decides not to proceed with it. So I'm not sure we wouldn't run into your problem.

And presumably, as well, if the tribunal entertained one of these cases, it would seek to have some input too. Possibly the bureau itself would choose to be part of any private action.

So, yes, I think this is going to increase the bureau's resource constraints, unless significant new resources are put in.

The Chair: Thank you.

Do you have a question?

Mr. Larry Bagnell: Yes, a short one for Howard.

You talked about other remedies, and not going the whole hog with the prosecution because it's so difficult. But if you put in other potential options, would it not be like sentencing: you can get ten years, five years or one year, but for most cases the judge will put the sentence somewhere in the middle? If you brought in weaker options, is there a chance that some serious cases that should be prosecuted to the full extent might end up with a less serious penalty?

Mr. Howard Wetston: I think that's a good question, but I don't think it's likely to happen in this area.

If we're simply talking about limiting areas of private access to the vertical restraints of trade, I don't think that's likely—because there's not much going on there anyway. I would agree with you on the example of cartels and price checks. I have raised this issue before, and asked why there appears to be less enforcement of conspiracies to reduce competition in Canada. I think there are probably some good reasons for it, but I do ask the questions. Those conspiracies are very difficult to detect, and very difficult to prosecute.

But in the area of vertical restraints of trade, other than the issues my colleagues have described, and that you have to grapple with, from the point of view of penalties I think it's quite benign. Frankly, there's not much going on.

The Chair: Thank you.

Thank you, Mr. Bagnell.

Before I go on, a couple more people would like to ask questions. And I want to clarify a few things before I move forward.

First, Mr. Kennish, in your paper and in your discussions with Ms. Torsney about deceptive notice of winning a prize, I thought that the non-application section under proposed subsection 53(2) would alleviate many of the concerns. In your brief, you say the proposal would prohibit virtually all standard promotional contests. I don't see that with the proposed subsection. It clearly talks about non-application, where you're okay if there's adequate notice, or fair disclosure, or a skill-testing question, or if you get some prize or other benefit.

So I'm a bit confused between the statement in your brief and what I see in proposed subsection 53(2). Maybe you could enlighten me.

Mr. Tim Kennish: I'm not familiar with that part of the brief, since the draft was generated by our marketing practices group. My understanding is that the exempting provision doesn't take away sufficiently from the application of the prohibition, in circumstances where there is an offer or promise of a prize and as a condition of getting the prize, a requirement for entry, or an option of entering through a purchase, or being required to do something.

• 1110

I'll be happy to follow up on that.

The Chair: That would probably be the best thing. Maybe we could do that, and have some dialogue with the group, because I'd like to get that clarified. If there's an error in the way the legislation is drafted, then we need to fix that, because that was not the intention...that adequate and obviously fair disclosure would allow contests to continue.

Second, I also want to pick up on something you said earlier, Mr. Wetston, about whether it should be in the act. The proposals or suggestions you mentioned: should it be up to the tribunal to decide, or should it be in regulations or guidelines? Do you have a firm opinion on that, or is it something we should just recommend?

Mr. Howard Wetston: That's a really good question, and I think it can go both ways. I personally would like to give the tribunal as much flexibility as possible in designing its rules to accommodate this area, should the government decide to include it in amendments. I think that's a better result.

On the other hand, some of these may require a legislative solution, so the tribunal is able to do it. Because if it tries to limit discoveries, it's going to run up against a brick wall with respect to the litigation bar and the kinds of issues we raised earlier. If you're serious about it, I think it would be better to pick the major areas and legislate it.

Let me give you an example: all matters must be concluded in three months. I think that should be in the legislation, because I doubt very much if that would happen in tribunal rules of practice. So my advice would be to leave as much as you can to the tribunal and its rules of practice, so it can fashion them to suit the cases.

The Chair: One last thing before I move on. I'm listening very attentively to what's taking place, and to what Ms. Torsney pointed out earlier on the border issue. I have grave difficulty with this. I see companies in Windsor and companies in Michigan with the same owners, technically, and I see businesses in Windsor that don't have a right of action and businesses in

Michigan that do. It could actually be a business in Windsor that now has a subsidiary in Michigan that has a right of action against the parent in Michigan, but their company in Windsor doesn't. Something doesn't seem right with this.

I don't agree that we want to go the same route as the United States, with treble damages. But at the same time, as a lawyer trained in both Canada and the United States, I can't understand why we think it's a bad thing to give people and companies access to protect their ability to be in business.

I'm not sure how to resolve that. I've listened to all the arguments, and with all due respect I haven't heard a strong argument for why we shouldn't. Other than that, there's not a consensus. I guess that means there are people who are for and opposed in many organizations. But I really haven't heard a strong argument for why it's a bad thing. I can't imagine it's a bad thing to have a right of action.

I'd appreciate any comments on that. Coming from a border community, about 95% of my time is occupied with what's going on at the border right now. Companies in my riding have businesses in both Canada and the United States, and they're having to make decisions. I wonder if we think this is a bad thing, or if we just don't think the legislation is there yet. But when we've discussed it for 30 years—sometimes change is good, and maybe it's time to make a change.

Mr. Wetston.

Mr. Howard Wetston: If I might add to your consideration...and obviously your riding is Windsor.

The Chair: Essex County, actually.

Mr. Howard Wetston: Essex County is up against Michigan, in that area.

Just so we don't lose sight of it, I always like to point out that in 1993, when I left the Competition Bureau to go to the court, we were doing work on trade, competition policy, globalization, and how innovation was changing our markets. We were trying to decide whether Canada really wanted to participate in a global marketplace or just continue to function with small, inefficient plants behind barriers.

• 1115

Those decisions were made a number of years ago, and I think we're in a different economy today—thank goodness. But at that time, 80% of all Canadians lived 100 miles from the border. Maybe it's 85% now. So I think your experience is not terribly different from the experiences of a lot of other people in Canada with respect to the impact of U.S. competition, and being on a level playing field.

But your point is very well taken, and my only response is to recall that most of us do live near the U.S. border.

The Chair: Thank you.

Are there any other comments?

Mr. Dillon.

Mr. John Dillon: I think we could obviously get into a much longer discussion of the complexities of the Canada-U.S. relationship. But it's interesting, because my organization usually gets accused by our critics of being in favour of total harmonization with the U.S. and not retaining any advantages as Canadians. That is fundamentally *not* our position. As I said earlier, I think this is one area where we consider our comparative lack of litigiousness to be an advantage over the United States. Our companies actually favour that.

So we don't have to adopt everything the United States does, particularly if we find those policies, laws, or practices not as efficient and helpful in improving productivity and competitiveness in Canada.

But what we've been arguing about is not whether companies should have rights, access, and remedies. Clearly they should. And as our other panellists have mentioned, in many cases there are remedies in law, and there are contractual disputes. What we've really been arguing about is whether this kind of provision could be abused, and how we could control that abuse in a way that promotes competition rather than inhibiting it.

The Chair: Thank you.

I'm going back to questions, starting with Mr. Penson.

Mr. Charlie Penson: I wonder if the panel members have seen the OECD report that talks about the Competition Bureau and the tribunal. Essentially, it comes down pretty hard on Canada for being ineffective in competition law.

I want to discuss that, particularly as it relates to private access and how that might or might not improve the efficiency of Canada's competition law. I'm going to the airline industry again. Mr. Ross talked about the airline industry being deregulated, but I would offer a rather different viewpoint: although the airline industry may have started down that road, there's still significant regulation.

I'm wondering how the right of private access would improve a situation like the WestJet case, which has been delayed for six months for a hearing, and now for a further six months by the Competition Tribunal. The case won't be heard until spring.

For background, a couple of airline start-ups have gone broke in the last year. One airline has an 80% monopoly; it has been accused of anti-competitive behaviour by WestJet; and the case takes at least a year to be heard. Would the right of private access help that situation any?

Prof. Thomas Ross: I'll take a stab at that. I don't think Bill C-23 would help any, or the proposed additions related to private access. Those kinds of cases typically fall under section 79, abuse of dominant position. As I've suggested, that might be the next place to introduce private access.

But it is a big area, and I favour the idea of starting small, with access to sections 75 and 77, and not 79 yet. Those are the kind of cases that come naturally to mind as areas where you might want to provide some access for parties damaged by predatory behaviour. But the bill that's before you, and the contents of Bill C-472 as well, won't help.

Mr. Charlie Penson: Professor Ross, if that was applied, and if we did include it in section 79, would it help that particular case?

Prof. Thomas Ross: It would provide an alternative outlet. WestJet, for example, could take the case itself, as opposed to relying on the commissioner to take the case.

• 1120

Now, I think the commissioner sees significant public interest in this case, and he's going with it. So the next question is, could the case go any better for WestJet...? If it were running it itself, well, it would be paying its bills, which would be worse for WestJet. Or it would be paying more bills; I'm sure it's paying some.

Could it make it move any faster? Well, I guess—

Mr. Charlie Penson: That's really the point here, isn't it? In these cases, companies can fall very quickly in this kind of market condition. That's the whole point in having effective competition law.

Prof. Thomas Ross: Right. The commissioner can now ask for these interim orders—and has, in fact. Under the previous amendments, that would not be available to private parties. I don't think there's anything in the proposed Bill C-472 or anything that provides for interim orders like that. So in some sense the commissioner has more tools to address this quickly than does a private party, even if you extend it to section 79, I guess.

Mr. Charlie Penson: But that hasn't happened either.

Prof. Thomas Ross: The commissioner issued interim orders to Air Canada, at one point, to withdraw some special fares it was offering—I forget what they were called, because they have clever names for those things—and then threatened another order. Air Canada just voluntarily withdrew a fare at one point.

But the process isn't as fast as you'd like, that's for sure.

Mr. Charlie Penson: I guess the point is, this would not be any magic solution, either.

Prof. Thomas Ross: It would not.

Mr. Charlie Penson: It could be a long drawn-out process. Even if there was a private access, it wouldn't really help in cases where there needs to be a timely decision made, or may not help.

Prof. Thomas Ross: No,

Mr. Howard Wetston: Not unless you put in more expedited provisions along the lines we were talking about.

I recommended before that you put in a five-year review. I really suggest you do that for private access. It will give you an opportunity to expand it, if you think it's appropriate, if it's working.

It will give the committee an opportunity to focus on it. It will give the government an opportunity to think about it. I've had some experience with that in the securities area, and I think it's very effective. It really focuses the mind when it's in the legislation.

The abuse of dominance is not being considered here. That's what this is all about.

Mr. Charlie Penson: Would you suggest that it be included?

Mr. Howard Wetston: I haven't given enough thought to it. I agree with Tom, to some extent. But I agree that if WestJet had access to the tribunal directly, was in control of its own proceedings, and there were more expedited processes in place, it might take a year, but I have a feeling it would take less time than that.

There's a lot involved, even with the public interest issues the commissioner is proceeding with. They may be completely valid. But don't forget, WestJet's in the business; they know what they're facing. The commissioner is not in the business. He's a public official.

In my opinion, the person who's in the business has the most to win and the most to lose. People who have that expertise are in the business. That's not to say the Competition Bureau doesn't have a lot of expertise in this area, but you could also help by decriminalizing predatory pricing and price discrimination. If you decriminalized predatory pricing in the area of the airline industry, you'd probably have a better opportunity to get speedier resolution of some of these issues, as well.

Mr. Charlie Penson: That would be a civil action.

Mr. Howard Wetston: Exactly.

Mr. Charlie Penson: It wouldn't have to go through the Competition Tribunal, and so on.

Mr. Howard Wetston: It could go to the courts, and maybe you could put it into the Competition Tribunal—but that's for another day.

The bottom line is the scheme might be a little off for what we might need, to have a really good functional competition law. Mr. Dillon says it's working pretty well. I don't disagree with him. I was part of this process in 1986 and I like to think it's working well, but it could work better. We're all searching for a better law, I believe.

The Chair: Mr. Dillon, do you wish to respond as well?

Mr. John Dillon: I'm hearing concerns about the process and the time it takes. I'm not convinced that private access is going to shorten that time very much, unless you're also prepared to introduce the kind of procedural changes Mr. Wetston is suggesting. There are at least two parties in all these disputes, and the other side will want to ensure it has access to its full rights and its ability to make a defence, as he suggested earlier.

The issue is the procedure you take before the tribunal, whether it's the commissioner himself who brings the case or a private party. The reality, as I understand it, is that the process today is quite slow. Maybe there are some ways to fix the tribunal process, so people can get access.

I appreciate, especially in cases such as WestJet, there is a need—that's why there are the provisions for interim order—to deal with these things expeditiously. But it's the process, and I'm not convinced that private access is going to speed that up.

• 1125

Mr. Charlie Penson: You may not have the answer to this question today, but why have a quasi-judicial body, the tribunal? Why not just make it a full court hearing?

Mr. Howard Wetston: Do you have an hour?

Mr. Charlie Penson: No, but I wouldn't mind you supplying some kind of opinion.

Mr. Howard Wetston: From about 1976 to 1986, when we made the first set of amendments to the Competition Act where we put in these vertical restraints of trade, and then improved everything in l986 by decriminalizing the merger law and decriminalizing monopoly law.... You have to recall that in 1986, in order for you to proceed with a merger, it was criminal law and so you had to go to the courts and prosecute a merger and show it was detrimental to the public interest.

I believe you're from the Maritimes. No? I thought there was a representative here from the Maritimes, where I'm from originally. The Irving newspaper case, which is a very famous Supreme Court case, was prosecuted under the criminal provisions of the Combines Investigation Act, because it was criminal law.

So they tried to find a tribunal resolution, and the government looked at different models around the world and tried to decide whether they would just go to the courts as they do in the United States, or the FTC as an alternative, as they also do in the United States, or develop other kinds of models. The decision was made that we'd get the best of both worlds if we mix a judicial model with an administrative expertise. So we'd have an expert tribunal with judges chairing the panels being able to make rulings on the law and then put members like Tom Ross on the panel who have the expertise in economics, and others in accounting and business. This was the decision that was made, a hybrid tribunal.

So that's a two-minute historical rendition of what went on.

The Chair: Thank you.

Mr. McTeague, finally.

Mr. Dan McTeague: I believe Mr. Kennish had another comment.

The Chair: I'm sorry, Mr. Kennish; I didn't see that.

Mr. Tim Kennish: I would add to this that what Howard said is correct. From a procedural or process point of view, the Competition Tribunal operates in a very court-like manner. It's quite formal. It does apply most of the safeguards and procedures that a court employs, which is one of the reasons their processes take quite a long time.

The Chair: Mr. McTeague.

Mr. Dan McTeague: Madam Chair, I have two questions.

The first is to all of you, and I'd ask you to answer as briefly as possible. We were discussing the issue of better allocation of resources, or the more appropriate use of resources, that are made available. There's much discussion over the question of how much is expended on

conspiracy, abuse of dominance, and of course on merger review.

I'd like to turn it to a different side to talk about the allocation of resources to the tribunal. In your opinion, is the tribunal effectively used as it is today? Could they be doing more? And does the private access correctly respond to the true or appropriate role of the tribunal?

That's the first question. I'll ask the second one after, Madam Chair.

The Chair: Professor Ross.

Prof. Thomas Ross: I'll start.

Mr. McTeague, I don't want to pretend to be speaking for anyone else, but just from my discussions with my colleagues, lawyers and economists working in competition policy, I think there is some disappointment with the tribunal model as developed. It's not that it's not fixable, but there's a feeling that it's more formal and slower than it needed to be, with the result that people are less interested in going to it, which means it hasn't been maybe as busy as it should have been. More stuff has been settled in the director or commissioner's office between the parties, because no one really wants to be involved in that process.

Some of what you're doing in Bill C-23 is going to address that, I think. As the current commissioner said, it does give the tribunal tools to control its own process to a greater extent. I don't know that there's any particular lack of resources at the tribunal. Other people here might know more about that than I do.

There is a question as well about the model of mixed lay and judicial members. I like it very much in principle, but the hard part is getting good members. That's not to cast aspersions on any particular members, but it's difficult for people, especially part-time lay members, for example, to drop whatever they're doing to come hear a case, with the result that you get people who are perhaps retired, which isn't meant to be good or bad. No one's ever asked me to be on the tribunal, but I'd have to say no, for example. It's probably better for Canada if I don't. So there are some bugs to work out, I think, in maybe making it work more effectively.

I'll leave my remarks at that.

• 1130

The Chair: Mr. Wetston.

Mr. Howard Wetston: I'm noticing that this committee asks difficult questions.

Mr. McTeague, there's no easy answer to that, although I don't have a sense that the tribunal resources are underutilized, because I don't think they have enough cases to be underutilized. So if the tribunal's purpose was not to require the commissioner to become the *pro tem* tribunal, which it has become, by resolving most issues inside the bureau in a non-public manner except for maybe a press release, then that result was not what was considered when the law was passed.

There was a real belief in 1986 that this tribunal would be used, it would not be as judicialized, despite judges being on it, and that it would be more efficient or effective. I don't entirely blame the tribunal, it just hasn't worked out that way. I think we need to recognize that there is

a public policy problem here, and that we need to try to solve it. So the question is, how do you solve it? Is it by doing something to the tribunal? Is it by giving it more work so that it can develop cases that are in the public interest?

We need a body of jurisprudence in this country. Lawyers like Tim Kennish are giving advice every day to clients without proper guidance from either the courts or the tribunal. There isn't enough. The guidelines produced by the commissioner are just not enough. With all due respect, I started that process and issued the merger enforcement guidelines in 1990. I issued the predatory pricing guidelines. I issued the price discrimination guidelines. It is not enough.

So in terms of the question of how do you get enough, there's only one way. You can decide that you have the tribunal and you want it to work, and you make sure it has the resources, the rules, and the cases and then you'll get the result. If it doesn't work, this committee can look at it in five years and decide to change it again.

The Chair: I have Mr. Dillon next.

Mr. John Dillon: I recognize there's been a lot of discussion, certainly in the legal community, with respect to whether there is enough case law in this area, and the reality is, as Mr. Wetston suggested, that the vast majority of complaints in cases are settled within the commissioner's office by consent orders, by agreement between the parties. I dare say that for a lot of the questions that would be addressed through this private access, dealing with sections 75 and 77, the reality is the commissioner can deal with these companies and say, just a minute, this particular behaviour or refusal to deal, whatever the case might be, is really skirting the line here, and the behaviour is changed. So the reality is that's the way a lot of these cases are dealt with.

I believe it is a view of the bar—I'm not absolutely sure it's shared by the business community—that we need more litigation, and more cases, and more case law. I think there is a need for clarity in a number of areas. That's what I've been hearing from our members and from people who deal with this. As Mr. Wetston suggested, there are guidelines, but it's not always clear in all instances. So there is not an entirely satisfactory situation, but on the other hand, I think there is a body of practice that is building up within the bureau that does provide a fair degree of guidance as to what kinds of practices are acceptable. I'm not convinced that simply bringing more private actions to get more cases before the tribunal is the best way to deal with this issue.

The Chair: Mr. Kennish.

Mr. Tim Kennish: I'm here in a representative capacity, so I'm a bit constrained in terms of not having instructions in responding to your question, Mr. McTeague, but from a personal point of view, in my own practice we don't really want to end up in front of the Competition Tribunal for a variety of reasons, which certainly include the time it takes and the costs associated. So just about any other solution is to be preferred in situations where you have to get to a particular point. Of course, if you're being challenged over something that's happened in the past, and is ongoing and is important to you, then you're confronted with that being the only option. But I think the fact it's a slow process, it's costly, and so on is difficult.

One procedural area that has historically plagued enforcement is the problem on consent orders, and I think that's been effectively fixed in this bill. It's an important change and it will allow things to get resolved more quickly.

• 1135

Mr. Dan McTeague: This is a a brief question to Mr. Wetston since you, sir, served as a commissioner or director in a research investigation in the past. I would ask what your views are, sir, on the commissioner's power of reference on matters dealing with competition to the Canadian International Trade Tribunal, which is a proposal put before this committee by me.

Mr. Howard Wetston: Refresh my memory on this, Mr. McTeague. Is it the reference to the CITT by the commissioner?

Mr. Dan McTeague: Right. The commissioner would have the power to refer matters dealing with sectors of the economy, or competitive impacts on particular sectors of the economy, to the Canadian International Trade Tribunal, rather than simply the finance minister or another minister.

Mr. Howard Wetston: Yes.

Mr. Dan McTeague: This is of course referring to the issue of the Conference Board study and the difficulty we had with it last year.

Mr. Howard Wetston: I would be unfair to you if I commented on it, because I haven't really given it a lot of thought. I would rather not engage in a professorial discussion here. Mr. Ross probably has a better response to it than I do.

I will say this, though. When I was in the Competition Bureau there were a number of trade-related matters. Mr. Kennish and I were involved in one, a very lengthy one as I recall, that ended up in a consent order. It certainly had as many trade components as competition components, and we had to seek a resolution to some extent on the trade side to resolve the competition side.

Am I stating that correctly?

Mr. Tim Kennish: I'm having trouble recalling the case you're referring to.

Mr. Howard Wetston: I'll remind you in the hallway.

I think there's no question—and I'm not sure what drove your desire to propose this—that there are many competition issues associated with trade-related issues, and it's hard to know sometimes whether the remedy is a trade remedy that will alleviate the competition problem or vice versa.

I'm sorry; I can't help you any more than that.

The Chair: Okay.

Mr. Dan McTeague: Madam Chair, perhaps if anybody wishes....

The Chair: No, I have another question.

Mr. Dan McTeague: There's no other question here, but if the witnesses wish to provide this committee, Madam Chair, through you, any of their observations after today, then that would be welcome.

The Chair: Certainly, but I have Madame Girard-Bujold first.

Madame Girard-Bujold, please.

[*Translation*]

Ms. Jocelyne Girard-Bujold: Thank you, Madam Chair.

Mr. Kennish, you represent the Canadian Bar Association. You are chairman of the National Competition Law Section. In your brief you stated, in Appendix A entitled "Private access" that the members of that section are divided on the issue of whether such an amendment is desirable or not. Earlier on, you outlined some of the arguments put forward in that regard. You also stated that by granting private individuals access to the tribunal, we were bringing about changes to the Competition Act and broadening the spectrum of proceedings that could be introduced under it.

I wonder if you would, as a lawyer—since what we have here is a piece of legislation based on October 30, 2001 texts drafted by lawyers—why the members of your section, of your association, are divided on this issue. Why do you state in your brief that this is what is going to happen? Are a majority of your members of the same opinion?

[*English*]

Mr. Tim Kennish: We have 1,300 members in our section. We have not canvassed the whole section to get their views on these issues, which are quite complicated and cover a broad range of issues. What we did when this initially came up was get people together who knew the most about the area, either from experience in litigating cases before the tribunal, or from other related areas of competition law, or from being just generally knowledgeable.

I would say the opinion was split down the middle as to whether or not people were supportive of the proposal. I'm really just saying we don't have a position on whether the case has been made out for reform in this area. But if it is decided to proceed with it, we've made some observations about how you might go about doing it to make sure the concerns about strategic litigation and so on are addressed.

The Chair: Is that it?

[*Translation*]

Thank you very much.

[*English*]

I have no other questions on my list.

I want to thank you all for being here this morning. You've left us with a lot of thought-provoking answers. It's been a very interesting discussion. The researchers obviously will have a lot to do now, as well as all the members on the committee, in trying to come to some type of consensus as we move forward.

• 1140

If you do have further comments as the proceedings continue, please don't hesitate to send

them to the clerk.

I will advise you that it is our intent to move to clause-by-clause in the week of November 20. The House won't be sitting the week of November 11, so our last hearings, technically, as things stand right now, will be the week before November 11. This will give us all about 10 or 12 days to decipher everything we've heard before we move to clause-by-clause. That being said, we may have other witnesses and may delay clause-by-clause by a day or two when we return.

We are trying to ensure that everyone has a chance to listen and hear and respond. So if you do have any comments, please forward them to the clerk. He'll make sure we get them.

I want to thank you all for joining us. We look forward to meeting with you again in the future and hope some of you will participate in our round table when we finalize our interim report in December. Thank you very much.

The meeting is now adjourned.



This is Exhibit “36” 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
CHAMBRE DES COMMUNES
CANADA

INST COMMITTEE MEETING

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October 24, 2001

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STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Wednesday, October 24, 2001

• 1519

[*English*]

The Vice-Chair (Mr. Walt Lastewka (St. Catharines, Lib.)): We will begin testimony on your order of the day, Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

I take it that some members are so used to coming here at 3:30 p.m., they're not reading their agendas, but I appreciate the witnesses coming on time. So I would like to begin the testimony.

Mr. Janigan, please.

Mr. Michael Janigan (Executive Director and General Counsel, Public Interest Advocacy Centre): Thank you, Mr. Chair.

• 1520

We appreciate the opportunity to attend today and give submissions concerning Bill C-23 and the amendments thereto. The Public Interest Advocacy Centre has participated in the current process that has preceded the committee's deliberations and has also submitted numerous briefs and reports over the past 25 years, dealing with competition law from the standpoint of the ordinary Canadian consumer.

I wish to chiefly address the issue of private-party access to the Competition Tribunal, but several other proposed provisions are deserving of comment. We support the provisions that will allow cooperation with foreign states for the purpose of ensuring compliance among substantially similar competition law regimes.

We are cognizant of the concerns regarding confidential business information, including business strategies and processes. However, it is equally important that confidentiality claims do not shroud the sharing of information that may give rise to meritorious prosecution of anti-competitive conduct by a foreign government. Information should not be confidential merely because of adverse consequences in competition law in another state if it is disclosed.

We also support the provisions of Bill C-23 prohibiting misleading conduct by direct mail and Internet marketers, to the effect that the recipient of a communication has won a prize but is really being set up for further solicitation. There appears to be considerable anecdotal evidence that this provision is responding to a genuine consumer problem that is occasionally having particularly harsh consequences, particularly upon the vulnerable consumer. At a minimum, the expurgation of this shopworn practice may help minimize cynicism concerning legitimate marketing practices, particularly in our youth.

Bill C-23's provisions giving the commissioner authority to seek an ex parte interim order of the Competition Tribunal to stop anti-competitive conduct are important and possibly long overdue weapons in the arsenal of remedies available to the commissioner.

Markets can move quickly, and the impact of anti-competitive conduct by a dominant player on a new entrant competitor can be devastating. Sometimes survival may depend on obtaining relief in days rather than weeks and months.

While we understand the natural reluctance to have any remedy, even an interim one, made without notice, we believe a careful balancing of interests allows for interim ex parte orders by the Competition Tribunal.

We note that the committee has before it amendments that would allow for declaratory or injunctive relief by private-party applicants, pursuant to sections 75 and 77 of the act, which deal with conduct involving refusal to deal, tied selling, and the like.

Before commenting on the substance of the amendments, I would like to first deal with the much debated principle of allowing private-party access to the tribunal. Commentators before me have noted the irony of having a statutory monopoly of enforcement set up in an act that has as its objective the maintenance and encouragement of competition.

There has been a rather extraordinary effort expended through the years to scare off advocates of allowing private-party access to the Competition Tribunal. For the naysayers this idea is a virtual sorcerer's apprentice that would unleash an avalanche of non-meritorious litigation on

successful businesses, with a view to obtaining in the tribunal what they couldn't win in the marketplace. Predictions of businesses crippled by years of expensive litigation brought by gold-digging barristers abound in the event that this model were ever adopted.

The remarkable thing about this little fable is the degree to which it has gained currency in the intellectual market of competition ideas. With respect, businesses are subject to any number of potential causes of litigation in the operation of their enterprises. Interference with contractual relations, products liability, actions for copyright infringements, actions by shareholders to compel a course of action by the board of directors—the list is near endless as to how parties can bring actions to obtain relief against businesses for alleged misconduct.

Many of these kinds of actions involve matters of public interest that may involve companion proceedings by the Securities Exchange Commission, the Attorney General, and/or provincial consumer ministries.

Are these rights of actions ever abused for strategic purposes? Yes, clearly. Does anyone think the litigation and competing claims between the McCain brothers was simply brought to adjudicate a difficult family disagreement? Of course, there are frivolous actions in strategic litigation, but no one suggests that the sole right to litigate for any of these matters be given to an official appointed by the government of the day. This is because we understand the value of the rights and the potential rights that these private remedies protect.

• 1525 

We design systems to discourage abuse, and we go forward adapting our commercial law to the circumstances of the marketplace, not walling off areas of public and private concern for bureaucratic initiative alone.

This quarantine of competition remedies has been allowed to take place because we have not been sufficiently concerned with the ramifications of anti-competitive behaviour. Potential legal expenses have been a greater motivator of policy than the potential harm done to consumers, innovators, and the market as a whole, by maintaining a bottleneck for access to competition remedies.

While the frequent expressions of trust in the commissioner by opponents to private-party access are heartening, it is instructive to note the asymmetric nature of that confidence. The same critics of vesting the commissioner with too much potential power, in relation to exchange of information with foreign states and the obtaining of interim orders, seem to be wholly content with allowing the commissioner complete discretion over the commencement of any Competition Tribunal remedy.

One would also note that the recent account in Saturday's *Globe and Mail* of the OECD report found that our bureau was lacking in independence and resources. Private-party access would help address both concerns.

As well, in our view there is little to commend the extension of private rights to merely the two sections that are subject to the amendment. Abuse of dominant position, given our history of promoting national champions, remains a key concern, particularly in recently restructured monopoly markets. We also see little reason to confine remedies to declaratory and injunctive relief.

I am prepared to entertain any questions concerning those submissions.

The Vice-Chair (Mr. Walt Lastewka): Thank you very much.

We'll now proceed with Democracy Watch. Mr. Conacher.

Mr. Duff Conacher (Coordinator, Democracy Watch): Thank you very much for the invitation to appear today before the committee on Bill C-23.

Democracy Watch has participated in the past couple of years in the consultations that were commissioned by the Competition Bureau and facilitated by the public policy forum on Competition Act consultations, and also in the industry committee hearings.

I will speak very briefly because we generally support what has been submitted today by the Public Interest Advocacy Centre, and we support, in particular, the creation of a citizen right to sue and take a case directly to the Competition Tribunal, without having to go through the current gatekeeper, the Competition Bureau.

We believe that any injured party should be able to apply for injunctive relief and damages for both criminal offences and reviewable practices under the act.

In addition, we believe that reviewable practices should be formally forbidden instead of merely reviewable, as they currently are in many cases, by the Competition Tribunal. In terms of penalties, we believe that damages should also be increased to include specifically punitive damages.

In terms of violations, we believe that changes should be made to ensure that price fixing and market division agreements should be, in a blanket rule, illegal.

On mergers, we believe that the threshold that triggers pre-notification should be significantly lowered, in terms of the parties and the type of acquisition that is contemplated, under part IX of the law.

In addition, as we noted when we were before the committee last year and released our report entitled "Revolving Doors, The Undue Influence of Corporate Lawyers on the Competition Bureau", we hope that in sending back the bill the committee will again, as it did in its June 2000 report, send a strong message to the cabinet, and particularly to the finance minister, that the funding for the Competition Bureau should be significantly increased to finally end the practice of repeatedly appointing lawyers from a few corporate law firms to assist or represent the commissioner in competition law cases.

• 1530 

The funding should be increased so the Competition Bureau can hire lawyers on staff who can develop expertise. Then these ongoing conflicts of interest and biases that have occurred in several cases, as documented in our report between 1986 and 1999, by having outside private lawyers working for the bureau will finally be ended.

The issue of corporate lawyers working for the Competition Bureau is a classic tale of letting the fox into the henhouse. Clear rules need to be enforced and adequate funding provided to the bureau to prevent this ongoing abuse of the public interest.

Returning to the key issue of creating a right to launch a complaint case directly with the tribunal, we believe Canadians should have this right to sue violators of competition laws, to help ensure, along with increased powers and penalties for the bureau and tribunal, companies comply with the rules.

Now you, as members of Parliament with this committee, have received this bill after first reading and have some opening to make such amendments, which we feel are very much in the public interest. We hope you will resist the very strong corporate lobby you face on the other side, made up of many companies that donate tens of thousands of dollars to the Liberal Party, and do something for all Canadians in this very important area that is somewhat obscure.

Most Canadians probably do not understand exactly how important the Competition Bureau is to them, in terms of their day-to-day interactions with companies. They would understand it if you cited cases where the Competition Bureau—in many cases simply following what the Federal Trade Commission had done, which is a symptom of the lack of resources of the bureau—has stepped in and ended gouging or other abusive practices.

But in the abstract, it's highly unlikely that Canadians would really generally understand the bureau and its role and the law and its role. We doubt you're receiving thousands of letters from Canadians viewing this as a hot-button issue. This means the issue is a true test of whether the government has integrity and is interested in upholding the public interest. Will it act when faced with a strong corporate lobby that is pushing against the public interest and against the public's right to have access to justice? Will it simply ignore the public interest and follow and bow down to that corporate lobby?

We ask you—as we've asked you many times before because many of the issues we work on are under the purview of the industry committee—to act with integrity, to uphold the public interest, and to amend the bill in the ways we have outlined today.

I now welcome any questions. Thank you very much.

The Chair: Thank you very much. We'll start with Madame Girard-Bujold.

[*Translation*]

Ms. Jocelyne Girard-Bujold (Jonquière, BQ): Thank you, Mr. Chairman.

I would like to thank the witnesses for appearing before the committee. Mr. Conacher's comments are akin to those of other witnesses who have voiced many concerns regarding the proposed amendments to the Competition Act. I think you came here to tell us that the government and legislators must make changes to reflect the realities of the year 2000. As another witness said yesterday, the time has come to act and to modernize this law.

Mr. Janigan, you said you support the sharing of trade information with foreign states in order to prevent competition. You also commented on the issue of marketing, which was raised at an earlier meeting. You also came out in support of the right of citizens to appeal to the tribunal.

• 1535

There are many people today who are affected by this law. If you were in our shoes, which of

the amendments presented by members would you support, and which would strengthen the act and allow the average citizen to access the tribunal without going through the Competition Bureau? I'd like you to be specific.

Thank you.

[*English*]

Mr. Michael Janigan: First of all, the area that appears to be in need of amendments, and one the committee has acknowledged it is going to study with a view to considering whether amendments are necessary, is that involving private-party access to the tribunal. You have before you some amendments that address the ability of a party to go before the tribunal to seek declaratory or injunctive relief under two sections of the act. One deals with refusal to deal and the other one is in the sections dealing with tied selling.

We see little reason to confine the ability to get declaratory or injunctive relief to those sections alone. We would like to see it extended to abuse of dominant position, at a minimum, principally because, as the OECD study notes, this problem is prevalent in the Canadian economy and the commissioner likely does not have the resources to fully deal with this problem. And it involves important competitive questions.

Secondly, we also do not believe that confining the remedies to declaratory injunctive relief necessarily holds water as well. We think there should be a right to claim damages and to obtain costs before the tribunal by private parties who seek that relief.

I believe it was former Commissioner Wetston or Professor Ross who said the other day that we view this as part of the maturation process of the Canadian economy. We are now in a position to understand that if we wish to in fact rely more on market forces to direct the economy, we have to make sure there is a genuinely workable competition in areas so consumers don't get hurt, so innovators can go forward, so efficiencies can happen, and so we're not in the situation where we simply have a small cluster of dominant players exercising their will over a deregulated market.

Mr. Duff Conacher: I agree very much with what Mr. Janigan just stated. I would like to add that when he talks about the maturation of the Canadian economy, citing other witnesses, plainly in our view the maturation of the Canadian economy has seen corporations gaining power without accountability measures also increasing. It has seen Canadians gaining the power to hold those corporations accountable. As a result, you have an ongoing, increasing ability of corporations to abuse their dominance in the marketplace. And simply, accountability measures must follow increased power. There must always be increased accountability; otherwise, along with the increased power within the marketplace in terms of market share, there's also an increased power to abuse, and it must be checked. It's in the public interest quite clearly.

[*Translation*]

Ms. Jocelyne Girard-Bujold: One of you represents Democracy Watch, whereas the other represents the Public Interest Advocacy Centre. Have you examined section 45 of the Competition Act, which deals with conspiracy? As you know, there has been a huge increase in

the price of gas everywhere in Canada, which led some people to accuse the oil companies of collusion. Under the act, a person has to provide written or verbal evidence before he may sue a company for conspiracy. Did either of your organizations study section 45?

• 1540

If you studied section 45, are there any specific amendments you would like to suggest to the committee, such as removing the word "unduly", which would ensure that in the future consumers are truly protected against the effects of certain decisions oil companies might eventually make?

[*English*]

Mr. Duff Conacher: No, we have not had the capacity to review the act and every single measure within the act. We're not going to pretend that we do have that capacity, which is why, to return to what I said earlier, we are really calling on members of Parliament to uphold their public duty and act in the public interest. In this situation, you have a very well-funded, large, corporate lobby that is trying to thwart that public interest and a true lack of capacity within citizens' groups and the citizenry to respond dollar for dollar, lobbyist for lobbyist, donation for donation.

So we hope that with the help of the Library of Parliament researchers and others testifying, including academics, you will be able to respond in the public interest.

Mr. Michael Janigan: Yes, I'm afraid that we as well do not have any specific amendments to help make this section more effective in dealing with the mischief that's set out in the act.

I would think, at first blush, that this appears to be an area that would be extremely amenable to more attention from the Competition Bureau, with the addition of more resources by the Competition Bureau, particularly where it's dependent upon the accumulation of evidence and analysis of the market operations. This is very resource-intensive and certainly might be capable of being addressed simply by the addition of more resources to the commissioner of competition.

[*Translation*]

Ms. Jocelyne Girard-Bujold: You are probably aware of the fact that the Commissioner said he does not have enough financial resources to study every request his office receives.

In your presentation, you said that he should hire lawyers, independent lawyers on a contract basis, who, in the past, would have been accused of... Are you asking the committee to call for an increase in the Competition Commissioner's budget to ensure that all these small files... I feel that's asking for a lot.

You also said that this would allow small businesses to go directly before the tribunal, without going through the Competition Commissioner first. Many SMEs cannot afford to hire lawyers today because it's just too expensive. That's a fact. Moreover, many lawyers and oil companies —in other words, the big guys—are involved in a lot of lobbying. By the way, I can assure you that I never let myself be influenced by lobbyists. They don't impress me at all.

Are you saying that the Competition Commissioner's budget should be increased as well?

[*English*]

Mr. Michael Janigan: As the OECD report appears to have pointed out—and I'm only going by the press account of it—and as the commissioner himself has acknowledged, they are short of resources, and I believe almost all witnesses before this committee have commented upon that fact.

In relation to this section 45, because it's an offence that involves prosecution before the courts, then it particularly is a matter of ensuring adequate resources are invested in the competition commissioner. In the event that private prosecutions are to be initiated, possibly other kinds of mechanisms for recovery of costs, the cost of prosecution may be considered in terms of amendments. From the start, it's primarily a question of ensuring that the commissioner has the resources to prepare an adequate case in order for the prosecution of these conspiracy provisions.

• 1545

The Vice-Chair (Mr. Walt Lastewka): Thank you very much, Madame Girard-Bujold.

I will now proceed to Mr. McTeague.

Mr. Dan McTeague (Pickering—Ajax—Uxbridge, Lib.): First of all, I want to thank our guests for being here today.

I appreciate your comments.

We've had a number of witnesses to this point on the issue of Bill C-23 and, more interestingly, the very limited restrained version that I proposed with respect to the private right of access. Surprisingly enough, a lot of medium and even larger players are not necessarily against the notion.

Ironically, these much larger witnesses, whom Mr. Conacher referred to earlier, seem to take a rather vicarious position. I would suggest, on your behalf, that the proposal would be out of the financial range of many individuals to be able to seek a remedy or at least find another alternative for recourse in very limited areas. Therefore those of us who advocate on behalf of the much larger population would be doing a disservice if we were to proceed with this limited form of private access.

I'd like to get your thoughts on that. I find it rather interesting that some of the individuals whom we would treat as individuals might have a little more to say and certainly a lot more undue influence, if I could use Madame Girard-Bujold's comments, in terms of what is in the act or those who are practising it, if indeed these individuals speak on behalf of your organizations.

Mr. Duff Conacher: No. Very clearly they don't speak on behalf of Democracy Watch. As I mentioned, we would support, beyond the limited right, the full right to apply, if you're an injured party, for both criminal offences and reviewable practices.

Everyone is of course predicting the future as to what might happen if such a right is created. We'd prefer to look at it another way, as opposed to talking about whether some mythical floodgates are going to open or some strategic litigation will ensue. Instead we'd prefer to simply look at it as a principle of effective enforcement.

It is well-recognized in many areas, for example in environmental law, that creating a citizen right to sue or a party right to sue is effective in terms of ensuring enforcement. It is effective in ensuring that the government regulators also act and uphold the public interest consistently and do not ignore cases that are in the public interest, because they are being lobbied themselves, for example.

So that avenue in a mature democracy is recognized as a very necessary avenue in many areas of the law. It ensures that not only violators of the laws face a good chance of being held to account but also that government agencies that do not uphold the laws consistently or don't have the resources, as we know quite clearly they do not have the resources to uphold the laws across the board, are also held to account. Or, at least, again, the citizens have the right to go around the regulator and set their own priorities.

As, again, we've documented in this report, *Revolving Doors*, currently in those cases that the bureau does choose to take to the tribunal, it does not even have the resources in-house to do them fully. It is hiring outside lawyers, on quite a regular basis, and creating all sorts of conflicts and bias within the bureau and within those cases.

So for those reasons, both this right needs to be created and the bureau funding needs to be increased so that they can take those cases they choose to the tribunal as the government only, without involving these outside private interests.

Mr. Michael Janigan: I would suggest that the first point to be made is that this remedy is available in addition to the remedy that might be enforced by the competition commissioner. So the presence of a private remedy will not take away whatever capacity is in place prior to this amendment for a small business, for example, to obtain relief.

• 1550 

Secondly, it probably unintentionally embellishes the argument that more than declaratory and injunctive relief should be available at the tribunal by the fact that if damages and costs were available to offset the costs of this potentially expensive litigation, it may make for a more effective remedy.

Mr. Dan McTeague: You're suggesting, then, that damages could be part of a proposal, as opposed to simply having the matter referred to the tribunal or to the Federal Court to ascertain damages. Do you believe that would provide us with more effective competition law to sustain, support, and invigorate the competitive process, if we had that?

I note, for instance, the Australian model does have a form of damages within it, and clearly, while there are some who would like to ascribe what we're doing to the U.S. model, in fact it's probably more analagous to the Australian system. It seems to work there. Do you see any fear that might be raised—except for those who have a vested interest, obviously—towards perhaps ensuring that small business or any type of business that's subjected to an anti-competitive harm is able to recover some of those losses as a result of lack of oversight?

Mr. Michael Janigan: I think the general experience with specialized tribunals is that they are much more receptive and attuned to the kind of evidence that might be proffered in order to prove damages or whatever relief is being sought. With all due respect to sitting judges of the

Federal Court, not all of them may have that kind of experience in competition law, in business law or commercial law, with respect to damages, to enable the kind of specialized assistance and knowledge the tribunal would bring to bear.

So, in general terms, I think it's best to have a remedy fashioned by the tribunal that's most equipped to deal with it.

Mr. Dan McTeague: Mr. Conacher, did you have something to say about that?

I have a couple of questions with respect to resources.

By the way, Mr. Clerk, could you also provide our witnesses with copies of the changes I've made, the amendments I've proposed, unless they have those already as a routine for witnesses?

The witnesses may not be aware of the fact that, as a result of the efforts of this committee, there was indeed an increase given to the budget of the Competition Bureau.

Is it your view that the working of the Competition Bureau should be investigation and enforcement in areas that do engender a broader public concern, areas such as abuse of dominance, areas such as mergers, merger review, areas such as conspiracy, if we could divorce the small issues that may not wind up on the national radar screen or don't necessarily, in and of themselves, create a general overarching concern of substantial lessening of competition? Do you see a line there that we may want to reach out to, that goes beyond the proposal in terms of my amendments, or do you believe my amendments, as suggested here by Howard Wetston yesterday, should be subjected simply to a five-year review and then we look at it from that perspective? Should we be going further as a committee on Bill C-23?

Mr. Duff Conacher: In terms of the private right of action?

Mr. Dan McTeague: Yes, in the context of Bill C-23.

Mr. Duff Conacher: Right.

Again, we believe it should be broader and should apply to both criminal offences and reviewable practices. Of course, you may decide to move more slowly and take a first step in terms of opening up the private right of action, and then we very much believe most federal laws should be on a mandatory five-year review period. Given how rapidly the marketplace is changing, but in particular in this area, with amalgamations in many industries, it is particularly important to be reviewing the rights and responsibilities under such a law on a very regular basis. But generally we believe the right to launch a case directly to the tribunal as a private party should be as broad as possible.

Mr. Michael Janigan: I think we would also concur that a full suite of remedies should be available, and particularly if you're dealing with a five-year review period, it would be good to get experience with the tribunal dealing in these areas, particularly in the area of private-party access. As well, at a minimum, it should be extended to issues associated with abuse of dominant position in the marketplace.

• 1555 

Mr. Dan McTeague: Thank you, Mr. Chairman.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. McTeague. We'll be back to you.

Mr. Martin.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you for the opportunity to get involved in this Bill C-23. I'm relatively new to the subject, so I'm learning a lot from the groups that come to give briefs to us.

I found it interesting that, in the last session we had, one fellow—I think it was Thomas Ross—was explaining that either you put regulations in place to guarantee fairness in the industry sector or you let competition be the regulator, that it's an either/or kind of thing, and more and more Canadians are feeling that competition as a regulator has in fact let them down. It hasn't worked.

There are examples where people are crying out for re-regulation of deregulated industry sectors to ensure fairness. The State of California would be a good example, when, in that bastion of free enterprise, they reached a crisis point with their electricity situation. Now they're re-regulating as fast as they can, because free and open competition hasn't served them very well.

Having said that, that helps sum up for me what important work has been going on for the last couple of years with the review process that took place, the public policy forum that we have in great detail here.

Maybe I will use my time to allow you to expand on a couple of things.

First of all, we understand that, regarding sections 75 and 77, allowing private access or private complaints to be filed under those categories—which deal with exclusive dealing, tied-selling, and so on—in reaction to questions here, one witness said this country is actually getting to be a sanctuary for scam artists in those areas. He was asked to table the information that led him to make comments like that. He did table the fact that—it goes year to year—for instance, in the year 2000, 613 complaints fell within the civil matters branch area. There were 74 complaints under section 75, and 47 complaints under section 77, of which zero applications went before the actual tribunal. Of the 613 matters filed, and of the 120-odd matters filed within sections 75 and 77, no applications went before the tribunal.

Will the amendments that you would be recommending regarding private access help to improve that startling statistic? And if it will cause an overwhelming number of more cases to go actually all the way through for a proper hearing, how would we then make sure it doesn't become a mini-industry, like it has, or some people say it has, in the United States? When you get three times the proven damages, it's like they're getting more litigious than ever in regard to those private...

So will the changes you recommend—and I notice you're in very good company; your organization is amongst a whole list, and both your organizations would recommend that particular change of private access—or the amendment put forward, bring the desired results, and what safeguards would you put in place to make sure we don't just create a frenzy of complaints?

The Vice-Chair (Mr. Walt Lastewka): Mr. Janigan.

Mr. Michael Janigan: I'll try to address some of those points.

With respect to complaints under sections 75 and 77, if any of those complaints have dealt with scam artists, the general results of enforcement seem to indicate that once something is initiated against them, they pack up and go elsewhere. So if a volume of these complaints involve scam artists, it doesn't necessarily surprise me that you would not see action of the tribunal. Probably all you're left with is an empty office or a boiler room where the marketing offences have taken place. You will see a volume pickup in circumstances where there simply are not the resources for the Competition Bureau to deal with this matter, and where there is substantial reward being obtained by the party accused of the misconduct.

• 1600

With respect to potential abuse of the system, the same kinds of remedies that are in place in courts of law or in other tribunals to deal with frivolous and vexatious litigation should be available to the Competition Tribunal in terms of awarding costs, dealing with something peremptorily, asking to have the particulars of the application substantiated. I think all those kinds of things are available to the Competition Tribunal.

I'm less panicked by the thought of a U.S.-style system than perhaps others might be. The United States didn't wake up at the turn of the century and decide, gee, let's give a bonus to lawyers here, and in fact let's allow them to collect three times the damages, because we like lawyers. Lawyers were about as popular at the turn of the century as they are now. The reason they did is they felt strongly that the businesses and the trusts of the day had to be disciplined in an effective way and that they couldn't necessarily depend upon their government to do that. This is why they invested so much into their various anti-trust legislation in the United States and why it has been given access. It has had some important results in the United States.

We may not need that level of legislation in Canada, but it's important to know they brought that about because they believed strongly in a competitive market. They have believed in the idea of competition probably much more strongly than Canada has. Canada to a large extent has always relied upon the government to partner with business in order to get us through problems that may occur. It has just been a function of our economy. We've always been less reliant upon market forces or the idea that the market has to be fair in order to deal with it.

We're now in a situation where consumers are being forced in large part to rely upon market forces to deal with this. So we better be certain that in fact we've got it right in terms of whether a competitive market is created. That doesn't mean we walk away from standards in the marketplace. It doesn't mean, for example, there shouldn't be a fair business practices act or health and safety standards. All of those still have to be enforced by the government. But on top of that, we have to make sure that in the areas where we have said the competitive market is capable of delivering these goods, there is a competitive market.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Martin.

Mr. St. Denis.

Mr. Duff Conacher: I would just like to make a brief statement. I won't repeat anything Mr. Janigan has said, because I agree with it generally. But we look at it this way. If you injure a company, what are the limits of that company taking action against you? If a company injures you, then why should it not be the same, if you believe in the market? Is the market only free

for the sellers and the large corporations that can dominate and drive prices and services in whatever direction they want, or is it also free for consumers? We believe that creating such rights is what creates an actual free market, not just a pseudo-free market where really it's just free for those who have power. So that's why these kinds of rights—those based on the principle of democratic operation and fairness and rights and responsibilities that work in the public interest—need to be created based on those simple principles.

The Vice-Chair (Mr. Walt Lastewka): Thank you.

Did you have any further questions, Mr. Martin?

Mr. Pat Martin: Do I have any time left?

The Vice-Chair (Mr. Walt Lastewka): Well, we're...

Mr. Pat Martin: That's fine, I'll wait for the next round.

The Vice-Chair (Mr. Walt Lastewka): No, go right ahead. You're on a roll.

Mr. Pat Martin: Okay, that's great. That will help me. Thanks.

Just before I move on to a different question, you'll be interested to know that when I said in the year 2000 that 74 complaints were filed under section 75 and 47 under section 77, of those, only 10 were investigated. And of those, three were resolved by an alternate mechanism, and zero went to the tribunal. I can give you a copy of this if you're interested.

• 1605 

I'm also curious regarding damages, etc. If we are going to be giving the general public better access to a mechanism of satisfying some kind of grievance, how do you measure the actual damages to an individual? It's easy enough to measure the damages for another corporation that feels they've been squeezed out of the market in some way. They can claim lost opportunity. You can calculate that, although you might not get it bang-on. For an individual, how would he... I'm not a lawyer, but to win any cases you have to show or prove damages. How is an individual damaged, other than having their democratic rights affronted? How do you put a value to the damages to an individual?

Mr. Duff Conacher: That's definitely a difficult area, but that's also why we recommend the damages should include punitive damages to punish violators and to create an incentive to comply with the law. So we believe the damages should extend to that area as well.

It's a key factor. You mentioned earlier how we've been generally in a deregulatory period and people are starting to see the effects of it. I don't believe we were in a regulatory period before. Although regulations were passed, I believe that in most cases, as with the competition area, there was a key element missing to the regulatory regime—a fatal flaw. It undermined the regime entirely in most cases.

Those key elements are: clear rules that are strong—no loopholes, no technicalities that you can get off on—and then an independent agency that will enforce those rules; a requirement to disclose what you're doing as a means of tracking problems; and penalties high enough to actually make a difference—to hurt the bottom line of a company. High enough penalties have been a major area very much lacking in Canada. Again, this is why we recommend punitive

damages be included, because Canadian regulators haven't taken into account the reality that companies make decisions based on the bottom line. If the penalty and the chance of getting caught do not add up to a penalty that will hurt the bottom line, then the company is highly unlikely to comply. The final element is the citizen's right to sue.

If you look at most regulatory areas, I think you will find that one of those five key factors is missing. As a result, the regime just simply does not work, because there are more incentives to violate the law than there are incentives to comply.

So I don't believe we've ever been in a regulatory period in Canada. I'm hoping finally we will move into a regulatory period, because I believe it's necessary to ensure the marketplace works fairly. It applies as well to government institutions. Government institutions themselves have not faced internal regulations to ensure they uphold the public interest. So I await that regulatory era.

Mr. Michael Janigan: Just very briefly, I don't know whether I'm in a position to conduct a damage seminar here, but, as I recall, it will likely involve a reasonable expectation of profits on the company's part. You have to look at the act itself to see whether or not it was an approximate cause of the damage that occurred, whether or not it was too remote to have affected the profitability. A variety of different questions have to be examined.

It's actually one of the reasons why the U.S. went to the triple-damage system, principally because the issue of damages was so difficult to apply and was so difficult to find, and frequently did not adequately measure the degree of wrong that had been done by the anti-competitive conduct.

That's why I say a specialized tribunal, such as the Competition Tribunal, is probably in the ideal situation to adjudicate these kinds of issues, because they will have the experience in dealing with it as time goes on.

The Vice-Chair (Mr. Walt Lastewka): Thank you very much.

Mr. Bagnell.

Mr. Larry Bagnell (Yukon, Lib.): Thank you. First I want to go on record that, unlike one of my colleagues, I'm not such a fan of regulation. I think it's a really poor second choice for solving the problem, in that Canadians have seen electric prices and telephone prices go up 20%, 30%, 40% when inflation is only at 2%. As hard as it is, I'd push for trying to make competition work. Obviously, it's difficult. We have this bill, and we're trying to fix it.

• 1610 

For years I've been fighting against a non-competitive environment in the big industries, and that's been pretty well addressed by my colleagues on both sides here in the committee meetings.

I was quite disheartened a couple of years ago when—and I'm just seeking your advice on this—a chap in one of the smallest industries, one that has a proliferation of outlets, suggested to me that he was under social pressure or peer pressure to not have low prices. If it's that prevalent, do you have any suggestions on how you could avoid situations like that with small business? I'm sure you deal with a lot of small underprices. Do you think that exists, or do you have any suggestions for routes we might take to... Maybe it just takes a change in attitude

and values, I don't know. Obviously, it works against what we're trying to achieve here, which is free competition and a free marketplace so everyone gets the best price and so businesses are sharpening their pencils.

Mr. Michael Janigan: I think it's always a question of resources that can be used to apply to this problem. Many times the Competition Bureau has difficulty in determining the pattern of behaviour in an industry. How do they know whether or not it is a situation of what's called "unconscious parallelism" in terms of prices or whether or not a given price is actually based upon an implicit or an explicit agreement to maintain prices at a certain level, thereby denying consumers the benefit of an effectively competitive market? That's the kind of analysis that you'll probably only get with a Competition Bureau with sufficient resources to do the kind of intensive investigation that needs to be done.

Mr. Duff Conacher: I wish I had other ideas, but I think these changes and more resources will help solve a lot of the problems that are out there now.

The Vice-Chair (Mr. Walt Lastewka): Thank you Mr. Bagnell.

Mr. Rajotte, did you have any questions? Madame Girard-Bujold? No further questions?

I'd like to thank the witnesses for coming this afternoon to share their information with us. Thank you for the question and answer period.

We'll take a two-minute break, and we'll start with the second session immediately after.

• 1613

• 1617

The Vice-Chair (Mr. Walt Lastewka): I'd like everybody to be seated.

We do have a vote, so we're going to be interrupted by the bells. Hopefully, we can get through this session before the bells ring.

I'd like to proceed, if I may. I'll proceed with the agenda as written. From the Canadian Federation of Independent Business we have André Piché and Stéphane Robichaud. André, I take it you're going to begin. Thank you.

Mr. André Piché (Senior Policy Analyst, National Affairs, Canadian Federation of Independent Business): Mr. Vice-Chairman and members of the committee, my name is André Piché, from CFIB, and this is my colleague, Stéphane Robichaud. He's the director of provincial affairs for New Brunswick and P.E.I.

On behalf of the 100,000 small and medium-sized business owners across Canada who are members of the Canadian Federation of Independent Business, we want to thank the committee today for inviting us to appear to discuss proposed amendments to the Competition

Act.

Bill C-23 is vitally important to our members. We had hoped to be here to present you with an Atlantic perspective today and to give you a national perspective on October 30. However, recent developments have caused the committee to decide to initiate a study of the Canadian economy next week. We applaud that decision, and we're very happy to participate in that exercise as well.

Catherine Swift, our president, and Garth White, our senior vice-president of national affairs, will look forward to appearing before you next Tuesday to present you with some post-September 11 data regarding our members' expectations for business and for job creation for the remainder of this year and for next year.

The purpose of our presentation before you today is threefold. First, we want to talk briefly about the role played by SMEs in the Canadian economy. Second, we want to describe some of the long-standing concerns of our members with respect to the Competition Act. And third, we would just like to briefly outline for you the main reasons for our strong support for Bill C-23.

[*Translation*]

As you are probably aware, most businesses in Canada are very small. Of the approximately one million businesses in Canada, over three quarters employ 5 people or less, and over 97% of businesses have less than 50 employees. As graph 2 shows, the SME share of total Canadian employment has been growing steadily over the past few years. As you will note, SMEs accounted for 56% of total employment in 1998, as compared to 53% in 1990.

• 1620 

Small businesses create the majority of new jobs and are the economic backbone of local communities. A recent CFIB survey called *Building better Communities* revealed that small business owners have a strong entrepreneurial streak and are very loyal to their community. Over half of the surveyed business owners stated that they started their business from scratch. The remainder have taken over a family business, purchased an existing firm or created a spin-off from an existing firm. When asked about the possibility of relocating their business, seven out of ten business owners stated that they did not plan to move over the next three years. Nearly all of those who plan to move indicated that they would move within the city limits or to an adjoining municipality.

SMEs not only play the major role in job creation and economic growth but also are a major contributor to their community's well-being. However, to fulfil their role, SMEs need not only fair rules of competition but also a fair and efficient redress process.

[*English*]

The stated purpose of the Competition Act is to maintain and encourage competition in Canada, to promote the efficiency and adaptability of the Canadian economy, to ensure among other things that:

> small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

CFIB has pushed repeatedly over the years for a review of the Competition Act to address the act's apparent inability to deliver on its intended purpose, which is to enforce fair rules of competition while not impeding the dynamic nature of the Canadian economy. In recent years we have also seen industry and consumer groups turn to provincial governments for help as a result of a perceived lack of effectiveness of the Competition Act. Indeed, CFIB has made several representations to boards of inquiry set up by both the Quebec and New Brunswick governments on the issue of gasoline pricing.

In 1999 the CFIB surveyed its members across Canada as to whether or not the federal government should strengthen the Competition Act. Of the 8,700 respondents who had an opinion, 64.3% said yes and 35.7% said no.

You may recall that CFIB wrote to this committee in April 1999 to express its support for Bill C-235, which was sponsored by MP Dan McTeague and which sought to strengthen the predatory pricing provisions of the Competition Act. We commend the committee for its decision at that time to take a closer look at the Competition Act and its enforcement.

Subsequently, a series of studies was commissioned by the Competition Bureau. In the report that looked into the effectiveness of the Competition Act and the performance of the bureau, the VanDuzer report, the authors pointed out that over a five-year period the Competition Bureau had received 931 complaints about alleged unfair pricing practices. However, very few had been the subject of formal inquiries, and even fewer were the subject of litigation. In fact, of 931 complaints, there were only three formal enforcement proceedings.

It is impossible to determine how many businesses have refrained from complaining to the Competition Bureau, believing it's a waste of time or fearing retaliation from the sources of unfair competition. However, based on anecdotal evidence the CFIB has heard over the years, we believe it is a significant problem.

The VanDuzer report also highlighted the need for more jurisprudence. The authors pointed out that some minimum number of formal enforcement proceedings are essential if the private sector is to attach any credibility to the Competition Bureau and hence be motivated to comply with the law. The authors pointed out that:

> The relative absence of formal enforcement proceedings raises several concerns regarding the certainty and, ultimately, the effectiveness of the law. More formal enforcement proceedings would force the courts and the Tribunal to progressively refine the law, making clear its appropriate application as well as signalling the seriousness of the Bureau's intent to enforce it.

• 1625 

Mr. Stéphane Robichaud (Director, Provincial Affairs, New Brunswick and Prince Edward Island, Canadian Federation of Independent Business): In consultations held in August 2000 on possible amendments to the Competition Act, CFIB provided numerous examples of flagrant cases of unfair competition that threatened the survival of many small businesses. Among the examples cited were the following:

In New Brunswick and Nova Scotia, independent gas retailers had to subsidize their operations with significant injections of capital just to survive the effect of eroding price margins imposed by their wholesalers.

Independent auto glaziers had to seek an invoice number from a national competitor before initiating work on an insurance claim. These independent operators would then have to forward their bill to the competitor, who would discount it by up to 40% before sending the bill to the insurance company. The cheque would then come back to the competitor, who would take a $15 administration fee and eventually pay the independent operator's invoice.

An independent grocery chain in the Annapolis Valley of Nova Scotia was driven out of business through predatory pricing. The grocery chain was forced out of business through a combination of predatory pricing and control of the wholesale market by the two largest supermarket chains in the region. Other small grocery chains have also been affected by these types of pressures—for instance, Capitol Stores in the Halifax region.

Nova Scotia greenhouse operators provided examples of price intimidation and dumping on the part of local dominant retailers that resulted in a reduction in the number of greenhouse operators in Nova Scotia from 16 five years ago to seven as of June of this year. For instance, you would have a large producer in Ontario with an order of 100 tons of tomatoes for the Boston market. In order to ensure the best quality, 120 tons would be produced and the extra 20 tons dumped on the Nova Scotia market.

Recently the CFIB contributed to settling an issue being dealt with by the Competition Bureau regarding the acquisition of Multi-Marque by Canada Bread. Without any intervention, this would have led to a control of 90% of the Atlantic Canada market with the remaining 10% divided among several small players. Following an extensive review by the Competition Bureau, market shares were divested to some other players and a minimum level of competition was maintained. Incidentally, this was a positive instance of our proceedings over the years.

As we speak, some foreign manufacturers of printing equipment are trying to squeeze out Canadian small and medium-sized businesses that remanufacture printing supplies such as ribbons, toner cartridges, and ink jet cartridges. These SMEs have created 5,000 direct and indirect jobs in Canada and last year saved through recycling 3,200 tons of plastic and metal from Canadian landfills.

The Competition Bureau has limited resources, as the commissioner pointed out in his committee presentation, and the bureau has to give priority to issues of national importance, such as merger proposals in the banking sector or the air transportation sector. Hence the need to give SMEs an alternate process to get redress.

CFIB's position on Bill C-23 is that we believe the proposed amendments are a step in the right direction in improving the fairness and effectiveness of the Competition Act. With respect to private right of access, we strongly support the proposal for the following reasons:

The amendment will ultimately benefit both large and small businesses as it will help clarify certain aspects of the law for all. As we pointed out earlier, there is very little jurisprudence with respect to reviewable matters under the Competition Act. Private access will help alleviate that problem, as was the case in Australia, the U.S.A., and New Zealand when private access was introduced.

We are satisfied that the proposed measures to prevent strategic litigations will prevent potential abuse since remedies available to the tribunal are in the form of an injunction as opposed to monetary damages and the award of costs.

Furthermore, we firmly believe that any small or medium-sized business whose very survival is being threatened by an unfair competitor ought to have the right to fight back and have its day in court. We are heartened by the fact that this also seems to be the position of the Commissioner of Competition and of his predecessor.

• 1630

Finally, with respect to the need for consensus to proceed with private right of access, we respectfully submit that there is strong support for the proposed amendments. As we are sure you have noticed in your hearings, virtually all small and medium-size businesses favour this proposal, while a few large corporations oppose it.

Given the predominance of small and medium-size businesses in Canada as compared to large businesses, we believe strong support exists for this progressive change in the legislation.

Not to proceed at this time with these amendments would be tantamount to giving veto power on matters of public interest to a few large corporate concerns.

We wish to thank the members of the committee for putting the spotlight over the past two years on the workings of the Competition Act. We believe you have an opportunity through this bill to make a significant improvement regarding fairness in the workings of the Competition Act, and we urge you to give it your full support.

Thank you.

The Vice-Chair (Mr. Walt Lastewka): Thank you very much.

We'll now hear from the Canadian Petroleum Products Institute, Alain Perez, president; and Tom Ryley, executive vice-president, Sunoco.

Mr. Perez.

Mr. Alain Perez (President, Canadian Petroleum Products Institute): Thank you, Mr. Chair.

We are very grateful to be invited to address Bill C-23 and to share our views on the concept of private access. My name is Alain Perez. I'm the president of the Canadian Petroleum Products Institute, CPPI. My colleague Tom Ryley is executive vice-president of Sunoco, and a director of CPPI.

As you know, CPPI represents refiners and marketers of petroleum products. Membership is attached to my brief. Since neither Tom nor I are lawyers, we will try to give you a business perspective on the matters that are before your committee.

On Bill C-23 itself, CPPI has been an active participant to the public policy forum process. We then argued for and against several potential amendments to the Competition Act, but we are now generally supportive of the bill in the form in which it was introduced in the House of Commons.

The Competition Act is a framework law. It is the most important piece of all legislation governing our industry. We adhere scrupulously to the letter and intent of the law. It provides Canadians with the framework needed to ensure a highly competitive marketplace, and we welcome all amendments that protect consumers and enhance competition.

Let me address the question of private access. Philosophically, our industry does not oppose private access.

To paraphrase the Commissioner of Competition in his testimony before you, there may be private matters that require that parties be allowed to argue directly to a tribunal. But as Mr. von Finckenstein also said, private access must be viewed as a way to complement public enforcement actions.

We agree with him and would add that private access must not weaken the core responsibilities of the Competition Bureau, regardless of what it takes in terms of resources. The bureau's mission is to protect competition and the public interest.

First and foremost, private access, even if found to be a fair and convenient process, must not be used to disturb the marketplace or diminish competition, or as a tool to promote private interest. Consistent with these premises, our industry, while not opposed in principle, is still apprehensive. Let me explain.

One point that needs clarification is that we are not apprehensive about private access being used as a tool for strategic litigation by the so-called small and medium-size enterprises, or SMEs.

In the case of our industries, SMEs are our customers. They are independent retailers and marketers, small and large. We have a commercial relationship that spans many decades.

I know some of them support private access, but I know also that many other independents, including those who are members of CPPI, see private access, the way it's defined by Bill C-472, as largely irrelevant to their relationship with refiners.

• 1635 

Instead, we are concerned that much larger commercial entities, for example, hypothetically a large U.S. retailer, may use the private access provisions as a tool to serve their own interests. In short, it could result in strategic litigation being used as one of the tools that could help them achieve commercial objectives such as rapidly establishing a strong presence in the Canadian market.

Going back to the core responsibility of the bureau, we believe that in such a dispute, even if the parties involved have the financial and legal resources to fight it out before the tribunal, it is incumbent upon the bureau to analyse and recommend what is in the interests of consumers and how competition should be preserved. I would submit to you that such a private dispute could have more consequences in the marketplace than many of the mergers the bureau studies routinely. Therefore, how can you allow reasonable private disputes to go to the tribunal —private access—and minimize the risks for strategic litigation?

First, we respectfully submit this is such a serious issue that the process of defining a broad consensus—I'm restating the commissioner's objective—should not be linked necessarily to Bill C-23. Other very critical amendments of the act are currently being studied by the bureau and

its stakeholders, and private access is important enough to be part of the next round of consultation.

Let me outline the requirements we believe are needed to make private access an effective tool that complements the bureau's role, serves the public interest, and gains broader consensus.

We think private access should not go beyond sections 75 and 77, because, as suggested by the commissioner, these sections often involve issues between two companies, usually a supplier and a distributor, and they are essentially private in nature. That was his testimony of last week.

We would, however, note as a matter of principle that when a private claimant seeks to apply under section 75, because there is allegedly a refusal to supply, the commissioner should intervene if the public interest in competition is at issue. If that public interest is not at issue, the matter is really one for private law and should be dealt with under common law or civil law by provincial courts.

As noted before, there must be safeguards to ensure private access is used in the public interest. The amendments proposed by Mr. McTeague, in effect the provisions of Bill C-472, include such safeguards, including the requirement for leave to institute private access, the possibility of costs being awarded against the plaintiff, notice to the commissioner, and the resulting possibility for the commissioner to intervene in the proceedings.

These safeguards, and others containing the core of Bill C-23 and Bill C-472, appear desirable to us. But they have not been sufficient to ensure a broad consensus of stakeholders. We would, therefore, like to suggest one more type of safeguard for your consideration, and that is that a private action could be instituted only if the plaintiff has approached the commissioner and asked the commissioner to institute the proceedings, and the commissioner has declined to institute the action in his own name. If the commissioner decides to institute the proceedings, there would be no need for private recourse. This, we believe, would have the effect of ensuring the bureau continues to exercise its core responsibility while allowing truly private matters to proceed in front of the tribunal.

Thank you for your attention. Tom and I will answer your questions when our turn comes.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Perez.

I'll now go to David Croome from the Consumers' Association of Canada. Mr. Croome.

Mr. David Croome (Chair, Trade Committee, Consumers' Association of Canada): Thank you very much.

My name is David Croome. I'm a volunteer who is the chair of the trade committee of the Consumers' Association of Canada.

• 1640 

In our 54-year history the Consumers' Association of Canada has appeared many times before the committees of the House of Commons and of the Senate. We have appeared on a variety of consumer issues related to competition within specific sectors, such as financial services, as well as the broader questions of the Competition Act.

We are, of course, pleased to have the opportunity of being here today to discuss this very important bill and its potential to support the interests of the Canadian consumer. I'd like to make the point that, of course, the Canadian consumer is part of the broader public interest that's been mentioned earlier.

First, I'll briefly outline the background and the work of CAC. We are a 54-year-old, independent, not-for-profit, volunteer-based organization with a national office in Ottawa and provincial and territorial branches. Our mandate is to inform and educate consumers on marketplace issues, to advocate for consumers with government and industry, and to work with government and industry to solve marketplace problems in beneficial ways. We focus our work in the areas of food, health, trade, standards, financial services, and communications services, though we most certainly also address other marketplace issues as they emerge.

All of our CAC policies are framed within a general set of consumer-oriented principles, which are in common with the principles governing consumers associations that are members of the worldwide federation of consumer groups, Consumers' International. Among those principles are the right to choice, to safety, to information, and to a healthy environment.

Now I'd like to turn to the Competition Act and the bill that is the subject of this appearance. To repeat the four principal points in the preamble to the Competition Act:

> The purpose of this Act is to maintain and encourage competition in order to (a) promote efficiency and adaptability of the economy, (b) expand opportunities for Canadian participation in world markets while recognizing the role of foreign competition in Canada, (c) ensure that small- and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and

—perhaps significantly last on the list—

> (d) provide consumers with competitive prices and product choices.

The three key elements of Bill C-23 are in principle supporting each of these points, in particular, efficiency, world markets, equitable opportunity for the smaller enterprise, and a competitive market providing the consumer with choice. We ask this committee—to make the point again—to remember that the greater good of Canadian consumers should come before the needs of business, whether it is large or small, domestic or international, or a new or existing investment. That is the long-term interest of the Canadian consumer.

In April 2000 at the start of the public review of the private members' bills preceding Bill C-23, the commissioner stated that "the Competition Act is part of Canada's marketplace framework legislation aimed at encouraging competition to the benefit of both businesses and consumers".

We should recognize that the act is generally acknowledged to be a very complex piece of legislation and we as members of CAC may not have the required specialist knowledge to discuss the minutiae of those inter-relationships and the implementation of sections of the act by itself or with other legislation. However, we are very grateful for this opportunity to present our more general comments on how we view the changes proposed under Bill C-23.

Our first comment is on deceptive prize notices. These are not a cause to be treated as buyer beware. They are misrepresentations of facts in order to induce someone, the consumer, to incur a cost and part with their money without proper warning of terms or probabilities of

reward. So, yes, we at CAC recognize and endorse the justification of a criminal sanction against those who commit the deception.

• 1645

In fact, we would like to see the bureau having the authority to issue immediate cease-and-desist orders where it has established that a prima facie exists. The bureau already provides guidance on good practices for competitions, so good practitioners are already aware of what is required and will know how to structure their competitions accordingly. Those who deceive and mislead should be prevented from continuing as soon as the bureau recognizes that fact. The bureau should not have to wait until a formal case is heard. The details of use of an adjudicator or some other method of separating all of these powers from the commissioner might have to be considered. But we feel that the availability of a well-designed, cease-and-desist process has great benefit in this area, and much harm to consumers may be avoided.

On a point of detail, we would also propose that there be specifications about the positioning and legibility of the conditions that apply when claiming a prize. Perhaps the point size should be specified together with colour and those conditions be displayed on the same side as the come-on, the prize announcement. Existing regulations on advertising claims could be used for guidance on these details.

In addition, as presently drafted it seems that the bill only applies to competitions delivered by mail or e-mail. CAC therefore suggests your committee consider having the act apply to hand-delivered competitions, say in the street or to a residence or place of work. In other words, the act should apply irrespective of the mode of delivery. We recognize of course that in some instances provinces and/or municipalities may have jurisdiction over some of these activities.

To reconfirm, CAC endorse the criminal sanction against those who use deceptive notice of winning a prize and we suggest the need for the act to apply to all delivery methods, and for the bureau to have the power to issue cease-and-desist orders.

Now we turn to the competition tribunal judicial powers. In spite of earlier, wide-ranging discussion by this committee and an open consultation process managed by the Public Policy Forum, the right of private access is not provided in this bill. Such access was originally proposed for the "Refusal to deal", section 75 of the act, and for the "Exclusive dealing, tied selling, and market restriction", section 77 of the act.

Many commentators feel that this bill, C-23, prepares the act for this right of private access. If correct, CAC welcomes the longer-term implications of these changes as providing increased transparency and accountability, and the opportunity for extending activities beyond the priorities set by the bureau.

Some might argue that the broad national consumer concerns of the Consumers' Association are and will be covered by the bureau, and that the right of private access will only benefit corporations in the competitive market. Indeed there are many cases where the bureau has pursued cases in which CAC saw great merit. So we're certainly not arguing that the bureau does not do the right thing.

Rather, where the priorities of the bureau do not allow it to take on a project, then CAC, possibly acting with other public interest groups, would—under the private access rule—be able to bring a case to the tribunal without waiting in line for the bureau to act. Therefore, in the

longer term CAC would like to see not only the right of private access, but also the possibility of class action suits being brought.

The CAC recognizes that there must be a balance between convenience and maintaining regulatory responsibility. So we are concerned that in the longer term the use of private access should not diminish the bureau's responsibility for oversight of maintaining and enhancing competition in Canadian markets. The commissioner and this committee should ensure that there is no off-loading of bureau responsibility to private entities through use of a future private access mechanism.

CAC recognizes that the changes in Bill C-23 to the powers of the competition tribunal will simplify and speed up the realization of the objectives of the act. In fact they will help the bureau in its work to "maintain and encourage competition in Canada in order to provide... consumers with competitive prices and product choices". The proposals appear to be practical and effective means of increasing the efficiency of the bureau and the tribunal in their joint handling of cases.

• 1650 

We also suggest that this committee consider the question of the sections under which such cases might be brought. So far discussion has been about one or more of sections 75, 77, and 79—abuse of dominant position. We suggest that such cases should be brought by the commissioner under those three sections and that all three be considered for private access in the longer term.

As a further comment, we recognize that there are valid concerns on the need for safeguards and against strategic litigation in these proposals of Bill C-23. The act itself is designed to promote competition in its broader sense and not to be used to harry competitors or suppress competitive behaviour through strategic litigation. However, we believe that with the tribunal able to award costs and summarily dispose of cases, such strategic litigation would be effectively discouraged.

The question of the award of damages by the tribunal is certainly a much more contentious and difficult issue. As we are all aware, in the United States triple damages are possible, as are class action suits. The CAC feels that the litigious temptation of triple damages may be too great, and that the tribunal should have the option to award single damages where the nature of the case justifies it.

The Vice-Chair (Mr. Walt Lastewka): We're slowly getting beyond our time. Could you just summarize the last page? Then we could get into questions, and if there are additional things you would like to point out, we could do it during the question and answer period.

Mr. David Croome: Certainly.

On the question of facilitating cooperation with foreign competition, we would like to affirm our support for the underlying principles of beneficial cooperation with foreign competition authorities. The bureau needs that power to effectively respond to anti-competitive behaviour, such as that with some transnational mergers and certain marketing practices.

In closing, we would like to emphasize that a vigorous and openly competitive market is in the best interests of all consumers. We have proposed a number of minor changes here and stated our support for the longer-term adoption of the right of private access.

Thank you for this opportunity.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Croome.

I'd like to now begin with Mr. Strahl.

Mr. Pat Martin: I have a point of order. I was wondering what the order was to be.

The Vice-Chair (Mr. Walt Lastewka): Pat's first.

Mr. Pat Martin: As a member of the fourth party, I'm somewhat sensitive to—

The Vice-Chair (Mr. Walt Lastewka): Oh, okay. I don't want you to be too sensitive. You can begin. Go ahead.

Mr. Pat Martin: Okay, thank you.

Thank you all for your interesting briefs.

Given that there are three groups, I would start by saying that I appreciate the views of the CFIB and I always welcome its briefs and presentations. They are often accompanied by a very thorough survey of your membership, and I like that. You don't just speak as an executive board; you do a really comprehensive job of canvassing your expansive membership first, and that carries a lot of weight for me. I appreciate the additional weight this gives your remarks.

I noticed within your brief you were careful to point out that although you were in favour of the private access side of this bill, you cautioned as well against the types of penalties. Maybe you could clarify. I'm a little unclear on what you were recommending as a form of penalty. I was interested to hear the Consumers' Association caution about the triple damages in the U.S. I'd be interested to hear about how those two views contrast, and then also I'd like to hear from the petroleum producers...

I'm not sure if I understood your brief fully as it relates to private access, but I do have a letter here from the commissioner, who followed up his presentation to this committee with some clarifying notes. He has your organization clearly in the camp of those who oppose the private access provisions. He has a list of both camps now, those for and those against.

• 1655

For the sake of the committee, I'll ask: which side are you on? Are you opposed to private access? As I said, your message seemed softer than an absolute condemnation of the idea. Most of your members are large American companies that operate in a regulatory regime that has triple damages and the possibility of class action. So if you operate well in that environment—and I would argue that you do—then why are you afraid of similar restrictions in this country that won't even go as far as the American regulations?

The Vice-Chair (Mr. Walt Lastewka): Mr. Perez.

Mr. Alain Perez: Well, the commissioner may have put us in the camp of the opposed because at the initial step of the PPF process, we opposed the introduction of private access, as it was defined, on questions of law and principle.

Obviously my members have been surveyed, and Tom and I speak for all of them. My brief says that philosophically we cannot be against private access, because private access is defined as private parties who want to go in front of a tribunal to deal with private matters.

What we are against, and remain against, is the type of private access that would take the bureau away from what we consider are its responsibilities to consumers and the marketplace. For us to support private access, it would need not just safeguards against strategic litigation but also a commitment in law for the commissioner or the bureau, if called upon, to study the case and decide whether it's a matter of public interest. In that case it would litigate itself, as it does today, or if it declined, it would explain why and allow the parties to go to the tribunal. In that case, I presume it would have declined because the matter was private, so only the private parties could debate it.

That's our position. We would oppose private access—as we have—if it was viewed as private interests or agendas taking precedence and using the Competition Act, the only law in Canada that protects consumers in the marketplace, to divert it from its primary mission.

Mr. Pat Martin: One thing I'll ask is whether any of your members are also members of the BCNI, the Business Council on National Issues.

Mr. Alain Perez: Yes, they are.

Mr. Pat Martin: So is there a contradiction there? The BCNI is clearly in the opposed column. When you canvassed your members, was it unanimous? Was there a split?

Mr. Alain Perez: No, not at all. There was no embarrassment there.

Mr. Pat Martin: No embarrassment.

Mr. Alain Perez: Next week, the BCNI and other groups will present a legal view of private access.

Mr. Pat Martin: They did yesterday, and they were vehemently opposed to any section 75.

Mr. Alain Perez: We also oppose rushing into private access and adding it to Bill C-23 without the proper consultation. We're giving you a business perspective. We are not concerned about litigation from small and medium-sized enterprises; that's a myth. We are concerned about much larger corporations using the threat of litigation.

If private access keeps the bureau involved in what it should be doing, which is defending the competition marketplace, and if it's in the law—not as it is today, because in Bill C-472 today, the plaintiff would notify the bureau, but the bureau doesn't have to do anything... We would like to see a process whereby the bureau would not just be notified—presumably they're going to read what's there—but the bureau would decide whether to pursue it themselves, or decline and explain why. At that point, we trust the government and the bureau to do the right thing.

• 1700

Mr. Pat Martin: Thank you. I think I understand.

Were there others who care to answer the other points I made?

The Vice-Chair (Mr. Walt Lastewka): Any other comments?

Mr. André Piché: Mr. Martin, you asked about our view of the strategic litigation. Essentially, we have the same view as the commissioner when he presented before you. He thought that the strategic litigation safeguards put in place were reasonable and could do the job. I quote him:

> You have to convince the court, first of all, that you have an arguable case, and secondly, that there's no incentive for you to sue, because you're not going to get money—all you're going to get is an injunction—and lastly, you may actually have to pay costs for yourself and your opponent if you're unsuccessful.

He believes those are sufficient deterrents, and we also believe they're reasonable.

Mr. Pat Martin: That's very helpful, thank you.

And the association?

The Vice-Chair (Mr. Walt Lastewka): Any other comments?

Mr. David Croome: At one point you raised the issue of why triple damages would not be appropriate. I understand that the general approach to the Competition Act is one of incremental change, so the direct step to triple damages may seem inappropriate. Go to single damages, though it may be hard to define, and see if that works. Then act accordingly.

The Vice-Chair (Mr. Walt Lastewka): Mr. Martin, last question.

Mr. Pat Martin: As a last comment, when the commissioner was here he opened his remarks by saying that Canada has become a safe haven for scam artists in the false contests and things you were talking about. He was asked for details. Mr. Bagnell asked him if this was just anecdotal evidence, or if there were numbers. Apparently there were 13,100 complaints related to misleading advertising and deceptive contest practices, 4,200 complaints related to mail, and 1,600 related to telemarketing. So the numbers are certainly there, and your association is justifiably outraged by this. I commend you for concentrating on that, as one of the things you could do for the Canadian consumer.

Knowing those figures, would you like to add anything to that—to restate your position on these telemarketing scams, which mislead seniors especially?

Mr. David Croome: On that last point, the people who fall prey to these things tend to be the ones who are least able to respond adequately to them. They might also be less than well informed about how they can respond, in the sense of lodging a complaint with some organization. They wouldn't be aware that the Competition Bureau in Ottawa is the place to address their concerns. So the bureau needs to respond proactively—not just wait for the complaints, but be an active manager in dealing with this large number of cases.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Martin.

I'm going to allow Mr. Strahl to ask some questions first, then come back to the government side for two questions. Then it's back to you, Mr. Martin, since you have a private member's bill.

Mr. Strahl.

Mr. Chuck Strahl (Fraser Valley, PC/DR): Thank you. We all seem to be speaking on the same private member's bill tonight, so we may all have to bail on you shortly.

Anyway, thank you to all the witnesses for coming. It's been good to hear from you.

I too am interested, as Mr. Martin was, in the nuances of the Petroleum Products Institute's position on this private action. I thank you for the way you've detailed it here. That makes it much clearer, and I think we all understand your position better. It appears to be a little different from the BCNI's position, which is categorically against it.

I'd like to ask the CFIB representatives what they think of these safeguards described by the other panellists. Do you think these are reasonable safeguards, or do they just complicate a matter that you'd like to see wide-open?

Mr. Stéphane Robichaud: I am not a lawyer either. For the past six years, though, I have spent an extensive amount of time talking to small business owners about various issues. I've dealt with people in the auto glass industry, gas retailers—people who are in very precarious situations, who feel their only resource is the Competition Bureau.

• 1705

What I hear from my members is that when they turn to the Competition Bureau, the message they hear is, "Until you're out of business, this isn't running you out of business". I say this because the Competition Bureau has explained to you that there's a good reason why these small business owners don't get the attention they feel they deserve. There are many issues before the Competition Bureau, and it has to decide which to spend its time on. The bureau has explained that to you very well, but I feel that what it's adding into the picture will simply stall the process further.

As it is, our members can't get access to the commissioner. They can't get the attention of the Competition Bureau for the issues they have. So if you follow that route, there's no reason to believe things would change in any way.

Mr. Chuck Strahl: On the last point—and we'll get the Canadian Petroleum Products Institute in here in a minute—they suggest that a private action could only be instituted if the plaintiff has approached the commissioner, and the commissioner has declined the institute the action in his own name. Then it could go ahead.

It does seem to me there's some validity to that, if there was a limited timeframe. If we said to the commissioner, "You have to respond within a certain period, and give a written reason why you're not going to proceed", that may save everybody. The commissioner may be able to point out that something has already been tried three times, and doesn't go anywhere. He may find it completely frivolous. Or he may just not have the resources because there are already two cases going on and may urge the plaintiff to start a private action.

Wouldn't that be reasonable? Wouldn't that keep some of the frivolous stuff out of there?

Mr. Stéphane Robichaud: In theory, it makes sense. But the reality has been that it's impossible for many of these small business owners to even get the commissioner's attention to have their situation assessed appropriately.

Mr. Chuck Strahl: But again, what if we required the commissioner to respond—if it were no longer good enough just to send a form letter saying "Sorry, I'm busy this week, I haven't got the resources."

I'm not a lawyer either, you know, I'm just throwing this out. But I saw in your brief that there were 900-plus complaints already, even without any hope of private access. There may be 2,000 if we open up the floodgates a little. We're going to have to give more resources to the commissioner and the tribunal. So what if we just said "Okay, you've got a month"—or whatever time is reasonable—"and you have to respond within that time, or else private access to the tribunal is allowed"?

It's interesting that most of the small fry in this pond say they want access, but the big fish say "Don't worry about us, just look over your shoulder and there are bigger fish". I'm not sure who to feel sympathy for. But it does seem to me that we need to be cautious, and not just throw open the doors to strategic litigation from anybody.

A bookstore could be doing a thriving business, but it would be vulnerable to some big conglomerate like Chapters—though I don't want to pick on them—saying, "We'll get this sucker". If everybody just got into it, the lawyers would have a field day. Isn't that a concern?

Mr. André Piché: In reality, I think perhaps the first step for any small business owner considering direct access to the tribunal would be to go to the Competition Bureau and check the facts. I would try to get informal advice from it before proceeding. So in a sense what you're talking about makes a lot of sense. But I'm not sure we need a formal process. I think it would happen because a small business owner who decides to go the tribunal route really has to think about it very seriously. It's very expensive, and very time-consuming.

Mr. Tom Ryley (Executive Vice-President, Sunoco Inc., Suncor Energy Inc.; Canadian Petroleum Products Institute): May I just add something?

Mr. Chuck Strahl: Yes, please, if you would. I find this an interesting topic.

• 1710

Mr. Tom Ryley: First of all, I'd like to tell Mr. Martin that Suncor Energy is a Canadian corporation, as are a majority of CPPI members.

The issue we would have with direct private access is really one of the efficiency of government and the efficiency of how competition matters are resolved, because there are no changes to the law that are really occurring here. The competition law that we're adhering to is the same whether there's private access or not.

Our concern is, first all, if we go directly to the tribunal, then it is a quasi-judicial process and we're involved. It becomes far more time-consuming. There's a lot more procedure. There's a need for a lot of outside experts. I'm frankly a little bit surprised that smaller companies aren't intimidated by that, because Suncor and Sunoco, which is a reasonable sized enterprise, is intimidated by the potential commitment of time to that.

The other thing I'm quite concerned about is when people have a public tribunal at which they can make their assertions, whether or not they're ultimately found to have merit, there's always the fear that you are judged to be guilty until proven innocent. The allegations that people make about your behaviour often get a lot more press than what is ultimately determined to be the reality of the situation.

So I think that's why our association takes the position that we are not opposing private access, but we think that the reputation of all the parties involved and also the efficiency of government is best supported by following this conduit through the bureau. If the bureau will pick up the case and take it to the tribunal, that should be fine. If the bureau does not wish to do so and provides its reasons why, then we're not concerned that it would then move to direct private access before the tribunal.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Strahl.

Mr. Bagnell.

Mr. Larry Bagnell: Someone is waiting for me in my office, so when I leave it's not because I don't like your answers.

My two short questions, which just need a short answer so I can leave, are for the CFIB. But before that I want to say I agree with the petroleum industry on the fact that—and I made this point yesterday—I hope private access doesn't dilute the regular core business of the competition board so that resources or whatever is needed cause the core business to suffer as well.

I was happy to see the consumers group bring up the issue of prizes. I did disagree, though, when you said consumers' needs were in front of business needs, because they're integrated. If there's a very competitive, healthy business community, then obviously they're going to be able to offer low prices and good products for consumers. But I'm glad you brought up the prizes, because no one else did. That's one of my pet points in this. In fact, I think the provision should even be stronger, that it should be guaranteed that the cost of collecting the prize can't be more than the prize.

My question is for the CFIB, because maybe some of your businesses are launching these contests. I'm not sure if it was in your brief, but are you in favour of these provisions related to contests?

Mr. André Piché: Yes, we are in favour of the provisions.

Mr. Larry Bagnell: As Mr. Martin did, I want to compliment you. Of all the groups I get information from, yours—and I wrote a letter this week to that effect to someone—is the best, in the sense that when you present the ballots and everything, you present the arguments that came in from your members on both sides, and that is very helpful for us in debating policy.

You talked about the cases that can't be held now because of private access, and that's been well dealt with by everyone else. But of the cases that can go under the existing regulations, the larger cases, are you happy that those are being dealt with effectively and competition is being preserved?

Mr. André Piché: I think what we pointed out is that there were a number of complaints made to the bureau, and very few had actually resulted in successful completion. So it's one of the reasons why we believe that private access is just another way of helping small business get redress.

As the Commissioner of the Competition Bureau said himself, this is to round out the Competition Act as it is now. So we certainly would be concerned if direct access meant an undermining or a weakening of the functions of the bureau. We believe the bureau has a very legitimate role to play. It's just another element of its arsenal. I think it's another avenue for small business to get redress.

• 1715

Mr. Larry Bagnell: Are you saying that if it didn't work the first time through the tribunal, then they could try plan B, try again?

Mr. André Piché: One of the problems that was highlighted in the studies made by the bureau was the lack of jurisprudence we have in Canada from the tribunal. One of the ways of increasing this jurisprudence is to have more cases going before the tribunal. The effect of that jurisprudence will be to clarify the rules of engagement with respect to competition between all businesses, whether they're small or large, and that can only be of benefit to everyone.

Mr. Larry Bagnell: Good, thank you.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Bagnell. Mr. St. Denis.

Mr. Brent St. Denis (Algoma—Manitoulin, Lib.): Thank you, Mr. Chair.

Thank you, gentlemen, for being here. It's been a very good discussion.

Mr. Perez, in your presentation you commented on the suggestion whereby an applicant for a private action would go to the commissioner first to get an opinion from the commissioner on whether the commissioner would take up this case and then proceed on behalf of the applicant, or to a broader class of people represented by the applicant, to the tribunal, or if it was rejected, the applicant would then make his or her own case.

Have you, in thinking this through, thought of the possible extra cost to the applicant, who, in your scenario, would first have to go to the commissioner and, depending on what happens there, then have to go to the tribunal? And have you thought of the possibility that a scenario like that would slow things down? Could you support a situation where maybe those two things happen at the same time, where, while the applicant for private access to the tribunal made an application to the tribunal, concurrently, the same application or documents were submitted to the commissioner in the run-up time before the tribunal looks at the case?

The commissioner would have an opportunity to decide to pick it up, to indeed see whether there was any support beyond the applicant's in the broader community for that. I think the commissioner is more or less mandated to look at things from a national point of view, as opposed to an individual case, and I can see the merit to that certainly in some cases. So could you support a concurrent application process where the general notion of private access, with

the necessary bells and whistles as proposed and others if necessary, could proceed with the commissioner having, shall we say, a fall-back option or the exception option of participating? Could I have your comments on that?

Mr. Alain Perez: Actually, Bill C-472 requires that when a complaint is made to the tribunal, the commissioner at the same time is notified and he has the right to intervene. So there is no question of delays here. There wouldn't be any more delays, and there wouldn't be any cost either, because it would be just a question of sending a notice to the commissioner. And the commissioner, as I have tried to explain previously, has to study that notice. They don't go into a drawer. He has to decide whether or not to intervene.

What we're adding here is that when he declines to intervene, he has to tell us why, and this goes to the core of our proposal here and I think to the core of the dispute between Bill C-472 and the private sector, which is that we don't want to see the bureau stop doing what they're supposed to do. If they don't have the money, give them the money, but don't let them abdicate their responsibility.

Very briefly, I've heard a lot of comparison with the U.S. The difference between Canada and the U.S. is that in the U.S., every state has an antitrust division. There is an antitrust division in Washington and there is the FTC, so there are lots of resources out there.

• 1720

Here we have one Competition Bureau, and no province has any jurisdiction on competition. So I don't see why, in getting to private access, you would even consider diminishing the responsibilities and the accountability of the bureau.

The Vice-Chair (Mr. Walt Lastewka): One more question.

Mr. Brent St. Denis: I may have misunderstood your earlier comments, but is it a one-after-the-other process, as you see it, or concurrent? Is there a danger that the comments of the commissioner—assuming he or she didn't agree and then made such a statement—could possibly prejudice the applicant's case before the tribunal? The commissioner swings a lot of weight, you know, when it comes to these issues. Is there a danger of that?

Mr. Alain Perez: He has the right to intervene already in Bill C-472.

Mr. Brent St. Denis: It would require him to make a comment one way or another, as I understood it.

Mr. Alain Perez: It would require him, if he declined, to explain why.

Mr. Brent St. Denis: Which would probably be in most...

Mr. Alain Perez: He would just have to say this was purely a private matter. In his opinion, it would have no effect on the marketplace, therefore the resources of the plaintiff and the other party should be expanded, not the government's.

Mr. Brent St. Denis: Okay, I appreciate the clarification.

Thank you, Mr. Chair. Thank you, Mr. Perez.

The Vice-Chair (Mr. Walt Lastewka): Mr. Martin, you have a short question.

Mr. Pat Martin: Yes. I welcome the chance to get back into it a little bit.

I don't want to back and forth with our witnesses from the Petroleum Products Institute, but Petro-Canada is on the list of your membership, as well as the list of companies that oppose this, as per the Public Policy Forum, as is the Canadian Chemical Producers Association, which may not be related; Imperial Oil; the Canadian Petroleum Producers Association; Shell Oil; and Irving Oil. I certainly don't think your industry is unanimous in this, but that's not the point; you're only speaking for the organization you're here to represent.

Mr. Alain Perez: I'm speaking for these people here.

Mr. Pat Martin: Are you speaking on behalf of those organizations? Have you actually contacted them again, and they've changed their views since the public policy forum?

Mr. Alain Perez: They have not changed their views, Mr. Martin. Petro-Canada is the chair of CPPI right now. I would certainly not be here committing suicide, presenting something that my chairman was not in agreement with. Mr. Ryley is not the co-conspirator here. We were opposed to Bill C-472, the way it was written. We are still opposed to Bill C-472 the way it is written.

Mr. Pat Martin: But Bill C-23, which we're here to speak to...

Mr. Alain Perez: Bill C-23 is fine. We will support that.

We're bringing to your attention what we think could bring a consensus, certainly with my industry, around Bill C-472 and the amendments to Bill C-23. So there is no—

Mr. Pat Martin: Contradiction. I think I understand. That's fine.

The Vice-Chair (Mr. Walt Lastewka): Okay, Mr. Martin. I want to go to Ms. Torsney. If there's time we'll come back.

Mr. Pat Martin: Okay.

The Vice-Chair (Mr. Walt Lastewka): Ms. Torsney.

Ms. Paddy Torsney (Burlington, Lib.): Yesterday we had some presenters who suggested that one of the ways to assist with private access and make sure it was achieving the best opportunity for Canadians would be to limit the length of time cases could be dealt with, have pre-agreed facts, and limit the number of witnesses and experts who could testify.

Have any of your organizations given any thought to whether that would be of interest to you? If you already support it, would that be a problem? If you're a bit concerned about it, would it help you to be less concerned?

Mr. Tom Ryley: Yes. I think it's fair to say... None of our organizations has people on staff just to deal with issues before the bureau or the tribunal, so efficiency in government is important to us, as taxpayers. It's also very important to us as enterprises that have to allocate our scarce time among various activities. We're in support of anything that can occur to make the process work more effectively. I think that is really the point Mr. Perez was making to Mr. Martin.

• 1725

As we've worked through this issue of private access, we're not advocating it. We're not opposing it because we see the pressures for it and we understand them, but we're trying to figure out a workable resolution, to make it work as effectively as possible.

Ms. Paddy Torsney: CFIB?

Mr. André Piché: Essentially, I have to agree that any process that takes place should be efficient and fast. It is in the interests of especially small business owners, who may not be in business for very long if the process takes too long. We would be in favour of something that was streamlined, efficient and fast—absolutely.

Ms. Paddy Torsney: Mr. Croome.

Mr. David Croome: I don't have anything to add to those points.

Ms. Paddy Torsney: To the CFIB specifically, I appreciate a lot of the work you do as well, and I appreciated you providing us with the numbers. They're very helpful.

You have over 100,000 members, but only 8,700 people replied—not a great return—and 64% of them said they supported changes to the Competition Act.

You mentioned in your brief that people are a bit afraid of annoying their suppliers, and what have you. But surely, if the information is kept confidential by you as an organization... I'm a bit surprised that the response rate was so low, if there's such a need for changes. That's one thing.

The second thing I'm concerned about is that it really is a question of resources. On the one hand, if a small business person feels that, through the Competition Act, they need to seek remedy because otherwise they're going to go under or their business is being severely affected, I'm a bit concerned about whether they have the resources to be involved in an action, to get counsel, to even attend, or even write the letter. I really wonder how effective a mechanism it's going to be for a small business owner, especially one with fewer than five people.

Mr. André Piché: I'll address the first point about the rate of responses we got. If I go by other survey methods that are being used by StatsCan, this is a very good return.

Second, many small businesses will not respond to this issue because they're not touched personally. It's one of those things that—

Ms. Paddy Torsney: Not yet.

Mr. André Piché: —when you're hit with it, then you're very concerned about it, but otherwise you're not and you don't think it's going to hit you. So that's about the rate of return on the responses.

Do you want to talk about the second point?

Mr. Stéphane Robichaud: Yes. It links to the point André is making, as far as the point of return. I know there are concerns about an influx of requests, as soon as this change is made in position.

I can assure you the small business owners know almost nothing of the Competition Bureau, until they are faced with the situation where they're losing their family business. They're not in it for interests, and they're not following these changes as another possible strategy in their competition or their marketing strategy. It's a tool for people who are faced with a very desperate situation.

From the examples I've been faced with there were small business owners who had grouped together, whether they were in the auto glass industry, or small retailers. Probably six to eight times a year I'm asked to meet with people in P.E.I., or in small communities. People from all over the Maritimes have joined together and are all in very desperate situations. It's not just one small business. When it gets to that point, they're all in a very precarious situation.

Ms. Paddy Torsney: That's fair.

To you, Mr. Croome, thank you very much for your support on the game cards. It is actually a serious problem. Perhaps because we get a lot of junk mail—not junk mail, but important circulations from businesses—especially those of us who spend time volunteering on some of these committees, you don't necessary look through it all.

Since they were distributed with my householder, I have paid a lot more attention to these kinds of things. I am constantly looking at what is out there in circulation. It's perhaps partly my interest in marketing, as well. It's surprising how many of these products are out there and how many people are confused into believing they have won something.

• 1730 

Ultimately, to Mr. Bagnell's point, if they know that it's going to cost them more than the prize is worth and they still choose to spend on it, we can't stop that. But if they don't understand that there is a cost, as with the 1-900 calls in the specific scratch and win ones that got me a little agitated, then they don't... It's a sad example of buyer beware, because they are getting caught and they're spending a lot of money when they don't have it. It does really concern me, which is why we started the private member's bill. And then we're inundated with all kinds of mail about those cards.

Thank you.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Ms. Torsney.

Mr. Martin, you had one last short question.

Mr. Pat Martin: That's fine.

The Vice-Chair (Mr. Walt Lastewka): Chuck.

Mr. Chuck Strahl: I agree with CFIB's comment that this is not a panacea for small business or big business. Nobody likes to go through these processes, and as WestJet is finding out, even when you're accepted, it's still no good. You still have to slog it out in the marketplace often against a competitor that seems to hold the cards. So I agree with you. I don't anticipate there's a whole flood of people with two or three employees just eager to get to see Mr. von Finckenstein.

The question I had for whoever wants to address it is the draft bilateral agreement that was tabled by Mr. von Finckenstein as a suggestion of how this bilateral agreement might work—I would think probably first of all with the United States and then with other countries that have a well-developed competition bureau similar to ours or someone we want to have an agreement with.

Did anybody have a chance to have a look at that to see whether you feel... I'm thinking of you, Mr. Ryley. You're asking what about that big American company that uses this just to get information or get access to your strategic plans or whatever it might be. Are you convinced that this type of bilateral agreement has enough safeguards for you to be comfortable if our government were to sign something like it with the Americans, for example?

Mr. Alain Perez: The issue of bilateral agreement is complicated first by the fact that we don't have the same laws and second by the fact that what is an offence there may not be one here, and vice versa. So it opens up all sorts of things. You could have a U.S. company suing just to get the information on something that here would be completely innocuous, but there would be considered something else.

So a lot of care has to be given. However, I don't want to doom the bureau by saying that I support them, but in general we trust the bureau and we trust the government. Therefore, it's a concern. Lawyers are going to bring all sorts of other issues around that. From a business standpoint and from the experience we have with other laws, such as access to information, etc., governments usually do a good job at making sure that their own nationals are not in jeopardy. It's a concern, but it's not something overwhelming.

Mr. Chuck Strahl: Well, that's my position too. This is a big framework agreement. None of us here is a lawyer. But it does seem to me for many industries—I don't know whether it would be the same for the CFIB folks or not—that the bigger threat, so to speak, for competition is the biggest fish in the ocean, whatever the ocean might be. If the ocean includes a bilateral agreement with the United States or with the Europeans, for example, and with others that have well-developed competition bureaus of their own—something not the same as us—it does seem to me that it's worth your taking some time before this is passed into law to look at that section itself. Although we may hope the government does it right, and let's hope they do, the concern we need to have is on that international competitive side.

We saw recently, for example, the Nordic countries complaining about some things that were going on in Europe and then saying, well, it passes muster here, but I go to another jurisdiction and it doesn't; it's a different set of rules.

This is one of the things we are going to have to get right, especially the first one or two of these bilateral agreements, because failure to get it right will perhaps doom us to some serious problems. It's as significant as a NAFTA type of agreement, especially for industries like yours that have a lot of transborder negotiations.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Strahl.

I'm going to conclude the meeting.

Mr. Chuck Strahl: If I might, just before you conclude, I have one thing to bring up, and not with regard to the witnesses.

• 1735

The Vice-Chair (Mr. Walt Lastewka): I want to thank the witnesses, both for your detailed reports and for being very succinct in your explanations today. I think it was very clear that there were a number of issues that were muddied, but you were able to clear them up. So I want to thank you for your efforts.

Mr. Chuck Strahl: Mr. Chairman, if I could, I don't have a motion or anything, but I wonder if it would be appropriate, given the article that was in the *Globe and Mail* on the weekend about the OECD's supposed analysis—an unknown confidential report that deals specifically with the Competition Bureau—to ask our clerk to make all necessary inquiries to try to get a copy of that report somehow.

They slam this thing pretty seriously. We had better either defend it vigorously or have the minister in to explain why the OECD apparently thinks it's such a bad deal.

The Vice-Chair (Mr. Walt Lastewka): Okay.

Thank you. The meeting is adjourned.

This is Exhibit “37” 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
CHAMBRE DES COMMUNES
CANADA

INST COMMITTEE MEETING

Notices of Meeting include information about the subject matter to be examined by the committee and date, time and place of the meeting, as well as a list of any witnesses scheduled to appear. The ***Evidence*** is the edited and revised transcript of what is said before a committee. The ***Minutes of Proceedings*** are the official record of the business conducted by the committee at a sitting.

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November 6, 2001

Minutes | Evidence | Meetings (INST)

Meeting 48 | Meeting 49

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Tuesday, November 6, 2001

• 0904

[*English*]

The Chair (Ms. Susan Whelan (Essex, Lib.)): I'm going to call the meeting to order. We will be looking at Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

• 0905

Just before we start, members, I want to give you a heads up that our trip to Washington is going to be delayed until January due to the constraints in Washington. So for those who are trying to adjust their schedules, I did want to let you know that. I'll get back to you about Europe, hopefully by Wednesday.

That being said, we'll go back to the meeting of the day, the subject of the day.

We're very pleased to welcome here today Mr. Stanley Wong. We also have Professor Michael Trebilcock from the University of Toronto; Mr. Robert Russell, a lawyer from Borden Ladner Gervais; and Mr. Jack Quinn, from Blakes.

We're going to begin with opening statements. I'm going to begin in that order unless there is another agreed upon order.

Mr. Wong, please.

Mr. Stanley Wong (Individual Presentation): Thank you very much, Madam Chair.

I appreciate the opportunity to appear before this committee. I know the committee has a very busy schedule, so I'm going to confine my remarks to three areas: temporary order, consent order, and private access, which I know I'm going to be asked questions about.

First I want to say I'm appearing before this committee in my personal capacity, not as a representative of any client or any organization. Specifically, I'm not appearing on behalf of the Canadian Bar Association, even though I'm a member of the executive of the national competition law section as its immediate past chair.

There's one other qualification I'll make when I come to talk about the proposed temporary order, and I'll start with that now.

The comments about the temporary order I'm going to make concerning clause 12, which adds proposed section 103.1, are made in my personal capacity. I emphasize that because I was retained by the commissioner of competition to advise him about the interim order powers. The good thing is that I made it a term of my retainer that I be allowed to comment publicly on whatever bill comes forward. Obviously, I cannot reveal to you what I said to the commissioner, but I'm free to comment publicly and that's what I'm doing.

My concerns about the proposal under clause 12 are the same as the comments I made when I appeared before the committee concerning the interim report, which was published in June 2000. Essentially, it is a generalization of the power that was granted to the commissioner in light of the demise of Canadian Airlines, what is now proposed subsection 104(1).

The last proposal that came in the private member's bill was really the same as proposed subsection 104(1), the present powers given in respect to domestic air service. The proposal in clause 12, which is set out as proposed section 103.1, just changes it from the commissioner issuing it to the Competition Tribunal being able to. Now that is an advance, there's no doubt about that.

What I find unsettling is that it still misses two key concerns with the generalized power. One is that there is no requirement, before applying for an order, or for the tribunal to award an order, to have the commissioner say, "I have reasonable grounds to believe there is a violation of part VIII of the Competition Act". That requirement is not there. There's not even a requirement for suspicion. All it says is that the conduct "could be" the subject of an order by the tribunal.

The second point is that in terms of the impact, the commissioner is required to say only that the likely impact of having no action taken is that there would be remedial harm to competition.

Now, if it stopped there, which is in the bill, that would be fine. But it goes on to say if a competitor is eliminated, if there's significant loss of revenue, or if there is significant loss of market share.

As you know, competition lawyers and those who study the policy all know the concept of competition law and policy is to preserve competition, not competitors. There are losers and winners in any competitive process. By imposing this requirement distinct from preserving competition, it creates a different avenue for public policy.

• 0910 

If, for example, there are only two competitors, obviously if one competitor is going to be eliminated, it will lead to a loss of competition. That will be taken care of by the first branch of the impact test.

By and large, I support the comments made by the competition law section in its brief to this committee.

The second area I want to comment on concerns the consent order process, which is in clause 14 of your bill. It amends section 105 of the act. I know there has been very little discussion on this in witness testimony before this committee. I know Mr. Addy has commented, and I know Mr. Goldman will be making some comments in this regard.

I am very, very concerned that this proposal is going forward. It does have broad support in the private bar. There's no doubt about that. And clearly, of course, it has the support of the commissioner. But we should not forget when Parliament amended the Competition Act in 1986—in effect, brought in the Competition Act—the Competition Tribunal was made to be a central figure in adjudicating the enforcement of competition law in this country.

What this proposal does is it turns the tribunal into a registry office. I agree with the technical and specific concerns in the CBA national competition law section brief, but not the conclusions. In my view, the proposal will marginalize the tribunal and undermine the adjudicative oversight of the tribunal with respect to enforcement of the act. That to me is very important.

I think one can see that a number of the amendments going forward, whether on the consent order process or the temporary order powers, are all designed to turn our competition laws into an administrative process where much of the power resides in the hands of the commissioner and the commissioner can make deals with private parties without public oversight. I think that is a serious mistake, which I urge the committee to address.

The final comment is with respect to private access to the tribunal. I personally support providing the right of access to the tribunal in respect of non-criminal matters except for mergers. I say this not because I have been "associated with being a plaintiff" in a number of private actions under section 36 of the act. Yes, that is true, but if you look at the cases I've been involved in, most of those clients were public institutions such as hospitals, public companies such as forestry companies, or major business organizations. So it's not a question of saying it is used for strategic litigation.

My concern around public access is related to the proposal brought forward by Mr. McTeague in clause 13. I think there are some specific problems with section 75. My concern is that it doesn't go far enough. I don't think, unless we're prepared to award monetary damages for

such things as abuse of dominant position, i.e. monopolization, it will be used at all.

I know from the history of section 36 that until very recently there have been very few cases. It's very, very difficult bringing these cases. I think the availability of class action legislation in three of our provinces—and a number of provinces are coming on board with it soon—will change the landscape to some degree. But I know of no major country where a breach-of-monopolization statute does not come with a fine in the public domain, whether it's the United States or the European Union. And that to me is a concern.

I think we can all make ourselves happy by saying "Gee, this is modest; we'll bring something in." But I don't think much will happen, because the cost of litigation is very high, even with the availability of cost remedies. I think if you want to fight a case, cost will not be a deterrent.

Those are my comments.

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

We're now going to move to Professor Michael Trebilcock, from the University of Toronto.

Professor Trebilcock, please.

Professor Michael J. Trebilcock (Individual Presentation): Thank you very much, Madam Chairman.

In the interest of time, I'm going to focus my comments almost exclusively on Mr. McTeague's amendment to Bill C-23 dealing with private party access to the tribunal. This is an issue with which I've long been engaged, and I think I can be most helpful to the committee if I focus on that issue.

Let me, however, just add my concurrence in support of Mr. Wong's point on consent orders under Bill C-23. I think it is bad public policy to turn the tribunal into a post office, to just mail them a consent order and require them to enforce it, whether they consider it appropriate or not. So I strongly endorse that concern.

• 0915

Turning to the proposed private member's amendment to Bill C-23 dealing with private party access to the tribunal, let me just situate this issue in a longer and broader context.

We have been debating this issue in this country for 30 years. We've been debating it since the Economic Council of Canada, back in its report in 1969, recommended a double damage remedy for private parties prejudiced by violations of the act. Their proposal or recommendation was not adopted, but in 1976 a single damage private remedy was provided for criminal violations of the act.

We have been debating ever since then expanding private party remedies, particularly with respect to reviewable practices. So this is a 30-year debate. This is not a debate that started with Mr. McTeague's private member's bill. I think it's time to close the debate, because 30 years is long enough to study and debate this issue.

The issue before us today is the question of whether private parties should be able to initiate complaints or proceedings before the tribunal with respect to part VIII reviewable practices, excluding mergers, which I accept. There are a number of reasons why this makes sense, as a matter of public policy, as opposed to self-interest.

First, private remedies supplement public enforcement resources. Those private parties bring their own enforcement resources to the process. In terms of deterring or discouraging violations of the act, this enhances effective deterrents. Secondly—and here again I endorse Mr. Wong's point—private remedies here provide the possibility of corrective justice for aggrieved parties, that is, righting the wrong they've suffered.

Injunctive relief, in part, rights the wrong they have suffered but only for the future, to the extent they've suffered some prejudice in the past as a result of violations of part VIII. A forward-looking injunction will not remedy that wrong, and only compensation will do that. In that respect, I think Mr. McTeague's proposed amendment falls short of achieving one of the major goals of private remedies—redressing the wrong private parties have suffered.

Private parties in some cases, relative to public enforcers, may have a comparative advantage. They're closer to the source of the grievance or the nature of the wrong; they have stronger incentives to take action to redress it; and they may have superior information about the nature of the wrongdoing, relative to the public enforcement agency. Another advantage of private party access to the tribunal is that by increasing the array of cases that the tribunal adjudicates, we will develop over time a richer, more nuanced, and more helpful body of jurisprudence.

Finally, I think private remedies—private party access to the tribunal—achieve something that's very important as a matter of public policy, and that is enhanced accountability of the public enforcement officials or agency, in this case the Competition Bureau or the commissioner who heads it. Remember this agency, unlike competition agencies in many other countries, is headed by a single commissioner. It is not a multi-member commission, like the Federal Trade Commission or the European Commission.

In terms of his decisions to bring or not bring cases, there is very little accountability. The ability of private parties to go to the tribunal, irrespective of the commissioner's decision, is an important check on the exercise of the powers and discretion he has under the act.

• 0920 

All of those are good reasons why I have been arguing for 30 years that private parties should have direct access to the tribunal with respect to reviewable practices.

Let me comment on two or three specific issues. I agree with submissions this committee has already received that, in one respect, Mr. McTeague's proposed amendment should be narrowed, that is, section 75, dealing with refusals to supply, should include a substantial lessening of competition test.

In another respect, I believe the proposal should be expanded. It makes no sense to me—and I've heard no coherent argument to justify this—to exclude section 78, abuse of dominance cases, from this proposal. Indeed, those of us who are close to this field know that in the past many cases have been argued before the tribunal by the commissioner in the alternative, as section 77 cases or section 78 cases. This is true of NutraSweet, Nielson, and TeleDirect. So

many abuse cases can be repackaged as section 77 cases, but not all abuse cases can be repackaged as exclusive dealing or tying cases. There'll be a subset of abuse cases that private parties will not be able to seek redress for.

Part of the domain of the abuse of dominance provisions can be covered off by parties repackaging their complaints as section 77 complaints, but not all cases. So I would strongly urge this committee to expand the scope of this proposal to include the abuse of dominance provisions.

I've already noted my concurrence with Mr. Wong on adding damages as a remedy here. I believe, realistically, this is probably an heroic request at this point. We are probably not going to see it now, but I would hope this committee would be prepared to revisit this issue in three or four years. If there have been no cases, or next to no cases under the proposal as it stands, then the committee should ask itself why. I believe if that turns out to be the case, the explanation will likely be that parties cannot obtain compensation for prior injury suffered.

Those are my comments, Madam Chairman. As I say, we've been debating this issue for 30 years, and I think we should not get into a mindset where nothing changes the competition law in this country inside of a 15- or 20-year timeframe. The world demands somewhat more timely responses to issues than that. Thank you.

The Chair: Thank you very much, Professor Trebilcock.

I'm now going to turn to Mr. Robert Russell from Gordon Ladner Gervais.

Mr. Russell.

Mr. Robert S. Russell (Individual Presentation): Thank you for the opportunity to appear before you this morning. I'd like to start by telling you, as I've provided in the written submissions this morning, I will be focusing exclusively on the interim order provision found in the proposed section 103.1.

I'd like to try to bring to you the perspective of a litigation lawyer, and the practicalities of the test and procedure proposed in the legislation.

Like Mr. Wong, I have advised the commissioner on provisions such as this in the past, but I'm appearing here today not as a representative of any private party or the commissioner, but in terms of my own individual viewpoints on the proposed legislation.

I believe we have to bring a pragmatic approach to the interim measures issue. There's no disagreement I've heard to date from the Canadian Bar Association, or anywhere else, that there is some need for a provision like this. The differences are that the CBA points to an expanded role for the current section 100. I do not believe that solution is adequate. I'm supportive of the current provision, and I believe there are a number of reasons why this committee should support the provision, as it's currently before you.

• 0925

The CBA, in their submissions to you, were critical of both the test that's applicable to interim measures and the procedure—particularly that it's an *ex parte* procedure for obtaining these orders. I believe the criticism that was put to you by the Canadian Bar Association is ill-founded.

The first point I'd like to raise with you is that this order is intended to be used during the investigative stage of the process under the Competition Act. Unlike injunctions in the civil courts or under this legislation, which are applicable to interim orders once proceedings have been commenced, once an application has been commenced under this provision, this is intended to deal with urgent circumstances, to give the commissioner sufficient time to investigate the matter and prevent public harm during that short period of time.

When you bring it within context, neither the test nor the procedure is ill-founded. In fact, as I'll be pointing out, they are very similar in both Europe and the United States. The U.S. provision and the process are almost identical to what is being proposed in this amendment.

Dealing first with the test, the CBA suggests the test is not rigorous enough. You've heard some of that this morning from Mr. Wong. It suggested that the commissioner would potentially move to obtain an interim order when he did not have a reasonable belief there had been an offence under the act.

My response to that is, first of all, when you look at other provisions such as section 11, which is currently in the act, the commissioner only has to say to a court in that case—in this case to the tribunal—he has commenced an inquiry. The basis for commencing an inquiry, at least in one respect, is a reasonable belief. So it's incorporated, if you will, in him putting forward to the tribunal that an inquiry is being commenced.

It's pointed out by the CBA that there are two other ways in which an inquiry can be commenced: one, by a six-person complaint, which I'm sure you've heard about; and two, by direction from the minister. It presupposes, however, that in those circumstances the commissioner will move to obtain an interim order when he doesn't have reasonable belief. That's what flows from the criticism you find in the report or the submissions from the CBA.

That ignores the oath of office the commissioner has to take, incorporated in the act in subsection 7(2), to impartially enforce the act. This is another important circumstance or perspective that you have to bring to this issue with respect to administrative discretion.

While many people put forward the litigation model or adjudicative model on almost all of these points, our act is not built that way. Our act is built on two models. It's built on administrative discretion by the commissioner during the investigative stage and then adjudicative models for final determination of issues under the act. In that respect, we are not different from other jurisdictions.

If you look at Europe, the commission has both. The commission has the administrative role and makes administrative orders under its legislation, but it also has an adjudicative role. So for those who say we should have separate and independent adjudication, our model would be better than what you'd find in Europe.

In Canada, what's being proposed here for interim orders is again better than what people would say in Europe, because in Europe an interim order can be made by the commission itself, much like was proposed in an earlier stage of proposed amendments to the act. This model brings in the balance we've always had under the legislation.

The commissioner must use his administrative discretion fairly and impartially to determine whether he's going to seek an order. Then there is an adjudication on certain issues before the tribunal. I'd ask you to keep in mind that this is at the investigative stage, which is essential to

review this provision. At the investigative stage—and I say this from some of my prior roles acting as counsel for the commissioner—at the early stage, what does the commissioner know about the industry? Very often he knows very little.

He has no evidence on day one to be able to go before a tribunal and have an adjudication on any of the merits of the case. He will have, potentially, informants and complainants who have suggested certain facts that would be harmful to the public interest, which is of course his mandate. Based on the balance he has to bring at that stage, because there is no evidence to adjudicate at that early stage, he would seek this very limited interim order. We are talking about ten days at the start of the interim orders.

• 0930 

Extensions are upon notice and with adjudication with the parties present. It's only for the first part of this order, if you will, that the party is not given notice. They can move immediately the day after or the same day before the tribunal to have a review of that. This is the balance they're attempting to strike in the legislation, and I believe it's very consistent with other jurisdictions.

As to the suggestion that the test should be more rigorous, what the CBA does is say you adopt the test for injunctions. That is essentially the balance-of-convenience test we apply in the courts. Now, we apply it in the courts once everybody has the facts. Of course, two private interests—say two airlines, just to use an example—will know the facts quite well. When one of them goes in seeking an injunction, they will be able to put facts forward very easily. That's not the commissioner's role at the early stages of an investigation; he doesn't have the evidence to be able to do that.

Secondly, the most important aspect of this is that he's not a private litigant. He is not protecting some individual pecuniary interest. It's the public interest that's at stake, which is the policy behind this legislation.

There are a number of cases dating back almost a hundred years where, when the Attorney General is attempting to pre-emptively block breach of legislation, he or she is not put to a test of showing a balance of convenience. Why? Because the public interest will always prevail over a private interest under our system of law. It is proper to subordinate that private pecuniary interest to the public interest.

Here's an easy example. You're going to have an order, potentially, in an industry where the party who's affected will say that they'll lose $1 million during the first ten days. Although my friend Mr. Wong says you're not to balance the harm to private parties, we do elsewhere in the act, I might point out to him; in merger review we look at whether a vigorous competitor is being eliminated.

What this test says is that the commissioner must come to the tribunal and show that a competitor could be eliminated during the period of investigation. That's really what he's doing. That is important because nobody can predict against that million-dollar figure that the big player might put up. What's the public interest? How is it going to be affected? How much will consumers lose in the long run if a small airline is put out of business in the first ten days?

You can't judge it in the beginning. You can only judge it based on what the commissioner can bring at that stage to allow the investigation to go forward. If the party can come forward and put cogent evidence before the tribunal, immediately—I want to remind you—or the day after this *ex parte* order is issued they will have a review of the initial *ex parte* order.

And that goes to the procedural element. There is a lot of criticism, and it even goes so far as to suggest that *ex parte* procedures are unusual. As the CBA says, ordinary principles of natural justice and procedural fairness are being obviated by this provision.

With all due respect to my friends, I must say that there are numerous provisions in this act and in civil procedure that provide for *ex parte* orders. They acknowledge that that is so in urgent circumstances, which is exactly what this provision is intended to deal with.

The opposite—if I could just give you the effect of the opposite approach—would be to give notice and to allow the party to be heard. It sounds very simple and it sounds almost intuititively fair, I acknowledge that, but it's what it imports into the process that you have to be aware of.

The opportunity to be heard imports the opportunity to file materials. It imports the opportunity to cross-examine on the commissioner's materials. In some cases the litigation process that accompanies it can take weeks and months, not only days. Even if the tribunal were to order that it happen quickly, in most cases you're not able to have that process completed within ten days.

It's very natural, I submit to you, to have this initially as an *ex parte* procedure followed by review, which is the structure of the legislation. Otherwise, the potential for delay, either legitimate delay from process or delay from strategic litigation, is a bigger risk than what is imported by initial *ex parte* process in these circumstances.

Finally, the CBA is critical of a lack of right to appeal the tribunal's order. I'd like to just point out first of all that in the investigative process, appeal rights are not currently provided for in the legislation. This has been brought before appellate courts in Canada, and they have said in respect of this issue that there is no inherent right of appeal under our legal system. It's only when Parliament grants a right of appeal that a right of appeal exists in Canadian law, and that is what we call "trite" law. It's incontestable law. There's no inherent right of appeal. Let me try to convince you why it makes absolutely no sense here.

• 0935 

We're talking about a ten-day initial term for this order. An appeal is useless without a stay in these circumstances. A stay means the order has no effect during the interim where the court hears the appeal. What happens is that if there is an appeal, that means the order is not applicable. Pending appeal, if you have an immediate stay, the whole effect and policy objective behind this are obviated. Second, if a stay isn't granted, the party who's seeking the appeal doesn't get the benefit they want. It simply isn't common sense to talk about appeals for ten-day orders.

In conclusion, I believe the provision on interim orders is a balanced approach in the circumstances in which it would be applicable.

I notice the red light went on. I just want to make one final comment if I could. I wasn't intending to make it, but after hearing my friends I feel compelled to.

It is on the registration of orders. If you said that the tribunal would be turned into a rubber stamp, you'd be required to make the same comment about our court system in Canada. Consent settlements are registered, if you will, or filed all the time in our legal process, and it's an efficient way of trying to resolve disputes. Right now it's done by undertakings, so it happens all the time as an efficient way of trying to deal with various matters that fall under this legislation. There's nothing untoward, nothing unusual, about the tribunal being in a position to basically register settlements on issues.

The Chair: Thank you, Mr. Russell. I'm going to have to stop you there.

I'm going to go on to Mr. Quinn, please.

Mr. Jack Quinn (Individual Presentation): Thank you, Madam Chair.

I want to confine my remarks to the amendments that would expand the rights to apply to the tribunal for relief of individuals who've suffered harm to their business interests. I agree pretty much with everything my old friend Michael Trebilcock has already said, so I won't go over all the points I would have perhaps otherwise made had I not listened to Michael's presentation.

I think the justification for this is that this is a modest proposal that's being put forward. As Michael mentioned, it doesn't provide for compensatory damage relief. That has been criticized by some of my colleagues at the bar as a deficiency, but I recognize that we're involved in expanding the scope of the tribunal's ability to develop Canadian competition law, the civil, reviewable part of Canadian competition law, and I would endorse the proposal even without compensatory damage relief.

This is for two reasons in particular. One is the point Michael made about public accountability. The commissioner's enforcement decisions under the current scheme are really not subject to any kind of external review outside the internal management structure of the ministry in which the commissioner's bureau resides. I do think that this modest proposal that's been put forward is a safety valve on the commissioner's discretion. If a private party feels aggrieved and is convinced that they have a meritorious claim, they can proceed without the commissioner's consent or involvement in the proceeding.

I think the other thing that's important to realize is that Canadian competition law has not developed a large body of well-thought-out jurisprudence in applying and interpreting the statute. With complex economic legislation of this kind, I think our system of precedent, of *stare decisis*, really depends on the tribunal being able to hear and decide enough cases so they can generate rules that give the law more certainty and predictability. I favour it for that second reason also.

Having said this, and in the interest of time, I'd just like to focus on two or three things where I do take issue with the amendments and where I do think they could be improved.

• 0940 

My first point, already made by Michael, is that there isn't any justification I can make out for

not including the abuse of dominance provisions as part of the matters that can be brought by private parties to the tribunal. I simply think it's a deficiency, one I can't really justify in my own mind on any logical basis.

The second concern I have arises from the rule for awarding costs in these proceedings. People have criticized private enforcement because of a concern it would give rise to frivolous litigation, to spurious claims being raised to inflict harm and expense on innocent respondents in these cases. My own feeling is that we should apply the same cost rules we apply in our civil court in Ontario—because that's the province where I've always practised and taught law.

I don't think the current standard that is in the bill now, "frivolous or vexatious", is going to work very well to ensure that the private litigant's incentives are aligned with the public interest. I think the "frivolous or vexatious" test is a very high standard to meet to justify a cost award. A lower standard like the one we apply in the civil courts makes a lot of sense.

Finally—and this is where I take issue with what my friend Rob Russell has just said—I think the consent order process in the bill is flawed. I realize that in settlement proceedings in civil courts, judicial approval or judicial review is typically not required to give effect to a private settlement. But in this context, it's very plausible that the parties to privately initiated actions in the tribunal could settle the case in a way that would be detrimental to the public interest, that is, to the interests of consumers. The classic example of this would be the patent infringement cases large companies file against each other where they then enter into a settlement in which they cross-license each other to employ the patent.

These kinds of agreements, these cross-licensing agreements that arise out of settlements and litigation, are notoriously suspect in that they may well be injurious to consumer interests. What we require here is a sober second look by the tribunal. The tribunal has to be put in a position where it has to review the proposed settlement and determine that it is in the public interest, that it will not likely harm competition.

With those changes, the bill would be a very good piece of legislation.

Thank you.

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

We're now going to move to questions. I'm going to begin with Mr. Strahl.

Mr. Chuck Strahl (Fraser Valley, PC/DR): Thank you, Madam Chair.

I've really enjoyed the testimony this morning from all of you. It's nice to see people give testimony without looking at their briefing notes. You must scare people to death in the tribunals, I would guess, because you obviously all know your stuff very well.

There are a couple of things I had. One question was for Mr. Wong, to start with. You mentioned that there's no requirement for the commissioner to rule ahead of time under clause 12, proposed section 103.1. What exactly would you like to see happen there? What's your ideal world?

Mr. Stanley Wong: Well, I'm glad you raised that, because one of the requirements for him is to certify that an inquiry is being commenced. I know my friend Mr. Russell said something about its very early days, but let's not forget that there are three ways in which a section 10

inquiry can be commenced. One is under section 9, where six residents of Canada file a complaint and say, we think so-and-so is doing bad things, Mr. Commissioner, so please investigate. Under law, the commissioner must start an inquiry.

The second way is for the responsible minister, in this case the Minister of Industry, to say, Mr. Commissioner, start an inquiry; then he must start an inquiry.

• 0945 

The third one is where the commissioner says "I have reason to believe that grounds exist for making an order" under proposed paragraph 103.1(1)(a), or grounds exist for an order by court under the other parts of the act.

I think if you put in there that the commissioner has grounds to believe there is a basis for making an order, that would meet that test. What in fact gets hidden behind section 10.... And we know section 10 can be started by a six-resident complaint, and that's done typically.

The Chair: Mr. Russell.

Mr. Robert Russell: I'd like to add and tell you why I have a different perspective on what Mr. Wong just said.

If you introduce as part of the test the terminology "reasonable belief", it then becomes part of the review of the order when contested by the party. To be able to say he has a reasonable belief or not means you're going to have to look at the economic effects of the conduct to be restrained at a very early stage. Anything you import into the test for getting the order is part of the review process. That is a mistake. It's not needed, I would submit to you, because you have to be able—and this is what I said earlier—to rely on the administrative discretion of the commissioner.

I'd put to you, would the commissioner seek this order if it was a six-person complaint he didn't believe was reasonable, where he didn't have evidence to show a party was being harmed, which is part of the test? It's not reasonable to assume his administrative discretion would be abused in that way.

Second, if the minister directs it, the commissioner still has the administrative discretion whether he's going to seek this order or not. Again I'd simply say to you, if I went through the act with you concerning referring matters to the Attorney General, any of the things that involve administrative discretion are much bigger, if I can put it that way, than what is being put to you as a problem with respect to seeking this order.

But I would say to you the big mistake of putting in the test of reasonable belief is it will turn the review of these orders into full-blown adjudication of merits during an investigation. And that's what I have to reiterate: we're within the investigative stage here; there should be no adjudication of the merits at this stage whatsoever.

The commissioner is not ready to deal with that, and that's not what's happening under the legislation.

The Chair: Thank you.

Mr. Strahl, you may have one more question.

Mr. Chuck Strahl: I have a whole bunch, but let me just try to chase this down a little bit further. Mr. Wong, is the reason you want this provision in there to limit the possibility of vexatious litigation, or why do you think it's important to have it?

Mr. Stanley Wong: I think it needs to be tied to a provision of the act, because if you look at the requirements under proposed section 103.1, it isn't tied to a provision of the act saying "I believe somebody is about to do something contrary to the abuse of dominant position" or "I believe somebody is doing something contrary to a tied selling provision of section 77". There's nothing that's required. All it says is that conduct "could be the subject of an order". We know the word "could" is very broad. Then it goes on to say there's "injury to competition", but not all injury to competition is within the ambit of this act. There is plenty of injury to competition that's not compensable—if it's not substantial, for example.

So that's the reason. Nobody's suggesting the commissioner has bad motives, but our system of laws requires independence of adjudication, and what this provision does is limit the review of the tribunal in issuing that order.

That's all I'm saying, and in fact it's a cosmetic change from 104(1) where the commissioner issues an order out of his own office.

The Chair: Thanks, Mr. Strahl.

Mr. McTeague, please.

Mr. Dan McTeague (Pickering—Ajax—Uxbridge, Lib.): That was a very interesting exchange between both of you, and I'd certainly like to see you continue that in just a moment if I could, but I had a concern.

First of all, thank you for being here, all of you. I realize there are other things that may preoccupy you on a morning like this.

You voice concern, Mr. Trebilcock, and yourself as well, Mr. Quinn, about private access not going far enough. In a perfect world I suppose we could make it do that, but this has been crafted in such a way that it doesn't raise the question of public interest or detract from the authority of the commissioner. I think many of us are content to hold on to that just for a little while—although I think the idea of single damages, as we'll see from the Australian example and others, is certainly in keeping with global trends.

I'm interested in your comments with respect to "refusal to deal". The competitive harms test I believe some of you had alluded to ought to be in there. We've heard this from other witnesses as well.

• 0950 

I'm wondering, in light of the Xerox case—where the tribunal, I suspect, has actually read this into jurisprudence—whether we need to crystallize that more formally. Is there a necessity for putting in a competitive harms test as it is written, given that case?

Prof. Michael Trebilcock: Is that directed to me, or—

Mr. Dan McTeague: Well, all of you, I suppose, but you can—

The Chair: Professor Trebilcock, would you like to start?

Prof. Michael Trebilcock: I'm not sure the tribunal's decision in Xerox is quite as clear on that issue as you're suggesting; that is, that it has interpreted section 75 as having a substantial lessening of competition. In fact, behind me in the audience are Neil Campbell and William Rowley, both of whom have jointly authored a paper on the Xerox case in which I think they argue the opposite. So to the extent there's any ambiguity about whether there's a competitive harm test implicitly in the section, we should resolve the ambiguity.

I'm more concerned about the exclusion of the abuse of dominance provisions from the proposal. I think this is a serious shortcoming, so I want to re-emphasize it.

Mr. Dan McTeague: Perhaps, Madam Chair, I will go on. Does anyone else have any comments on that?

The Chair: Mr. Russell.

Mr. Robert Russell: I didn't speak on private access, but I would like to say that I believe the balance struck in the current proposal is probably the best balance, because you are experimenting quite broadly with this provision. I don't think there are too many people who would endorse the problems that come out of private antitrust lawsuits in the United States. This is an appropriate balance to bring some of the benefits my friends have spoken of without attracting too much strategic litigation, which has always been the concern about private access. A balanced approach, I believe, has been put forward.

On the issue of reading in to "refusal to supply", I just comment that the courts typically say it's when Parliament hasn't done its job that they have to read in. I say that with all due respect to the committee. If you have an opportunity to clarify, and the courts or the tribunal have said it needs to be read in, then I think that's an invitation to clarify the issue.

Mr. Dan McTeague: On the question of private access, I'd like to get your impressions generally. I must also suggest very strongly that I thank many of you here for your help and assistance over the years—Professor Trebilcock in particular; Stanley, you as well; and Jack, I know I've read some of your material in the past as well on this subject in trying to find the proper balance.

We have heard overwhelmingly from witnesses that this isn't going to bring an end to industry as we know it in Canada. But there are some who have suggested—and I suggest for a number of reasons.... But dealing with the facts and the arguments, do you believe the current safeguards that are in Bill C-23, as represented in part IV, section 72, will be enough to prevent strategic litigation? Do you also believe, if I could ask all of you—it's up to you, Mr. Russell, if you want to answer some of these—

The Chair: Mr. McTeague, I'm going to have to ask you to limit yourself to one question right now.

Mr. Dan McTeague: On the same question, do you believe this proposal will bring Canada's economy into a state of fragility as a result of its introduction, as some no doubt will probably try to suggest, if they haven't already? Thank you.

The Chair: And is that addressed to each of them?

Mr. Dan McTeague: Each of them can respond.

The Chair: Mr. Wong, would you like to start?

Mr. Stanley Wong: I just don't think this present proposal will lead to strategic litigation. The benefits are enormous here. If you had monetary damages, it could, without proper safeguards, but as it's proposed now I don't think it will lead to a serious problem.

The Chair: Professor Trebilcock.

Prof. Michael Trebilcock: I agree entirely with Mr. Wong. My worry is that as the proposal stands it's almost excessively modest, and I worry that three years from now we'll be meeting here and finding that nothing has happened. So if I have any concerns, they're the opposite of those you note.

The Chair: Mr. Quinn.

Mr. Jack Quinn: My only point, to elaborate again, concerns the cost award standard. "Frivolous and vexatious" is a very high standard to meet in order to get a cost award. The idea that the cost rule functions to discourage frivolous claims I think is well-founded and a very important part of our civil justice system. So I would apply the normal cost rules and not have the standard be frivolous and vexatious.

• 0955

The Chair: Mr. Russell.

Mr. Robert Russell: I believe we can take some instruction from the experience under section 36, which is the provision that provides access to the courts in respect to criminal matters. That has been around since 1976, and although there haven't been a large number of cases, that doesn't mean that matters aren't resolved because of section 36 all the time. Of course, in any sort of commercial litigation—and that is what this is all about—nine out of ten cases don't see the courtroom steps. So you can have a lot more effect from this provision than you may see in terms of adjudication.

I agree with Mr. Quinn that the test for costs is actually, in my view, somewhat contrary to the structure of the act today, because under section 36, is it right that you would get costs in the ordinary model if you commence an action under section 36, but to go to the tribunal you have to meet a higher standard in order to obtain a cost award? I think that's inconsistent, and I would agree with Mr. Quinn that it should be applied the way he has suggested.

The Chair: Thank you.

Mr. Wong, did you want to add something?

Mr. Stanley Wong: Yes. I think the cost provision under section 36 is more than the normal cost rules. It really is a provision for the cost of investigation, and certainly, although it hasn't been litigated yet, it is broader.

The Chair: Thank you.

Thank you, Mr. McTeague.

We're going to move to Mr. Rajotte, please.

Mr. James Rajotte (Edmonton Southwest, Canadian Alliance): Thank you, Madam Chair.

I want to follow up on what Mr. McTeague was asking about. Particularly, Mr. Quinn, you mentioned that we should apply the same procedure for awarding costs that exists in civil cases. For those of us who are not lawyers, could you expand on what the current procedures are and why you think they are better than what's proposed?

Mr. Jack Quinn: I think the civil standard is typically to award costs, not all the consequential costs but a substantial portion of them, to the party who wins the litigation. So this discourages people from bringing cases that clearly are not likely to succeed.

Mr. James Rajotte: When you say "a substantial portion"—

Mr. Jack Quinn: I mean two-thirds or half of your costs.

It is possible for courts to award solicitor and client costs, but that's typically only done when the judge determines that the case was probably frivolous and vexatious, which is a hard standard to meet.

I think we need to use the cost rules to encourage people to bring meritorious claims, or claims that are likely to be meritorious, and to discourage behaviour that makes the trial process unduly costly and expensive.

Mr. James Rajotte: Does anyone else want to add to that?

Private access is obviously the controversial issue that this committee is looking at in terms of Bill C-23, and many industry groups have opposed it, but I have not frankly heard many reasons why a moderate form of private access should be opposed.

To follow up on that with a general question, I believe at least three of you have said what's in Bill C-23 is almost too modest and we should go farther, and I believe, Mr. Russell, you said this is a good balance. Maybe you want to comment generally. Are those your positions? Is it too modest, and if so, how much farther would you go at this point?

The Chair: Mr. Trebilcock.

Prof. Michael Trebilcock: As to why I think it's modest—I'll comment in a moment on whether I think it's too modest—first, as the Roberts study that the committee will have access to has reported, almost every other industrialized country's competition laws have private rights of action or private remedies in the context we're talking about. So we are the outliers; we are not ahead of the pack here.

• 1000 

Secondly, if you think about other fields of law that will be familiar to many of you, in securities law, regulation of securities markets are common, both in Canada and other jurisdictions, for breaches of securities law, like insider trading, to lead the best criminal prosecutions and private rights of action by aggrieved parties. This is routine. In environmental law, there may

be a public prosecution; there may be a tort action for nuisance or breach of statutory duty. In consumer protection law, misleading advertisements may lead to prosecutions that may lead to breach of contract actions or tort actions for fraud, or whatever.

Let me emphasize that I think people who come here and defend the application of competition laws to private monopolies, that we should apply our anti-trust laws to inhibit private monopolies, but at the same time argue the virtues of a government monopoly, a government monopoly on the enforcement function, are adopting a position that is internally contradictory.

The Chair: Mr. Russell.

Mr. Robert Russell: As I've said, and I don't retract from my viewpoint, I think it's balanced, given the competing interests. I'm not sure, you may have heard it from other people, but there is a competing interest against it, of course, that the Competition Act is a form of economic regulation and that we have in the past chosen a system where that is the purview of government because it is intrusive and it can be abused when it becomes part of private process.

The reason I say it's balanced is because I'm concerned that we would shift too much towards the United States, where nine-tenths of any trust law enforcement is done through private action. It's a very costly process in the U.S., and very costly to the businesses that operate in that environment, and in fact causes some companies to avoid setting up operations in the U.S. So you are looking at broad economic regulation. It's a much bigger issue than whether I believe we should have private action or not in my world. It will give us more jurisprudence.

That's a good thing, but the process in getting it is not necessarily a good thing for the economy, and I think you have a big job on your shoulders to balance it. If you are trying to balance it, I think what has been put forward is a good balance, but there are very important competing interests from a public policy standpoint that Parliament has to balance here.

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

Mr. Volpe, please.

Mr. Joseph Volpe (Eglinton—Lawrence, Lib.): Thank you, Madam Chair. Gentlemen, you might find this kind of a strange question, but I find some of the presentations, including your response just now, Mr. Russell, a little curious as well.

Others have come forward and have essentially said, as you have, that this could turn out to be a costly exercise for businesses, as we see in the United States. I'm wondering why we would be concerned about that, simply because in the United States this cost factor has already absorbed into the business environment, and it would appear that statistics and analysts who read them and convey their impressions would agree that the American economy is probably more productive and more competitive than any other, bar none. Is that too big a cost to bear, to add the jurisprudence you're talking about?

Mr. Robert Russell: You're inviting me into a debate I don't particularly want to get into, but I believe any form of regulation is a form of tax, to put it in a context. We came from an economy that had a fair amount of regulation, and the current government has brought us a long way in taking some of those costs away. That's the first thing I'd say.

We are talking here about introducing another form of regulation, albeit by private action, a cost to our economy. I'm not exactly the best person equipped to balance the benefits of the structure of the U.S. economy compared to Canada—you have better people to speak to you about that—but I'd just make the observation that it's that economic cost that's very difficult for you to judge when you introduce this issue. I'm quite willing to leave it in your hands, but I'd just make the point that it is a tough balancing act, and you really don't know where it's going to take us.

If it shifted us all the way to what the experience is in the U.S., I'd be alarmed, because I think it would be a very big cost, and we have other ways in which we want our economy to run in Canada. We have social needs that we see as more important than maybe they do south of the border, but you have to balance all these costs of doing business in Canada.

• 1005

So I wouldn't ask you to adopt willy-nilly—you wouldn't do it anyway—the U.S. approach, because we have other objectives to meet in our economy, and it's a really important balance.

The Chair: Mr. Wong, did you want to answer that?

Prof. Michael Trebilcock: I would like to say something.

The Chair: Yes, Mr. Trebilcock.

Prof. Michael Trebilcock: I think the U.S. experience with private actions is a red herring in the context of this proposal. They have one-way cost rules, contingent fees, expansive class action procedures, treble damages, and civil jury trials. If you add all of these things together, it's a night-and-day contrast with what is being proposed here—adjudication by the tribunal, no damages, two-way cost rules, no civil jury, and no contingent fees in most jurisdictions. So I think the scare-mongering by drawing on the U.S. experience—I appreciate you are not doing that, but some interests will—in the context of this proposal should be dismissed out of hand.

The Chair: Mr. Wong, do you want to say something?

Mr. Stanley Wong: I think sometimes, Mr. Volpe, the comment is made that this legislation will have a chilling effect. Well, if it's the chilling effect, it may bring us a better standard of living and a higher dollar. I agree with what my friend Mr. Trebilcock said about it being a red herring. What is being proposed is very modest—with some technical changes that are needed.

The Chair: Mr. Russell, you wanted to respond?

Mr. Robert Russell: A litigator has to reply, particularly when he's being accused of offering up a red herring.

I simply say this to my friends. The problem with the argument I just heard is if there are so many impediments to the U.S. experience in the current proposal, then you have to judge whether it delivers the benefits my friend suggests it will, and that's the problem.

If you want all the jurisprudence my friends have talked about developing—like in the U.S., they're really saying—then you're talking about a model that would attract that amount of litigation, which they say is a red herring that won't happen.

Similarly, if you don't have a broad enough right of private action.... We do not have a large consumer movement in Canada, so you don't have.... While I started off saying it's a balanced approach, I predict you won't find the jurisprudence being generated the way my friend suggests, because without that large consumer movement in Canada, I don't know who exactly is going to bring it, except people who may want to interfere with the transaction. That's the problem. And it's really a tough one for you to judge.

The Chair: Okay. I'm going to let Mr. Wong respond, and then I'm going to have to move on.

Mr. Wong.

Mr. Stanley Wong: I actually wanted to make a remark that I didn't make in the beginning. I want to say I appreciate what the committee has done in their interim report. I know there were some early debates in this committee at the start of this session on whether to continue with it or bring it up on a different day. I personally think it's a great idea that we have another independent source of debate about competition law policy. It shouldn't be in the hands of lawyers, private companies, and the commissioner of the government of the day. We do have a parliamentary system, there's no doubt about it. Things won't happen if the government of the day doesn't support it. But I think it is important that this committee develops its expertise to offer independent observation about the public policy issues in this area.

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

[*Translation*]

Do you have any questions, Mr. Bergeron? You do not. Okay.

[*English*]

I have Mr. Bagnell.

Mr. Larry Bagnell (Yukon, Lib.): I have one short follow-up to Mr. Volpe's question.

I agree with you we don't need more litigation in general, or regulations or cost, but in this situation, where it increases competition, I think the only cost is to the inefficient businesses, the large businesses. The benefit of that litigation is to the consumer, because you make the businesses more competitive, and in the long run, that actually improves the business and the economy, as opposed to taxes, because when they're more competitive, they're going to get more international contracts.

Mr. Robert Russell: There are a couple of things I'll respond to.

The first is the statement that we don't have a system that guards competition as effectively as we've suggested. Second is that large enterprise isn't necessarily efficient to deliver consumers the best benefits. I don't agree with that. For example, there have been numerous international studies that show Canada has the lowest food prices in the world, bar none, for every hour of work done in Canada. Yet there are those who say it's too concentrated.

It's not an easy equation to say big versus small, but again, I would say we've picked a model where we do have a champion of competition. We've picked an administrative model, much as we did in various other areas, be it corporations or the securities commission, and I would suggest if you look at the experience in Canada and what's being delivered, bar some

industries, like airlines, we actually do better than we think we do in preserving competition in Canada. I said I believe it's a balanced approach, but you're talking about a fundamental change, and with that you are embarking on a very major policy decision in competition law.

• 1010

The Chair: Are there any other comments?

Mr. Strahl had another question.

Mr. Chuck Strahl: A couple of you brought testimony about the consent orders provision of the act. Mr. Addy, in his submission, suggested that perhaps we should go.... I think, Mr. Russell, you expressed some concern about how this may develop under the current system, but he suggested something in between full right of appeal and delaying tactics and so on. Mr. Addy suggested we adopt the U.S. standard of a waiting period, allowing the concerned parties to have written submissions, and so on.

I don't know if you've read Mr. Addy's testimony or not, but he suggests that on the consent order, we actually consider some sort of middle ground where we do allow people to...not actually file a full appeal, perhaps, but allow them to make submissions and allow a period of time to do it. Are you familiar with that idea?

The Chair: Mr. Russell.

Mr. Robert Russell: I'd just say I'd be dishonest in appearing before you if I didn't tell you I've been retained by private interests that would look at consent order processes as an opportunity to delay and to interfere with the transaction. I think any of the people who are in this area would have at least similar consultations, and legitimate arguments to bring, hopefully. But what you do by introducing that is take something that is settled and then open it up into an unsettled state, to put it simply.

The suggestion that the tribunal is rubber stamping is incorrect. The tribunal is not asked to adjudicate. That is true. The commissioner has used his administrative discretion to enter into a resolution and is asking to have enforcement of the tribunal. If you open it up, as is suggested by Mr. Addy, you're opening up the same possibilities as we've seen in a number of other consent order proceedings.

The Chair: Mr. Wong.

Mr. Stanley Wong: The concern here is that unlike in the civil courts, where there's a settlement every day, this is not a settlement between two private parties. The court has to make sure it has jurisdiction—basically, when you send an order in, within the four walls of the litigation, it's settled. But here, one of the powers that is going to be granted the commissioner is to make terms the tribunal itself cannot make.

As the Canadian bar pointed out—I disagree with the conclusion, but I agree with the observation—you could have a term that's already part of the registered consent agreement. Then it comes up for amendment and variation, and the tribunal asks to vary a term that it had no power to make. It boggles the mind to think that could go on.

The Tunney Act is what Mr. Addy has proposed, and I know Mr. Goldman has been in favour of that. I think we need something like that. The problem is we've had very few cases. I know in the early days of the 1986 amendment that brought in the consent order process, the tribunal went too far. It opened the door for interventions left and right. But that has been changing through the course of reform. The trouble is, with all due respect to the commissioner, he's too impatient. Every time he loses a matter, he wants to amend the act. That is absolutely wrong. If he doesn't like the result, he should appeal it.

I know, as a private practitioner, when I make a deal with the commissioner I do very much want to have no interventions, but that is not what I say as a person trying to talk about the public interest. You want the tribunal to mediate. Maybe the standard should be some sort of public interest, but I want to be careful about using the words "public interest". Public interest has to be for the purpose of the act. It can't be in a broad context, for example, employment or regionalism. That is not what this act is about. This is about a law of general application dealing with preserving competition generally in the marketplace, and not any other purpose.

I say this looking at some of the members who have been introducing legislation to deal with their favourite interests. I say this very bluntly, but I think it is wrong to turn the tribunal into a registry office. That's what it is.

The Chair: I'm going to have to stop you there, and I'm going to have to stop Mr. Strahl there.

We are definitely over time, but I wanted to ask a question that didn't come up earlier today. Is proposed subsection 104(1) still necessary in light of proposed section 103.1, which would give the tribunal the power to issue interim orders?

• 1015

Mr. Stanley Wong: I know you asked the commissioner that question at his first appearance before the committee. I think he evaded the answer.

The Chair: That's why I'm asking you.

Mr. Stanley Wong: If you're going to keep proposed section 103.1, which I hope you don't, you won't need proposed subsection 104(1).

The Chair: Are there any other comments on that?

Mr. Russell.

Mr. Robert Russell: I think they are for different purposes. I hope that's what you got from the commissioner, and I tried to focus my comments on the particular purpose of proposed section 103.1.

It's an investigative stage we're at, and our act is actually broken into those parts. One is investigation, and that's what this is all about.

The Chair: I have one other question on private access.

Often opponents of private access will say it's not necessary, since you already have the ability to take actions through private contracts or tort. Are there any comments on that?

Mr. Wong.

Mr. Stanley Wong: That's not necessarily so. For example, you could be a competitor under the abuse section, and the dominant player could be locking up all your suppliers. You would have no contractual relationship, necessarily, with the competitor. I hope you wouldn't because then you might be into a conspiracy issue.

So there will be non-contractual bases for complaints.

The Chair: Thank you.

Professor Trebilcock.

Prof. Michael Trebilcock: I agree completely with Mr. Wong.

Most of the abuse cases occur when the complainant has not had a contractual relationship with the respondent. In fact, that's what they were complaining about. In the TeleDirect case, the advertising agents were complaining that they could not form a contractual relationship with the respondent.

The Chair: What about under general tort law?

Prof. Michael Trebilcock: There might be some kinds of abuses that would be subject to tort claims, but I think there would be very few. This would be interfering with economic relations, or something. These would be quite speculative kinds of tort claims.

The Chair: Mr. Russell.

Mr. Robert Russell: I believe there are more remedies available than have been put to you, both in tort law and under section 36.

Many of us have crafted lawsuits, on behalf of private companies, that have relied on concepts in tort law like unlawful interference with economic interest, and general laws related to conspiracy to injure, which Canada has uniquely in the world as a tort. This allows you, without certain elements required in the U.S. and England, to bring a lawsuit for conspiracy. So there are various remedies.

The other thing I would point out to you is the abuse of dominance section. There is significant overlap with the conspiracy provision, in terms of application to facts. If you have a strong enough case to bring one—and I'm talking about somebody who's prepared to spend a fair bit of money bringing a case—and it doesn't matter whether they're in front of the tribunal or the courts when it comes to this area of law, they probably have a good enough case under section 45, if they have a good enough case under the abuse section, to at least test the waters.

The Chair: Under the sections you refer to and under tort law, do you have any idea of the success rate?

Mr. Robert Russell: Like any commercial litigation, there have been a number of cases settled on those. I've commenced cases on some of the earliest ones, and we had resolution based on the case being brought.

The Chair: Okay. Thank you.

I want to thank you all for being here. I do apologize. We have gone over our time a bit here. I'm going to ask members to try to stay in their places as much as possible, so we can exchange witnesses, because we have another group of witnesses coming right now.

I thank our witnesses for being here, and invite our next group of witnesses to the table.

• 1020

I want to welcome our next group of witnesses. We're very pleased to have with us, from the Canadian Council for International Business, Mr. Mark Katz, the vice-president and a lawyer from Davies, Ward, Phillips & Vineberg; and Mr. Matthew Ivis, who is a policy analyst.

We also have with us, from the Competition Law Policy Group, Mr. William Rowley, a lawyer from MacMillan Binch; Mr. Neil Campbell, also a lawyer from MacMillan Binch; and Mr. Arthur James, a former vice-president of law and corporate relations from IBM Canada Limited.

I propose we have opening comments from both groups, and then we'll move to questions together, if that's okay. I propose we have the comments first from the Canadian Council for International Business, unless there's a different agreement among you.

We'll begin then with Mr. Katz or Mr. Ivis.

Mr. Matthew Ivis (Policy Analyst, Canadian Council for International Business): Thank you, Madam Chair.

The Canadian Council for International Business is pleased to have this opportunity to provide comments to the committee on Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act. This bill raises several issues of vital importance to the CCIB membership.

CCIB is the Canadian business secretariat to two important international business associations —the International Chamber of Commerce and the Business and Industry Advisory Committee of the OECD. In this capacity, the CCIB is the key business voice on policy issues, including competition law-related issues discussed at a number of multilateral forums, including the United Nations and the World Trade Organization.

The CCIB generally considers Bill C-23 to be a positive contribution to the development of Canadian competition law. However, we would like to provide the committee with some detailed comments, specifically in the areas of mutual legal assistance and consent orders.

Before I turn the microphone over to Mr. Katz to relay CCIB's detailed comments, I'd like to briefly express our perspective on the issue of private access, which is under consideration by this committee, in addition to the other elements of Bill C-23,

Generally, the CCIB believes it is premature to introduce private right of access to the Competition Tribunal. The consultation process failed to forge a consensus on this issue, and from the perspective of CCIB, there hasn't been much progress in this area since the consultation process concluded. Specifically, from the perspective of CCIB's membership, we recognize there are both pros and cons to private access.

On the pro side, for example, we believe that private access will result in reducing government expenditures, which is something we fully support. However, on the con side, there are some serious concerns as to whether private access will achieve its stated goal, to provide SMEs with a more efficient access to enforcement on competition matters. The fact that the cost of bringing a case in front of the tribunal is estimated at over $1 million raises serious concerns among our membership as to whether private access will help the SME community.

Furthermore, the CCIB believes this process should not be about building consensus for consensus' sake. We should be looking to implement the best solution for our stated objective, which is to provide effective remedy to the small business community. Currently, one can point out at least two such solutions to this issue: one, to allow private access as this committee is discussing; and two, to give the bureau more resources, on a committed and prioritized basis, to bring more cases forward.

I understand earlier witnesses to this committee provided other alternatives, and I think all of these possibilities must be evaluated on equal footing. In short, we believe the necessary groundwork has not been completed on this issue. We submit that much more assessment, with input from relevant stakeholders, including the Competition Bureau, is necessary to determine which solution is best for the stated problem.

There has been no comparative analysis of alternative solutions, and we believe the committee could benefit from such a robust discussion. Only then will we be able to weigh the pros and cons of each proposal and implement the most effective solution.

With this brief introduction, I'd like to turn the microphone over to Mr. Katz, vice-chair of the CCIB's international competition law and policy committee, to relay specific detailed comments on the elements of Bill C-23 itself.

Mr. Mark Katz (Vice-President, Canadian Council for International Business): Thank you very much, Matt, and thank you, Madam Chair and members of the committee. I'm very happy to be here today, particularly because prior to this morning I didn't realize I was vice-chair of this committee, so it's nice to see I've been promoted.

Let me open with a brief explanation. As you probably know, Mr. Cal Goldman, who is the chair of the committee, was originally scheduled to be here. As matters have developed, however, we thought it more appropriate that I appear at this initial stage to present the CCIB's views. Mr. Goldman would of course then be happy to appear at a later date to answer any questions you may have once you've had the opportunity to fully consider and absorb our own submissions and those of the other parties who have appeared or are going to be appearing before this committee.

• 1025 

That could take place in the context of a subsequent hearing or in a series of round table discussions that we understand the committee is planning, whatever the committee chooses.

As I said, we thought proceeding in this way would be of greater benefit to the committee and allow for greater use of Mr. Goldman's expertise and experience. We hope you understand.

That said, I'll turn very briefly to detailing the CCIB's views on Bill C-23, which are set out in detail in the brief that has been submitted. I understand the members will have a copy.

As noted by Matt, by and large the CCIB is very comfortable with Bill C-23, and we commend the Competition Bureau and the other officials involved for the work they have done.

There are two areas, however, in which the CCIB believes that changes are appropriate and would make the bill even more effective. These areas are with respect to, one, the provisions of Bill C-23 dealing with mutual legal assistance and, secondly, the provisions of Bill C-23 dealing with consent order proceedings.

Let me turn to the issue of mutual legal assistance first. Again, our specific comments relating to this issue are set out on pages 3 to 7 of our brief. Let me outline them for you here. On the whole, the CCIB considers international cooperation in competition law enforcement to be a necessary development. The benefits of increased cooperation for the private sector include a reduction in the cost and time of investigations, less duplication of effort, enhancement of the level of transparency and certainty afforded in the legal process, and less frictions arising out of the multiplicity of national competition laws.

That said, one of the key concerns of the private sector in this process is the protection of confidential business information. In other words, accepting that there will be cooperation among authorities in terms of exchanging confidential business information, which they have been provided or have obtained through other means, the question is what protections will be in place to secure the legitimate interests of business in that information?

Bill C-23 recognizes the importance of this issue by incorporating a series of very helpful protections, and these are listed on page 4 of our brief at footnote 6. This certainly represents an improvement over the first proposed version of the legislation for mutual legal assistance that was contained in Bill C-472. Nonetheless we believe that certain gaps remain, and these can be summarized briefly as follows.

First of all, in terms of scope, the mutual legal assistance provisions in Bill C-23 are extensively meant to apply only to cooperation with respect to civil, reviewable matters. Unfortunately, the language of the bill gives rise to a certain degree of confusion regarding the bill's intended scope. For example, proposed paragraph 30.01(a) speaks in terms of the agreement addressing conduct that is prohibited or reviewable under this act. The use of the term "prohibited" connotes possibly criminal matters.

Accordingly, the CCIB suggests that Bill C-23 be amended to explicitly indicate that this applies only to mutual legal assistance in civil non-criminal competition law matters; that is to say, matters that are treated as civil in both Canada and the foreign country with which the agreement is entered into.

Second is the level of confidentiality required by the other party. Proposed paragraph 30.01(b) provides that before Canada enters into a mutual assistance agreement contemplated by the bill, the Minister of Justice must be satisfied that any record or thing provided to the foreign authority will be protected by laws respecting confidentiality that are in his or her opinion substantially similar to Canadian laws.

We believe that the standard of substantially similar is not sufficiently precise. At the very least, Bill C-23 should be amended to require that the requesting foreign government offer protections that are at least the same as the protections conferred on this information by the commissioner and the Competition Bureau.

Having said that, this actually points to a more fundamental problem with Canadian law. There's currently a lack of clarity regarding the scope of protection afforded to confidential information under the Competition Act due to a disagreement over the interpretation of section 29 of that Competition Act. Until such time as the scope of section 29 is clarified, it is actually difficult to say what constitutes a degree of protection that is substantially similar to Canadian law.

• 1030 

Accordingly, we recommend that the opportunity afforded by Bill C-23 be used to put an end to this controversy once and for all. I'll get into more detail below. It is our position that this be done by stipulating criteria to govern the disclosure to foreign authorities of information received by the bureau as part of its own investigative processes, and particularly information that is provided voluntarily to the bureau.

The third element of the bill we'd like to discuss is the issue of disclosure of information already in the Competition Bureau's possession. As drafted, Bill C-23 does not provide any protection for information a foreign agency may request that is already in the Competition Bureau's possession, as opposed to protecting information that is actively secured at the behest of the foreign agency. That is the case whether the information was obtained by the bureau pursuant to compulsory process, or provided to the bureau voluntarily.

In our view, there's no principle or reason for excluding information already in the bureau's possession from the protections afforded by Bill C-23. The risk that such information might be handed over to a foreign government would act as a severe disincentive for companies to voluntarily provide this information to the commissioner.

Therefore, we again submit that Bill C-23 should be amended to prohibit the communication to a foreign government of confidential information already in the bureau's possession, absent a waiver by the party from whom this information was obtained, or a court order of the type contemplated by Bill C-23.

Finally, and following from that previous point, we have concerns about disclosure of information provided under merger pre-notification filings or requests for an advanced ruling certificate. As you know, merger review under the Competition Act regularly involves the filing with and review by the commissioner of very highly sensitive company information. Accordingly, we believe that Bill C-23 should be amended to explicitly prohibit the communication of this type of information pursuant to any agreement with a foreign agency. This, for example, is consistent with the position that is adopted in the United States.

Those are our views regarding mutual legal assistance. Our next area of concern is with respect to Bill C-23's provisions governing consent orders, of which there's been some discussion today.

In our view, if enacted, these provisions go too far. We understand that the proposed changes reflect a certain level of concern that some have felt regarding the Competition Tribunal's consent to order proceedings. But, as we said, we don't believe the balance that is sought to be struck here is an appropriate one.

Accordingly, we have prepared draft language for your consideration, which I believe has already been provided to the clerk, which we think strikes a better middle ground by returning a limited role of oversight for the tribunal. In the end, we think it is important to maintain

checks and balances in the system.

The legislation that we have provided is modelled to some degree after the U.S. Tunney Act, which you have heard referred to today, and as well by Mr. Addy. At least it's modelled on the practice under the Tunney Act, perhaps not exactly on the statutory language. But we believe this approach will provide a much better balance in terms of the various interests that are involved.

If you do have, or are able to gain access to, the proposed draft, obviously you can review it afterwards, but I would like to bring your attention specifically to two key provisions.

First of all, proposed subsection 105(2) would read as follows:

> (2) The consent agreement shall be filed with the Tribunal at least 30 days prior to its effective date and shall be based on terms that could be the subject of an order of the Tribunal against that person.

That addresses the provision in Bill C-23 as currently drafted that would allow the commissioner to file and register an order, even though it may contain terms that the tribunal itself could not have granted. We don't think this is appropriate, and we think our provision strikes a better balance.

I'd also like to point out to you proposed subsection (4), which says that:

> (4) The consent agreement shall be registered upon the expiry of 30-days from the date on which it was filed with the Tribunal, unless a determination has been made by a judicial member of the Tribunal that there may be grounds for not registering the agreement based on a reasonable apprehension of bias, bad faith or a conflict of interest on the part of the Commissioner, or an excess of jurisdiction.

This is probably the core provision here. What we're trying to do is maintain a limited form of review. We have deliberately avoided using terms such as "patently unreasonable", because we don't want to open the door to a full-scale review of the competitive implications of the consent order, taking into account that this is based upon a settlement between the commissioner and the private party involved. However, we do think a limited form of review is appropriate, and this is our suggestion to narrow the scope. Of course, this is something that is obviously open for further consultation and consideration.

• 1035 

In any event, I hope this brief has been of assistance, and I thank you for the opportunity to appear today. We'd be pleased to answer your questions afterwards.

Thank you.

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

We're now going to turn to the Competition Law Policy Group, and we have Mr. Rowley, Mr. Campbell, and Mr. James. I believe Mr. James is going to begin.

Mr. Arthur B. James (Former Vice-President, Law and Corporate Relations, IBM Canada Limited; Competition Law Policy Group): Thank you very much, Madam Chair.

We are here representing the Competition Law Policy Group, and that organization in its structure has been in existence for over 30 years. It has followed the involvement and developments in competition policy. It's made up of 14 Canadian companies. We've already made our submission, and I hope it has been read. Today we're going to restrict our comments to one issue only where we think we can add some value to this debate, and that's on private action analysis.

We have, independently of this hearing, as a group put together over the last several months a report that you all have, which we've distributed to you, and I commend it for your research as it has material that I don't think has been covered by any other group in trying to examine the issue of whether private access should be adopted in the law.

The report has four components to it. It analyses proposals for private actions, the need for them, rationales, benefits, safeguards, and cost effects. We have a separate report prepared independently by Mr. Donald Baker, former Assistant Attorney General for anti-trust in the United States, on the American experience, and I think it will be helpful to you.

Third, Deloitte & Touche has prepared a report that's included in here on the empirical survey costs of all of the reviewable practices, actions that have taken place, and the actual costs that have been incurred by the organizations to pursue these matters before the tribunal. Finally, there's a detailed executive summary.

This morning we're proposing to approach this by, first of all, focusing on the uniqueness that Parliament put in place in the Competition Act in terms of its approach to reviewable practices, which is very clearly different from that of Australia, the United States, and the EC; second, discussing whether private actions needs are actually established; third, giving a cost-benefit analysis of the introduction of private actions; and fourth, presenting alternatives to ensuring concerns are effectively addressed.

At this stage, I'd like to turn it over to Mr. Rowley to pursue these four points.

The Chair: Mr. Rowley.

Mr. J. William Rowley (Lawyer, McMillan Binch; Competition Law Policy Group): Thank you very much, Madam Chair, members.

I think we'll start with the proposition that if it is not broken, don't fix it. If there is not a mischief that is understood across Canada, then don't try to fix the mischief. We say there is not such a mischief or such a problem, and the reason we say there is not such a mischief or a problem is because of the nature of our law. It's a very different law from any of the laws studied by the Competition Bureau that have been put before you in the Roberts report in support of introducing private actions. That report says all these jurisdictions, Australia, New Zealand, the United States, Ireland, and the U.K., either have or are considering private actions.

Each of those systems is entirely different from the Canadian because these systems are all systematically prohibitory. Canada's system is made up of prohibition and review. The reviewable practices—we crafted these in 1976 and added to them in 1986—are admired worldwide. We're moving in the world through the international competition network towards convergence.

Commissioner von Finckenstein is interim chair of this new unit, and I very much hope we will be using Canada as an example.

• 1040

The reason the reviewable practices are so important is that they are understood to be practices that are commonplace, day-to-day practices that can be pro-innovation, pro-efficiency, competition neutral, tough competition, or anti-competitive. You do not want to constrain those practices unless they are anti-competitive. We've chosen as our general standard substantial lessening.

Now we put in a commissioner with a legal duty who is subject to being required to investigate —from the sources we've heard this morning—these complaints, and we say the issue he faces.... You heard von Finckenstein on October 4. He says we agonize over this decision. Why do we agonize? Because such a tough line has to be drawn between what is pro-competitive and anti-competitive.

In 1995 the then-commissioner, then-director, had a consultative panel. They said do not go forward until you do a thorough cost-benefit analysis. That has not been done to date. We hope very much that the data in this book we have prepared and commissioned will assist in that process.

Let me make a couple of points before taking it to the important data. It is not suggested by anybody that meritorious cases are not going forward. It is not suggested that the director will not look at them; indeed, he is obliged to. The fact is that many unmeritorious cases are filtered out.

Here are some facts and figures. Over the last seven years the average number of complaints under part VIII, excluding mergers per year, was 537 complaints, and of those less than 1% are said to be anti-competitive.

Think about that number and assume you have a private action now, a right to go forward. Take 5%, 10%, or 15%; that's an additional 27, 54, or 81 cases a year. The tribunal has huge difficulty in dealing with two or three a year. Why? Because competition law cases, it is understood, are the most complex, expensive, and problematic of the legal system. One needs to think of those numbers.

Now let's look at costs. What does this Deloitte & Touche study tell us? Let me just tell you what they did. They looked at every case from the beginning of the Competition Tribunal that went through the process so they could judge an apple against an apple. The costs are direct and indirect, the out-of-pocket and those from the chill effect.

On the direct costs, the learning is that the average external legal costs born by defendants amount to $3.3 million per case. The average total cost, and this involves executive time, is $5.5 million per case. The average intervener's cost is $316,000 per case. The average Competition Tribunal cost is $685,000 per case. Add to that the average costs in the Wise, Blackman study of $1 million per case for the plaintiff and you see what you're dealing with. Multiply that by the 5%, 10%, or 15% we talk about as possibilities, and you have added costs to the system, leaving aside any chill effect, of $95 million, $100 million, or $292 million annually, and that's based on only half of those cases going forward.

Much has been said about safeguards. I'd like to say two final things in conclusion, something about safeguards and something about an alternative to ensure that the proper complaints are dealt with.

As to safeguards, there are basically three: leave of the court, summary judgment, and absence of damages. On leave of the court, let me just say, from 30 years of experience in the courts, that courts are very, very hesitant at the beginning of a case to deny a person his or her day in court. Second, summary judgments are very, very difficult to obtain, but it's not as if this will save costs. The only example of summary judgment we have before the tribunal is that the director in the Warner case was subject as soon as he brought his application to a summary judgment application.

• 1045

I was involved in the case, and we succeeded. The director's costs were $627,000 up to that point. There were two of us who were respondents. I can assure you that our costs were a good deal more. So in a summary judgment, we were at well over $2 million in costs.

Finally, as to the absence of damages, this entirely ignores strategic litigation. Strategic litigation is engaged in regularly. We heard from Mr. Russell that this is what people come to us about. Why? To delay, to get information, and to interfere with transactions.

Now if I may, I'll just turn in conclusion to some recommendations for alternatives if this committee and the government decide the costs we're putting in front of you are worthy of further consideration.

Let's look at service standards. The commissioner has done a lot in other areas of this act. He's published service standards. He has 360 round tables. They have guidelines. This will give certainty, and it will show when cases ought to be brought, when they ought not, and when they will not.

Finally, I'd talk about reasoned decisions. Look at Europe as an example. The European Commission's merger task force and the director general for competition publish a reasoned decision for any decision they make. What this has done in Europe is it has given a very rich body of jurisprudence as to when cases should and should not be brought.

In conclusion, Madam Chair and members, we hope this is a useful contribution to the debate. There is no question it is felt that there is a potential for chill that would arise if this kind of action were made available. Who would use it? Obviously, people who could afford it. That suggests on its face that strategic litigation would be high. We say the cost benefit needs to be analysed properly. We say the case is not made. When you do the cost-benefit analysis, it comes out in favour of an act that works exceptionally well now, that is a model for the world, and that can be improved by one or two transparency headings.

Thank you.

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

We're now going to questions. Mr. Rajotte, please.

Mr. James Rajotte: Thank you, Madam Chair. Thank you very much to the witnesses for your presentations this morning.

I do want to follow up with Mr. Rowley. You talked about how Canada had a unique competition legal system and about how other countries, particularly those with which we share our common law system, were different. I was wondering if you could expand on that.

If you could talk about.... You mentioned international convergence and how the current commissioner is very much involved in that. If he is involved in that and if Canada is a model the way it is now, why did he himself endorse private action or private access when he appeared before the committee?

Mr. William Rowley: What the commissioner said—and I wasn't here, but I've read the transcript of his comments—was, well, we're not putting it forward at this time. He personally believed there would be a basis for rounding out the act. He set out the pros and cons.

What you have not asked the commissioner about and what you may wish to when he comes back—and you'll have Mr. Fels this afternoon, who's an old friend, the commissioner of Australia—is the basic difference in the system. Canada chose, when it introduced reviewable practices, to say, we will not characterize these as unlawful. You heard Mr. Wong speak of violations. You heard about breaches of prohibitions. These are not prohibitions. These practices are practices everybody in business engages in, usually in an efficiency-enhancing way.

A small business benefits from having a region in which to distribute goods. Unless there is an anti-competitive purpose, the business benefits from the distributor saying, no, I will not give my goods to the person next door and make the distribution system not work for us unless there is an anti-competitive purpose.

• 1050

We have said all these reviewable practices are reviewable. There is jurisdiction in the public interest to look at them. We give the commissioner extraordinary powers of intervention. We have a right of six Canadian citizens, the minister, or the commissioner himself, to initiate proceedings, and he does regularly.

There are three proceedings. Think about it, because I know you've been talking about the interests of small and medium-sized business. The Xerox case, the Chrysler case, and the Laidlaw case, all landmark cases in the reviewable practices, were brought as a result of complaints brought to the commissioner, the then director, by small and medium-sized business.

Small and medium-sized businesses, and indeed large businesses, are not being denied access. The director in fact represented large business when he brought the Warner Music case. That was at the suit of the Bernalsman group. So the director is doing a very good job at bringing appropriate cases and filtering out those that are not in the public interest of competition.

Mr. James Rajotte: I want to follow up, then, on the costs, because people argue that it's going to be used for strategic litigation, but people are also saying that the costs are going to be prohibitive, particularly for small and medium-sized businesses. But when we had before us many representatives of small and medium-sized businesses, they argued in response to a question from me that the costs would actually be less if you had private access.

Mr. William Rowley: If I may answer that directly, these are facts we're putting in front of you as to costs; they're not made up. They're based on the survey as set out here. These are the real costs involved, and if you look at the Roberts study, the Australian Law Reform Commission says—and I can give you page references—we understand that this is the most expensive and complex litigation in the world.

If you put this in, I venture to say that small and medium-sized businesses have the ability more to suffer than to win. The expense of bringing this forward is very high, but the director now is obliged to represent the interests of those who complain to him. He must do so. He must look at it. He makes a value judgment. If you put this in, the director can say with greater equanimity, well, no, we've had a quick look, and we don't think so; you bring your case.

I can tell you, they cannot afford to bring their cases. The director's own facts tell you that. It costs the director $1 million to mount a case. The director has the most experienced bunch of plaintiffs, lawyers, and economists in Canada. I can assure you that small, medium-sized, and large business, unless they are bringing strategic litigation, cannot afford it. So I think you're running the potential of disadvantaging the small and medium-sized business community.

Mr. James Rajotte: Mr. Ivis, do you want to comment on that as well?

Mr. Matthew Ivis: I don't think I have much more to add to those comments, other than to concur that on its face value, from what we've heard from our membership, it appears to be a cost-prohibitive solution to help the constituency it's supposed to address in the SME community.

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

Mr. McTeague, please.

Mr. Dan McTeague: Thank you, Madam Chair, and good morning to all of you. I hope this doesn't take us too far into the afternoon.

Mr. Rowley, I'm interested in the document you've presented.

I note there are 15 companies here, Mr. James, and that a good number of them—BP Canada, DuPont, General Electric, General Motors, Imperial Oil, IBM, Shell Canada, Xerox Canada, and I think Xerox even printed this—are companies that do business in other jurisdictions around the world.

Tell me, Mr. Rowley, are any of these companies in a position or have they in the past ever used an equivalent private access in any other jurisdiction around the world?

Mr. William Rowley: Sorry, I do not understand your question.

Mr. Dan McTeague: The companies that are represented here in the text, which I presume you represent, do business in Canada and elsewhere in the world. Have any of those companies triggered or operated in a jurisdiction where they've had to avail themselves of, for instance, the Clayton Act in the United States, or the Australian competition act or the Irish Competition Act, with respect to private access? Have any of those companies availed themselves of the use of the tool of private access?

Mr. William Rowley: As plaintiff?

• 1055

Mr. Dan McTeague: As plaintiff, preferably. We'll talk about as defendant shortly.

Mr. William Rowley: I'm not immediately aware, so I'll see if Mr. James can help us.

Mr. Arthur James: In my experience—and I can only talk for IBM Corporation—I'm not aware of any case in which we have initiated action as a private plaintiff in a competition—

Mr. Dan McTeague: Your company or your group?

Mr. Arthur James: My company—all of our company worldwide.

I can talk to you very specifically, however, about being defendants in such actions—

Mr. Dan McTeague: I understand that, Mr. James, but I just want a simple answer, because I have a couple of questions I want to ask.

I note that some of your comments here refer to the great fear of what is happening in the United States. I also note, Mr. Rowley, your comments with respect to there being no overwhelming need for this, that in the 30 years you've been here, there hasn't been any great expression. I think the witnesses who have been here prior to you would beg to differ. Canadian truckers, independent oil, travel agents, and many who will be coming forward have not only stated to this committee their ability to avail themselves of private access notwithstanding the great shibboleth of costs that you raise, but are also prepared to mount the resources necessary so that someone will actually listen to their cases.

So it becomes a bit of a concern for this committee when we hear comments by Mr. Ivis and others that the SME community.... We've heard from the SME community, the Canadian Federation of Independent Business and others, and they're very favourable to the notion, limited as it may be, to private access.

So if what you're representing here today is the position of 10, 12, or 14 companies that do business in Canada but ostensibly may do business in other jurisdictions, and we have the private sector, who you've vicariously suggest are smaller businesses that are concerned about this, that are not concerned, on what basis do you make the claim that this is going to affect them, and more importantly, bring Canada's economy into a state where it may not be able to function as well, come to a screeching halt, or bring about chill? Is the chill only one-sided in terms of large businesses?

As Mr. Strahl has pointed out in previous demonstrations, it would appear that your view is extremely one-sided to those of large businesses who have nothing to fear in other jurisdictions.

Mr. William Rowley: Let me, if I may, provide a two-pronged answer, part from Mr. James and part from me. But let me just say at the start that when I say there is not a large body of complaint and has not been over the years, I do not say there has not been some complaint. There has been. Professor Trebilcock has been arguing this for many years. A number of plaintiffs' lawyers are very keen on this. A number of economists who will benefit are very keen.

You will find when you look at the PPF process that there were over 100 briefs filed, and about 52 dealt with this, about private access. So half didn't deal with it at all. Of the half that did, they were roughly evenly divided, 50% in favour and 50% against; but of those in favour, a good number were also the individuals I've mentioned.

If you look at the directors' reports over 30 years, you will not find a concern in the directors' reports about concerns about access not being granted at the tribunal, at the proper level. Yes, there have been two white papers, I'll call them, on private actions put forth in the last 10 years, and as I said, on the last one, the consultative panel said you must do a cost-benefit, because it could be harmful to proceed without it, and on this one, the PPF said there is no consensus. Maybe there will be a consensus.

Mr. James can speak about what he knows about small business, and I invite you to hear what he has to say.

Mr. Arthur James: As part of my role, I have served as chair of the Canadian Chamber of Commerce. The Canadian Chamber of Commerce has gone out of its way, and I might say, partly because of my insistence, to go to its members across the country on seven occasions to see whether there is any interest or concern about this topic at all. The last attempt to get feedback from people was after their appearance here, and as of yesterday, there had been zero—zero small companies had come forward.

• 1100

Mr. Dan McTeague: On that point, Mr. James, Mr. Ivis, and of course Mr. Rowley, we hear constantly from you that you're not hearing. Of course, one talks about the PPF. Mr. Ivis, for instance, is here on behalf of one organization but two weeks ago represented the Canadian Chamber of Commerce.

I guess it's kind of difficult to reach and achieve consensus in a stacked deck. What we're trying to do is address some of the concerns that have been raised with us, that have been raised ostensibly by witnesses who have come before us here. I don't expect people with a legitimate complaint to take their problems to you.

We've heard from a lot of chambers of commerce across this country, smaller ones, that have never heard of the position you have taken today, which is opposed to private access. Conversely, we have heard from many who believe this would be a unique opportunity to provide issues that may not bring about a public concern about competition but may bring about, nevertheless, a harm that is occurring to the competitive process in outreaches that aren't normally represented at this industry committee.

The Chair: Mr. McTeague, your final question.

Mr. Dan McTeague: This is a question.

In your document here, I note that, for instance, you have my name in here several times. I have to tell you, I don't remember ever being contacted by Deloitte & Touche, but it may have very much to do....

There are eleven sections that you've looked at with respect to reviewable practices, Mr. Rowley, examples of unmeritorious reviewable practice complaints, page 194. I know that this committee and I and others have dealt with at least five or six of these. So to suggest, as it does here, that somehow there is no real reason to involve ourselves with this issue is a bit alarming.

The question has been put to us here before.... You're concerned about supplier relationships and distribution, etc. If indeed there is a contract that is established between individuals—and the question was put, of course, by you, Madam Chair, with respect to torts—

The Chair: Mr. McTeague, your question, please.

Mr. Dan McTeague: Madam Chair.

Can you tell us why you have a concern with respect to wanting these issues to be addressed in the courts when they could very well be addressed by the tribunal, which of course was specialized and made for this very mandate?

Mr. William Rowley: We think the tribunal is the right place to address competition law issues. We say we have a system that is the envy of the world, that does address it, and we say we have a commissioner who is obliged.

We also say there is a way to get to courts. If you look at appendix 5, we set out there ten methods of contract or tort where people can settle private issues in the courts. I can tell you that we represent people, the whole time, who are faced with court litigation for breach of the Competition Act and other competitive torts and contractual matters.

I invite you to have a look at it with care. I know you have not had the chance to look at this for long. I also know you're going to have round tables. We truly hope this provides some input that will be useful, but the costs are the costs.

The Chair: Thank you.

Mr. A. Neil Campbell (McMillan Binch; Competition Law Policy Group): Could I just briefly elaborate on Mr. McTeague's reference to appendix 4 in the report, which talks about some unmeritorious cases, just to explain where that came from.

Those are all reproduced as quotes from the annual reports of the Competition Bureau, in which they describe investigations undertaken and report in a number of cases on overtly finding that despite particular complaints, the conduct was certainly not anti-competitive, indeed often pro-competitive and efficiency enhancing.

I guess, Mr. McTeague, if the subtext of your question is that the bureau is not doing a good job on reviewable practices, I have a couple of remarks first.

We've reviewed the enforcement record in some detail in the body of the report. We weren't able to come to that conclusion. But to the extent that there is a feeling that in particular private and local matters are not getting on the radar screen with the Competition Bureau, it may well be that you would wish to seek the bureau doing the equivalent of a VanDuzer report with respect to its enforcement policies and criteria. Indeed, that is where we attempted to suggest an alternative, which we thought would be constructive to small, medium, and large

business consumers, anyone, which is to enhance the rigour around guidelines, around reasoned decisions, around performance enforcement criteria, in the civil matters branch of the Competition Bureau.

Our comment about the small business constituency was not to seek to speak for them, obviously, Mr. McTeague, but simply to make the observation that this proposal might backfire if it gives the Competition Bureau a greater ability to say that's private and local and not our job, and you pay for it yourself and deal with it yourself.

The Chair: Thank you, Mr. Campbell.

• 1105

[*Translation*]

Do you have any questions, Mr. Bergeron?

Mr. Stéphane Bergeron (Verchères—Les-Patriotes, BQ): Thank you, Madam Chair.

I will not repeat what Mr. McTeague said so eloquently. However, I must say that, as we have seen many times in this committee, some groups representing big businesses have a rather different view on the private access issue from that of small or medium businesses. As I indicated from the start, I will not add anything on this. I think that Mr. McTeague summed it up very eloquently. I want however to ask a question to the representatives of the Canadian Council for International Business.

In your submission, in Section II, *Comments on Bill C-23*, you say that:

> The CCIB urges this Committee to limit its deliberations to the amendments proposed by Bill C-23 and to refrain from expanding the scope of inquiry to other, more contentious issues. These issues were deferred for a good reason.

Do you know that reason?

You continue:

> There will be ample time to deal with them at a subsequent stage, after a more comprehensive consultation and analysis has taken place.

In fact, our committee wants to hear the witnesses to know whether there are other elements, other issues which could be the subject of our inquiry. First, how do you reconcile your request to refrain from expanding the scope of inquiry to other issues with the amendments to Bill C-23 you are proposing? Secondly, what is you motivation to insist so much on us to refrain from elaborating or examining other issues pertaining to the Competition Act?

[*English*]

The Chair: Mr. Katz.

Mr. Mark Katz: I guess I've been elected to answer.

I think what we were referring to here is the fact that the PPF process involved the consideration of a number of issues. The thought was that the issues that would proceed to be included in the bill would be those for which consensus was achieved. On those issues for which there was no consensus, there would be perhaps subsequent debate if deemed necessary. That's what we were getting at.

Our suggestion, of course, was that in order to expedite Bill C-23, in order to ensure the rapid enactment of items for which consensus had been achieved, this committee would be better off considering those issues rather than perhaps getting bogged down in other matters for debate. That was the sole purpose of this.

I don't believe there is any contradiction in the proposal we've put forward regarding consent order proceedings. What we're trying to do is deal with the matter that has been raised specifically by Bill C-23 and to propose an alternative solution. So it's certainly tied to what the bill is proposing. Again, that was our sole intention here.

[*Translation*]

Mr. Stéphane Bergeron: Excuse me, but I want to come back to my question. You are saying in your submission: "These issues were deferred for a good reason". I wonder what you were alluding to when you wrote this. As a matter of fact, this committee intends to hear a number of witnesses to know whether there are other elements of the Competition Act which need to be amended or to be changed. You seem to presume right away that this committee did not want to focus on the issues in Bill C-23. What did you mean when you indicated: "These issues were deferred for a good reason"? What is the good reason you were referring to?

[*English*]

Mr. Mark Katz: The good reason we were referring to was the fact that no consensus had been achieved at the PPF level during the prior consultations. So again, to repeat, our view was that this committee should—obviously it's up to you to do what you want to do—focus on Bill C-23, for which there was, by and large, a consensus, proceed with the enactment of that bill in an expeditious fashion, and to the extent that there are issues like private access or others for which there may be more scope for debate, deal with that in another forum. That was simply the suggestion.

The Chair: Mr. Bergeron, are you finished?

[*Translation*]

Mr. Stéphane Bergeron: Yes, I am finished.

The Chair: Okay, you are finished.

• 1110 

[*English*]

The Chair: Mr. Volpe, please.

Mr. Joseph Volpe: Thank you, Madam Chair.

Gentlemen, thank you for your interventions. My experience on committee is that we usually get representatives who come forward because they are interested in public policy or because they are advancing private interests. Both are legitimate approaches, in my view, but the two rarely mix. I gather this is a situation where you're advancing a private interest?

Mr. William Rowley: I'll have a first crack at that.

Just so I can give you a bit of my background, I'm the former chair of the International Bar Association's business law section, and prior to that, the antitrust section. The International Bar Association advances public policy interests with respect to the law around the world. It represents its view marrying business and legal interests in the—

Mr. Joseph Volpe: I'm sorry, I don't want to be discourteous, and I thank you for that, but I also don't want to impugn anybody's motives. I did indicate that these are all legitimate. I just wondered whether you were acting for a private interest or—

Mr. William Rowley: I'll give you a short answer, then.

The propositions we put forward we believe are in the interests of Canada, public policy, and the business community at large, because we believe—

Mr. Joseph Volpe: Yes, it's clear enough—

Mr. William Rowley: —in the law as it exists. We do believe this is one of the very best competition laws in the world.

Mr. Joseph Volpe: Mr. Rowley, I'm sure you're very sincere in that. The reason I asked that is not to put you on the defensive, but because you did make reference to the fact that Canada deliberately chose this model, and it chose this model in the timeframes you indicated. So I assumed you were speaking about a context in which this piece of legislation and this model were important and central to public policy.

I'm not a great student of history, but I think some of the assumptions upon which competition policy and other models of economic and regulatory affairs were struck have changed considerably since the initiation of the competition model you have just referred to. So I'm wondering if the basic premises are the same.

For example, until 1988, and just shortly before that, we believed in what one can still refer to as a "national policy" designed to introduce direct foreign investment and protect Canadian competition from the ravages of foreign competitors. I think all of those presumptions went by the wayside in 1989, again with the passage of NAFTA, and then again with the emergence of the WTO.

I'm wondering whether I'm way off base, but I noted Mr. James took some exception to Mr. McTeague's reference to the 15 members of the competition policy group, all of whom fare relatively well in an environment in which the competition model is different from the one you want to defend. In fact, I think some of them have their subsidiaries here defending a model that was okay before 1989, and across the river in Detroit they do fairly well in a model that you say is probably not good for Canada.

Mr. William Rowley: I know Mr. Campbell wanted to respond, but let me just suggest that Mr. James tell you about the experience of his corporation under a different model.

• 1115

First, I'll just say there is no changed model. We've moved from ten competition laws around the world about ten years ago to about a hundred today. It's the model of all competition law, and nobody is against it. It's fundamental framework legislation and it makes for a better economy, better global welfare, and better consumer welfare. One wants the best model, and one does not want to bring disincentives into the model. One does not want to, in a very fragile economy, add chill. And above all, you don't want to divert your focus—and Mr. James can tell you something about that.

Mr. Joseph Volpe: But before he does that, let's accept that members' interventions around the table, mine included, are as sincere as those of the witnesses, and that we agree with what you just said.

Now, I'm as patriotic a Canadian as the next person, but the models I keep hearing about, especially when the word "convergence" comes forward, which you introduced in this discussion, mean that we have to converge to those models that prevail and are dominant in the marketplace. They are not the ones in Canada.

Now, Mr. Rowley, if you'd suggest—

Mr. William Rowley: Is that a question?

Mr. Joseph Volpe: Well, I'm coming to the question.

If you'd like to suggest that the model you want to defend is the one to which the rest of the competitive world is going to converge, then I'm going to applaud you.

The Chair: Mr. Campbell.

Mr. Neil Campbell: May I start just by noting that in the analysis we have done in the report, we looked to economics, which is the discipline that applies the intellectual framework about what competition is and why we think competition is good. The views are very different when you're dealing with hard-core cartel conduct, which everyone recognizes is unambiguously bad, versus distribution practices, which are frequently very efficient, and indeed very beneficial to both large and small businesses in allowing for distribution through distributors and dealers, rather than a vertical integration approach. And it's through exclusive territories and dealing arrangements, and sometimes bundling arrangements, that one has very often a beneficial situation, both for the intermediate distributors and dealers in the distribution chain and also for consumers.

To give you just a quick sense of it, tied selling can capture something as extreme as your combo meal at McDonald's. That would be within the definition of "tied selling". When you look around and see the things that are tied selling, 99% of them are good and beneficial, and result in lower prices and more competition.

What the economists have said, which supports that, is that one needs to be attentive to very limited conditions in which a tie, a territorial restriction, or an exclusive dealing arrangement would be anti-competitive. So the concept of reviewable practice was to allow a competition authority to fix things when there is a problem, without interfering with the vast majority of activities when there is not a problem.

The Chair: Thank you.

Thank you very much, Mr. Volpe.

Mr. Neil Campbell: And I don't think the economic model has changed in that area.

The Chair: Mr. Volpe, I'm going to have to move on.

Mr. Strahl, please.

Mr. Chuck Strahl: Thank you, Madam Chair, and thank you all for your testimony here this morning.

Mr. Rowley, you mentioned our competition policy is the envy of the world, but a couple of weeks ago in the paper there was quite a report from the OECD that indicated the opposite. The quotes that were published indicated that Canada's Competition Bureau is plagued by an inconsistent policy framework; it's hampered by national monopolies; it's undercut by a lack of resources; and it's tainted by a reputation for having no independence. That comes from the OECD, which is made up of other countries that I would think would have fairly well-developed competition frameworks. Their report, which I've asked the clerk to try to get a copy of in its entirety, seems, at least in its initial comments, to say there may be some significant problems with our Competition Act.

Mr. William Rowley: First of all, I know about that report. In fact I was at the OECD meetings the day before it came out. I've not read the report. I believe it's a draft. I believe it is one of the country reports that covers all of the 30 OECD countries, and I don't think it's been completed yet.

• 1120

Concerning the comments I read about in the paper, about lack of funding and perceived lack of independence—really, on the funding question—I hope every witness this committee has heard from would endorse what we believe to be the case: if there is perceived to be a lack of funding for this framework legislation, then it should be provided. You might ask the commissioner how the funding of the Canadian agency compares with other G-8 agencies, for example.

Respecting independence, I think the question is in reference to some of the comments that have been made in connection with banks and airlines, both of which are very special cases. The OECD report, as far as I know, makes no criticism whatsoever of the substantive law. I do know, because I travel in these circles, the Canadian law is very highly regarded. We're one of the leaders in the competition community. It is true, we don't have private actions to enforce the reviewable practices. But do you want to take on the American experience? Because that is where we will head, or that's the risk. If you read the Baker report, you'll see.... I'll read you his conclusion in two sentences. It's at page 227:

> I suggest that the idea of an expanded right of action for essentially private disputes is probably not worth the potential cost to Canada, a cost that will be measured in private litigation and counselling, public cost for the courts, and most importantly, the cost of forgone business opportunities caused by legal uncertainty.

Now, Mr. Baker was Assistant Attorney General in charge of the antitrust division in the Ford administration. He's one of the leading scholars today in antitrust—and yes, he takes plaintiff cases; he also defends. But when we look at the reviewable practices, that's his conclusion.

I can't tell you it's right. The one thing about antitrust—and public policy of course—is it's forward-looking. You have to look into the future and say: "By going this route, are we adding benefit that is better than the cost?" That is a very tough question. It is why it was suggested by the last committee that a very thorough cost-benefit analysis should be performed before you take that risk.

You even heard from the previous panel that maybe nothing will happen; maybe you'll have to move to a damages award, so you can get in the U.S. experience.

Mr. Chuck Strahl: But I don't think anyone's proposing going to the U.S. model; that's the thing. If everyone said let's just copy the U.S. model—we'll just open the floodgates and do treble damages and look back and forward at the same time.... But no one's really proposing that.

Other witnesses have come forward and said this is really pretty modest. It will allow some right to private access, but it's not as if you're going to get rich doing this. You're going to want to be pretty serious about it before you start in on this because, as you've already mentioned, it's just way too expensive to do it for fun. Under this current regime there's no way you're going to make that money back for past damages. So you have to be pretty serious. It's not like the American experience, where if you win, you hit the jackpot. Here, it seems to me what we've been hearing from a lot of witnesses is that it's a reasonable middle ground.

I have to say that one of the things that's really weakening the arguments—obviously, I haven't looked at your book here—is that when we line up those for and against, it really is a case where all the big oil companies don't want it and distributors and the retailers do. Chapters Books doesn't want it; the small book distributor people do. The bigger the outfit, the more likely they are to be against it.

If it's such a bad thing for the small folks, why don't you just say "serve 'em right"? Let it go through, and they'll just pay through the nose for the rest of their days.

• 1125 

I mean, it's nice for you to be concerned about the small businesses, but that's really how it's coming down. People just are saying "We want it". The big business groups are saying "It's better not to let them have it, because it's not good for them". If I were you, I'd just say "Let 'em have it".

Mr. William Rowley: We're not saying it's not good for them. We're saying it's not good for Canada. We're saying it very clearly.

Let me say a word about big business. I happen to represent big business, medium-sized, and small business, and I have over my whole career. I am in no way anything but proud to be associated with this group, because if we do something that hurts big business—and we say the potential is very much there—then we're doing a disservice to the country. The fact is, it will also not benefit small- and medium-sized business.

So I'm not coming here and saying we're doing them a good turn. I'm coming and putting forward the best evidence we can concerning a policy decision the government is going to have to make. What we are saying is that on balance, we strongly believe—and the facts suggest—the costs involved are very high. The chill risks as a result are high because there is strategic litigation that goes on, and you don't have—as I said at the start—a system that's broken.

There's no evidence that meritorious cases are not being brought.

Mr. Neil Campbell: May I just add one point again, Mr. Strahl? Just to clarify, what we're talking about in terms of strategic litigation is very often brought by competitors. We certainly don't mean to imply it will be small businesses who are always the plaintiffs. It is quite often big businesses who have the wherewithal to bring the strategic case, where cost is not a deterrent because the opportunity to disrupt your rival—to impose costs on your rival, to get discovery of information about your rival, simply to divert their focus from their business—may be of significant strategic value.

When the proposal is brought forward described as private matters between buyers and sellers, that is certainly not really the nature of a tied-selling, or exclusive-dealing, or market-restriction action. Those are going to be most typically brought by the competitor who is outside of the customer-supplier relationship. It may be the competitor of the supplier, and it may also be the competitor of a dealer who for example objects to the local dealer having an exclusive territory and wishes to get supply from the same supplier—to undermine a dealer who's made an investment in promoting whatever brand of products that dealer has an authorized franchise for.

Mr. Chuck Strahl: I don't know if anyone wants to answer the first part of my question, which was that this does seem to be the modest, middle ground for many people who have come before the committee. That says that it's not the American experience; it is a limited right to private access with limited rewards in doing so. The chill factor's not nearly as much as it might be if we had a similar framework to the States.

Mr. William Rowley: I'll speak to the middle ground very quickly.

You heard, with the witnesses before us: "You'll be back if you suggest the government should make this change. You'll be back because it won't work. You'll be back three years from now—and then you'll listen to us about adding damages, maybe one-way cost rules, and maybe double damages, so we can get the case law and get the cases going."

There is a slippery slope with this business. My own personal experience is the litigious nature of Canada is changing. We live in a North American market. A plaintiff's bar has developed in competition matters over the last several years—a class actions bar.

I can assure you that people who make their livings doing these things will be seeking more. So yes, it is not as bad as the U.S. system, but that's not the question you should be asking yourself. You should be asking yourselves.... Forgive me; I don't mean to be instructive. But the question, it seems to me, I would ask myself is does the present system not work? If so, how can we make it work better? We have suggested some methods of making it work better, in our proposal, that stop short of this, which we believe would be destructive.

• 1130

The Chair: Thank you very much.

Mr. Ivis, last comment please.

Mr. Matthew Ivis: Just quickly, to tie this question back to a question on the issue of public policy, I think you might want to step back and see, from a different angle than what was just mentioned, what issue we're trying to solve here. What is the problem we're trying to solve? In this context, it's the issue of access to enforcement for small businesses. We've been presented with one solution, in trying to forge a consensus on one solution to fix this problem.

We've heard from a number of witnesses that there are alternative proposals to fix this solution. In making good public policy, we're trying to say there may be a need to have a robust discussion on all these proposals, to make sure we make the right public policy to solve this one identified solution.

Thank you.

The Chair: Thank you very much, Mr. Ivis. Just so you know, it's not just about small business when we talk about private access; all businesses would have that action—just to clear that up.

I also want to suggest to the witnesses that this committee takes the role of making public policy very seriously. We take the role that it is our goal to make the Competition Act better. That is why we're here.

I want to remind the witnesses, with all due respect, that several times now I've appeared at different conferences over the last three years to try to explain the role of the committee and why we were elected to be legislators. That is our job, and we appreciate your input into the process.

We also take our jobs very seriously. Many of us spend long hours reading briefs and documentation, in preparation for meetings. Regretfully, we didn't receive your book until yesterday afternoon, Mr. Rowley, and because it wasn't in French, we had to have permission to distribute before it could be distributed. Members have only now received it at this committee, and we will take a chance to read through it.

I'm a little bit disturbed by some of my initial review of it, and the way the interim report of the industry committee seems to have been dismissed, because we put a lot of work and effort into what we do here at the committee.

I also have great respect for what you do in your profession. Some of us sitting around this table have legal training. Some of us had legal training in both Canada and the United States, before we were elected to Parliament, and have worked in that regime. We now come here to look at this legislation, and we'll look at it in a very clear fashion.

It is a very difficult task we have before us, as members of Parliament. We believe that the Competition Act and competition law are very complex areas and very serious matters. We have given much time to this over the past several years.

I have to go back to Professor Trebilcock's earlier comments—30 years of study. I'm just not sure how many more years of study we need, before we come to some kind of decision. In the end, consensus does not mean that 100% of the people will agree, because it's not possible to

have 100% of the people around the table agree. I'm not sure what this committee is going to decide. I don't have a vote as chair. The reality is we're going to work together as a committee to try to come up with some type of agreement on how we proceed with Bill C-23.

It was referred to the committee after first reading for the very fact that we could have this discussion. So for those who think it shouldn't have been here after first reading, and those who don't think we should be discussing it, that's why it was sent here. I couldn't have made that clearer at the conference I spoke to in September. I couldn't have made it clearer at the conference I spoke to a year prior to that in June, and the year before that in September.

I've been out speaking to the legal community. For the legal community that wants to ignore the processes of the committee, or the businesses that want to sponsor this book, with all due respect to them, maybe you should hire someone to monitor the work of the industry committee and its role in the Competition Act, because we are working on this and have worked on this for several years. Members of Parliament have put a lot of time into private members' business in the past. This committee has had hours and hours of witnesses, and hours of work done outside of the committee process, in reading and preparing.

I don't know what the decision is going to be of this committee, but I hope we can work together as we move the Competition Act forward. I hope we will have an opportunity to meet together, in a round-table format, so everyone is at the table. We've invited witnesses in the past to our committee meetings and they have chosen not to attend. So when we draw conclusions in our interim reports or our final reports, if people choose not to appear, it makes it difficult for us to have a different opinion. So I encourage you to participate.

• 1135

This meeting today has been very good. We have a lot of information now to review, which we will review. We've set a 10-day break in the process before we go to clause-by-clause, so members can take that opportunity to review, if there isn't more information we have to hear.

That being said, we have kept you long enough. We're way over your time, and I do appreciate that. I know you're all very busy individuals.

We're going to suspend for about two minutes while we change witnesses. Thank you very much.

• 1136

• 1144

The Chair: Would members take their seats, please?

• 1145

We have scheduled two groups of witnesses from now until the end. I'm going to propose we hear all of the witnesses together and move to questions together. One witness has not yet arrived—it's Canada Post Corporation—but when they arrive we'll include them in this session. That will give us more time for questions. And if we have similar questions for all companies, they can all be asked at the same time.

We're going to hear from the Canadian Real Estate Association, the Association of Canadian Travel Agents, AT&T Canada Enterprises Inc., and Canada Post Corporation.

We'll begin with the Canadian Real Estate Association and their opening comments.

[*Translation*]

Mr. Pierre Beauchamp (Executive Director, Canadian Real Estate Association): Thank you very much, Madam Chair.

First, I cannot give you a French copy of my text this morning as opposed to what the Association is used to do. I apologize for this.

The Canadian Real Estate Association represents more than 65,000 realtors throughout Canada. Those are real estate agents or brokers who practice in all parts of Canada.

[*English*]

In Canada, the word "realtor" may be used only to designate licensed and registered members of the association. Our membership is organized in 106 local real estate boards and associations, 10 provincial associations, as well as 1 territorial association.

Realtors in Canada own the Multiple Listing Service trademark. In 2000, some 374,000 properties were exchanged through the Multiple Listing Service for a dollar volume of about $62 billion.

Most of you meet with representatives of our real estate boards and associations when they come to Ottawa annually for their political action conference. Many of our members are small business owners, that is, they are self-employed real estate brokers who operate in some 6,000 brokerage offices here in Canada.

The Canadian Real Estate Association was represented at last year's round table discussions on the four private member's bills. Our association also submitted written submissions directly to the Public Policy Forum.

As you well know, the real estate industry, like the vast majority of businesses in the country, is subject to competition laws. The Canadian association has had some experience with the Competition Bureau in the past. In fact, we negotiated a comprehensive consent prohibition order back in 1988, and were subject to a section 11 order for production of documents in the 1990s, concerning a national ad campaign.

As a result of our involvement with these two matters, however, no member board, provincial association, territorial association, or even the Canadian Real Estate Association, has been successfully prosecuted under this act.

Our past involvement with the Competition Bureau and our subsequent compliance programs to heighten awareness of the law are evidence of our keen interest in this legislation.

I will now ask our senior legal counsel, Marcia McGuire, to outline one of the concerns of the Canadian association, with respect to Bill C-23.

Ms. Marcia McGuire (Senior Legal Counsel, Canadian Real Estate Association): Madam Chairman, we are basically concerned about any substantial amendments that would change the scope of Bill C-23. We have focused particularly on the proposed private right of access provision.

We understand the committee is considering an amendment to facilitate private access to the Competition Act, and this is a significant and very controversial amendment. There are compelling arguments as to why this amendment should not be made. There is a real concern that private parties might misuse such a right of direct access to achieve unfair strategic advantages. I know you've heard this over and over again.

It is our view that private persons may wish to utilize the tribunal to further their personal interests. Private persons could force businesses to incur substantial expense and potential embarrassment defending proceedings that might be without merit.

• 1150 

Currently, the Competition Bureau performs an important screening function in ensuring that such proceedings are not commenced before the tribunal. Although it has been suggested that private persons might commence proceedings only with leave of the tribunal, this is of little comfort. Litigation designed for strategic purposes may not appear to be frivolous or vexatious. The gatekeeper function performed by the bureau is an important one, and it should not be passed to some tribunal that would hear the matter. It is entirely unclear to CREA that any satisfactory screening mechanism will remain in place if an amendment of this nature were to be enacted.

To our knowledge, there is no evidence that anyone concerned with our industry has been prejudiced under the present legislation. Therefore, we see no pressing need for any change.

We note that the public consultation processes have shown that there does not appear to be any consensus as to whether a private right of access should be granted or, if so, on what terms. The consultation process that followed the introduction of the four private members' bills last year reflected broad division of opinion on a private access proposal. As the Public Policy Forum noted in its report to the Commissioner of Competition, there were divided views as to whether this proposal should move forward.

A similar division of views was expressed with respect to the proposed amendments to section 45 of the act, which has resulted in further study of section 45 issues. In our view, further study should also be undertaken before any amendments proceed to allow private access. We don't believe private business should, under these circumstances, be forced to pay the cost of developing case law. This argument assumes that at present the commissioner is failing or refusing to commence proceedings. We are aware of no such evidence to this effect. If evidence does exist, it should be shared with the stakeholders. If that were indeed the case, we would submit that the solution rests in adequately funding the bureau.

As well, granting to private parties the right to initiate proceedings before the Competition Tribunal may ultimately dissuade people from bringing legitimate complaints to the attention of the commissioner. This could ultimately undermine the commissioner's role and current position in negotiating with parties in his efforts to enforce the reviewable trade practice provisions of the act. If private parties have concerns about the bureau's decision to investigate or commence proceedings, those concerns are best addressed through better dialogue between the bureau and the complainant.

The commissioner could be authorized or instructed to explain in more detail why particular cases have not resulted in the commencement of proceedings before the tribunal. Again, to the extent necessary, increased resources could be made available to the commissioner to ensure that legitimate concerns pertaining to any competitive context are addressed in a timely and effective manner.

Mr. Pierre Beauchamp: Madam Chairman, we are keenly aware that this issue has been framed as a big guy versus the little guy type of issue. It's the position of the Canadian Real Estate Associate that private right of access is not beneficial for small business. In the absence of strong evidence that it is necessary and indeed in the public interest, we oppose this amendment.

We thank the committee for the opportunity to appear before you today and stand ready to answer any of your questions.

The Chair: Thank you very much.

We're going to move to the Association of Canadian Travel Agents. Mr. Martin Taller, please.

Mr. Martin Taller (President, Ports of Call Travel Services Ltd.; Association of Canadian Travel Agents): Thank you, Madam Chair, and again we congratulate you on creating this opportunity for us to speak before the second reading of the bill.

As the owner and operator of one of 5,000 travel agencies in this country, I am pleased to have the opportunity to comment on the changes to the Competition Act.

As you know, we live the day-to-day competitive reality in a business dominated by one large supplier, one who is also becoming a direct retailer. In this context, ACTA would like to make three points. First, we would like to comment briefly on the expanded powers being accorded the tribunal. Second, we would like to bring you up to date on the consequences of the last round of the amendments to the Competition Act. And third, we would like to suggest a couple of items to be placed on the agenda for the next round of legislative amendments.

• 1155

Given the safeguards the government has introduced with the amendments contained in Bill C-23, ACTA supports limited direct access to the tribunal. We believe that small and medium-size businesses should be given the additional opportunity to seek a remedy for what they believe to be an unjust competitive situation. Like the proceedings of a small claims court, such a provision might not have a measurable impact on the macroeconomic level, and for that reason actions might not be readily taken up by the bureau. Nevertheless, it should benefit the particular businesses in their buying and selling operations.

Second, as you recall at the time of the airline restructuring legislation of Bill C-26, the Competition Act was amended in section 4 to allow agencies to come together for the purpose of collectively negotiating fair compensation with the dominant supplier of air services. A special committee representing all travel agencies was formed and began in good faith to negotiate with Air Canada. After months of slow progress, the dominant carrier announced on August 27 that it was reducing commission rates unilaterally, thus bringing a halt to any further negotiations.

Parliament's intent in putting in place a legislative remedy for travel agencies has been foiled. However, this committee now has the opportunity to see that Parliament's will is respected. ACTA proposes that you amend Bill C-23 by adding a new clause that will extend the provisions found in section 4. Essentially, we are requesting that an arbitration process be laid out to deal with such a contingency as a breakdown in negotiations.

Having willed an end, Parliament should be prepared to will the means. The kind of arbitration we have in mind can be found in the consent order approved by the Competition Tribunal in the case of the merger between Indigo and Chapters. To remedy the loss of competition, the dominant distributor had to agree to certain ceilings on the terms of its contracts with book suppliers. In the event of a dispute arising out of this behavioural remedy, an arbitration procedure has been provided. ACTA would like to see the air travel industry benefit from a similar procedure.

Finally, my last point is that the government has made it clear that it wishes to proceed incrementally with changes to the Competition Act. ACTA would like to put two items on the table for future consideration: amendments to section 45 and amendments to section 78.

ACTA was pleased to see the Competition Bureau has begun to get expert opinion on how we in Canada can best handle the increasing number of complex agreements between competitors. There is clearly a need in this age of easy communication and information sharing to revamp section 45. On the one hand, we need a civil procedure that will put strategic alliances and joint ventures to the test of reasonableness and, on the other hand, a criminal procedure that would cover the hard-core cases of conspiracy, regardless of their effect on competition.

ACTA for some time now has raised the issue with regard to global airline alliances and the creation of ORBITZ, a single online agency created by the five biggest airlines. At what point does cooperation become collusion?

Sections 78 and 79 of the act, which deal with the abuse of dominance, form another item ACTA would like to see clarified in the next round of amendments. Whenever there is a lack of competition, it is important that policy makers keep a close eye on the behaviour of the dominant firm or firms. But that behaviour extends vertically as well as horizontally. It is not just a matter of how they treat potential rivals in their core business but how they treat ancillary businesses upstream and downstream with whom they sometimes enter into competition.

ACTA would like to see the expressions “for the purpose of” and “with the object of” found in section 78 replaced by the expression “with the likely effect of”. These changes would clearly shift the focus of an inquiry by the bureau away from why a firm does what it does to how it maintains or increases its dominance.

In conclusion, ACTA urges the committee to give serious consideration to our proposed amendment to section 4 and generally to maintain its close watch on the state of competition in this country. I would be pleased to answer any questions you may have.

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

We're now going to turn to AT&T Canada Enterprises Inc. Mr. Chris Peirce.

Mr. Chris Peirce (Vice-President, Government Affairs, AT&T Canada Enterprises Inc.): Thank you, Madam Chair. Thank you for the opportunity to be here today.

• 1200

I've provided your clerk with copies in both English and French of a brief submission. Knowing that your desire is to focus on questions and that you've heard a number of these issues talked into the ground by no doubt a number of witnesses, I don't propose to read through the letter but merely to summarize the submission briefly for you.

First I would like to provide some context as to who AT&T Canada is and who competitive providers are more generally in the telecommunications industry, as they comment on something like amendments to the Competition Act. AT&T Canada is the largest of the national competitive providers of telecommunication services in Canada. So at one level you would see a certain size associated with our company. We have over 500,000 access lines in service, 29 cities within which we have a presence, 3,300 buildings in which we have facilities to provide services, and over $1.5 billion in annual revenues. In the context of the telecommunications industry overall, however, we are not a significant player. We have less than 10% market share overall in telecommunications, less than 5% of the target market of local business services.

Attached to the letter are three charts that put in context where competitive providers find themselves in the context of the telecommunications industry. The first is a bar graph of the business market in Canada. The blue portions of the columns represent incumbent market share; that is primarily Bell Canada and TELUS. The red portions provide competitive market share. Similarly, for the residential market the blue represents incumbent, the red competitive providers. And finally, in terms of profitability of incumbents versus competitive providers on the last chart, the white bars above the line are incumbent profit figures. The blue bars below the line are competitive provider losses showing a trend of growth in incumbent rates of return and profitability following the introduction of competition and showing competitor losses increasing over time.

Further, despite having invested over $2 billion in facilities in Canada over the last three or four years, a company such as AT&T Canada finds itself paying to incumbent providers sums each year approximating 55% of our direct costs; that is, competitive providers overall in Canada pay to the incumbents approximately $750 million for facilities and services they require of the incumbents in order to compete with them.

And finally, most customers that competitive providers are taking on were previously customers of the incumbents. Now, of course in telecommunications part is regulated activity under a regulator, the CRTC, and part is forborne activity where the CRTC has found competition to be present and the competitive playing field supposedly to be level. But companies compete in a

converged way, so incumbent providers are vertically integrated and consequently for competitive providers the threat of anti-competitive behaviour is constant and very difficult to guard against.

So we congratulate the committee and the government on taking up the issue of reform to the Canadian Competition Act. The areas that are of relevance to us include interim orders, first off. We support the granting of interim orders—the broadening of the authority of the tribunal to issue interim orders. We agree with a lot of the comments the Commissioner of Competition made to the government in October that presaged the airline amendments. I think those types of amendments could have far greater applicability wherever you have a dominant provider and competitive providers struggling for market share.

Given the short duration of the interim order that's contained in the bill before you, we also support the lack of notice. In the context within which competitive providers find themselves, that reversal of onus, if you will, of a dominant player having to apply to have an interim order reviewed, where the tribunal has found grounds to grant it, is importing a necessary bias for action to preventing the continuation of anti-competitive behaviour while any study is ongoing.

• 1205 

We support the additional powers the tribunal has been given under the bill to deal summarily with issues to award costs. We think that the power to award costs could be more generally available, as is the case in the typical area of litigation with costs being capable of being granted to the successful party.

Finally, we strongly support the right of private access to the Competition Tribunal. Frankly, we think that access should be available under part VIII as generally as possible. We disagree in this respect, obviously, with some other members of this panel. But believe that the additional tribunal powers included in the bill would give the tribunal and a party who is on the other side of a matter brought before the tribunal by a private party the ability to defend against any notion of the act being used for strategic purposes or vexatious purposes.

Frankly, we don't believe the flood of litigation that's threatened by opponents to private access would result. The simple cost of pursuing an action, the dynamics of the market, and the ability of the tribunal to deal summarily, we would suggest, provide ample protection in this regard. But the private right of access would serve, we believe, to promote the ultimate goal of the act to help and assist as much as possible in creating a competitive playing field in Canada.

We also would agree with the ability of private parties bringing actions before the tribunal to obtain damages when conduct that is contrary to the provisions of the act is found to exist. I have to agree with Professor Trebilcock in this respect in saying we find it difficult to understand why a party who is found to be responsible for actions that are in contravention of the act shouldn't bear the responsibility of those actions in terms of damages.

We would in closing suggest that more general amendment to the Competition Act is something that Canada, the Canadian economy, and competitive providers and industries such as telecommunications would be richly served by. We encourage a continuation of the process of invigoration and review of the Competition Act.

Thank you, Madam Chair.

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

I'm now going to ask Mr. Ian Scott from Sprint Canada if he has any opening comments.

Mr. Ian Scott (Vice-President, Government Affairs, Call-Net Enterprises Inc.): Good morning. Thank you, Madam Chair, members of the committee. Thank you for the opportunity to appear before you and to provide you with a few brief comments of Call-Net Enterprises on Bill C-23.

In view of the late stage of your deliberations and the obvious time pressures on the committee, I'll limit my opening remarks to just a few key issues of concern to Call-Net Enterprises.

My name is Ian Scott. I'm the vice-president of government affairs of Call-Net. Call-Net is one of the leading integrated suppliers of telecommunication services to both businesses and residential customers in Canada, primarily through its better known operating company of Sprint Canada. Call-Net's headquarters are in Toronto. It owns and operates an extensive national network across Canada. Like Mr. Peirce's company, it is very much in competition with the large former monopoly telephone companies.

I won't repeat some of the comments made by Mr. Peirce, but in the context of the Canadian competitive landscape, we and AT&T are major competitors in virtually all of the market segments for telephone services to those former monopoly companies, such as Bell Canada and TELUS. It's in this context that we retain a very key interest in the current and future amendments to the Competition Act.

There is a process by which we move away from regulation and towards more competition and the role of the competition authorities will be ever increasing in significance to competitors in that important market. Even large national competitors such as ourselves are facing difficult times in terms of competition with the larger dominant telephone companies, so the competition amendments are very important to us. For that reason, we are very supportive of the work of this committee and the decision of the government to examine and modernize competition law in Canada.

• 1210

It's my understanding that the Commissioner of Competition has indicated to the committee that future work may indeed address other provisions, including perhaps the abuse of dominant position provisions of the act.

I would like to urge the committee to carefully look at these provisions of the act and also legislation relating to other federal regulatory agencies, if you will—the issue of parallel jurisdiction between the competition authorities and regulatory agencies such as the one we deal with, the Canadian Radio-television and Telecommunications Commission. This will be very important, I believe, in your future deliberations.

With respect to the current bill, I'll limit my comments to the issue of the private right of access to the Competition Tribunal. I believe that the private right of access is an important issue and should be addressed immediately. On a general basis, I concur with Mr. Howard Wetston, the former Commissioner of Competition, that there is no valid public policy reason why the commissioner should be the only individual to have access to the tribunal.

I believe that the issue of a private right of access to the tribunal and damages should be explored in a more generalized way in the future. The debate, it appears to me, is less about the issue of access and more about concerns of strategic behaviour or abuse of private access. If this is correct, we should focus on ensuring that the matter of strategic behaviour is addressed, rather than hesitating to introduce the issue of private right of access.

With respect to the proposed amendment, there should be no hesitation at all. The private right of access will be restricted to areas that deal largely with private matters between buyers and sellers, specifically the provisions relating to refusal to deal, tied selling, market restrictions, and exclusive dealing. With the inclusion of the appropriate safeguards, such as those contained in the bill's provisions around summary judgments and costs, a private right of access will complement the respective roles of the Commissioner of Competition and the tribunal.

With respect to the stated concerns about the strategic use of a private right in the context of section 75 and section 77, or the threat of a flood of litigation, I believe they're unfounded. The cost of pursuing a claim, the dynamics of the market, and the ability of the tribunal to deal summarily with appropriate applications and to award costs will effectively discipline this type of behaviour.

Thank you. Those are my comments, Madam Chair.

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

I'm now going to ask Canada Post Corporation, Mr. Gerard Power, general counsel and corporate secretary, and Mr. Marc-André Leblanc, legal counsel, to do your opening comments. Then we're going to move to questions as a group if that's okay.

Mr. Gerard Power (General Counsel and Corporate Secretary, Canada Post Corporation): Thank you, Madam Chair.

Thank you for the opportunity to speak to this important bill on behalf of Canada Post Corporation. Canada Post had the pleasure of participating in the consultation process led by the Public Policy Forum. We were pleased to notice in reviewing Bill C-23 that indeed it reflected what we perceived to be the broad consensus achieved during that consultation process.

The importance of the Competition Act to Canada's economic legislative framework cannot be overstated. We applaud the purposeful and methodical process in which the amendments to the act are being undertaken.

The purpose of these comments is to put on record Canada Post's support for the provisions of Bill C-23 in their current form and to bring the committee up to date on Canada Post's efforts to contribute to issues relating to unscrupulous use of the mail by fraudulent telemarketers and also to speak on the ongoing debate regarding private access to the tribunal.

As with the other provisions of Bill C-23, Canada Post fully supports the proposed amendments relating to notices that are calculated to mislead recipients into paying money to win a prize of little value or for no prize at all. We have noted the comments of others relating to the need to clarify language to ensure that the provisions are not misunderstood as prohibiting legitimate promotional contests.

Promotional contests, as we all know, are popular with advertisers and consumers alike. It would be unfortunate if an overly cautious interpretation of section 53, as proposed, would lead to some legitimate businesses abandoning contests completely. Consequently we are supportive of the intent underlying section 53 as well as the call to clarify its language.

Canada Post has marshalled its resources to raise public awareness of the risk posed by fraudulent marketers. Detailed information about fraudulent schemes has been posted on the Canada Post website. We've also placed posters warning against marketing fraud and informing Canadians about Phone Busters in thousands of outlets across the country.

• 1215 

Canada Post is a founding member of the Deceptive Telemarketing Prevention Forum and we are one of its biggest contributors. We've also formed partnerships on a national level with Crime Stoppers and the Better Business Bureau. We have mounted an awareness campaign with our own employees, approximately 55,000 Canadians, to raise the awareness of other Canadians with respect to these schemes. Our retirees go out to malls and set up booths to advise Canadians as to the dangers of fraudulent telemarketing.

We feel that public education is the most effective means of dealing with marketing fraud. However, we also have legislative tools to deal with these issues. Canada Post has contacted federal, provincial, and municipal law enforcement agencies from one coast to another in order to advise them as to the provisions of the existing Canada Post Corporation Act to deal with illegal use of the mails.

As you know, Canadians enjoy the freedom to communicate through their mails without censorship, but as a balance to this, when the mails are abused the mailing privileges of the abusers can be suspended by order of the minister responsible for the corporation. As a check to that, the individual who is subject to such an order may seek a board of review to review the minister's action. The minister's final action is also subject to review by the Federal Court.

In the last year we have had orders made against companies and individuals engaged in fraudulent marketing practices. Those orders were brought before a board of review, and the board of review, at the request of those who were the subject of the orders, indeed adjourned its proceedings *sine die*. In other words, the orders remain in force and those schemes were shut down. Thousands and thousands of pieces of mail were seized during that process and the individuals who would otherwise have been defrauded were protected.

On the issue of private access, while there appeared to be a consensus on other issues, we were of the view from our participation in the Public Policy Forum that there was not a consensus on this issue. It was clear in looking at the written submissions that were made during the consultation process that views are deeply divided.

Canada Post is only too aware of the enormous costs, both in terms of the distraction of management and in the legal and other expert fees that are generated by a complaint before a tribunal for strategic reasons. United Parcel Service used every administrative procedure that it could conceive of in its campaign to undermine Canada Post and thereby gain a competitive advantage.

Although Canadians are closer to Europeans and Australians in our aversion to litigation, the growing presence in the Canadian economy of U.S.-based interests who are steeped in a culture where strategic use of litigation is common cannot be ignored. These are very wealthy enterprises. The Canadian enterprises do not have the deep pockets, do not have billions of dollars from initial public offerings in the U.S. markets that American enterprises have in order to fund campaigns against Canadian businesses.

The cost of defending a tribunal proceeding is so great that many Canadian companies will prefer to cease a practice or leave a market rather than defend it. The result will be reduced competition and another advantage for large global companies that have the funds to litigate.

We noted that the current commissioner and past director seemed to favour some form of private access because they feel that the Competition Bureau lacks the resources to pursue all meritorious claims. Little has been said, however, as to the resources the tribunal will require if it is to hear a great many more cases. We know that the bureau currently weeds out hundreds of frivolous complaints each year. If this were to cease being the case, the tribunal, even with summary dispositions, will be taxed to the prejudice of larger issues that have an impact on competition law at a national level.

It is equally unclear how the bureau, which still has an active interest, will be expected to achieve the savings that would correspond to the increasing costs of the tribunal. We know from the bureau's annual reports that filing fees, advisory opinions, and fines from criminal prosecutions generate funds well in excess of the bureau's annual budget. Consequently, the funds appear to be available for the Competition Bureau to fulfil its enforcement mandate, which is fundamental to a healthy competition law environment.

• 1220 

What is clear is that more discussion and thinking needs to go into the issue of how legitimate complaints regarding reviewable practices can be heard and dealt with fairly and in a practical manner. We noted that some excellent suggestions have already been made to this committee. At the same time, what has been forcefully argued is that it is too important a matter for it to be introduced without sober consideration that has so well served the process of amending the Competition Act in the recent past.

Thank you for the invitation to make these comments. Canada Post looks forward to participating in the continuing discussion. Thank you.

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

We're now going to turn to questions. I would remind members that we'll probably be here until about one o'clock, so if they could try to keep their preambles brief, it would be great.

Mr. Rajotte, please.

Mr. James Rajotte: Thank you, Madam Chair.

I would like to thank the witnesses for their presentations today. There's a very healthy disagreement amongst some of you, and I think that's helpful, actually, particularly for members who are trying to decide on the issue of private access.

I want to get a bit of a discussion going, and I'll start with you, Mr. Peirce.

In your presentation you say you're not concerned about strategic litigation because the ability of the tribunal to deal summarily with appropriate applications and award costs will limit these types of cases, and I believe Mr. Scott said something very similar. But then how do you deal with the concern raised by Ms. McGuire that strategic litigation may not appear frivolous or vexatious? I'm assuming she's saying if a company hires a legal firm that's very good at this sort of thing, it will be very difficult to just dismiss this out of hand.

So if you could respond, and then, Ms. McGuire, if you could comment as well....

The Chair: Mr. Peirce.

Mr. Chris Peirce: I think "strategic litigation" is a delightfully obscure term. We have courts of general jurisdiction in Canada. It reminds me a bit of saying that if a party perceives that it has been wronged in some other field of endeavour, a contract, a tort, or something like that, there would be circumstances where you don't want that person who's being victimized to have the ability to go an independent decision-maker.

Obviously it's strategic, if you perceive you've been wronged or you perceive someone is not playing by the rules, to go to a decision-maker to try to get that conduct stopped, and what do we do to prevent people from abusing that right? We give the decision-maker the authority to either throw things out summarily and to levy costs against a party who's abusing a right of access.

I think that type of argument against the notion of a right of access is something you are always going to hear from the party who's doing very well without that kind of right existing, but for parties who are being affected day to day in the marketplace and presumably could not persuade a commissioner who is strapped for resources to take up every legitimate instance of what could be anti-competitive behaviour, that, to my mind, defines why you wouldn't have a monopoly in effect on the ability to enforce the legislation. It's almost axiomatic that, in a free and democratic society that we have, where at every other level we do give private interests access, we would not do that here.

The Chair: Ms. McGuire.

Ms. Marcia McGuire: Thank you for the opportunity to respond.

The phrase was just used that the party doing very well likes to refer to strategic litigation. I think that brings to light again the dichotomy that you have seen in your deliberations between large and small representation here around this table. But as you've heard today, we in fact represent more small business than large business, and we come from a very different perspective on the issue. We are not at all of the view that strategic litigation is only undertaken against large companies; we think this can happen to any company in the country.

Also, there was concern or the argument was made that the bureau can't fund all these cases. Well, we have to go back to first principles. What is the rationale for allowing private access? If it's the development of case law, I would submit to you again that this burden should not be put on the back of private business when there could be meritless cases going before them. Certainly the answer there, if you want a fairer response, is to fund the bureau appropriately.

• 1225 

It's a very important question that you have to ask before you make or recommend any

amendment of this nature. Are there cases currently being brought forward to the bureau that they are refusing to act on or that they find have merit and they don't have the resources to act on? The answer to that last one is to fund them appropriately. It's a much bigger issue if they are just refusing to act. Is it a communication problem back to the complainants? Are the cases in fact meritless?

So I don't think we can dismiss this and say strategic litigation is a term that's used by the big guy. We're not here representing the big guy, and I think it's very important to recognize that there are other solutions to this problem that have to be considered more seriously.

Those are my comments.

The Chair: Mr. Rajotte, your last question, please.

Mr. James Rajotte: Ms. McGuire, what about the concern, though, that Mr. Peirce raised in his answer, about the competition commissioner having a monopoly? Mr. Trebilcock raised this as well. Why should the commissioner have a monopoly on the enforcement of the competition law?

Ms. Marcia McGuire: What we are looking at is framework legislation for businesses to promote economic efficiencies and competition. This isn't just general tort law. In fact, some aspects of this legislation could be viewed much more in terms of criminal law, though it's not looked at that way, than another, and it's certainly something that has serious impact on businesses and the way they operate. I think there has been a reason why we've seen it as a role that government intervene in ensuring that the competitive environment stays out there and is maintained so that it is competitive. The Competition Act isn't designed to ensure that every small business is in fact successful; it's designed to ensure that a competitive marketplace is available.

If you look at the purpose of the act and at the significance it has for businesses and the business environment that you're creating in which these businesses have to operate, it's a very important screening function that is served by the bureau. I don't think the tribunal, which will be both judge and jury as to whether the case goes ahead and then to determine the outcome of it, is the appropriate route to implement. I know you've looked at models from around the world, and I can only submit, in line with comments that we heard previously, that there is no doubt that this line of thinking will go further.

The Chair: I'm going to have to stop you there, Ms. McGuire, and move on to Mr. McTeague, please.

Mr. McTeague.

Mr. Dan McTeague: Ms. McGuire, we've heard this kind of argument word for word from a handful of individuals who tend to perpetuate themselves as one group versus another. I think they might constitute themselves as another group of individuals. So I'm interested in correcting something that you said, first of all.

I think you should go back to the witnesses who have come before this committee. There are ample examples of cases where the bureau refused to take up cases. It obviously might ultimately be detrimental to the business, but in the spirit of keeping the competitive process open we've also introduced safeguards.

So I have a question for you. You say you represent small business. You also say we should go back to first principles. Tell me, Ms. McGuire and Mr. Beauchamp, how many members do you represent, and did you go back to first principles and consult with these individuals, including the real estate agent who just sold my home?

Ms. Marcia McGuire: We are a national body, and we have a board of directors that represents every region of the country. In fact, during the process of reviewing the private member's bill, as well as in this round of amendments to the act, we have certainly consulted every region of the country and have expressed concerns and given opportunity for feedback.

Mr. Dan McTeague: How many members of the real estate board across this country have you consulted, written to, or discussed this with? Did you talk to the Toronto Real Estate Board members in the Durham region? Did you, for instance, talk with the Vancouver Real Estate Board? Specifically, have you sent information to them explaining and outlining your position, your objections notwithstanding the safeguards, and were you able to do that in this period of time? It seems to me that the submission you just made today is the same one you made before the PPF. At that time, the PPF concluded there was room for consensus if the safeguards were put in place. Of course, we hear now that seems to be lacking.

• 1230

Could you specifically tell us if you have contacted your membership, your rank and file, or have just a handful of individuals among you made a decision on behalf of them, without them knowing? Don't you think they ought to be informed?

Ms. Marcia McGuire: Would you like to go first, Mr. Beauchamp? I'd be happy to respond, as well.

Mr. Pierre Beauchamp: The Canadian association is set up in such a way as to get its instructions from an assembly of boards that represent their members. In so doing, it mandates the board of directors of the Canadian association to represent their interests and adopt policies, decisions and positions that fit and follow the guidelines the membership would want.

Of course, we did not consult actively with 6,000 firms in Canada on a one-to-one basis. That is a physical impossibility. Our association, like all associations in Canada, operates on the basis of the mandate given to it by its members. In so doing, as was said by Ms. McGuire a moment ago, we have actively consulted, informed, and obtained ratification for the direction that is presented to you today by the board of directors of our association.

Mr. Dan McTeague: That sounds rather top-down, Mr. Beauchamp. Because you represent all these small businesses, you come here with the position that you speak on their behalf. I'm wondering if you would take the liberty over the next day or so, at least in the next week, of informing all 6,000. I would be quite prepared to lend you support to do that because I have access, as you know, to your membership.

Perhaps you could canvas them on what their positions are. If in fact they square with yours, then we could probably take the position you've taken as accurate, as opposed to the grain of salt you've presented us.

More importantly, on the question that has been presented by Canada Post, I find it passing strange—

Ms. Marcia McGuire: Madam Chairman—

The Chair: Just a second.

Mr. Dan McTeague: I'm going to finish my question here.

I find it passing strange that your own chairman, as former minister, was the last one to propose double damages to the issue of the Competition Act. Have you not been able to canvas the frustration members have felt over those who have brought the issues of priority post and cross-subsidization to our attention? How have you been able to respond to members of Parliament who have heard this concern, which the bureau has simply dismissed or not dealt with directly?

The Chair: Mr. McTeague, I'm going to let Ms. McGuire respond, and then we'll hear from Mr. Power.

Ms. Marcia McGuire: Mr. McTeague's position is very clear, as he was the member who presented one of the private member's bills. I hope that as you sit and listen to the views of those coming here, whether they be from large or small companies or business interests, you'll be able to hear that there is a divergence of views.

Mr. Dan McTeague: You haven't bothered to question your own membership on this, Madam McGuire.

Ms. Marcia McGuire: Excuse me.

Mr. Dan McTeague: You haven't bothered to ask your own membership here.

The Chair: Order, Mr. McTeague.

Ms. Marcia McGuire: That's not true.

Mr. Dan McTeague: Why are you asking me to make a decision?

Ms. Marcia McGuire: That's not correct. Why are you rushing it through?

Mr. Dan McTeague: We're not rushing it through. It's been around for 30 years, Marcia.

Ms. Marcia McGuire: I'm sorry there was the same divergence—

The Chair: Mr. McTeague and Ms. McGuire, please.

The question was whether or not you canvassed your membership. Either you did or you didn't. We heard how you did it. Fine.

Mr. Power.

Mr. Gerard Power: Thank you very much.

With respect to the comments made regarding Canada Post and its priority courier service, this was thoroughly investigated by the Competition Bureau over a period of several years. The Competition Bureau determined that there was no evidence of any cross-subsidization. They

advised the complainant of that fact. So there was an open process. The bureau had the full cooperation of Canada Post, in looking at those things.

Furthermore, Minister Marleau, when she was minister responsible for Canada Post Corporation, asked the Canada Post Corporation board of directors to have an annual audit conducted to compare not only the priority courier service, but all competitive services, to determine whether or not there was the presence of any cross-subsidization. That audit is done by external auditors each year, and is included within the annual report of Canada Post Corporation, which is submitted to Parliament. It is also available to the Canadian public on the Canada Post website.

• 1235

The Chair: Just before I move on to Mr. Martin, I want to make it clear to people here who don't understand the committee process that this is the first reading of the bill. We are in no way, shape, or form rushing anything through. The bill will go through second reading and third reading. It will then go to the Senate, where it will go through the same process again.

There is no intent by this committee to rush anything through. We've been discussing the Competition Act for four years at this committee. I encourage people to follow the proceedings of this committee, if they think we're rushing anything through.

Mr. Martin.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you, Madam Chair.

Thank you to all the people who've made representations today.

I'd like to start by commenting on Mr. Taller's brief, from the Association of Canadian Travel Agents. In the recommendations for amending sections 78 and 79, I think I see something I can agree with, and I'd just like to flesh that out a little more.

I guess the object here is to change the terms "for the purpose of" and "with the object of" to language more like "with the likely effect of". In other words, in trying to get into people's minds to determine what was motivating them, let's look at the consequences of what they've done. There's a point in law that a person can be presumed to have intended the probable consequences of his or her actions.

Would you see this change as giving the tribunal more tools to be able to...? Maybe you can just expand on what your motivation is, in asking for these changes in section 78.

Mr. Martin Taller: Thank you very much.

Just to comment on the issue of that very slight change, the motivation behind some organizations.... There are clear-out advantages for a business to do something strategically or competitively, to make changes in the way they do business. However, the issue is how they do it, how they maintain that presence, and how they increase their dominance in the small and medium-sized businesses.

I think this small change would certainly give the tribunal the opportunity to review that information and make a judgment. That's basically where we're coming from for that small change, but it's quite dramatic.

Mr. Pat Martin: You also point out there's a precedent for this type of language found in the guidelines dealing with the abuse of dominance in the airline industry. They already use language similar to "practices that will have the likely effect of". Is that where you got that?

Mr. Martin Taller: Yes, that's partly it, and partly because of the rather dynamic restructuring going on in our industry right now, the current state of the airline industry within Canada, and the distribution systems that are currently working to maintain stability within our industry. So we feel we want to retrench and ensure that stability remains.

Mr. Pat Martin: Excellent. Thank you.

Do I have one more minute, Madam Chair?

The Chair: Certainly, Mr. Martin.

Mr. Pat Martin: I'm interested in what Canada Post had to say, as well. I was going to comment on the UPS issue as well, but you've dealt with that, I think.

Since you're one of the groups that opposes the idea of amending toward increased private access, and you're already being harassed and badgered by UPS in such a way, what other challenges would Canada Post contemplate? What other services that you currently offer do you think other people may come and badger you about, where you might find it a nuisance to have increased private access to the tribunal?

Mr. Gerard Power: Obviously, the UPS matter comes to mind.

Mr. Pat Martin: That's more under NAFTA than under our internal competition, isn't it?

Mr. Gerard Power: The UPS-NAFTA complaint is. However, a matter was brought to the Competition Bureau by some individuals, and subsequently one of the individuals commenced an action against UPS, claiming that UPS had encouraged that individual to bring the matter before the Competition Bureau, and in fact essentially that the individual's Canadian-ness had been abused by this U.S.-based competitor.

• 1240 

So it's possible these matters come up—much as under the Access to Information Act, where Canadians from time to time lend their Canadian citizenship to foreigners. Indeed we could see this kind of thing happening, with large and very sophisticated global companies coming in and doing that.

Mr. Pat Martin: Is it only the parcel service you see other groups really being after? I guess that's the only profitable thing about Canada Post. You'd be left with all the less profitable things—delivering letters to family farms—and other people are after the more profitable side of your business. Is that the risk?

Mr. Gerard Power: That's very much the case. I would go further, though, to say that the universal service obligation Canada Post has, and that Canada has adopted pursuant to the convention of the Universal Postal Union, includes a parcel service. It includes ensuring that—to the most remote location in Canada—parcels are delivered. And the health of Canadians is dependent upon it: pharmaceuticals get delivered to people in remote communities not by the UPSes of this world, who don't want to go there, but by Canada Post. Greengroceries are delivered to northern communities not by UPS and not by Federal Express but by Canada Post.

Mr. Pat Martin: Good point.

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

Mr. Lastewka, please.

Mr. Walt Lastewka (St. Catharines, Lib.): Thank you, Madam Chair.

I want to go back to the Canadian Real Estate Association. I'd like you to expand on some of the discussion and feedback you got from all your branches on the reason they were against private right of access. Can you just share with us some of the discussions and the reasons that were brought forward?

Ms. Marcia McGuire: Some of the reasons the Canadian Real Estate Association is opposed to the private right of access are based on principles of what is best for Canadian law. Certainly we believe the commissioner plays a vital screening function. That probably is one of the paramount reasons: that the screening function the commissioner plays is a significant one.

We also looked at the reasons put forward when the private member's bill was introduced last year in support of the notion. There had been some work done on this. At the competition seminar in the fall there was a presentation, and a paper had been prepared. Mr. Russell Lusk was the chairman of that particular session.

The reasons put in support didn't appear to have a basis that couldn't be answered another way. So it's for all of the reasons discussed in our paper that our association is here with this position today.

Mr. Walt Lastewka: Okay.

I want to refer a comment to AT&T. Earlier today, we received this book, which is from the Competition Law Policy Group, and I notice both of you are not part of this. Have you ever been part of it?

Mr. Chris Peirce: I'm sorry, you're referring to what?

The Chair: Mr. Lastewka, the book is in the process of being published. They've given us a pre-publication copy.

It's a group, though, of competition law that represents a number of companies that sponsored the book.

Mr. Walt Lastewka: I noticed other firms similar to yours are a part of this competition policy group who are speaking against private access. You both are not part of it—probably because you're speaking for private access.

Mr. Chris Peirce: I'm not aware of the project you're referring to, Mr. Lastewka, but I can advise you that AT&T Canada—with the support of Call-Net as well—in 1999 wrote to the Minister of Industry of that time on its own behalf and on behalf of four other companies who are competitive telecommunications providers, urging him then to engage in a review of the Competition Act.

• 1245

We took part by way of written submission in the Public Policy Forum's consultation around the Competition Act and as well, for a time, took part in consultations being undertaken by various associations that then came to represent views on the Competition Act. But I think you'll find that obviously parts of the Canadian economy have been built up over the years by large, dominant providers. It's only in the past number of years that in a variety of those sectors of the economy we have tried to go from that type of monopoly or dominance to a situation of more even-handed competition.

On the road to competition, I would probably not expect—it would not be rational behaviour on their part—those parties who were the dominant or monopoly providers to favour something like this private right of access. I expect you're going to find differing views on issues like this. Frankly, if consensus is the threshold for action, you won't have action, because that's not a threshold you'll be able to obtain.

Mr. Walt Lastewka: One of the concerns that has been raised concerning private access is that it would be abused—that it wouldn't be on competition, but trying to find out the strategies and plans of other companies. Do you feel that you, or companies like yours, might want to play that game?

Mr. Chris Peirce: I think.... No. Practically speaking, what companies like ours want to do is compete in the marketplace. As you look at the charts we put in front of you, that's a difficult row to hoe in terms of winning individual customers. When you look at the profit picture of competitive providers in an industry like ours, we also don't have the resources to be devoting great time to figuring out the secrets of our competitors.

What we want is the ability to compete with someone who obviously and quite understandably is in a position of dominance because of where they've come from in terms of the history of that sector of the economy in Canada. I really quite firmly believe that this notion of abuse of a private right of access without more....

I think it's really incumbent upon the person or the party who would seek to prevent legitimate Canadian interests—or interests in the Canadian marketplace—from having access to a decision maker who is there to enforce the public policy of the government and the law of the land, to establish why Canadians should not have access to that type of remedy. To simply offer up phrases like "abuse" or "strategic litigation", I would suggest is not enough.

Mr. Walt Lastewka: Mr. Taller, you had spoken in favour of private access to a limited extent. I didn't hear what you wanted to have any restrictions on, or how you favoured it—with what types of mechanisms. Could you expand on your thoughts?

Mr. Martin Taller: I'll try to be as accurate as possible. We really believe the safeguards that are existing out there now—for example the disposition and the awarding of costs—would really be helpful in controlling the abuse of private access. We believe in some ways the punitive side

of disposition and awarding of costs would be the control mechanism for that limited access. We believe frivolous submissions would be held back in the way Mr. Peirce and Mr. Scott have indicated.

Mr. Walt Lastewka: Thank you.

Thank you, Madam Chair.

• 1250

The Chair: Thank you very much.

Mr. Volpe, please.

Mr. Joseph Volpe: Thank you, Madam Chair.

Mr. Power, I wonder if you'll forgive the tone of this question, but how many flights does Canada Post generate to deliver pharmaceuticals to northern communities or to remote communities on a yearly basis?

Mr. Gerard Power: Our network uses approximately 600 flights a day. Many of those flights are—

Mr. Joseph Volpe: Those are cross-Canada, transcontinental.

Mr. Gerard Power: —both transcontinental and those going into northern communities. Every community does not have a flight every day. However, from key staging points—at the end of the road network, in essence—from those points on we use commercial aviation to fly these products north. However, we don't charter or own aircraft, unlike some postal administrations, such as Brazil and so on, which has its own fleet of aircraft. We are not an airline. That is not the business we have.

Mr. Joseph Volpe: So if I phrased my question differently and I were to ask you what percentage of all of your expenses are dedicated to flying pharmaceuticals and greengroceries to remote communities in Canada's north, what would the answer be?

Mr. Gerard Power: I would not be able to provide you with that information. I don't have that at my fingertips in terms of knowing the percentage of our costs. What I can say, though, is that our competitors come knocking on our door and ask us to carry things for the last many miles to remote communities—either directly or indirectly through other players in the market.

Mr. Joseph Volpe: So I should go to them to ask them how much it would cost them to do it.

Mr. Gerard Power: That is one possibility. Since there is no obligation on the part of other carriers to take items to those communities, unless it is lucrative business that not only pays its way but also generates sufficient contribution to their bottom line to justify dedication of management time and resources and other resources to the activity, as opposed to another activity, they would not engage in it. However, the universal service provider does.

Mr. Joseph Volpe: But the Government of Canada backs up those expenses. That's the difference between, I suppose, Canada Post operating as a crown corporation at arm's length from the government and any business that wants to go and deliver the greengroceries and the

pharmaceuticals to the far north.

Mr. Gerard Power: The Government of Canada does not provide Canada Post with any measure of assistance in moving pharmaceuticals. What happens—

Mr. Joseph Volpe: Then the decision, Mr. Power is strictly economic.

Mr. Gerard Power: The decision made by Canada Post is not a strictly economic decision to do that. In the legislation setting out the objects of the corporation is the requirement to provide basic customary postal service to all Canadians.

Mr. Joseph Volpe: And in the course of that, it can then engage in whatever practices it requires in order to ensure there's profitability, even at the expense of its competitors, so that it can fulfil that mandate. That's what I thought I heard you say.

Mr. Gerard Power: No, we cannot do that, because Canada Post Corporation, unlike some other posts, unlike the United States Postal Service, is subject to Canadian competition law. Therefore, the Competition Bureau is able to come along and ask whether you are engaged in an activity of abusing your dominant position of tied selling or any other activities that are proscribed by the Competition Act. We do have to communicate with the bureau on those issues on an ongoing basis.

Mr. Joseph Volpe: I'd like to pursue that, actually, even a little bit more, because Health Canada provides the pharmaceuticals and assumes the expenses for delivery thereof, as well as the issue of greengroceries. A good portion of the cost is borne by the private enterprises that undertake to provide greengroceries to remote areas.

I'm imagining that Canada Post must make a little bit of profit. Otherwise it's not worth while having other people pay the freight or make the profit. It doesn't make sense to me. Why does it make sense to Canada Post?

• 1255 

Mr. Gerard Power: The Department of Indian Affairs actually sets the policy for what items will be carried as air stage items. They in turn contract with Canada Post, and the contract with Canada Post provides that we will carry these items on a cost-recovery basis. So we do not make any profit. There is no contribution to the overhead of the company for the carrying of these items.

The Chair: Last question, please, Mr. Volpe.

Mr. Joseph Volpe: Okay, I'm going to ask my last question to Mr. Beauchamp.

The Chair: Okay.

Mr. Joseph Volpe: I'm glad that Mr. Power said that Canada Post doesn't lose money on the delivery of altruistic services.

Mr. Beauchamp, a few years ago all of the small businesses in the real estate industry were really owner-proprietor operated—small brokers. They did their own business and they might be able to hire an agent or two. Then along came Century 21, Remax, HomeLife, and a whole series of others. They introduced a market concept that has seen the elimination of those small

brokerages. In fact, many of the brokers are essentially in the employ of these large franchises. Is that an accurate understanding of how the real estate business is organized? And if it is or if it isn't, is there any chance that some of those brokers might feel that the presence of a Century 21, Remax, HomeLife, and so on is deleterious to their abilities to operate as small brokerage houses?

Mr. Pierre Beauchamp: Thank you for your question. I think you have described about 20 years of evolution in the real estate industry in Canada.

You're right in suggesting there are large franchisors that operate in Canada. You're incorrect in suggesting that the franchisees of those franchisors do not operate as individual, independent business people, who have a choice to make decisions on their own, to operate with that franchisor or not to operate with that franchisor. In fact, I could argue that some of the larger firms that were maybe around ten years ago no longer operate in exactly the same fashion. I think the franchise business is thriving in Canada—is operating well and is serving consumers well—as are independents who do not belong to franchise operations.

At the same time, I can suggest to you, as I explained in our paper, that we still represent independent individuals, whether they operate within a franchise network or on their own.

The Chair: Thank you.

Thank you very much, Mr. Volpe.

I just have two brief questions before we wrap up here.

First, Mr. Power, you said in your opening comments or in your opening statement that "The Bureau currently weeds out hundreds of frivolous complaints each year". How do you know they're frivolous?

Mr. Gerard Power: From the dealings that we have with the bureau on an ongoing basis and from the presentations that officials of the bureau make at various conferences involving legal professionals, it's clear that they take their responsibilities very seriously and that they proceed with the valid complaints, where they believe there is clear and cogent evidence. So from the information in their annual report, in terms of what is being dealt with, it is effectively the frivolous complaints, such as the one brought by UPS, through a dupe, against Canada Post. It's those frivolous complaints that are being thrown out by the current process.

The Chair: But I think you're making a large assumption that all the cases that aren't being heard are frivolous, and I have to disagree with you on that, based on the testimony we've even heard from the commissioner himself that this is not in fact the case. So I have to say that I take exception to the way it's presented in your brief.

My second question is to Ms. McGuire. You quoted the Public Policy Forum in your opening comments and you said that no consensus could be reached on private access. But if I recall the Public Policy Forum report correctly, their statement went on to say that consensus could possibly be reached if safeguards were put in place. You failed to mention that very important point, and I wonder why.

• 1300

Ms. Marcia McGuire: Thank you, Madam Chairman. I'm very pleased that you raised the point for me. It actually brings me back to an earlier comment you made, because I am not suggesting that you're not trying to engage in a thoughtful process, as I'm sure you are. But when I talk about rushing, I look to something else the Public Policy Forum discussed, and that was changes to section 45. Because a similar result was found in their conclusion, they've decided to go to a white paper.

The Chair: Ms. McGuire, my question was very specific.

Ms. Marcia McGuire: Yes.

The Chair: You talked specifically about the fact that we couldn't achieve a consensus on private action, and you've quoted the Public Policy Forum. The Public Policy Forum very clearly stated in its report that they believed it could be achieved with proper safeguards. We now have an amendment in front of us that has a number of safeguards, which I don't believe you've addressed—

Ms. Marcia McGuire: And I'm suggesting, Madam Chairman, that the process that has gone through in the past for thoughtful competition law amendments isn't served by not putting them forward in a discussion paper like a white paper, and that to do it this way—

The Chair: With all due respect, Ms. McGuire, there is not—

Ms. Marcia McGuire: But you've said yourself—

The Chair: There is not any one way of doing competition law process. Having been a member of this committee for four years now and having been through Bill C-20 and then through several rounds of Competition Act proposals by private members' business—

Ms. Marcia McGuire: But we submit there's a better way.

The Chair: I appreciate what you're saying, but with all due respect, there is not just one way in which amendments to the Competition Act have occurred over the last 20 years. We've had a lot of work done on the Competition Act. I would suggest that it's important for us to look at all the options and to also remember—

Ms. Marcia McGuire: But Madam Chairman, there haven't been a lot of changes to the Competition Act over the years. There was a big one in 1976 and again in 1986, and in 1988 there was a small one. We saw a number of private members' bills that died. There was an amendment a couple of years ago. We've had a thoughtful process normally. What I'm suggesting is that if there are ways to satisfy concerns of businesses such as ours or businesses that we represent in our presentations, then why can't we engage in a fuller dialogue?

The Chair: Ms. McGuire, you and all members of the public have been invited to engage in this process, since it began at this committee four years ago—

Ms. Marcia McGuire: And we have.

The Chair: No. In fact this is the first time you've been at the committee to talk about the Competition Act. We've had several rounds of discussion. We did an interim report on the Competition Act where part IV section 72 was discussed, and that was on private access. So

with all due respect, there has been a long engagement. As we heard from earlier witnesses, it has been discussed for 30 years.

That being said, we're going to adjourn. We will meet again this afternoon at 3:15 to hear from our Australian witness. Thank you.



This is Exhibit “38” 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
CHAMBRE DES COMMUNES
CANADA

INST COMMITTEE MEETING

Notices of Meeting include information about the subject matter to be examined by the committee and date, time and place of the meeting, as well as a list of any witnesses scheduled to appear. The ***Evidence*** is the edited and revised transcript of what is said before a committee. The ***Minutes of Proceedings*** are the official record of the business conducted by the committee at a sitting.

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November 7, 2001

Minutes | Evidence | Meetings (INST)

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Wednesday, November 7, 2001

• 1534

[*English*]

The Vice-Chair (Mr. Walt Lastewka (St. Catharines, Lib.)): Shall we begin? The order of the day is Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

We have first the chief executive officer of WestJet Airlines, Clive Beddoe. I would ask that you begin with your opening remarks, and then we'll turn it over to questions.

Mr. Beddoe.

Mr. Clive Beddoe (Chief Executive Officer, WestJet Airlines): Mr. Chairman, thank you very much.

• 1535

As you've probably seen in the paper today, the airline industry is yet again going through a major evolution or revolution. We have an industry that has a 97% failure rate in North America, and I believe a lot of this could be avoided, particularly in Canada, if we had a fairer and more appropriate Competition Act that could respond to the concerns of our industry.

Let me start off by saying that, last year, WestJet made a 20% profit margin. We have, on average, gone into communities across Canada and lowered fares by 50% in every market we've gone into, and yet we've been able to make a 20% profit margin, pre-tax, pre-profit-sharing to our employees. That 20% represents a near record, if not a record, in the history of aviation in Canada.

Clearly, we have been a very successful and growing organization. We have grown WestJet by an average of 55% since we started flying, notwithstanding all the attempts to stop us, first by Canadian Airlines, then Air Canada, and then Air Canada and Canadian Airlines combined. So I think I speak with some level of authority when I say that we have had a very difficult time dealing with anti-competitive issues in Canada. We have been able to overcome them; clearly, others haven't.

In the past four years we've lost six airlines in Canada: Greyhound; VistaJet; Royal, recently; CanJet; Canadian Airlines; and RootsAir. I think Canada 3000 was saying today, in the press that I read this morning, that they too are close to bankruptcy and failure. We're down to two airlines, if that happens, us and Air Canada.

Air Canada has, in our estimation, 80% to 85% of the market share in Canada when measured either in revenues or in terms of available seat miles. If you look at the distinction in pricing on Air Canada's routes, where Air Canada flies versus where Air Canada flies against a competitor, against WestJet, you'll see that fares are double elsewhere. I can show you plenty of examples of that.

They use those excess profits to find ways, in my opinion, to drive other people out of business. I think the papers have recognized this, the parliamentarians have recognized this, and the Competition Bureau has recognized this. I don't think there's any doubt about the matter. However, I'm not here to criticize Air Canada, except to say that I think the act has given them the opportunity to do this without restraint.

We filed a complaint against Air Canada for predatory pricing activities in Moncton last year—actually 20 months ago, I think. Since then, we have spent the best part of $750,000. The competition department has spent, obviously, a huge amount of money to pursue this issue also. We've been in front of the tribunal only a matter of about four or five days in total. We're told by our lawyers that the process will probably take another two or three years before we finally end up having some resolution to the process.

At the end of the day, even if we're successful, Air Canada simply gets a slap on the wrist and told to stop—with respect to that route. There's nothing to stop them from doing the same thing on another route over and over again.

The damage that's done to the industry in the process is enormous. CanJet got a cease and desist order, but it didn't work for them. The difficulty with our industry, and one of the reasons our industry has such an enormous failure rate, is that if you look at the profitability on average

of the airline sector—and this isn't something I invented; it's just an observation on my part—the margins in the airline industry are nothing much more than 3% or 4%, at the very best. If you take an average airplane with 120 seats on board and a load factor operating at 75% to 80%, you're going to have roughly 80 or 90 people on board that airplane. With a 3% to 4% profit margin, only three to four people on board that airplane are making a profit; everything else is paying the overhead.

So it is relatively easy to eliminate a competitor. Dump capacity on top of the competitor, drain five people from that competitor, and you put the competitor into a negative position. Drain 10, 15, or 20 people from them, and you have killed them in very short order.

• 1540 

The process is relatively simple for a major carrier to kill start-up carriers or smaller companies. We've been able to resist that because we've been able to win the hearts and minds of the public at large in Canada and persuade them that they should fly us over our competitors, as a result of which we've been successful. But the process involved in filing our complaint has lasted months and with little prospect of solution.

The problem is, if you look at it from the point of view of the major carrier, they have a huge benefit at stake. In the case of Canada 3000, topical as they are today, they generate something between $700 million and $1 billion in revenues. They've lowered fares, similar to us, in every market they've gone into. If they were eliminated, where would the majority of that revenue flow? It would flow to Air Canada, the dominant carrier.

If they're able to double fares as soon as the competitor has been eliminated—which is what has happened in every market where we have seen ourselves pull back or move to different markets and leave Air Canada as the dominant carrier, and Winnipeg is an example where we've seen air fares double as soon as we leave—then the net effect is, does that $700 million grow to $1 billion or $2 billion?

So the benefits to the major carrier are so large, what's the risk? There's no downside risk whatsoever. In our view, the Competition Act has to be modified in order to bring some discipline back to an industry such that the penalty involved has some bearing on the benefit that could flow to the dominant carrier. Better still if the dominant carrier has to pay the penalty to the offended party, maybe even by way of damages.

Capacity is not addressed in the Competition Act. The dumping of capacity, in and of itself, is a highly anti-competitive act in the sense that this capacity is what drains the revenue base for any individual carrier.

There are no consequences to the board of directors in most public service/public interest legislation. There is a liability imposed on the boards of directors of corporations. If I were to allow our company to pollute the atmosphere or the riverway somewhere, our board would be held personally liable. Why not make the same thing true in the Competition Act? If you want to bring discipline to the Competition Act, make sure the individual board members of the corporations have a personal liability. Let me assure you, if their board is anything like my board, they have to make sure those sorts of activities don't happen. They're not going to expose themselves personally to litigation or to damages.

The concept of avoidable costs that's used in the Competition Act presupposes that no sane businessman is going to sell a product below his avoidable costs. The reality in the airline business is if you have a huge benefit in getting rid of a competitor, you'll sell huge quantities of product below your total cost in order to make sure you've eliminated a competitor.

Recently, Air Canada launched Tango, a supposedly low-cost alternative. Tango, in my view, is nothing short of a fighting brand, designed to drive a competitor out of the marketplace. Tango is offering fares right now between Calgary and Toronto for $169 on a walk-up basis. That fare on Air Canada only a few weeks ago, before Tango arrived, would have been nearly $2,400.

We, who have a cost structure 50% less than Air Canada, would just about break even if we filled our entire airplane at $169. There is simply no way that Tango or Air Canada can possibly make money at those fares. That is dumping of capacity. It is purely designed, in my opinion, to make sure that Canada 3000, which is on the edge of bankruptcy, will be destroyed, and I think we're seeing the results of it today.

The use of fighting brand is addressed in the act, but unfortunately, if you have to go to the Competition Tribunal and say you need their help, that you are in desperate shape and will, as Canada 3000 said, run out of cash by Christmas, the moment you say that, you've effectively slit your own throat. In this business, you would cease to have any bookings come in after having made that statement.

So in order to take advantage of provisions such as the cease and desist provisions or protection under the Competition Act, you first have to acknowledge to the world that you're about to fail, and in so doing you will be guaranteed to fail. It is impossible to get out of that conundrum. The Competition Act does not recognize the realities of life today as we know it.

• 1545 

The cease and desist provisions under the Competition Act were designed to try to prevent this, but again you have to say you're going to be irreparably harmed. The entire process fails the airline industry, no matter how you look at it.

As I mentioned earlier, the "avoidable cost" concept is used throughout the Competition Act as a means of determining whether or not abuse of dominant position or predatory pricing is occurring. In the airline sector, what is your avoidable cost? Air Canada's claim is that they virtually have none, because they have the airplanes and they have to fly them somewhere. They have pilots, they have crews—they have to do something with those airplanes: what's their avoidable cost? We've spent months arguing every component of the cost structure of Air Canada versus WestJet, trying to determine what is avoidable and what isn't.

The solution to the act is to do away with avoidability as a cost component and use fully allocated costs. Every airline in Canada runs route profitability numbers. They know exactly what their route profitability is. If you're going to keep selling product below your cost, then you're clearly doing it for some reason other than to make money.

In my view—

The Vice-Chair (Mr. Walt Lastewka): Could I ask you to slowly wrap up so we could have time for questions?

Mr. Clive Beddoe: As a last point, the cease and desist provisions, in my view, only have any bearing if the applicant has a chance to survive until the tribunal has provided its decision with respect to an application under the Competition Act.

Right now the cease and desist provisions available under the act extend only to 20 days initially and two subsequent appeal periods of 30 days, to a total of 80 days. In my view, that has to be amended to make sure the cease and desist provisions available under the act are not only available because you are in dire straits and desperate but also extend to the point in time when the tribunal has rendered a decision.

In summary, that's my point.

The Vice-Chair (Mr. Walt Lastewka): Thank you very much, Mr. Beddoe. I'll now refer to questions.

Monsieur Bergeron, please.

[*Translation*]

Mr. Stéphane Bergeron (Verchères—Les-Patriotes, BQ): Thank you, Mr. Chairman.

Good afternoon, Mr. Beddoe. Thank you for being here with the Committee and for the comments you have made. One can safely say that WestJet is a success story for Canada. At this very difficult time, it is probably one of the only airlines, if not the only one, to be still profitable.

That being said, I believe you have correctly identified one of the difficulties or gaps of the Competition Act and I think it is one thing we will have to deal with. Either the Act does not provide for any remedy in some cases—and you mentioned one—or the Commissioner does not intervene. That is the same situation that we faced about the increases of gas prices. So, if you will allow me, I will ask my question on the basis of gas prices.

We know that one of the reasons why WestJet is still profitable is that it is able to keep its prices relatively low, and one of the reasons for that is that WestJet, contrary to other airlines, does not add any surcharge for the high prices of fuel. And if you are able to avoid this type of surcharge, it is because you have negotiated hedging contracts for your gas supplies.

• 1550 

Do you believe this type of contract could be extended to other industries and even, perhaps, to consumers, in order to control any future increases of gas prices and, in this manner, to contribute to economic growth?

[*English*]

Mr. Clive Beddoe: Thank you for the question.

First of all, I'm afraid I disagree with you that WestJet has been able to avoid putting up fares or adding a fuel surcharge because of our favourable hedging program in purchasing fuel. We do not add, as you say, a surcharge. We do not have an additional charge—a gas surcharge or a fuel surcharge—in Canada.

Part of the reason is.... And you're right, we do have a hedge in place where we contracted to buy fuel in a favourable time; however, if you look at the history of hedging, you can be caught on both sides of that. In fact, for a while we were caught on the wrong side of it. When we hedged initially, we hedged at $16 a barrel, and fuel fell to $12 a barrel. We had to live with that. But let me explain how we have achieved what we've achieved.

We have no fuel surcharge because of innovation within the company. We sell 35%—some days 40%—of our seats on the Internet. One booking made through our reservation centre, exclusive of any commissions paid—just the cost of making one booking in our reservation centre—is $10. The cost of making one reservation through the Internet is 30¢. When our average fare is only $90, you can get some idea of how much of a benefit this has brought to WestJet. As a result of that innovative process that we started two and a half years ago, we've been able to avoid having to actually add a surcharge. If you look at the math involved, our savings, net of any discount to our passengers, is actually as much as the increase in fuel costs we've experienced.

I think there's a big danger for industry as a whole in hedging fuel on a broad basis, because you can get caught on the wrong side of it. We've already seen what happened to fuel in the last few days. It's come down, and headlines today were suggesting fuel could become $10 a barrel again. How does industry cope when it's on the wrong side of that? I think it depends what industry you're in.

We hedged at $16 and then $18 a barrel because we looked at the statistical information that indicated only about 7%, I think it was, of the time in history could you say fuel had ever been less than $16 or $18 a barrel—I forget the exact number. So we just took a gamble. We lost on the first phase of that gamble and made on the second phase of it. I think industry has to be very, very careful about getting into a hedging program.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Bergeron. It's five minutes. I'm going to switch over.

Mr. McTeague.

Mr. Dan McTeague (Pickering—Ajax—Uxbridge, Lib.): Mr. Beddoe, thank you for being here today. Much as I'm pleased to see you're here today, I can tell you that a fight I began many years ago on the Competition Act unfortunately has required your presence here. We're seeing an increasing domination by several groups throughout the various number of strategic sectors in our economy.

We are proposing very limited changes to the Competition Act, but they are nevertheless a start. Some, like yourself, seem to allude to the fact—and we're getting a large number of people, who aren't obviously the largest of large corporations—or suggest that perhaps it's time to be a little more aggressive with the Competition Act. I think I heard in your summation something with respect to damages.

I too, sir, am interested in the fact that we're now dealing with a number of substantive issues on the Competition Act, which has been largely ignored by the media over the past few years in favour of other issues.

When I presented my Bill C-235 many years ago, it was treated as something directed strictly to gasoline. Of course, it has given rise to the possibility and the prospect of private rights of access to the Competition Tribunal.

As you know from several interventions in the media—particularly one medium—I've been able to actually get the point across with respect to how much time it will take before you're able to get your issue before the Competition Tribunal, notwithstanding the fact that the Competition Bureau has taken the right position with ensuring—notwithstanding the Transportation Act and certainly notwithstanding the beliefs within the Transportation Act—that preserving competition is far more important than protecting a particular competitor.

• 1555

My question to you is, given the large failure rate, given what we're seeing with Canada 3000 today, given the litany of those who have lost out or simply folded, what would you expect of this committee? Should we be moving beyond simply the restrained area of private access with respect to refusal to deal, exclusive dealing, market restriction, and tied selling and perhaps provide damages to those who bring applications before the tribunal and have damages awarded based on abusive dominance? I believe you're referring to "fighting brands", which of course is part of section 78 of the Competition Act.

Mr. Clive Beddoe: I feel that if you are trying to change behaviour, whether it be in adults, corporations, or children, the truth of the matter is you have to make sure there is a reward and a penalty. Unfortunately, the way the act functions today, as I suggested earlier, there is such a huge reward to those who drive others out of business, particularly if you think in terms of the Canadian airline business, for example—an area I'm familiar with—which is a $12-billion-a-year industry: $12 billion and there are only three players left in it.

What a magnificent reward there will be to those who drive one or even two of those players out of business. The capital markets will not come back to support future airlines in Canada.

It seems strange for me, perhaps, to be here saying I'm in favour of modification to the Competition Act, because undoubtedly we are going to be the beneficiary of this. But I really believe if we are going to have a healthy industry that's going to attract capital in Canada, we have to be able to have a viable business base, and that's not going to exist when you have one dominant player with 90%, or 85%, or even 80% market share.

There is a danger, though. The difficulty is—and you talked about access to information—in going through the process we've been through, Air Canada has demanded information from us as to our profitability on every route. Well, guess what happened immediately they got it? Guess where they put their capacity? Guess what they did? It's not too difficult to figure out.

So it is a dilemma. There's no simple solution to some of this stuff. But there's no question we have to take away the risk and the reward process. The reward is far too great, and even if we had a penalty that was $50 million, it would be peanuts in relation to the benefits.

Mr. Dan McTeague: Mr. Beddoe, yesterday your competitor Air Canada, through its lawyers, made the presentation that the Competition Act, if it were to proceed with very limited forms of private access in very restrained areas, would bring about the destruction of the Canadian economy or a chill in investment. Sir, I'm wondering, if your company should decide it can't

continue in business and there is only one airline left in this country, what will it mean for consumers large and small and the Canadian economy in general if it's carried into several other industries?

Mr. Clive Beddoe: It's purely speculative on my part, but I can say that every market we've gone into.... Winnipeg was a classic. We went into Winnipeg and lowered fares by 50%. When we pulled out, because we didn't feel, after three or four months, that Winnipeg was responding favourably to us—initially, Air Canada and Canadian lowered their fares to match our fares—as soon as we left that market fares doubled. Greyhound went into that market a little while later; the fares dropped to match Greyhound. Air Canada put more capacity on top of Greyhound; Greyhound failed; the fares went straight back up again. We entered the market; the fares came down again.

Competition is what this country needs, and if its economy is going to be stimulated, we need fair competition. But I think the Competition Act needs to take into account various different industries, and I can only speak really about ours.

The Vice-Chair (Mr. Walt Lastewka): Mr. Strahl.

Mr. Chuck Strahl (Fraser Valley, PC/DR): Thank you, Mr. Beddoe, for being here today. As I mentioned to you before we started, those of us in Abbotsford almost feel you're our airline because of course you put Abbotsford airport on the map by bringing in WestJet—since matched, of course, by Canadian Regional or Air Canada or whatever it is now. But the fact that you were there first and get your service work done at Conair of course, has given you the "homer" status back in Abbotsford. I'm sure you know that, and many of us are happy to fly WestJet because of it.

I have a couple of questions. You mentioned the six airline failures, but just to play the devil's advocate, airline failures are going on right now all over the world. It's not because of the Competition Act. It's because it's a cutthroat business with a bad set of regulatory bodies, and there are all kinds of other reasons. Couldn't an argument be made that it's not really Air Canada, it's just the fact that people are going belly-up, from Swissair to Australian companies to Air New Zealand, you name it? They're all on the ropes. It's not a Canadian phenomenon or a Competition Act problem; it's just a worldwide phenomenon.

• 1600

Mr. Clive Beddoe: Since September 11, I would certainly agree with you that the industry has gone through some very radical changes. I'm not suggesting for a second that the Competition Act is going to solve those problems, but long prior to that the problems in the industry were well apparent. Even as much as a year ago we were entering a recession, but rather than cut back, Air Canada increased activity and capacity. Even today, as we speak, Air Canada has said they are going to cut capacity by 20% when in fact what they've done is add 4% more capacity on top of WestJet and added some 60-odd percent—according to Canada 3000—on top of Canada 3000 with Tango.

Yes, I agree with you that the airline industry is in a state of absolute turmoil and change, and there's no question but that it will have to emerge from this era with a much more profitable base to it than it's had in the past. That's even more reason why the Competition Act should be

modified, to attract capital to the industry, because no one is going to put any money into this industry, given the state of the industry.

Mr. Chuck Strahl: I do think it's going to take more than just modifications to the Competition Act.

Mr. Clive Beddoe: Absolutely.

Mr. Chuck Strahl: It's going to take an awful big change in patterns of government interference. WestJet has almost been a success in spite of, not because of, government policy, not just on the Competition Bureau's side.

We've spent an awful lot of time talking about the right to private access, and in your particular case the right to private access isn't really an issue because your case was actually taken up. That doesn't happen very often, so it's obviously a very strong case in the sense that the commissioners deemed it to be in the public interest to resolve this thing.

You're suggesting—I take it from your testimony, I don't know what your opinions on private access are, and you're welcome to give an opinion—that the problem with the act is twofold. One is that it just takes way too long; you're talking about two or three years before it's finalized. The way Air Canada is going, you may not have to drive that to resolution. Maybe that will take care of itself, but it takes years.

The other thing is, are you suggesting that penalties should be similar to what they have in the antitrust legislation in the States, where you get double or triple damages, that kind of thing? Or do you have something else here, where it would make the board of directors liable? Are you...?

Mr. Clive Beddoe: Well, we're trying to modify a behaviour. I think the act is there to try to modify a behaviour. The behaviour is going to persist until such time as the risk outweighs the reward, and the only people who can control that, really, are the president of the company and the board of directors.

If the board were made to be personally liable, let me tell you, they'd not let the president continue down a path that would jeopardize their own personal net worth. There's the first or one possible way to modify behaviour.

An alternative is to make sure that if you're making a decision as to whether you do or do not pursue anti-competitive behaviours, you have to weigh the risk. If you're going to be penalized, then part of the fine should be awarded to your competitor. Let me tell you, you'll have to think twice about doing some of those things.

Mr. Chuck Strahl: The counter-argument is that there's been an awful lot of talk about strategic and vexatious litigation, of people just taking you to court just for the heck of it. For example, if you're an upstart with two jets and if a big company just says, well, we'll drive these guys out of business by forcing them into a multi-million-dollar defence of their activities at the embryonic stages, you won't be able to afford it. It's a way of driving you out.

Would you also say that if somebody does launch a strategic litigation, one that's ruled to be strategic or vexatious, the board of directors should be liable for that as well?

Mr. Clive Beddoe: If you want to change behaviour—I'll go back to the point—then make it costly, and it will change behaviours. I think we've seen that in the environmental act; there's no question that our environment has been improved substantially because of it.

I can guarantee what my board would do if they thought we were pursuing things that were illegal. I believe you already have a provision in the act that says it's prohibited to create a fighting brand. What have we got? What's Tango if it isn't a fighting brand?

In order to stop it, look at the process. The process is unbelievable. It might stretch into years, and by the time you get to a solution.... You saw it with CanJet. CanJet is gone. There's something wrong with the process, and it has to be changed.

• 1605

The Vice-Chair (Mr. Walt Lastewka): Thank you.

Mr. Bagnell.

Mr. Dan McTeague: On a point of order, Mr. Chair, I think there is substantial interest in this. Perhaps with the indulgence of the next party who's going to be here, we could extend this for a few more minutes. I think there are some excellent questions, particularly from the opposition—

The Vice-Chair (Mr. Walt Lastewka): And that's why I like to start the meetings on time.

Mr. Dan McTeague: I was here, Mr. Chair.

The Vice-Chair (Mr. Walt Lastewka): I've been keeping it to five minutes. I know you're all going to be mad at me, but that's fine.

We'll carry on with Mr. Bagnell.

Mr. Larry Bagnell (Yukon, Lib.): I just have one really quick question. I'm from the Yukon, and our route from Vancouver has been a virtual monopoly for years. Each airline that has held it has said that they can charge more basically because it's a monopoly, and they do so, which annoys people. In fact, yesterday, I think, the airline infuriated the Yukon by making that flight a long haul, meaning you need 25,000 points instead of 15,000, so once again they're furious.

A number of them think the answer is increased competition, and in fact some people are looking to your company. If there's anything you haven't mentioned so far that would facilitate you going into that route, should you decide to do it.... If it's a question of amendments to the Competition Act or any other legislation we would have to do, just let me know so I can lobby for it.

Mr. Clive Beddoe: You mentioned exclusive routes and monopoly routes. I'd just like to point out that we have a monopoly route from Calgary to Comox, and we charge the same fare, fundamentally, on that route as we charge on our competitive routes, where we are up against a competitor. We've done that intentionally because we go back to the belief that we are here for the long haul, making sure we offer fair and inexpensive air transportation in Canada. If we were flying into the north or anywhere, we would be charging rates based upon our costs, what we felt was a reasonable margin to make, and not on what we could get away with.

Mr. Larry Bagnell: Don't forget the Yukon.

Thank you.

The Vice-Chair (Mr. Walt Lastewka): Thank you.

Mr. Strahl, a short question.

Mr. Chuck Strahl: On competition, you mentioned Tango several times. How do you differentiate between that and a company that's starting up, one trying to woo a bunch of new customers, trying to use the Internet, as you are, and promoting a seat sale to let people know they're around, alive, and in competition? It could be a loss leader for a couple of months while they establish a name brand and get their act together. Is that reasonable, or do you just not buy it?

Mr. Clive Beddoe: No. I think we're dealing with two issues here. We're dealing with the question of dominance in the marketplace. If you have a dominant carrier, as we do in our case, they came and were given the right to have an 85% or 90% market share by the Canadian government. With that come some social and practical responsibilities. If you're going to have that kind of dominance, then there are certain things you should and should not be able to do.

I don't see any reason whatsoever...and certainly a seat sale is legitimate, but when it extends ad nauseam.... Take the example of Moncton. Air Canada was charging $605 one way between Moncton and Toronto. They announced they were going to cut 20% of capacity out of the route. We announce we're going in there. Air Canada immediately adds 50% more capacity and drops their walk-up fare because ours was at $350 versus their $605. I'm not suggesting they can't match our fare, but there are two things: adding capacity and undercutting. They turn around and cut their walk-up fare to $250, add 50% more capacity, and add double and triple mileage points on top. For what purpose? Then they have the audacity to suggest they're making money doing it.

The Vice-Chair (Mr. Walt Lastewka): Thank you.

Mr. McTeague.

Mr. Dan McTeague: Mr. Beddoe, I want to be very brief about this.

Air Canada, your competitor, launched Tango after September 11. We've been told as parliamentarians and as a country that this company is going to face a number of problems. It doesn't have the money, and it's looking for a bailout from the federal government. I note that you did not take the requisite amount that was being offered to you. Sir, do you believe that Tango has been established as a fighting brand to destroy your company and to destroy any other company?

Mr. Clive Beddoe: It's my opinion that Tango was launched for one purpose and one purpose only, and that was to destroy Canada 3000 and to inflict some contingent damage upon us.

Mr. Dan McTeague: I think there is a bit of reluctance from time to time, as a result of the weight and scale of some of the more powerful, deeper-pocketed interests in this country, to influence certain outcomes. Do you not believe that a first step towards justice would be to

bring about an opportunity to reduce the lag time it takes to bring cases to the tribunal, thereby having someone recognize a case of simple, common justice and ensuring that you remain part of the competitive process in this country?

• 1610

Mr. Clive Beddoe: Absolutely. But we've got to get away from such nebulous concepts as "avoidable cost" if there is indeed to be some allocation with respect to fixed cost, which is the purpose behind it. Let's legislate it; let's say it's 80%; let's just put a definable number in there. But we can't get drawn into these nebulous terms that are so subjective that they let litigation drag on for months and months on end.

Mr. Dan McTeague: Mr. Beddoe, if I'm given a split second, I can only say that I hope your testimony here has been compelling for members of Parliament, who have seen this issue occur in other industries and who are very concerned about airlines. It's sort of the issue of the day, particularly with what's happened.

We are trying to propose a very limited process, a limited opportunity, for people to bring their cases before the Competition Tribunal and avoid the lag time it took, for instance, for you and CanJet—which is no longer with us—to bring their cases to the tribunal. We have done it in a very restricted way, with some humility in that there is no provision for any damages.

Can you live with no damages and the fact that it does not apply to the abuse of dominance provisions of the Competition Act? What would you say to those who are making the accusation that this is going to bring industry to a halt?

Mr. Clive Beddoe: It's certainly not going to bring industry to a halt. Quite frankly, we've lived for five and a half years and succeeded in this environment. We can manage without any changes if you get right down to it. But that's not going to help the long-term interests of the industry, which is much more what my concern is.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. McTeague. Thank you, Mr. Beddoe.

Mr. Clive Beddoe: Thank you, Mr. Chair.

Mr. Bergeron, do you have a short question?

[*Translation*]

Mr. Stéphane Bergeron: I would like to follow on Mr. McTeague's question and, perhaps, play devil's advocate. My question may seem very naïve but, from the point of view of consumers and competition, could we not see the creation of Tango as a benefit? Don't you think that the creation of Tango has made the industry more competitive, which is beneficial to business travellers and for domestic travel?

[*English*]

Mr. Clive Beddoe: Tango will, in my view, last as long as there is a need. It will be used as an anti-competitive tool until Canada 3000 doesn't exist any more or there's no competition on that routing; then it will disappear or revert to being Air Canada. There's every evidence to suggest that's the case. Look at what's happened in every market where Air Canada has

dominance. Look at what happens to the airfares. Whether it's Tango or Air Canada flying a route will be a moot point. The purpose behind it is still, in my view, to drive others out of business.

[*Translation*]

Mr. Stéphane Bergeron: What I find rather interesting in this discussion, Mr. Beddoe, is that the Competition Act exists to protect consumers and to ensure that there be some healthy competition in the market. However, you are telling us that the Competition Act does not protect properly some industries such as yours, when new companies appear on the market, whereas those new companies should normally increase competition. What you're telling us is absolutely fascinating.

This brings us back to Mr. McTeague's question and to what I was saying earlier, which is that one has the feeling that the Competition Act as it presently exists does not allow us to deal with some situations. Either the Commissioner does not have the powers he should have to promote some healthy competition, or, if he has those powers, he does not use them.

[*English*]

Mr. Clive Beddoe: Let me take issue with your first point, though. Tango is not a separate company. Tango is Air Canada. It isn't any different. Even if they start a low-cost carrier, it's still owned 100% by Air Canada. This is not competition. Let's decide what is really competition.

Air Canada has matched a lot of our fares wherever we've gone and in some cases undercut them. I'm not sure I really understand, quite frankly, what the purpose of Tango is other than to confuse. True competition will only exist if there's a relatively level playing field, and there has to be some kind of level playing field.

• 1615 

In the United States, United Airlines tried to buy USAir recently, and the U.S. Department of Justice turned them down on the grounds that the combined entity would have a market share of 24%. They said that was unhealthy and not good for competition.

We have a carrier in Canada with 85% to 90% market share. Air Canada will argue it's only 60% market share, if you measure seats. Seats are not the issue; available seat miles or dollars is the issue. Seats absolutely confuse the issue. So there's no question Air Canada still has 80% to 85% market share, no matter how you cut it.

Mr. Dan McTeague: I note, Mr. Beddoe, that you alluded to the American Airlines situation, where there were of course treble damages. Perhaps you'd like to comment on the problems experienced by Southwest Airlines when they were denied opportunities to compete with their major competitors.

You have two complaints with the Competition Tribunal. It's taken you a year and a half or more to get there, which of course is a symptomatic question of justice delayed is justice denied.

In the case of your request on abusive dominance, it requires a certain threshold to be satisfied on predatory pricing. It requires that you don't just have to be bad, you have to be really bad in order to get the Competition Tribunal or the courts to understand.

How successful do you believe you can be if Air Canada is able to use Tango to its advantage to continue to apply pressure to your company in areas where it is clearly perhaps providing product below cost for the specified reasons you've indicated to this committee?

Mr. Clive Beddoe: I take issue with low cost; it's low fare, not low cost. The costs haven't changed.

I think we can survive against competition. We have done so. We've battled it by winning the hearts and minds of the public, as I mentioned earlier. I don't think we are in jeopardy at all. Certainly our growth rate will be slowed. Our ability to continue to do what we do will require more agility on our part, more creativity on our part, tougher campaigns on our part.

We'll still survive, because we have a cost structure that's 40% to 45% less than Air Canada's. I believe they will bleed to death if they carry on with this much longer.

However, I still come back to my point that an industry needs to be healthy. Yes, we will be healthy within a failing industry, but that's not really what I think the industry needs in the end analysis.

Mr. Dan McTeague: Would the introduction of foreign airlines be correct?

The Vice-Chair (Mr. Walt Lastewka): Sorry, Mr. McTeague, I must go to Mr. Rajotte for one last question.

Mr. James Rajotte (Edmonton Southwest, Canadian Alliance): Thank you, Mr. Beddoe. I have a question certainly related to the Competition Act, but a little outside it. Would WestJet and would the industry itself be helped if we did lower or eliminate the foreign ownership restrictions, if we did allow cabotage? Would this prevent, in your particular case, Air Canada from cross-subsidizing Air Tango? Would it help WestJet and would it help the industry as a whole, in your view?

Mr. Clive Beddoe: No. In fact, I would suggest that the contrary is true.

First of all, if you had asked that question before September 11, you might have attracted some interest into Canada.

If you look at what's happened since September 11, there's no carrier in the United States that would have any interest at all, in my view, in pursuing cabotage in Canada.

You have to understand, first of all, that fuel in the United States is two-thirds of the cost of fuel in Canada. So a Canadian carrier is going to be operating at a significant detriment against a U.S. carrier. If you allow a U.S. carrier to come into Canada, all they will do is pick off the primary routes—probably Calgary-Toronto, probably Toronto-Vancouver, perhaps Toronto-Halifax—fly those routes, take the cream right off the top, and actually jeopardize the existing carriers even more.

I would say that cabotage would be the worst thing that possibly could be done for the Canadian industry, particularly because they would be able to come into Canada, load up with fuel in the United States at two-thirds of our cost, fly across Canada, and offer fares a little lower—certainly better for the consumer in the short run—and then exit and go and refill in the States.

So the idea of cabotage working for the benefit of Canadians—absolutely not, it would be detrimental. It's not going to bring competition to Kelowna or Abbotsford or Chilliwack or Cranbrook.

The Vice-Chair (Mr. Walt Lastewka): Mr. Beddoe, I want to really thank you, on behalf of the industry committee, for being very straightforward and right to the point in answering the many questions.

We're going to take a 30-second break and then we'll resume.

• 1619

• 1620

The Vice-Chair (Mr. Walt Lastewka): We'll resume, with the pleasure of the Commissioner of Competition from the Competition Bureau, Mr. Konrad von Finckenstein. He's going to start off with eight to ten minutes of preamble, and then we'll get right into the questions.

Mr. von Finckenstein, please begin.

Mr. Konrad von Finckenstein (Commissioner of Competition, Competition Bureau, Department of Industry): Thank you for inviting me to come again to talk to you about Bill C-23.

We have followed your proceedings with great interest and have listened to the comments. You've obviously done a phenomenal amount of work and you are now well-informed about the issues. It would appear to us that there's a consensus contained in Bill C-23, and we are very much encouraged by the broad support the bill has received.

However, the comments from witnesses that you've heard suggest there may be some small changes needed, where appropriate. I propose to run through those and give you our view on those.

First of all, on deceptive notices, the proposed amendments concerning these were first put forward by Ms. Torsney, and they can be clarified by a technical change to ensure that legitimate contest promoters conducting a draw are not captured by the provision.

Let me draw your attention to proposed section 53 on page 22. That proposed section prohibits the sending of a notice that:

> gives the general impression that the recipient has won, will win, or will on meeting a condition win, a prize or other benefit,

Some concern has been expressed that the phrase "will on meeting a condition win" could capture standard legitimate contests such as those that essentially say "You have won on condition that your name is drawn." Replacing the phrase, "will on meeting a condition win" at

line 10 with the phrase "will on doing a particular act win" eliminates such a possibility.

As you may recall, both Mr. Musgrove and Mr. Woolford supported this change and indicated it satisfied their concern.

The bureau would also propose qualifying the term "notice or document" in line 8 with the phrase "in any form", to ensure that the provision addresses all the forms of deceptive prize notices.

Those two small changes, in our view, should be made to the deceptive notice provision.

[*Translation*]

International cooperation: evidence gathering in civil competition matters.

Secondly, concerns have been raised in discussions involving the provisions in Bill C-23 relating to:

(a) the absence of specific protection provided under section 29 of the Competition Act for information provided voluntarily;

(b) the possibility that information in the Competition Bureau's possession, at the time it received the request for evidence, could be provided to a foreign competition authority without going through the formal, judicial authorization process outlined in Part III of Bill C-23.

• 1625

On the first point, it has always been the Competition Bureau's practice, set out in our information bulletin, not to provide foreign authorities any confidential information that was given to the Bureau voluntarily, save for the exceptions outlined in section 29.

However, even though we do not think any changes to section 29 are required, the Bar, the Business Council on National Issues and many other stakeholders have clearly indicated that they want assurances that this practice would be continued. Accordingly, to reinforce our practice, the Bureau would propose adding to section 29 of the Competition Act which concerns the treatment of confidential information and specifies the type of information to which the section applies, the phrase: "(e) any information provided voluntarily pursuant to the Act."

Since there are occasions when the parties providing information voluntarily have no objection to that information being provided or discussed with foreign authorities—for example, complainants who are victims of international scams—the Bureau also proposes adding to sub-section 29(2), which currently reads: "This section does not apply in respect of any information that has been made public" the words "or any information the communication of which was authorized by the person who provided the information".

[*English*]

With respect to the second point, involving information already in the possession of the bureau at the time it received a request for evidence from a foreign authority, it is our view that the proposed provision of Bill C-23 implicitly requires that this information could only be provided under the judicial authorization process set out in that new part III.

However, out of an abundance of caution, the bureau would suggest making it explicit. It would propose adding a new proposed subsection to part III, after proposed section 30.29 on page 20.

This would read:

> For greater certainty, any evidence requested by a foreign state under an agreement may be obtained for the purposes of giving effect to the request only in accordance with the agreement and the procedure set out in this Part, even in the case of records or other things already in the possession of the Commissioner.

These two changes should address the concerns raised by the witnesses. You'd also put in a proposed subsection (2) there, clearly providing that:

> This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

With these two changes, I think the issue of concerns raised against the international gathering of evidence would have been addressed.

On interim orders,

[*Translation*]

a number of witnesses spoke on the subject of the proposed new interim order authority, section 103.1.

One of the concerns raised was the possibility that an interim order could be sought without the Commissioner having reason to believe that grounds for an order by the Tribunal existed. This is the standard for the Commissioner to initiate an inquiry under section 10(1)(b) of the Competition Act, and section 103.1 requires that the Commissioner certifies that an inquiry is being made under section 10. It is however, also possible for an inquiry to be initiated under section 10 if requested by six residents of Canada or the Minister. It was not our intent to be able to ask for an internal order in those circumstances and the Bureau would propose to make this clear by simply changing the phrase "section 10" in section 103.1, on line 20, page 27, to "paragraph 10(1)(b)".

Concern has also been expressed that section 103.1 does not specifically require it to find that the relevant conduct is of the type described in sub-section 103.1(1), such as refusal to deal, market restriction and abuse of dominance.

• 1630 

While the Bureau views this as an implicit requirement, it would suggest making it explicit by adding to line 27 on page 27: "order if it finds that the conduct or measures could be of the type described in paragraphs (1)(a) and (b) respectively, and that, in the absence of an...".

[*English*]

Those amendments will make the interim order process absolutely clear and will remove any concerns expressed about interim orders.

On consent agreements, concern has also been expressed that proposed subsection 105(2), dealing with the possible terms of a consent agreement between the commissioner and a person against whom an order from the tribunal has or might be sought is too broad.

We do not agree with this view. Our intent was to provide a provision that would allow us to address competition concerns in a flexible manner. Nevertheless, because of the concerns that were raised, the bureau proposes changing proposed subsection 105(2) on page 29 so that it only reads:

> The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

In other words, the rest of the proposed subsection, "and may include other terms, whether or not they could be imposed by the Tribunal" should be taken out.

In order to make the latter change meaningful, the bureau would also suggest changes to proposed section 106, which would make it possible for a third party directly affected by a consent agreement to apply to the tribunal for a change to an agreement, on the grounds that the relevant terms could not have been subject to an order by the tribunal.

This could be done by adding the following to proposed section 106 after line 27 on page 30:

> (2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

This, in my view, would make the consent provisions more streamlined and would eliminate the objection raised before you.

The one issue that remains is private access to the tribunal. As the minister stated, major changes to framework law, such as the Competition Act, require broad support. The bureau continues to believe that some form of private access is necessary in order to round out enforcement of the Competition Act. But whether this is the appropriate time is something the committee must consider.

Should there be a decision to proceed with private access, we would suggest that the amendment proposed by Mr. McTeague would need to be slightly redrafted. While we at the bureau agree with the principles set out in Mr. McTeague's motion, they may need to be redrafted so as to work more harmoniously with the rest of the act.

In conclusion, I would like to thank the committee for this final opportunity to discuss Bill C-23. With the changes we have proposed, as a result of your hearings, we are convinced the Competition Act will be significantly strengthened and improved.

I will be pleased to answer any questions you have.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. von Finckenstein.

Mr. Rajotte, I will start with you and give you around seven or eight minutes.

Mr. James Rajotte: Thank you, Mr. Chairman, and thank you very much, Commissioner, for appearing here today.

Just going through your brief here, it seems on first glance there are some very helpful substantive amendments, so I certainly want to thank you for that.

I notice, though, just doing a quick overview, you spend about eight pages on deceptive notices, international cooperation for evidence gathering, interim orders, and consent agreements. You offer some very substantive amendments, which I thank you for. But I think it's fair to say that the biggest controversial issue this committee has faced, in discussing Bill C-23, is private access. You have about half a page here, and then you mention Mr. McTeague's amendment.

I guess I'd like to indulge you and ask you, based on your experience, to maybe talk about that a little more and guide the committee in its deliberations.

On my first question, you say changes to the Competition Act, particularly in private access, will require broad support, but we all know there is a difference of opinion on this—that's the reality. So we either have to go ahead or we don't.

What would you consider to be broad support? If the reality is that a lot of large businesses oppose this, does that stop us from going ahead or not?

• 1635 

Mr. Konrad von Finckenstein: Obviously not. It's your responsibility as legislators to decide what's in the best interest of the country. That's your job and you do that on the basis of hearings. Obviously you want to have the broadest support for any changes you make, especially framework law changes.

These hearings have been extensive. You've heard from them. There are some people who feel very strongly about private access, both for and against. I guess it's your job to evaluate which are the better-founded arguments and what the consequences of private access to the tribunal will be in the long run. Will they be as negative as people suggest? Will they be as positive? On balance, will they be more positive than negative, or not?

I put my cards on the table quite clearly when I appeared here last time. We feel that changes along the principles of Mr. McTeague's amendments would round out the act. They would deal with essentially private issues that are not of public concern. In our view, they would not produce the negative effect some of the critics have suggested. They would provide an adequate relief for some private parties who feel the Competition Bureau does not address their concerns. But the final judgment is up to you, not me.

Mr. James Rajotte: Thank you for that answer.

Maybe I'm taking Mr. McTeague's fire here, but in terms of his specific amendments, would you feel comfortable highlighting how it would be best to amend Bill C-23?

Mr. Konrad von Finckenstein: Mr. McTeague's amendments are based on what was before the Public Policy Forum, which in turn were based on the position originally advanced by the bill. They suggest that only with regard to sections 75 and 77 would there be access to the

tribunal, and it would be limited.

So you'd have to first of all get leave of the tribunal to make sure it was not a vexatious case. You could only get injunctive relief, not damages, so there would be no incentive for strategic litigation. The court would have the power to award costs against a litigant if it should prove this was vexatious litigation or litigation meant to hinder or delay.

The principles of Mr. McTeague's draft basically reflect what was part of the consultations before the Public Policy Forum, which the bureau believes would be useful to round out the act.

As I mentioned in my opening remarks, there are a couple of minor drafting changes that would be needed in order to make it work more harmoniously. But in substance, what's there is exactly what we put out for consultation before the Public Policy FORUM. It's something we would endorse.

Mr. James Rajotte: Thank you again for that clear answer.

Just to switch a little bit, we have Clive Beddoe here, so maybe I can get you to address one of the points he made that the Competition Act, in his view, does not work that well, specifically on predatory pricing.

I want to give you an opportunity to respond to that, first of all, and see whether you think there is a way for the act to work better on predatory pricing.

Mr. Konrad von Finckenstein: Mr. Beddoe was kind enough to send me a copy of his comments about half an hour before I appeared, so I had a quick look at them.

A fully allocated cost test, which he suggests, may in the end be something one should be doing. We have not opted for that. As you know, the legislation talks about an avoidable cost test. We have that issue before the courts right now; we are litigating it very fiercely with Air Canada. Until we have a decision on it, I don't think one should change the test. It may work. If it doesn't work and proves to be too difficult to apply, one might want to look at Mr. Beddoe's suggestion.

Penalties and accountability are big issues. You must have heard from the various witnesses before you how the damages in the U.S., especially the triple damages, have distorted the picture and have led to a lot of strategic litigation.

We have in Canada, so far, not opted for any kind of damages, except in misleading advertising, where we have administrative monetary penalties instead of damages. You can get damages only if there has been a criminal breach of the act.

The issue is clearly one that needs to be addressed. The question is, do you want to go for damages, penalties, or restitution? All of them have pros and cons. It's something that needs to be addressed, and we will want to look at it in the next round of amendments.

• 1640

I believe when I appeared before you the first time in October I mentioned that this would perhaps be something for the next round.

I also understand that you want to hold some round tables in future months, and this may very well be a subject of one of those round tables. But it's something that I think has a very long-run effect on the whole act and on the economy. It's something one wants to think through and be sure one does the right thing. It's not something you want to do on the fly at the eleventh hour now.

On fighting brands, well, the provisions are there in the act. They have been used.... Mr. Beddoe suggests that the issue of irreparable harm is difficult, that nobody wants to admit that because it will become a self-fulfilling prophecy. That's true; I don't argue with that. On the other hand, let's face it, we have a free economy. People are entitled to compete as they want, and if they want to establish new brands, I don't think it's the role of the state to prohibit it unless you can establish that the brand is there only for one purpose, to drive your competitor out of business. That's what it does right now.

So, in my view, those provisions would do the trick as they are right now. If you take out the concept of irreparable harm, the question is, what harm do you have to prove? Otherwise just establishing another fighting brand by itself, if it doesn't cause any harm, should not be subject to the Competition Act.

In the fourth point he makes, which is to extend the cease and desist powers, I think he has put his finger on something. In the case where he is actually one of the victims of what we alleged is abuse of dominance by Air Canada, we issued a cease and desist order, which was in force for 80 days. However, during that time, we did not get all the documents. I believe we issued it in late October, and it ran until the end of the year, and then we started our action before the tribunal in February.

There was no provision under the law to extend it. On the other hand, these documents are very difficult to find. Whether by design or whether they are difficult to gather and locate, I make no judgment on it; the fact was, we didn't get all the documents from Air Canada until late January, before we started the action in February.

Amending subsection 104(1) and its companion, section 103 in Bill C-23 so as to provide the possibility to extend those orders until such time as all the documentation has been furnished and, I would say, at a period beyond this for us to come to a decision—let's say 20 days—is actually something that would be very useful. It's a technical amendment that I haven't drafted; we could draft it, obviously. But I think he has an idea that you might want to pick up, if you want to do something to make those cease and desist provisions work better.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Rajotte.

Mr. Bagnell.

Mr. Larry Bagnell: Thank you.

I think Mr. Rajotte, Mr. McTeague, and I all have the same questions, so I'm going to have to figure a different way to ask them. But before I do, I want to make one statement. I'm not sure anyone else agrees with me, but on the contest, I always felt that there should be a provision that it's impossible for it to cost more to claim the prize than the prize is worth, even with your own free will, because a lot of old people are affected by these.

Going back to the private access, which I think most people said is the key to this, there are only six lines in your paper here. I know you've sort of agreed to the concept, and it's not the yes or no, but in your paper, when you answered Mr. Rajotte's question, the spin is on the time. You've put "whether this is the appropriate time".

In relation to timing, apparently Australia has had this for 30 years. It seems to work. I think one of the academics who was in here last time said, "Don't let anyone fool you. This is an issue that has been going on for 30 years; this isn't a brand-new thing."

So when you're suggesting "an appropriate time", that means there might be another more appropriate time. What would make another time more appropriate? What would make this time not appropriate, and what in a future time would reduce the...? I think less than a majority of submissions we have are against that.

Mr. Konrad von Finckenstein: On private access, you don't have full consensus or near consensus, or something like that. The question is, how much support do you feel is necessary in order to make those changes?

• 1645

As legislators, presumably this is a decision you make quite often. You have to judge, is the support broad enough for something to do it, or is it something that is so vital and so necessary for the national interests that you'll do it regardless of whether there's broad support? That's what I was referring to. That is the key decision, and it is really your decision. I have nothing to add to it. It's a judgment call that you have to make as elected officials.

Mr. Larry Bagnell: So by suggesting "at an appropriate time", in terms of the interveners we had who were against it, is there anything that makes you think that in time they would change their mind, they would change their view?

Mr. Konrad von Finckenstein: No. I believe you heard yesterday from Mr. Rowley, for instance. He has been against this, and the group has, from day one. I've met with them several times. I believe they even gave you a costing study yesterday, something we hadn't seen before. Also, I have encouraged him for over a year now to conduct such a study. It was presented to you in printed format, yet we did not see it until yesterday. Nonetheless, the arguments therein are not convincing and there's nothing new.

Actually, I had an analysis done of his study by a professor, Peter Townley, who's a resident fellow with the bureau from the University of Dalhousie. He's in the audience, and if you want me to, I can call him to the stand and he can give you an analysis of the costing report. But as to will there be a change or not, I can't say.

Mr. Larry Bagnell: Mr. Chair, can we have him come forward and explain that?

The Vice-Chair (Mr. Walt Lastewka): Go for your next question and then we'll see.

Mr. Larry Bagnell: I'll go to my last question.

You referred to the amendments related to Mr. McTeague, and Mr. Rajotte asked about them, and you said there were just a couple of minor amendments. Is there any chance you could use the rest of my time to give us those minor amendments? We have to do a bill and it's not in your written submission.

Mr. Konrad von Finckenstein: You're not doing clause-by-clause yet. As I say, we're talking, really, about drafting refinements.

Mr. Larry Bagnell: So before we do clause-by-clause, you could give us a suggestion?

Mr. Konrad von Finckenstein: If that's what you desire, yes.

The Vice-Chair (Mr. Walt Lastewka): Does the committee request we hear Mr. Townley?

Mr. Dan McTeague: I would ask, Mr. Chairman, with the committee's consent, that we ask Mr. Townley to come forward. It's extremely important. That is, with the consent, of course, of my colleagues here.

The Vice-Chair (Mr. Walt Lastewka): Does everybody agree?

Some hon. members: Agreed.

The Vice-Chair (Mr. Walt Lastewka): Mr. Townley.

Mr. Dan McTeague: Thank you, Mr. Chairman.

Mr. Konrad von Finckenstein: Professor Peter Townley from the University of Dalhousie. He's presently—

The Vice-Chair (Mr. Walt Lastewka): Mr. Bagnell, you still have a minute if you wish. Do you want to carry on?

Mr. Larry Bagnell: No. It would be great to listen to the witness.

The Vice-Chair (Mr. Walt Lastewka): Professor Townley, did you want to make some remarks first?

Prof. Peter Townley (Economics Professor, Acadia University): Yes, sir, I could say some things.

The Vice-Chair (Mr. Walt Lastewka): Fine.

Prof. Peter Townley: The commissioner has it a little bit wrong; I'm from Acadia University. But all those Nova Scotian universities are alike.

The Vice-Chair (Mr. Walt Lastewka): He'll pay for that.

Welcome from Acadia.

Prof. Peter Townley: Thank you, sir.

I've had 24 hours with the question, should reviewable practices be turned into competition torts? And I do have some observations that will be short, but not necessarily sweet.

There's one number that drives a lot of the results in that report, and you'll find it on page 13 of the executive summary or page 138 of the report proper, and that is the average annual number of civil branch complaints. That's given as 537. With that number, you turn around and say, based on that number, how many of these do we expect to go to private access? What proportion of those would be non-meritorious? And from that number, what would the costs to

the Canadian society be of having private access? So it's 537. Unfortunately, that 537 number is based on all civil actions brought to the bureau, and not just those regarding refusal to deal, exclusive dealing, and tied selling. So it overstates things.

• 1650

When you go to the tribunal's website, and go from 1986 up to the present and see the proportion of cases dealt with by the tribunal that are refusal to deal, exclusive dealing, and tied selling, it works out to about 20%. Therefore, you might want to say that the 537 is overstated by a factor of five. So we're down to 107 cases. Then the analysts do a little sensitivity analysis. They say what if 5%, 10% or 20% of these are non-meritorious? It's 5%, 10% or 20% of 107, which is a fairly low number.

The second issue is that there is the allegation that most of the cases that would go to the tribunal via the private access route would be non-meritorious. I'll use that to mean strategic as well. I certainly have some thoughts on that. In fact, we just have to ask the question, would meritorious cases go the private access route? I would assume that time to resolution is important for firms. They want it done quickly. I put it to you that perhaps the one step through the tribunal, via private access, might be quicker than the Competition Tribunal two-step. If you want speed, I would expect meritorious cases to go to private access, at least some of them.

If you have a strategic case and you want to slow things down, I suppose you might argue that we'll go through the bureau and then go through the tribunal. I'm not so sure about that because if you do go to the bureau, there's the chance that your case will be seen as being non-meritorious, as strategic, and that may make any further action a bit more difficult.

Again, on whether meritorious cases will be brought via private access, we're worried about strategic litigation. I think the view we get of strategic litigation is that big firms—big firms that can afford big legal costs—will take small firms through private access. That may be, except I don't think it works in this case. I want you to think of that in the context of refusal to deal.

So we'd have a big firm taking a small firm to the tribunal for refusal to deal. That would be something like a Bill Gates taking a small software company to the tribunal because the small software company won't sell Bill Gates, or license Bill Gates, to use its software. My impression is that the small software company would love to have Bill Gates and Microsoft do this. It's the same with small automobile parts makers and GM. I don't see that this makes sense. The circumstances in which large firms would bring non-meritorious actions against small firms I find difficult to imagine.

Back to the numbers. I started at 537 and I think we were talking about maybe 20% of those. But there's another factor. If we look at the data, about three-quarters of the cases brought to the bureau are deemed to be anti-competitive and are settled. There is some sort of settlement. I think we could infer that, yes, these were meritorious cases; there was a legitimate complaint since we went to settlement. This leaves, at most, 25% of those cases not being meritorious. If we have firms bringing meritorious cases, or having an incentive to bring meritorious cases through private access, what if we're talking about 50-50 going to the tribunal? There's only 25%, and half of 25% we'll call 13%. So I start from 537, I reduce that and multiply it by 20%, then multiply it again by 13%, and I'm down to about 14 or 15 cases.

So I think something is overstated here, slightly. In Nova Scotia, we have small fish and we have big fish.

• 1655

I wouldn't be an economist if I didn't talk incentives. I've mentioned the lack of incentives for big firms to bring small firms to the bureau, but this report talks about the propensity to have non-meritorious cases brought. They concede on page 164 that only if damages were allowed would Canada develop a U.S. style of litigation. It's so obvious, there are blatant differences between American and Canadian legal systems.

Treble damages—that's a good incentive to perhaps take on strategic cases. We don't have that, but my understanding is that the bill does not even have damages. The authors say that if there are damages, then you might get it. There aren't any.

I haven't thought this through, but I can see a role for how legal fees are paid on a contingency basis or not. I think these things affect the incentives.

Another matter brought up is whether this will induce chilling. I'll be a true professor for you and relate my confusion, because on page 64 I'm given reason to think there are all sorts of alternatives to private redress. On page 64, the report states:

> Thus a wide variety of common law torts may be available to a party which has been injured by the actions of another marketplace participant irrespective of whether the conduct is subject to challenge under the *Competition Act*.

I read that as saying there are lots of ways to proceed, strategically or anything else. But a hundred pages later on page 164, it says:

> Even if damages are left out of the regime, plaintiffs would undoubtedly also attempt to use the establishment of private rights of action under the *Competition Act* to overturn the well-settled law that reviewable practices do not provide the legal violation needed to invoke common law torts such as conspiracy to injure, interference with economic interests or restraint of trade. This [private access] would likely increase the frequency and breadth of common law tort litigation.

That says to me that these other potential venues for redress lack force; they are not really there. I'd ask the question, are these other legal torts available or not? If they are available, have we observed them being used in some strategic way? I haven't observed it but maybe someone else has.

If these other venues are not available, this means that currently there is no effective recourse. Perhaps private access is needed to correct this lack. A little chilling might be warranted.

One last matter is on the use of data, and I'm afraid I can't be fair to the issue. The people who prepared this report used the data they had available. I understand that. There's a problem here, though. If you use Canadian data, you're using data on cases that the bureau has decided to proceed with. The bureau has certain priorities about which cases have gone forward. A very basic problem is that the data comes from a regime with no private access and you're trying to extrapolate and say, what if there is private access? I think you have to be careful.

On the American side, could you do it there? Yes, they have private access, but you'd also want to correct for the business of potential treble damages, the whole legal system. I really don't mean that as a strong criticism of what people try to do. I just think with the data, you have to be very careful to draw inferences from it.

Mr. Konrad von Finckenstein: I'd like to comment on this last point by Professor Townley. Even if private access is there, the bureau doesn't stop bringing cases, and all the data that was used for the study is based on the cases we brought, which were all of national scope, the most difficult and the most expensive ones to litigate. Private access, if it should be granted, would of course be used most likely by small firms in local or regional markets; the size of those cases might make them smaller and easier to prove, and therefore not so costly.

• 1700

The Vice-Chair (Mr. Walt Lastewka): Thank you very much.

I want to ask the help of the committee. We're going to have five minutes for everybody. I want everybody to have some time for questions. We're going to go just beyond our time limit by a bit, but I want to make sure everybody gets a good five minutes, so keep your preamble short and go right to your questions.

Mr. Bergeron.

[*Translation*]

Mr. Stéphane Bergeron: Thank you, Mr. Chairman.

I would like to come back to the issue of private access. I believe we've had some extremely interesting discussions about this. Yesterday, when we met with Mr. Fels, the chairman of the Competition Commission of Australia, I mentioned that, among the reservations expressed and the arguments used to oppose introduction of private access in Canada, there was the idea that it would increase frivolous and vexatious actions, at a very high cost, which would probably create bottlenecks in the system. What they have in Australia is a system where all the legal costs have to be paid by the loser.

Do you not believe that, were we to implement a similar system in Canada, this might discourage some small- and medium-sized companies from using the courts to sue major companies on the basis of the Competition Act?

Mr. Konrad von Finckenstein: As you know, the present provisions of the Act allow the Tribunal to provide for costs in cases of frivolous or vexatious matters. If we adopted the Australian system, this might discourage small- and medium-sized companies because, of course, they would not win in all cases. However, in cases of abuse or refusal to deal, we would want to give them a chance. It is not a matter of giving them an advantage but only to give them the chance to be heard objectively. If their case is not frivolous or vexatious, I don't see why they should be penalized.

After all, the Tribunal in Mr. McTeague's proposal would make an initial determination to see if the case should proceed or not, that is to say if there is a *prima facie* case. This screening, I believe, will get rid of most of the frivolous cases.

Mr. Stéphane Bergeron: But, if the tribunal decides on a prima facie basis that the case is not frivolous or vexatious and that it can go to trial, and if the small company that put the case to trial loses, in the Australian system, were we to apply it here, it would still have to pay the costs. So, if we wanted to introduce a similar system of private access, do you think we should force the loser to pay all the legal costs or would the State cover part of the costs?

Mr. Konrad Von Finckenstein: I believe Mr. McTeague's proposal provides a fair balance between the various points of view. Since my legal counsel is here, he might answer my question.

• 1705

Mr. François-Bernard Côté (General Counsel, Competition Legislation Section, Department of Industry): I would like to explain this better than you did.

Of course, if you established an absolute rule, you would discourage those that you would in fact want to encourage. What is suggested in the bill is a provision that allows the Tribunal to allocate the costs to the losing party when cases are frivolous, useless, inappropriate or abusive. If we were to decide that the loser would always pay the costs, this would be a disincentive for small and medium companies, as the Commissioner suggested. As a matter of fact, it does not exist at the present time. In all other tribunals, but not the Competition Tribunal, the court has the discretion to make a determination on costs.

[*English*]

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Bergeron.

Mr. McTeague.

Mr. Dan McTeague: Gentlemen, thank you for being here—and, Mr. Townley, thank you also.

As you can probably imagine, it was difficult for a committee to be caught flat-footed, as it was yesterday when that one group presented its document, a document that has a number of very interesting people behind it. This is one of the reasons, of course, we are concerned as a group here, because such a small step has engendered such huge opposition, strategically, from a very, very limited group of individuals.

What you've just given us is a point-by-point refutation of that document from Deloitte & Touche. We have heard from others, and I must say, with the help of many of the members on the committee, we've pretty well been able to fend off the rather frivolous and vexatious comments made by those opposed to this limited private right of access proposal, basically because none of them addressed the safeguards. They refused to touch on the safeguards.

To the commissioner and to your lawyer, you have both heard some of those arguments, in particular those from the Canadian Chamber of Commerce, the Canadian Real Estate Association, and the one that was recycled from the Canadian Chamber of Commerce—I'm trying to think of the name—the CCIB. Has there been anything in the arguments you have heard, in their effectiveness and accuracy, to concern you that it would bring about the kind of chill we've heard so often?

Is there anything in those arguments you've heard that merit these concerns? Since you're going to be in part involved with this in one way or another, they may be a reflection on whether you're doing your jobs or not, but are you concerned with any of this? Or are you, like many on the committee, satisfied that this very limited but very strategic proposal meets the test of ensuring a Competition Act that changes with changing times?

Mr. Konrad von Finckenstein: You know this chill argument cuts both ways. The purpose of the Competition Act is to be a framework law, to make sure we have a well-functioning marketplace where things are transparent and people have an ability to prosper. And we have a market where, if you enter into it, you can be subject to anti-competitive behaviour without any recourse; this has a chilling effect too. You may think twice whether you want to invest in this country or start a business if one of the key factors is to get supply from some company that can refuse to supply you and therefore prevents you getting off the ground.

In terms of the arguments we've heard, the way this proposal is phrased, it only deals with sections 75 and 77; it's not opening the floodgates by bringing in 79, which is abuse of dominance, refusal to deal, exclusivity, and tied selling, and a fourth one, which I always forget.

A witness: Market restriction.

Mr. Konrad von Finckenstein: Market restriction. Thank you.

Those are really issues primarily of private dispute between companies. Then on top of it you have the leave of the tribunal, and this tribunal is not likely to give the leave if there's any suspicion of a case not being meritorious. Last, there are no damages; therefore I can see no incentive for bringing these cases.

As Professor Townley pointed out so rightly, the abuse of these provisions by large-scale competitors trying to hurt each other or trying to drive smaller ones out of business really can't work. I need to use his example that Bill Gates doesn't buy from a small software company, or if he does, he certainly will be supplied; no one is going to refuse to supply him. I have not heard anything to suggest this proposal would have the detrimental effects its critics have suggested.

• 1710

Mr. Dan McTeague: Commissioner, there may be some on this committee who are tempted to ignore the fact that this has been kicked around for 30 years and that our Commonwealth cousin, Australia—an example we have used to bounce a lot of ideas off—has been doing this without much reservation for much of that time. There may be some on this committee—and I don't presume to preclude what their thinking will be in a day or so—who say maybe we should study this for another 30 years.

We've heard from people who have said enough is enough. From your experienced perspective, and from that of those who are at this table, is there any advantage to us continuing to exhaust this question? We may be whipping the proverbial dead horse here. But is there any reason you believe we should keep trying to find more people who recycle themselves under different names to come forward and say why they don't like it, or is it time to fish or cut bait, to use Professor Townley's his analogy?

Mr. Konrad von Finckenstein: Well, this question is certainly well studied. As you know, we have done three major studies, which are all on our website. One of them is an international comparison with jurisdictions that have private access.

If you'd heard from my colleague, Professor Fels, he would have told you that in Australia not only do you have private access, but you also have damages. And it isn't restricted to those four sections; it's across the board, and the sky hasn't fallen in in Australia yet.

I don't know whether any more time or more studies are required. What is required is a decision to see whether what is proposed here works. Should it be broader, should it be narrower, and should it be implemented or not? Further studies won't give you any more elucidation. You have all the facts before you.

The Vice-Chair (Mr. Walt Lastewka): Thank you, Commissioner.

Mr. Martin, you're next.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you very much, and thank you for the representations made.

I have one question. Yesterday one of the groups presenting a brief was the Association of Canadian Travel Agents. I presume you have a copy of their brief. They put forward a technical amendment I'd like your opinion on. It's dealing with sections 78 and 79, the abuse of dominance. You may have the language there and I don't, but as I remember it, the burden is that persons filing complaints would have to demonstrate that those accused of the abuse of dominance are acting for the purposes of dominating, with an intent to dominate.

Proving intentions was felt to be difficult, so if an amendment was made to make it about proving that a party acted in a way that would have the likely effect of showing dominance, this would be an easier thing to do. Perhaps you could comment on this.

Mr. Konrad von Finckenstein: Yes, my general counsel can tell you best. There's case law to the effect of what "for the purpose" means, and it actually doesn't mean you have to prove intention.

Francois, do you want to explain?

Mr. Francois-Bernard Côté: Yes, the way to prove the purpose is to prove the facts, and the purpose flows from the facts. Whether the test is for the purpose or intended to or designed to or destined to...finding the right word might be more difficult than actually doing the case.

If you come up with facts leading to the conclusion that there's only one explanation, that it was done "for the purpose of".... All of section 78 is built around doing something "for the purpose of" having an anti-competitive effect on your competitor.

• 1715

So I don't know what the change would bring about. You would still have to rely on facts, from which you might have to deduce what the purpose or intent or design was. I guess it would be to find the right word to describe what they really want to do, but they all come down to the same issue: do the facts show they were made for an anti-competitive purpose?

Mr. Konrad von Finckenstein: You infer the purpose from the facts. If you said "has the effect of", it's the same thing: you'd have the facts and draw inference from them. So I really think it's a semantic difference rather than a conceptual difference.

Mr. Pat Martin: The way they explained it was it stems from the point in law that a person can be presumed to have intended the probable consequences of his or her actions. Maybe that exists already in the current act.

Okay, if I have a moment left—

The Vice-Chair (Mr. Walt Lastewka): Hurry up.

Mr. Pat Martin: —Professor Townley, the numbers and the stats you put forward are interesting. I was wondering if you can take that line any further.

You started with 537 civil branch complaints, of which 107 were dealing with tied selling or refusal to deal. How many of those 107 were actually settled, maybe by mediation, how many were withdrawn, and how many, ultimately, went all the way and were ruled on? And of those, do you know how many succeeded and how many failed? If you take the 107 all the way to finished products that went all the way through the system and were ruled on by the—

Mr. Konrad von Finckenstein: Before he answers, a "finished product", if we settle through an alternate case resolution, it means the company has changed its behaviour as a result of our action. We see that as a finished product too. You don't have to go—

Mr. Pat Martin: Right, I agree.

Mr. Konrad von Finckenstein: Okay, Professor Townley.

Prof. Peter Townley: What the numbers were concerned with was what number of cases would go to private access that were deemed non-meritorious. And just working it all the way through and—

Mr. Pat Martin: Work, but who would tell us how many were deemed non-meritorious and might give us an indication—

Prof. Peter Townley: They're looking for an expectation. The figure I gave was, of the civil cases brought, three-quarters ended up in some sort of settlement. In a sense we're assuming they must have been meritorious, since there was a basis for settlement. We're saying there's a maximum of 25% of the cases that were brought to the bureau that could have been non-meritorious. From then on we're basically trying to get at how many non-meritorious cases would be brought through private access. At that point you're into a guesstimate. We said there are incentives to bring meritorious cases. So, of the whole, we're down to about 14 or 15 cases. It's a long road.

Mr. Pat Martin: Okay. That's where you come to.

[*Translation*]

The Vice-Chair (Mr. Walt Lastewka): Mr. Drouin.

Mr. Claude Drouin (Beauce, Lib.): Thank you, Mr. Chairman. I want to thank you also, Mr. Commissioner, for your testimony this afternoon.

You've already answered part of the question I wanted to ask, Mr. von Finckenstein, but I would like to go into it in more detail.

Referring to private access in Australia, you stated that it might be a disincentive for small companies. Considering yesterday's testimonies, it seems that this system has been in existence in Australia for 30 years. If it is true that we have some problems in our Competition Tribunal and that there is a backlog in the Bureau of the Commissioner, would that not be part of the solution? We would not have to deal with frivolous requests since those companies that might be tempted to put a frivolous complaint would know that they would risk having to pay the costs and so they would not waste their time with frivolous issues. At the very least, this might get rid of some bottlenecks.

Secondly, as you mentioned, major corporations would not risk complaining about smaller corporations, even though there would always be the risk of strategic complaints from major corporations with deep pockets. If making such a change might be a disincentive for smaller companies, this might be an important issue. I don't know if you have thought about this but I would like to know your point of view.

The Vice-Chair (Mr. Walt Lastewka): François.

Mr. François-Bernard Côté: If you would allow me, Mr. Drouin, I will answer your question.

• 1720

Indeed, if I understood the Commissioner's position, implementing a private access provision in Canada would indeed get rid of the bottlenecks insofar as local or regional matters, rather than national matters, would find their way to the Tribunal.

Furthermore, as far as the risk of strategic complaints is concerned, this risk will always exist. Someone referred a while ago to common law provinces. In Quebec, as you know, one may lay a complaint about tort actions but you do not find more strategic complaints there than in the other provinces. So, the risk exists but we believe that the regime we have established would be sufficient to make sure that only proper cases go to the Tribunal.

Mr. Claude Drouin: In other words, it is worth taking the risk in order to protect the consumer.

Mr. François-Bernard Côté: I think the facts would allow for such a conclusion, but it is not up to me to make that conclusion.

Mr. Claude Drouin: Thank you.

[*English*]

The Vice-Chair (Mr. Walt Lastewka): Mr. Strahl.

Mr. Chuck Strahl: Thank you, Mr. Chair.

I thought maybe the next time we get a big thick thing like this at the last moment—a book like this—we'll just get the professor to give us a grade on it and then we'll all take it.... I'm afraid to get the grade on it, actually, but we'll leave it at that.

Mr. von Finckenstein, I have quite a few specific questions as we're kind of wrapping this whole thing up. Can we write to you or your officials over the next few days to get you to comment on some of the specifics, if we don't have time to get them out here today?

Mr. Konrad von Finckenstein: Absolutely.

Mr. Chuck Strahl: That's good, because we're getting to that nitty-gritty stage. I think, barring a real bombshell here, there's been an awful lot of chatter among committee members suggesting we're going to want to proceed with the private access issue. That means we're going to need to fine-tune that process if it's what the committee decides to do.

I'll deal with just a couple of things in the time we have then. One is, you're proposing an amendment on consent orders that would give a 60-day period to allow people, if they're affected, to ask that the order or the terms be varied.

Now, Mr. Addy in his testimony equated that to the Tunney Act, but he also suggested the Government of the U.S. gives an impact statement at the same time—I guess to allow people to decide whether they want to make representations. Is that important, do you think, or is it just a...?

Mr. Konrad von Finckenstein: The U.S. Tunney Act is based essentially on the public interest. That's not the amendment we are suggesting here. We are suggesting the consent decree, which would be something the commissioner agreed with the respondent. But it has to be something that is within the four corners of the tribunal's authority. It's something the tribunal could have done, but we can save ourselves the necessity of going through a trial if both parties agree, "Yes, this is a fair resolution." We do it, we sign it, we register it, it becomes effective.

Now if it affects a third party and somebody gets sideswiped by it whom we didn't think of—unlikely, but it's this kind of...that third party should have in our view a right to have a term rescinded of right, if we did something the tribunal couldn't have done.

If the tribunal could have done the same thing, then the case is exactly what we have here: we have something that is within the power of the tribunal to do. Before we would agree to consent orders, we'd go through an exhaustive process of examination, of hearing witnesses, of listening to other parties, etc. We try to do what is in the public interest. There is actually jurisprudence to the effect that the commissioner is deemed to be acting in the public interest. So we don't really think you need to bring in the whole public interest.

What you want to have here is control. If there's something that's being done that is really outside the purview of the Competition Tribunal, then it shouldn't be done by consent decree either, because the whole idea is to substitute a consent decree for a full trial. But the outcome should be something that could have been ordered by the tribunal.

Mr. Chuck Strahl: Okay. On the right to private access, some people have suggested that if we proceed with some form of it—Mr. McTeague's amendments, or some form like it—the Competition Bureau, or your role even, is going to be bypassed, that there's going to be frivolous stuff. There's going to be stuff hitting the scenes without anybody having taken a first look at it to see if there's any validity to it whatsoever. And I believe there has been.

• 1725 

Some people suggest we should actually require the commissioner—and maybe you can comment on this—to state your support or opposition to the allegations being made at the

earliest stage. In other words, you get into it and say that in your opinion it's frivolous, or not detailed enough, or something. Do you think you should be mandated or be compelled to do that, or not?

Mr. Konrad von Finckenstein: No. I don't think so.

Our role is to investigate and bring forward a case where we feel the facts warrant it and there has been anti-competitive behaviour that should be stopped.

If you establish private access, the party has the option of coming to us and saying "I'm a victim of this anti-competitive behaviour, please investigate", or, if they want, they can go forward. Obviously, coming to us is a lot cheaper. We will do it. Also we get at the evidence much easier than they do, because we have judicial powers. We can search and seize. We can order production of documents, etc.

On the other hand, it may be that we won't take the case because we don't feel the competitive impact is that large; it's not something that warrants it; or maybe, because of resource constraints, it's something that comes very low on our priority assessment. Or we may have a very honest difference of opinion and say it doesn't fall under the act, or the facts won't allow them to establish it.

Now, if you disagree, that's fine. You should have the option, in my view, to try it on your own. I shouldn't prejudice your case by giving a ruling on it. It seems to me it's your case. If you want to proceed with it, you do. If you want to avail yourself of the bureau, you come, and we'll tell you whether we think there's a case to go forward or not. But I don't think it's the role of the bureau, in any way, to pass judgment on your claim and to somehow prejudice or enhance your claim going forward on its own.

Mr. Chuck Strahl: So then basically what will happen, if we proceed with the right to private access, is that people who want to avail themselves of that will have to make that choice in the very initial stages. They'll have to say they'll give it to the commissioner and hopefully he'll take it to the tribunal, or not. Because once you start down a path with the bureau, or on your own, your right to private access is no longer there.

Mr. Konrad von Finckenstein: No, it's not an either/or position. You can do both.

Mr. Chuck Strahl: You can do both.

Mr. Konrad von Finckenstein: You may come to us and feel dissatisfied. You may feel we're doing a sloppy job. We're not doing it fast enough, etc. If you want to go on your own, be my guest.

Mr. Chuck Strahl: But they also would not have to come to you. They could just start it and take it on themselves?

Mr. Konrad von Finckenstein: Precisely.

Mr. Chuck Strahl: Okay, and you feel that's—

Mr. Konrad von Finckenstein: I would think the overwhelming majority of people would come to us, but it's a free country, and if they want to do it on their own, I don't see why they should be stopped.

Mr. Chuck Strahl: Of course, it's not a free country now, because they can't go out on their own.

Mr. Konrad von Finckenstein: That's the problem. But I'm going on your assumption that the private access has been established.

Mr. Chuck Strahl: Right. And so—

The Vice-Chair (Mr. Walt Lastewka): I think you'd better end your questioning at this point.

Mr. Chuck Strahl: I'll do that. Thank you.

The Vice-Chair (Mr. Walt Lastewka): In regard to your suggestion concerning questions to the commissioner, was it your intention also to circulate the answers to the committee, so everybody—

Mr. Chuck Strahl: Well, they're of interest to me. Whether they're of interest to the committee.... But they're not going to be very secretive.

The Vice-Chair (Mr. Walt Lastewka): There may be some questions and answers you might want to put together between now and next Friday.

Mr. Chuck Strahl: Okay.

Mr. Konrad von Finckenstein: I might suggest what we could do is answer Mr. Strahl with a copy to you as chairman.

The Vice-Chair (Mr. Walt Lastewka): You have one question on this side.

Mr. Dan McTeague: I would give Mr. Strahl a few of my five minutes, if you wish.

The Vice-Chair (Mr. Walt Lastewka): You have one minute.

Mr. Dan McTeague: I have one minute. Thirty seconds, Chuck?

Mr. Chuck Strahl: No, go ahead.

Mr. Dan McTeague: I'm convinced.

We've heard from witnesses, your predecessor, Mr. Wetston, and others, that there currently may be a number of anti-competitive occurrences that do not wind up on the broad public interest radar screen and are missed. We may be missing a few things here, and I think some of the comments that were made by the professor may corroborate the necessity of underlining the point.

Commissioner, you suggested at the outset, although it wasn't in the written brief, that you would like to ensure the amendments I've put forward with respect to private access be fashioned in a way that dovetails more harmoniously with the act. I'm paraphrasing, of course.

Could you give this committee a few of those ideas, or is it simply the wording you're concerned about? Obviously words mean a lot, but the themes are nevertheless intact. Are you proposing an overhaul, suggesting to the committee it put different wording there, or is it the structure? I think it would be helpful for the committee to know before it takes up the clause-

by-clause. We may be off for a week, and I have no doubt there will be a lot of lobbying by certain groups telling us not to do this. We need that for precision reasons. Is there anything in there that we should know?

• 1730

Mr. Konrad von Finckenstein: I said should there be a decision to proceed with this private access, I believe the amendments proposed by you in principle are correct and workable.

There are some small drafting changes; we're talking about purely technical drafting so the interrelation between sections works harmoniously and cannot be misread. You'll appreciate when you draft, your first aim is to make sure it's clear and people understand it, but your second aim, which is just as important, is to make sure nobody can purposely misunderstand or misinterpret it, and that's what I'm talking about.

The fine-tuning is all I'm talking about.

Mr. Dan McTeague: Thank you.

The Vice-Chair (Mr. Walt Lastewka): Thank you.

Mr. Rajotte, it's your question. Please get right to the point.

Mr. James Rajotte: Thank you, Mr. Chairman.

Mr. von Finckenstein, one of the witnesses yesterday, one of the lawyers, talked about section 8 in the Competition Tribunal Act and the part about "frivolous" and "vexatious", and in a response to me he argued we should not have that standard. He thought that standard was too high. He was a practising lawyer from Ontario. He felt they should just use normal cost tools as they do, for instance, in Ontario. I just wanted to get your feedback on that issue.

Mr. Konrad von Finckenstein: It's not just frivolous and vexatious. That's really a short form. If you look at page 32, proposed subsection 8.1(1), it's frivolous, vexatious, or that any step in the proceedings is taken to hinder or delay the progress, and that's really what the issue is—hinder or delay.

If you are involved in strategic litigation you try to stretch things out as long as possible. That's why. What we're saying is the tribunal has the power to deal with it, but you don't have to go as far as loser pay, because we think the nature of the proceedings, given that you're not talking about damages here, doesn't warrant it.

But there should be a power within the tribunal to control its process. As I mentioned, in some instances we've had motion after motion, and there's no penalty, because right now the tribunal doesn't have the power to award the cost. If they had the power to award costs when there's a step taken to hinder or delay proceedings, they could say that motion has no effect, and bang, they could award costs on whatever basis they see fit. So I think it serves the right middle ground that has been chosen here.

The Vice-Chair (Mr. Walt Lastewka): Seeing no further questions, I would like to thank the committee and thank the witnesses, Professor Townley, Commissioner von Finckenstein, and the expert lawyers.

I just want to remind the committee that clause-by-clause will begin on November 20, and any amendments should be submitted to the clerk by next Friday, November 16 at 5 p.m. Is everybody clear on that?

You can take the next number of days to submit your amendments.

Thank you very much. The meeting is adjourned.



This is Exhibit “39” 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
CHAMBRE DES COMMUNES
CANADA

INST COMMITTEE MEETING

Notices of Meeting include information about the subject matter to be examined by the committee and date, time and place of the meeting, as well as a list of any witnesses scheduled to appear. The ***Evidence*** is the edited and revised transcript of what is said before a committee. The ***Minutes of Proceedings*** are the official record of the business conducted by the committee at a sitting.

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November 27, 2001

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STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Tuesday, November 27, 2001

• 1605

[*English*]

The Chair (Ms. Susan Whelan (Essex, Lib.)): I call the meeting to order on Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

We're very pleased to welcome here this afternoon, from Air Canada, Mr. John Baker, the senior vice-president and general counsel; Mr. Stephen Markey, the vice-president of government relations and regulatory affairs; and Mr. Lawson Hunter, legal counsel.

I'm going to turn it over to you for an opening comment.

Mr. Stephen Markey (Vice-President, Government Relations and Regulatory Affairs, Air Canada): Thank you, Madam Chair.

We were going to start by introducing ourselves, so you saved us all the boredom of doing that. We'll just move straight into a short presentation and then turn it over to you after that for questions. And we're pleased to stay as long as your time permits today.

I turn it over to John Baker at this point.

Mr. John Baker (Senior Vice-President and General Counsel, Air Canada): Thank you, Madam Chair. It's a pleasure to be with you today.

Air Canada appears before this committee today on very short notice and with little appreciation of any legislative proposals that may be considered by this committee or by the government. We appreciate the opportunity to address you regarding industry issues.

That Air Canada is facing legislation that would apply only to it is a very dangerous legal proposition. It is widely accepted that laws should not condemn persons for what they are; it is what they do that the law should address.

Given the fact that the Competition Act currently has special provisions that apply almost solely to Air Canada, and in a more extreme way than they apply to other sectors of the economy, any attempt to further target Air Canada in the legislation would come perilously close to condemning Air Canada simply for being the largest airline in the country.

Of course, you understand that the mere fact of being dominant has never been illegal under competition law in Canada, or for that matter anywhere else where sophisticated competition laws exist. It is the abuse of dominance that is challenged by the legislation.

Air Canada understands that concerns may be raised about the speed with which the law can be applied, but the rules for Air Canada should be no different from those for anyone else affected by the Competition Act. Furthermore, as Madam Justice Simpson said at the time of her review of the commissioner's first use of the extraordinary interim injunction or temporary order power currently affecting the airline industry, everyone is entitled to the protection of the law.

We would also remind the committee that in this one instance where the commissioner used this extraordinary power the reviewing judicial member of the tribunal found that the commissioner had not had the facts to initiate the order when he did so.

Air Canada is currently being challenged by the commissioner for engaging in an abuse of market position with respect to routes in Atlantic Canada, but as you know, that proceeding has not concluded and has been adjourned on the decision of the Competition Tribunal because of the extraordinary events taking place in this industry after September 11.

Our point is that there has been no determination that Air Canada has acted in an anti-competitive way by any independent judge or tribunal in this country. The commissioner and Air Canada are agreed that the line between vigorous acceptable competition and conduct that abuses a dominant position is a difficult line to draw. The commissioner is an investigator and a prosecutor. He is not a judge, except in the unique injunction provision dealing essentially with Air Canada.

From a policy, institutional, and fairness point of view, to convert the commissioner to the de facto regulator of Air Canada, let alone any other industry in this country, creates a situation where there is in effect no accountability over his powers and puts Air Canada at the whim of

one individual.

Air Canada does not know what precisely the amendments are that are being contemplated, but amendments that would have the practical and legal effect of enhancing the commissioner's powers to make determinations without appropriate independent judicial determination are very concerning to us. As we have mentioned a number of times, the extraordinary powers the commissioner already has to issue injunctions are highly unusual. To only enhance these powers further exacerbates these concerns.

We have mentioned briefly the situation in the airline industry worldwide as a result of the attacks of September 11. All airlines, including Air Canada, are facing a markedly changed business and grave financial consequences. To restrict our ability to respond to these changes through interventionist legislation could have profound effects and consequences for us, let alone for the travelling public in Canada. Needless to say, the government itself could be faced with a seriously crippled airline.

• 1610 

By way of background, we would like to discuss some of the business and competitive realities of the airline industry, not only in Canada but throughout most of the world. We want to take the opportunity to do this because of our concern that there are factual and theoretical misconceptions about the nature of this business and what constitutes vigorous competition.

We further want to raise these issues because of Air Canada's concern that policy may be enacted here not on sound legal, economic, and commercial bases but because it is the politically expedient thing to do. Of course politics is a very relevant consideration for government, but surely there's an obligation to understand the consequences of these legislative initiatives and to ensure that they reflect sensible policy for the country and the industries affected.

We would also remind committee members that Air Canada is currently engaged in constructive discussions with government about the future of this industry.

Turning to some of the underlying realities of competition in the industry, we wanted to start by indicating that competition in the industry does not mean having at least two carriers on every route. We've had historically very serious evidence of the results of that policy in which both Air Canada and Canadian Airlines could not survive even during the most robust economic times in our memory. To now advocate a policy that would duplicate this result, particularly in the extremely difficult times we face now, does not seem to make much sense.

There's also a misconception that competition does not exist if there are not two carriers on the same route. In industries that have a demonstrated ease of entry, as the airline industry does, incumbent air carriers must always behave and price in anticipation of entry at any time. Furthermore, frequent entry and exit in the airline business is to be expected, and it does not mean a lack of competition. In fact it means the opposite; i.e., the market is very competitive and contestable. It is also noteworthy that exit takes place not only by small firms in this industry but also by large ones.

There seems to be also an undercurrent of view that Air Canada should not respond to competition from new entrants on its routes. The responses of Air Canada to new entrants have been measured and legitimate from a competition policy perspective. Air Canada has not

undercut the prices of new entrants. In some instances it has matched those prices, but more often it has offered prices slightly above the lowest price available in the market.

Remember as well that the prices in the market were not being set by Air Canada, they were being set by new entrants. Air Canada was merely following the downward price movement in the market, surely something that is to the benefit of consumers and to competition. When an air carrier selects a price in the market, they have to be presumed to be astute enough to recognize that there will be a response from other competitors in that market. They must develop their business plans taking this into account and ensuring that they have adequate capital in order to respond to that response.

Furthermore, it is they who are determining the price in the market in the first instance, and if they felt it was not sustainable at that selected level, one must question that business plan. The business plan must also include sufficient capitalization to deal with competitive pressures.

An additional very important reason that Air Canada must respond is the fact that worldwide product markets in the airline industry are becoming more distinct and in many ways commoditized. This is particularly true of non-business-class travel. The importance of the fact that a huge proportion of the airline industry is becoming a commodity is that price is the only distinguishing characteristic in consumers' minds. And if price is the overwhelming basis on which consumers make choices, then if you do not meet the price in the market you will inevitably lose all of your market share in that business. As prices tend to be relatively uniform in a commodity market, for that very reason the consumers do not make distinctions on a basis other than price.

• 1615 

What this means for Air Canada is that it must respond to this new change in its business. It recognizes that it has a higher-cost operation than some new players specializing in this commodity part of the market, such As WestJet, but Air Canada's trying to respond to that by lowering costs and taking initiatives that will make it more efficient and able to compete in this segment of the market. In fact, there is a very strong likelihood that Air Canada cannot and will not survive in the face of WestJet-type competition without lowering its costs so that it can make an adequate return on capital when it competes with such carriers.

Initiatives like Tango by Air Canada are one example of Air Canada attempting to respond to the market and make itself more cost-effective. The notion that Tango is targeting Canada 3000, regardless of the commissioner's *ex post facto* statements as a judge, is completely without factual basis. As one illustration of this, we would point out that the Tango routes selected initially were the seven largest origin destination routes in the country. Those coincidentally happen to be some of the routes that Canada 3000 was operating on, presumably for the very same reason—i.e., that they were the largest routes.

But as we have pointed out, the Tango routes did not completely overlap the Canada 3000 routes, and furthermore were on the most dense routes, at least by Canadian standards, where competition is likely to be more vigorous than on less dense routes.

One other fact that has become all too painfully obvious after September 11 is that both large and small airlines are extremely vulnerable to adverse external factors, which can quickly jeopardize their financial liability. Astounding as it may seem, we have had discussions about, and you have all read about, the failure of major airlines like Sabena and Swissair in Europe,

and contemplation that there will be much consolidation in the U.S. among the largest carriers. There has even been discussion about the ongoing viability of American Airlines. It is a very telling comment that we could be sitting around this table discussing in realistic terms that potential.

The point we're making is that it is the large airlines who are just as vulnerable, and, in most commentators' minds, must take prompt and effective steps to respond to the new reality and new environment. Adding further constraints and costs to Air Canada at this most vulnerable time could be a serious contributing factor to damaging the viability of the company going forward. Preventing competition is never a pro-competitive result.

I thank you for hearing our comments. We would welcome your questions and your comments.

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

We will now turn to questions. Mr. Penson, please.

Mr. Charlie Penson (Peace River, Canadian Alliance): Thank you, Madam Chair.

I'd like to welcome Air Canada here today.

I'd like to start in the area where you've suggested you may be targeted. Are you concerned that there may be extended power to the commissioner on a cease and desist section?

Mr. John Baker: Mr. Penson, we can only go with what we hear and what we read, as recently as this morning's paper, about that very possibility of an extended power being offered to the commissioner in that respect. We're very concerned that this extraordinary and unusual power, which, by the way, we have objected to from its very beginning and in fact, as you may very well be aware, have challenged in court, may in fact be further extended. We're very concerned about that.

Mr. Charlie Penson: I see. I wonder, though, Mr. Baker, if you could think in terms of maybe being on the other side of this issue: if your airline happened to be a small airline and some large player was in the business of trying to drive you out of business and it didn't seem like there was a timely solution at the Competition Tribunal, where sometimes these decisions, even to hear them, are delayed several months.

You've told us about how this business is a business that can lose money very quickly under certain circumstances, external shocks and so on. But it also means that a small airline, if you were on that side, as I made this proposition to you, could be out of business in a short period of time. You're telling us you'd rather not have the commissioner having extended power, and yet the Competition Tribunal is not willing to hear these kinds of cases. How would you see that if you were on the other side of this issue?

Mr. John Baker: I suppose, Mr. Penson, the difficulties we have are with the unfettered nature of the commissioner's power. What we have argued is that his intervention, while laudable, should be one that is justified on a review of the facts and is taken to a third party like the tribunal for their decision. That can be done, we assert, in a very expeditious way.

• 1620 

In fact, the commissioner's recommendations with respect to other Competition Act

amendments that have been before you contemplate a cease or temporary order power going before the tribunal. It is only the specific legislation that is directed at Air Canada that leaves with him the power in his investigation to issue a cease and desist order by himself.

The difficulty we have—and we all find ourselves in this situation—is that there is not yet clarity in the legislation or in its enforcement on what anti-competitive behaviour in the airline industry should be perceived to be. That is why, as I think you are all aware, we are before the tribunal on this initial issue of defining with clarity what the test for avoidable costs should be. If you're a small airline, or if you're a large airline, none of us have sufficient precision and clarity to assist us in our operations and to know what rules should govern our pricing and our capacity allocation.

Mr. Charlie Penson: In the interests of time, because I have a short period of time, I want to talk about that. You seem to suggest that the pricing issue is the main issue that may lead to anti-competitive behaviour, or driving somebody else out of business. I suggest that capacity may be just as big a problem.

If a company like yours wanted to meet the competition in terms of price and decided to put on a tremendous amount of capacity, a flight every hour out of Calgary to Vancouver and so on, wouldn't that have a big effect on a competitor that wouldn't be able to meet the capacity, even though they were setting the price? It may have been a discounted price, as you've suggested, but wouldn't that have the equivalent effect?

Mr. John Baker: Capacity can certainly be one of the factors that go toward competitive or anti-competitive behaviour, but we at Air Canada have been very careful in how we have allocated capacity in response to a competitive market.

Mr. Charlie Penson: Do you have any suggestions that might move this along? Do you feel your company has been harnessed with regulations that have driven your costs higher? Do you have any suggestions on how government can resolve this issue?

Mr. John Baker: As I indicated, we are in discussions with Transport Canada on what the industry outlook currently is and what our role within that should be. Those are constructive discussions, which will take some time. We recognize where the industry currently is and we want to be partners in creating a new environment that works.

Mr. Charlie Penson: You have the opportunity, Mr. Baker, to tell us... You tell us here today that you're fairly high cost compared with some of your competitors. Are some of those costs imposed on you because of regulation by government that you would like to see removed in order to get your costs down?

Mr. John Baker: We have said that we would like to have a uniform playing field in all areas, but that has not been our prime focus of concern in terms of the subject matter before this committee. We are, in our view, quite highly regulated both by Competition Bureau scrutiny and by the CTA, and we have addressed those concerns.

Our response, simplistically, is that we would like an even playing field going forward. We recognize how that regulatory framework has developed through the events of the last number of years, and we're working with government to create an efficient, optimal marketplace.

Mr. Charlie Penson: Maybe in the discussions we'll have a chance—

The Chair: Mr. Penson, Mr. Hunter wants to respond as well.

Mr. Charlie Penson: Maybe, Mr. Baker, in another question you'll have a chance to expand on that. I'd like to hear what some of those are.

Mr. Lawson A.W. Hunter (Legal Counsel, Air Canada): On your last question, about what might be done, as John says, there's been a tremendous amount of uncertainty at Air Canada about what it could and couldn't do. Lawyers are expensive—some more expensive than others—and there's certainly been that sort of cost.

As a rule, it strikes me that what Air Canada has tried to do, as John said, is that if some new entrant enters the market and they select the price... That's what's happened; new entrants have come in, and any of them who have entered either a new route or a new carrier can set the price they want to charge. Air Canada has never undercut those prices. As John said, typically they were slightly above that.

• 1625

So if the rule were... By the way, I think this would be the rule in the United States under predatory behaviour. There's nothing wrong. In fact, there is a case in the Ontario courts as well that says matching a competitor's price can never be predatory.

On the capacity question, you're right that capacity could be a factor. But again, with one possible exception, Air Canada has never increased capacity when new entrants have come on any new markets. Of course, as you know, they have decreased capacity significantly over the past year. You have to understand as well that in this time, when demand for air travel is declining so precipitously, Air Canada is sitting there with—

Mr. Charlie Penson: Two Air Canada flights to Vancouver from Calgary, one at 10:53 a.m. and one at 11 a.m., both a third full on a route that WestJet has established, seems like quite a bit of capacity to me.

Mr. Lawson Hunter: My understanding is that there has been no instance where Air Canada has increased capacity over the previous year on any route in this country. Never.

I don't deny your proposition that from an anti-trust point of view, increasing capacity could be an issue, but I would also remind you—and this is also true in the United States—that when new low-cost entrants come into a market like this, they typically are stimulating demand. If they're stimulating demand, and there's a proper amount of capacity in that market, maybe there is room for the incumbent carrier to also have some additional demand. It shouldn't all be just handed over to the new entrant.

The Chair: Before I move on to our next questioner, I just want to clarify something. There were some statements made in your statement, Mr. Baker. I'm not sure what's happening here, and I just want to clarify this for the record. We have evidence before the committee from WestJet, and members of the committee are all entitled to bring forward amendments, aside from government amendments. I think their evidence has been on the record for about three weeks now, so I think you're pretty much aware of what it is.

Mr. McTeague, please.

Mr. Dan McTeague (Pickering—Ajax—Uxbridge, Lib.): It would be nice to have the proof of where WestJet is offering prices that are below your routes, Mr. Hunter.

I'd like to talk to Mr. Baker for a moment about Tango and its new partner, Low Cost Co.

On November 23, your company, Air Canada, announced that one-way fares to Toronto from St. John's would be $129. Air Canada's lowest one-way fare prior to the announcement was about $1,009, give or take a penny or two. That fare represents an 87% reduction. Mr. Penson has talked a little bit about the west. I'd like to concentrate a little bit on the east. Halifax to Ottawa will go for as low as $79 in the same announcement. Air Canada's lowest one-way fare on that route was $641, representing an 85% reduction. There are a number of others here that I'd like to put on the record, but I may not have the time to do that.

In addition to increasing the seating capacity on your A-320s by 20% and cutting the meal and movies, I guess the question we have is what else Air Canada can do, given that its planes are operated, handled, maintained, marketed, and sold by the same personnel that pay the same rates as Air Canada. How is it possible for you to meet competition without engaging in what looks a whole lot like predatory pricing, or cross-subsidization at the very least?

Mr. John Baker: The Tango product, as you know, Mr. McTeague, is a new brand within Air Canada that has some of the attributes that you've mentioned: densing up the aircraft to some 159 seats; payment for essentially all services that are provided, whether it's food, beverage, or otherwise. It's an O and D service. There are reduced reservation costs because you book online. The whole product base and product attributes are very different from the main line, and we are trying to address all those costs and reduce them as dramatically as possible.

As Lawson said, we are trying to stimulate the market. In this post-September 11 climate, we are trying to address the capacity reductions that have come into the market. Recognize that Tango was announced and is operating in an environment where we have reduced our domestic capacity by up to 20%. Within that 80% remaining capacity, we have put some Tango flights at the expense of Air Canada's main line flights.

Mr. Dan McTeague: I don't think your numbers make sense in light of what has occurred as of November 23. Now you have a proposition to obviously target Calgary and Hamilton, which are the mainstays of WestJet.

• 1630

I guess you may find it hard to believe, but most people looking at this issue would probably prefer that the Competition Bureau in fact take Tango and Low Cost Co., as two dancing partners, off the ballroom floor and maybe deal with a more strenuous version of the Competition Act to ensure that with 80% domination—unlike the American examples you've cited, where the largest player may only have 15% or 16%... You would not find any circumstance where the Competition Act should not apply evenly to other industries—as it should to yours, but most specifically.

I have constituents, and a number of individuals, who have raised questions—and they're not necessarily involved with the industry—and will go to great lengths to tell us that what they have seen here looks a whole lot like an example—the finest example, in fact—that your organization may very well be poster boys for the need to change the Competition Act as it currently stands; and that in the time we wait for the Competition Tribunal to make a decision,

as we see with CanJet, or with WestJet in the application with respect to Canada 3000, your competitors are dead and gone; and that because of your position within the industry over a longer period of time, you're able to sustain these applications before the various tribunals.

So the question I have for you is how is it possible, having such a dominant position, for you now to announce that you're going to again find some wit and wisdom in providing a new low-cost discount alternative—strictly to Hamilton and Calgary—without using finances you currently have to meet and challenge the existing competition? Is 80% not good enough? Do we have to wait for 100%, Mr. Baker?

Mr. John Baker: I don't think the percentage, Mr. McTeague, is relevant here. What is relevant is Air Canada responding to what it sees are the market demands for more of the commodity product I mentioned. The market worldwide in Europe and in the States is going to a low-cost variant, and we feel it is incumbent on us to be able to address that variant and compete in that variant, and we intend to do so.

Mr. Dan McTeague: But, Mr. Baker, where you have those routes where there is no competition, the price is 30% to 70% higher. Why aren't you cutting the prices on routes where there is no competition, if that is the case?

Mr. John Baker: We have been applying the Tango product increasingly throughout the country on the major routes, and we intend to see an expansion of it.

Mr. Dan McTeague: But only where you have competition, Mr. Baker, which begs the point. You're complaining the Competition Bureau shouldn't have the power to order you to stop, and yet every example where you have lower prices is where you have competition.

One would suggest you're not just meeting competition, you're undercutting competition, and you can only do it because you have a large presence in the marketplace. If the Competition Bureau doesn't have the power to stop you, then I presume you're going to be able to raise the prices to 30% and 70% above those you see in areas where you don't have competition. Is this the case, Mr. Baker?

Mr. John Baker: No, it clearly isn't the case, Mr. McTeague. As we said in our opening comments, we have done nothing but match competition initiated by competitors. We have not undercut.

Mr. Lawson Hunter: Could I also just add, Mr. McTeague, that, as you probably know, the CTA has the ability to review prices—and on its own motion, at the moment—on routes where there is no competition. And I think certainly with Tango it is not correct to say that Air Canada hasn't offered consumers low prices—through Tango—on routes where, after Bill C-3, there was no competition.

This industry is a very complex industry, and it is true that a price discrimination goes on between routes, depending on the amount of competition—but of course, that is the nature of competition.

I remember, to give you an example, when I was the director, the Great Canadian Superstore went to Saskatoon; it didn't go to Regina. I had all kinds of complaints from consumers in Regina saying "Well, now Safeway"—the dominant supermarket at that time in western Canada —"is offering low prices in Saskatoon, but they're not offering them in Regina". I said, "Well, that's not my problem to fix. That is due to the nature of competition in that business."

One last point concerns this 80% number that is bandied around. As you know, this committee has become very specialized in competition law—and that's a good thing, as it's time we had people who have a better understanding of it—but as you know, you define competition in markets; you don't look at the country.

If you looked at Northwest out of Detroit or Minneapolis, you would find a degree of dominance in those markets—which are probably in revenue terms almost as large as Air Canada—that is greater than Air Canada's. One of the misconceptions that troubles me is that you don't assess competition by looking at a huge country like this. You look at it local market by local market.

• 1635

Mr. Dan McTeague: You're trying to have a monopoly, Mr. Baker.

The Chair: Thank you very much, Mr. McTeague. We'll come back to you.

[*Translation*]

Mr. Laframboise, please.

Mr. Mario Laframboise (Argenteuil—Papineau—Mirabel, BQ): Thank you, Madam Chair.

You just announced a deficit of about $600 million for the last quarter. When we discussed with the Minister the possibility to grant some help to Air Canada and other airlines, he told us that your financial situation was quite good, that you had $1 billion of liquidity and that you could borrow about $3 billion on your assets, meaning the planes that you could sell and rent. He gave us a picture of Air Canada which showed that the company was in fairly good health and would be able to keep going through this crisis.

What can you do about the $600 million deficit? Can you absorb it with your billion dollars of liquidity? I noticed that you had written off $400 million of assets. What can be the effect of the losses incurred during the last quarter on your short-term liquidity?

[*English*]

Mr. John Baker: I'm sorry, Mr. Laframboise, I'm not sure I understand the question. We have indicated as recently as yesterday, in our third quarter results, liquidity in the amount of some $900 million and that we seem to be holding steady at that, for which we're grateful. We are, however, still in the early stages of the post-September 11 environment in which the market continues to be extremely soft.

As you know, more than half of our revenue comes from transborder and international traffic. With respect to the transborder traffic into the States, our load factors and our revenue are extremely soft—as is reflected in all U.S. carriers. Other Canadian domestic carriers don't have that issue before them; we do. We have therefore made the link, as a carrier heavily dependent on transborder and international traffic, that some of the benefits and support the American government has given its carriers gives them a leg up—in terms of financing ability, in terms of sustainability—that, without similar "all things being equal and adjustments being made" assistance, puts us in a prejudiced position relative to those American carriers with whom we are competing.

[*Translation*]

Mr. Mario Laframboise: You are then saying that your liquidity will keep going down because you don't foresee a quick recovery. That's what you are saying, isn't it?

[*English*]

Mr. John Baker: It is very difficult at this time to be forecasting. We're not ones who, like many others, are forecasting these days where the market is going. We are somewhat comforted by last month's traffic numbers that the recovery is somewhat better than our worst fears. We hope it will recover. But it is no secret that we are also in what most people would call a recession and that the exit from that recession, in terms of time, is very unclear at this moment.

It is also clear that even before September 11 there was a substantial reduction in the level of business traffic, and we at Air Canada, of course, are a carrier that is highly dependent on business traffic. There has been a fall-off in that traffic, so it is an area of concern to us. It goes to the earlier comment about the increasing commoditization of travel based on price. That is something we are struggling to adjust to going forward.

[*Translation*]

Mr. Mario Laframboise: Here's why I am asking you those questions. I agree somewhat with the government who says that before September 11, Air Canada could have survived without being so aggressive on the market. But given the fact that you have incurred enormous losses since September 11 and that the government has not helped you, they want you to do it in a free market. I understand why you are announcing new products so you won't die slowly, as the government would like you to. It has been announced that you had liquidity and they give the impression that you have enough to go through this crisis, that as good managers, you want to be sure that you're going to survive this crisis. You're in competition with all the other airlines on your routes and you are competing with international companies as well. That's what I understand. It's a policy choice. That's what you just told us.

• 1640

The Americans, your competitors, have decided to help businesses. The Government of Canada has not done it, with the approval of the Canadian Alliance, and you are being asked today to compete against everybody even though you don't have the same weapons as your competitors have. We are therefore asking to be allowed to offer the same services or the same prices as the other airlines give. Is that about right?

[*English*]

Mr. John Baker: I don't take issue with your summary. We do wish to be able to compete in a free marketplace; we do wish to be able to vary our products to meet the changing market; and we do want everyone to be conscious of the market in which we compete—which is not just the Canadian domestic market, but the international market—so that everyone is aware of the forces that pertain to those other markets and allows us to compete fairly and freely within that market. Yes, I agree with some of your statements.

The Vice-Chair (Mr. Walt Lastewka (St. Catharines, Lib.)): You may have one more short question.

[*Translation*]

Mr. Mario Laframboise: Thank you.

If your response to competition was restricted, if you were forced to use your liquidity and if Air Canada went bankrupt, do you think another Canadian company could take your place or would the whole market fall down?

[*English*]

Mr. John Baker: This is not a consequence we are planning on or developing plans B, C, or D for. We think we have had a historically prominent role to provide air transport in this country. We wish to continue to be a prime supplier of those services as they evolve and change. We want to be responsive to the needs of consumers—and to the needs of government—in doing that.

The Vice-Chair (Mr. Walt Lastewka): Thank you very much.

We'll now ask Mr. Keyes.

Mr. Stan Keyes (Hamilton West, Lib.): Thank you, Mr. Chairman.

Hello, gentlemen. It's nice to see you again. I remember you all before us at transport committee on different occasions.

Mr. Baker, you just said Air Canada is reacting to the changing market. You can see our concern —I say some of us, but I think a lot of us—when by next February, if you can believe it, in a nutshell you'll have in this country Air Canada, which is going to be doing your domestic, wide-body, and international stuff; Air Canada Regional, which is going to be bringing together all the regional airlines—Air Ontario, and all the rest of them, and all their contracts with the unions, and they're all going to be signed shortly—and there would be Air Canada Regional, or whatever announcement you make to call it whatever you're going to call it; Tango, which is, of course, the perpetual seat-sale airline; and Lowco, which is Steve Smith's low-priced carrier. It's going to try to compete against WestJet through Hamilton and anywhere else they can compete.

Yes, sure, reacting to a changing market is important. I too have nothing against competition. I think it's marvellous that you can go out there into the Canadian marketplace and work hard to establish Air Canada as the carrier of choice for anybody who wants to fly in this country from coast to coast to coast or abroad. Congratulations.

I have a fear, personally, of the dominance that you are now going to have as a result of your creativity, of your formulation of the different carriers, all under your control under one board.

First, I think personally there's a great, urgent need to redefine "predatory" in this particular legislation, vis-à-vis price and capacity. My question for you is would you have any difficulty with an amendment to the Competition Act that would give the Competition Bureau the power to level a fine against any airline found to be predatory?

Mr. Lawson Hunter: I would absolutely be opposed to giving the Competition Bureau that power.

Mr. Stan Keyes: And why would that be, sir?

Mr. Lawson Hunter: Because, as John said in his opening remarks, the commissioner... If you're talking about the Competition Tribunal, we have to make a distinction here about the enforcement mechanism.

• 1645

I assume we're still talking about people's rights under the law—as Madam Justice Simpson said in the challenge of the commissioner's first interim order—but to give one individual the right to levy fines without an independent judicial determination of the facts I think would be an extremely dangerous precedent.

In fact, as you know, it doesn't exist anywhere under our law except in the misleading advertising area today, and it's certainly not the commissioner. It's not the commissioner. It's the tribunal. Of course, we know the courts, under the criminal parts of the law, are able to levy fines if they find people guilty.

Mr. Stan Keyes: So we have the Competition Bureau having the ability to step in and order an airline to cease and desist from any kind of activity it sees to be predatory activity in Canada. Why not give the bureau, upon revelation of the facts, verifiable... I don't even know if there's a problem with moving it over to a tribunal. Let them do the review, if that's what it takes to understand that Air Canada, or any other airline, has acted in a predatory fashion against a smaller airline that's trying to do its job out of small-town Canada and is found guilty. Boy, a $250,000 fine. Case closed.

Mr. Lawson Hunter: As I said, I think the question is that the facts are not always so obvious. As you know, I think when the commissioner appeared before you after Mr. Beddoe, and when he talked about Bill C-23, it wasn't that he couldn't get the facts from Air Canada. He didn't have the facts from somebody else. But the facts are not always so obvious. So to give one individual the right to impose that level of fine without a fair hearing is just, in my view, not—

Mr. Stan Keyes: Right, but a fair hearing was available.

Mr. Lawson Hunter: But the question, I think, is—

Mr. Stan Keyes: Would you be opposed to a—

Mr. Lawson Hunter: I'll stand back now and talk more from the concept of this legislation. You're suggesting something that so far... I think you debated it in part in this committee on the private access provisions, about whether there should be damages available, and my understanding was that the conclusion was no. You're proposing to change that, and that could have repercussions on the whole institutional framework of this law. From Air Canada's point of view, to single them out, which has already been done with this extraordinary injunction power that... It doesn't exist, by the way, anywhere else in the world. It certainly doesn't exist in Europe. It doesn't exist in the United States. It doesn't exist in Australia, where the investigator and the prosecutor have the power—

Mr. Stan Keyes: I don't mean to cut you off, but my time is short.

Mr. Chairman, when we were before this committee doing the Competition Act, and then before the transport committee on the Competition Act, it was decided that this rule that gave the competition commissioner the power to order an airline to cease and desist was necessary because of the fear—and sometimes not provable actions yet—of the predatory nature of one

airline like an Air Canada against a smaller airline. The fear that we have, of course, is that it can be taken into the courts, dragged out for two years, and the airline that was competing with you in the first place is shut down. They can't outlast you. They don't have the monetary guts or the staying power in order to meet all the requirements that would be necessary to prove you out. So there has to be another way.

Short of re-regulating pricing in the airline industry... I know Stephen laughs at that, but people's tempers are getting very thin on the airline file. Short of that, maybe the government ought to bring back a crown corporation that would take over regional airline services in this country. We'll supply the big guys and we'll fly them in from the regions and if there's a good, small competitor or person already operating a well-priced airline out there and the government crown corporation won't go into that particular community, we'll let that one operate on its own. Then we'll let the Americans fly in here and compete against you, because quite frankly, people no longer have an attitude or a stomach for what's going on at Air Canada today.

Mr. Lawson Hunter: Can I just add one comment about WestJet Airlines Inc.? You talk about the small carriers, but as you know, WestJet is now the largest carrier of passengers in western Canada. WestJet has a market capitalization that is greater than Air Canada's.

• 1650

WestJet has said, after September 11, that it did not need any assistance from the government. It has remained profitable. It has been very, very careful and astute in its business plan.

It is not unlike Southwest Airlines in the United States. As you know, Southwest, with less than 10% of the market in the United States or business in the United States, has a market capitalization that is greater than all other airlines in the United States combined. It continues to be profitable after September 11.

So the notion that you can't survive as an astute operator in this business is certainly not true for WestJet. I don't know if you asked Mr. Beddoe whether on his route, where we're being attacked, he's profitable.

Mr. Stan Keyes: Then how do you explain that Clive Beddoe, the owner of WestJet, says "If you want to fine the big guys, go right ahead"?

The Vice-Chair (Mr. Walt Lastewka): Thank you, Mr. Keyes. I appreciate your questioning.

Mr. Strahl.

Mr. Chuck Strahl (Fraser Valley, PC/DR): Isn't this fun?

I'm not sure I agree with the government's idea that what we need is a crown corporation to take over. I'm a little nervous of that.

An hon. member: You may get one, anyway.

Mr. Chuck Strahl: We may.

The question a lot of us are trying to come to grips with is whether it is possible for Air Canada or Tango or Low Cost Co. to make money on these routes. Do you actually make money going head to head against... WestJet is making money, obviously, maybe not on one route there, but generally speaking somehow they continue to make money. Does Air Canada make money when they go head to head with WestJet?

Mr. Lawson Hunter: Again, a lot of these things are going to come out of the tribunal hearing, once that gets under way. But the answer to that, according to Air Canada, is absolutely yes, they do.

On the new Tango routes, for example—this is a start-up, and it will take time to see what demand is there—the whole purpose of Tango was to select routes that were very dense, at least by Canadian standards. As you know, there aren't very many, but the purpose was to offer that low-cost service in a manner that would reduce Air Canada's costs of operation by 20% to 30% and still enable it to provide the higher-class of service, because if Air Canada couldn't provide business-class service then everyone would be screaming about that. So the routes were selected where there was enough frequency. So I think the answer is basically absolutely yes, they have to.

Mr. Chuck Strahl: I don't know. The confusing part to us who are just looking on—and none of us are maybe experts in the airline industry—is if you're making money at those cut-rate prices, you must be making a lot of money on the other routes, because the other routes are priced...

My round-trip business-class ticket from here to Vancouver is $3,500. So if you're making money on a similar low-budget thing at $319, you must be making a mess of money. Yet you don't. You're losing hundreds of millions of dollars. So how are you losing all the money?

Mr. Lawson Hunter: With demand off 30%—

Mr. Chuck Strahl: You were losing money well before September 11.

Mr. Lawson Hunter: Yes, but as John said, one of the other factors... The front end of the bus, the high-yield passengers, has always been, for airlines like Air Canada that have at least two classes of services, where you made your money. If you look historically, you made your money in one or two quarters of the year.

Mr. Chuck Strahl: Yes, but if you're making money there on the expensive tickets, and you're making money on the low-cost tickets, you must be raking it in at all quarters.

Mr. Lawson Hunter: We should be careful what we say when we say making money, though. The question is whether if you have fixed costs, if you have revenue that covers your variable cost and makes some contribution to overhead, then it makes sense to do it. Otherwise, you're caught with no revenue and you have this fixed cost that you have no revenue toward.

Mr. Chuck Strahl: Obviously, some of your costs continue whether you park the plane or fly it.

Mr. Lawson Hunter: Absolutely.

Mr. Chuck Strahl: One of the things I would suggest... Part of my riding is Abbotsford. WestJet started up there, endeared itself mightily to the city of Abbotsford and all flying citizens in the whole upper valley of the Fraser Valley, because there was no service there before. It

flew unchallenged—it had a monopoly really—out of Abbotsford for three or four years. Canadian Regional or Air Canada is now in there and offers competitive service at a competitive price.

But what endears WestJet to its fairly loyal travelling public is that when it's a monopoly the price is cheap, when there's competition the price is cheap. Air Canada has a reverse psychology thing that has not endeared them, which is that when there's a monopoly the price is high, and when there's competition the price is low. WestJet keeps the same price. They've had the same price when they had a monopoly, and then when there was competition they kept the same price. Nothing changed.

• 1655

We have scads of examples where when competition leaves a marketplace Air Canada immediately bumps the price up—I mean like next week, and it doubles. People are wondering what factors go into the price structure at Air Canada. I believe competition is good, but what are the factors that drive the price that you put on a particular market? It seems to be strictly monopoly that does it. On anything else, there doesn't seem to be any rationale to it.

WestJet is a corporate philosophy, I realize: low budget, one type of plane, all that kind of stuff. But Air Canada doesn't seem to have a guiding philosophy that I can figure out.

It has caused some real friction, as Stan and others have pointed out. People are yelling at us to do something with you. I'm not sure what it should be, but they're an unhappy bunch. They can't figure out the pricing structure.

Mr. Lawson Hunter: I would like to make one point about the powers of the CTA, and I referred to it before.

The CTA can look at Air Canada's prices and the level of service it is offering on routes where there is no competition, on complaint and on its own notion. They have received a number of complaints about that, and we have received only a couple of decisions out of that. They have had to compare it to routes where there was competition. So far, in every instance they have found that Air Canada's prices were not unreasonable when they were compared to comparable routes.

At the same time, pricing in the airline business, as you may know, changes minute by minute, and there are thousands of changes a day. It's a very complex business.

I would go back to my example about supermarkets. You price in part because you are worried about the threat of entry; that's the whole notion of contestability. You can't ignore the potential of new competition, so you take that into account, because presumably you don't want it to happen.

At the same time, if the routes are not very dense, let's say, and no one is going to be able to make money, that's part of the concern that John mentioned initially. People seem to think that we need to have two carriers on every route in his country. Our routes aren't big enough to justify that. So there are going to be routes where there will be no competition and the threat of entry will be less. In there, if you were operating as in a proper free-enterprise, profit-maximizing business, which is what I assume you would say is the right approach, you would charge what the market will bear.

I'm not saying that's what Air Canada does, because we have to worry about the CTA. We have to worry about the fact that the consuming public will object. So there are other factors, but if you were just looking at it strictly from a normal business perspective, that's precisely what you should do. That's what you want them to do.

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

We're going to move to Mr. Savoy, please.

Mr. Andy Savoy (Tobique—Mactaquac, Lib.): Thank you very much, gentlemen. Sorry I was late.

As Mr. Strahl mentioned, we get it all the time with regard to this situation.

I would like to go at this from a little different angle.

You are going to market as a low-cost supplier right now in Tango. In any business plan that I've ever been associated with, including my company previously, any time you're trying to establish that niche in a new market, as a low-cost supplier, you have to be the low-cost producer because you'd lose your competitive advantage. We've established that you're not the low-cost supplier.

Mr. Hunter, you mentioned that WestJet were careful in the suit and their business plan. I agree that the low-cost suppliers have carved out a niche there, because they're the low-cost producers. So it's a competitive advantage for them.

Can you explain to me how you, as a higher-cost producer against the likes of WestJet, can substantiate your business plan to become the low-cost supplier?

Mr. Lawson Hunter: I'll give you two answers on two different parts of the business.

On Tango, as I said before, the effort there through the type of route structure, the lack of service, the better utilization of the aircraft, because it doesn't connect at all, interline, with Air Canada... You don't have to worry about luggage. There are no meals, so it's less time on the ground. It actually better utilizes the aircraft and reduces costs overall by 20% to 30%.

• 1700

Now let's put that in the context, as well, of what happened after September 11. When Air Canada, as many other airlines in Canada and around the world, were sitting there with a hell of a lot of "iron", as aircraft are called, where there were fixed costs, fixed monthly leases, employees, they couldn't. They had to find the best revenue they could to make a contribution to the overhead. And that was clearly part of what happened here with Tango.

At the same time, we're seeing a move in this business, around the world, toward no frills, low-cost, low-price service. And Air Canada, as all of the American airlines, has to respond to this. If they don't get their cost down, they are not going to survive.

Now, on Low Cost Co., Tango is different from the low-cost model because it is part of Air Canada. So it was an effort to reconfigure aircraft, to find a better way to utilize those aircraft and those employees and to lower the costs and do it within the Air Canada structure and to make a contribution to the overhead.

Low Cost Co. would be a separate operation, which wouldn't have the same high fixed costs as the network carrier does, so it should have even lower costs. As we know, the union is a very major component of the cost in this business, and that's been a struggle for Air Canada and all airlines, because of the power the unions have. And the low-cost people have been able to avoid that better than the network carriers have. So this is an attempt to try to find another way to respond to the changes in the marketplace and to meet the competition, which is inevitable.

I don't want to go on too long here, but we saw Air Canada's overall share of the business in Canada after the acquisition of Canadian Airlines drop almost 15% in a year. That's a fairly dramatic drop in any industry.

Canada 3000 was a good operator. They had grown very rapidly. Largely because of... Well, who knows why, but certainly because of September 11 and perhaps some ill-advised acquisitions, they unfortunately went out of business.

Now Air Canada's percentage has gone up, but we see every day in the press talk of new entrants. This business is a business where, if you look anywhere around the world where it's deregulated, you see a lot of entry. You also see a lot of exit, but you do see entry, and that's competition. And an incumbent carrier always has to anticipate that this is going to happen.

We in Canada have to be very careful that we don't just try to duplicate the old Air Canada and Canadian Airlines scenario, where we try to have two carriers on every route and neither one can make any money.

Mr. Andy Savoy: You haven't convinced me of your competitive advantage, certainly, and the sustainability of your efforts are seriously in question, looking at it from a business perspective. As I said, to be the low-cost supplier in the market you must be the low-cost producer, and you're cutting it by 20% to 30%. And WestJet is cutting it by 40%. You're at a competitive disadvantage, in fact, in that market, and as a business planner I would look at that and say this is not sustainable over the long term.

You may get a share of the market; you may contribute to some overhead in a minimal way, I guess, if that's what your business case says. But to me, sustainability is still an issue. I don't see you staying in that market for long if you aren't the low-cost producer.

Mr. Lawson Hunter: I assume, again, that if it isn't profitable and it doesn't have a return on capital for the shareholders of Air Canada, then something's going to happen. If it can't be sustained, if it can't do what you suggest and improve the bottom line and improve the utilization of the capital that Air Canada has, then the shareholders will speak.

Mr. Andy Savoy: In the interim, we are faced with a decision that it may have negative impacts on the smaller regional lines—WestJet's flow was not small—which could seriously impact air travel in Canada. And we have the responsibility to look at that. That's why I think it's a very irresponsible approach to the market, not only from a business perspective and a business planning perspective, but also from corporate citizenship, let's say.

Mr. Lawson Hunter: I understand the questions people ask about that. Someone over here said to put your foot in the other shoe and see how you think it would be for the small guy. But you also have to put yourself in Air Canada's shoes.

What do you suggest, if they couldn't do this? If it is making a contribution to overhead, what are they supposed to do? Leave these A-320s sitting on the ground and paying the monthly leases? Is that what they should do, and potentially put them into bankruptcy?

Again, I really think John asked a very important question earlier. What is it you think Air Canada should do when someone new comes on one of their routes? Are they just supposed to sit there and say "Too bad; we're too big overall, but we have this new competition and our prices are here and theirs are lower, so I guess we'll have to abandon the market"? You can't do that.

• 1705 

They certainly can't do that in an industry where they have two classes of service: the consuming public, and I assume you would want there still to be business class service. As we saw with RootsAir, and even in the United States, nobody has ever sustained an airline based only on high-yield traffic. You need to have some low-yield traffic to fill up the bus, to cover those overhead costs. Then you make your money on the business class travel, on the people who have less discretion. That's the model. If Air Canada can't respond to new competition, that inevitably is what will happen. So you have to ask yourself, what is it you want them to do?

By the way, if Air Canada didn't respond to a new price on markets where they didn't face competition before, the next thing we would know is that they'd be saying obviously you have too much market power, because you don't care about competition; competition is irrelevant to you.

That isn't true in this business, it absolutely isn't, because as we've said—

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

I'm going to have to stop you there, Mr. Savoy.

Mr. Rajotte, please.

Mr. James Rajotte (Edmonton Southwest, Canadian Alliance): Thank you, gentlemen, for coming in today.

I want to ask a fairly broad question. When the competition commissioner appeared before us for the first time he said that what you really have to look at in terms of this specific bill and the Competition Act overall is defining the difference between "healthy competition" and "anti-competitive behaviour". That's essentially what we're doing, but it's a very difficult question. He also said you must protect competition itself, rather than specific companies.

What I'm finding and other members are finding is that protecting competition depends specifically on which company you are. It often depends on the company the way they define "competition" and "anti-competitive behaviour". So I think it would be helpful if you would guide us by actually providing your definition. What is the difference between "true competition" or "healthy competition" and "anti-competitive behaviour"?

Mr. Lawson Hunter: A word that is bandied around a lot in the press and elsewhere is this notion of "predation". In anti-trust law, in most jurisdictions of the world "predation" means if you are offering or selling at a price that is below your variable cost. You have to have a high

market share to begin with. If you don't have a high market share, you can charge nothing, if you want, but you probably won't stay in business very long.

So you have to look at your variable costs, and if you are pricing below your variable cost, not your fully allocated cost, as I think Mr. Beddoe suggested to you. You're making a contribution to overhead, if you price below that. It's not a rational decision to make. So that would be one.

Another thing is that we have tried to match the prices of a competitor. Unfortunately, we don't have any clarity from the bureau, as we said before. Perhaps if you could put that in the law, it would certainly help Air Canada. If you are not leading the price down yourself, if you are matching the price, then that's not predatory. So it gives Air Canada a benchmark to say now we know we can't undercut these people, but at least we can respond. So I think you need to look at that as well. How do we know what these rules are, and how do we have tests that are along brighter lines than we have at the moment?

Mr. James Rajotte: Well, one of the charges launched against Air Canada is you do in fact lower your prices and you target specific routes that WestJet has established a reputation in. And as Mr. Strahl outlined, you do go in there and undercut them. For the other routes comparable across Canada, then, the prices are substantially higher. This charge is out there, and I'd like to hear your response to it.

Mr. Lawson Hunter: First of all, on the comment that they undercut, if they did, it's not my understanding of Air Canada's philosophy that they undercut.

Mr. Chuck Strahl: They might have matched it.

Mr. Lawson Hunter: Yes.

By the way, when Tango started I know that WestJet said it was undercutting their prices, but presumably, if you're responding to competition, you're responding to the lowest price on the market. And at that point in time the lowest price in the market was Canada 3000. They never undercut Canada 3000.

• 1710 

We found, by the way, that because of a little bonus we gave people, depending on whether or not they bought over the Internet, there was one route we were maybe undercutting by $5. As soon as it was found out, they immediately changed it. So they've never attempted to do that.

What was the rest?

Mr. James Rajotte: You did answer it. Basically, is there a substantial difference in the pricing at Air Canada on those routes where it competes with WestJet?

Mr. Lawson Hunter: The principal discipline there is the CTA. I know there are airline economists who will tell you that price discrimination in transportation markets is common. You can look at the railroads, as well. I don't know whether your committee ever looks at the railroads.

The Chair: We just spoke with them two weeks ago.

Mr. Lawson Hunter: But in these types of markets, price discrimination is common because you are responding to competition. If you tell Air Canada they shouldn't be profit-maximizing, that's what you're saying. That's the implication of it. We're saying, if you're on a route where you have no competition and the market will bear a higher price, we don't want you to be profit-maximizing there. We want you to charge a lower price.

If you're going to do that, then you have to regulate Air Canada. You really do. There are airline economists who will say that the ability to price discriminate this way is the only way airlines can meet their overall costs.

So you really need to be extremely careful in the notion that somehow prices should be uniform across the country. In this business, you will drive people out of business unless you regulate them and ensure their rate of return.

Mr. James Rajotte: I think you mentioned we have to look at competition by looking at markets, looking at local markets. Then you also mentioned that Air Canada competes. You can't just look at it in terms of Canada. You have to look at competing in the international markets. So would you be in favour of relaxing the restrictions on foreign competition?

Mr. Lawson Hunter: I think Air Canada's position has been that it does not oppose reciprocal cabotage. It's willing to do that. There are, as you know, other issues.

By the way, on all of these issues about the nature of competition in this business, we would—and I guess I personally would—certainly be quite interested in having a debate with the commissioner. Invite him here. We'll sit here and talk about these things, so you can understand where he's coming from and where Air Canada's coming from. Then you'll understand how competition really works in this business. If he's willing to come here, we're willing to come too. We can talk with you to him about how competition really exists in the airline business.

Mr. Stephen Markey: If I may add, we are on the record—and have been for some time—as supporting reciprocal cabotage. If American carriers want to fly in Canada, we're saying that's fine, simply give Air Canada the right to fly in the U.S. market.

We're not afraid of that competition. The problem is that it's not easily achieved in this current economic environment, and perhaps even political environment.

Mr. James Rajotte: On my last question, are there any restrictions on Air Canada currently, whether they're regulatory or put on by the government, that are hindering Air Canada from competing?

You appear before this committee and it seems to be very confrontational, which is obviously because many of our constituents are very concerned about Air Canada and traffic service. But I think we all want to see a healthy airline industry.

In that interest, are there current restrictions or regulations you can point to that are hindering you from being competitive today?

Mr. Lawson Hunter: I'd have to go back and check all the conditions and impositions the government imposed on Air Canada at the time of the takeover. There were certainly things there that still apply to Air Canada. When the world changed on us, as you know, there was this

commitment about labour, employment. There was also, by the way, the commitment on service to small communities.

Those are things you wouldn't have in a normal market. They still apply to Air Canada. They don't apply to anybody else, of course. So there are things out there.

The most costly thing for Air Canada is the uncertainty. I have never been involved in a situation, as a lawyer, where I had a client who had to constantly, on every business decision they made about pricing, check with their lawyers about whether they could do something or not. It has a tremendous chilling effect on morale, on the people inside Air Canada, because of this tremendous uncertainty about where you cross the line and where you don't cross the line.

• 1715 

Mr. Stephen Markey: If I may add one point, as I think John said earlier, we are hoping to have as level a playing field as possible, in order to encourage competition.

There are some commitments we've made, which Lawson has referred to, for example, on service to small communities across the country, and they run for another 14 months, or thereabouts. We have no intention of either abrogating those or changing those at this point. We recognize they are commitments we made and we're trying to honour them, but they obviously include substantial additional cost.

Mr. Lawson Hunter: I've pointed out to you that since September 11—there have been articles in the press in the United States about this—in the United States, carriers have been abandoning routes left, right and centre. The number of single-carrier routes in the United States has jumped dramatically since September 11, but Air Canada can't do that in any community it was servicing before the merger.

Mr. John Baker: If it does, it is told by the CTA to reduce its prices, and by the bureau to raise its prices. So the lack of operational certainty that governs every one of our daily activities is hugely problematic. When competitors—

Mr. Chuck Strahl: Are you all in favour of that?

The Chair: Mr. Strahl, you're done.

We're going to move on to Mr. Volpe, please.

Mr. Joseph Volpe (Eglinton—Lawrence, Lib.): Do you mind my asking, what's the dollar figure on that?

Mr. James Rajotte: We're a very cooperative committee here.

Mr. Stephen Markey: We've never even begun to calculate that value, Mr. Volpe.

Mr. John Baker: So if I just started with the external legal costs alone, it would be a number that would shock you.

Mr. Joseph Volpe: But it would leave a lot of legal counsel salivating.

Mr. John Baker: That is a very different issue.

Mr. Joseph Volpe: It's not the one we're going to be dealing with just yet.

Mr. Baker, I appreciated your brief seminar on the economics of airlines, but as a new member on the committee, I really became part of the committee so I could get a seminar on the way any one of the industries operated.

If you don't mind, Mr. Baker, in your introduction you lamented the fact that your company was being singled out, you thought it was being singled out, or there was an appearance that it was being singled out. If I can paraphrase the example you used, it was a little bit like traditionally we condemn the sin and not the sinner, but this was one of the cases where we were going after the sinner.

Just exactly what were you talking about?

Mr. John Baker: I was talking about the regime that was implemented post-merger with Canadian Airlines two years ago.

Mr. Joseph Volpe: But I mean in reference to the bill that's before us—which we don't have before us. Is there something in that bill that is really problematic for you?

Mr. John Baker: What I was responding to were the press reports in the *National Post* this morning on what were being considered as potential amendments that have come laterally. If there is no substance to those discussions, I stand corrected. But we were trying to address them here.

Mr. Joseph Volpe: Maybe we should have part of that discussion, because I think you also said you came here on very short notice. I don't know if the staff or the chair summoned you before the committee.

When I was a chair, I never gave anybody short notice. If you were responding to an article that appeared this morning, you're right to lament the fact that it was really short notice. When did you get the notice to appear?

Mr. Stephen Markey: In fairness to the chair, that's not what we're saying. We're saying we have not appeared individually. As I think the members of the committee know, there have been business delegations before the committee who have articulated points of view on the proposed changes.

We're just saying that in the last 72 hours there has been a lot of speculation about what could possibly be considered as additional amendments. Over the course of the last four or five days, we took the opportunity to call and ask for an opportunity to appear before the committee, in that context. It's not at all critical.

Mr. Joseph Volpe: But you don't have any amendments on paper.

Mr. Stephen Markey: Not at this point.

Mr. Joseph Volpe: This is purely hypothetical.

Mr. Stephen Markey: Absolutely.

• 1720 

Mr. Joseph Volpe: I asked some of the committee members opposite, and they don't have any amendments they've shared with us. I asked some of my colleagues here on this side of the table, and they don't have any amendments to share with me. The chairman and the clerk don't have any amendments they're sharing with me. I'm beginning to feel like the sinner you were talking about.

Are there any amendments you have access to?

Mr. Lawson Hunter: I think it was anticipatory, because we were reading in the press and we were seeing ministers talking about possible amendments, but the problem was that we had no idea what they were.

The Chair: Well, just to clarify that once again, Mr. Volpe, when WestJet was here, they asked for certain amendments on November 6 or 7—whatever the date of their appearance was. There are amendments before the committee that could be moved by committee members when we go to clause-by-clause. I don't think we have to talk about it as if they're not there, because they've been put on the table. They haven't been moved by committee members, but there is the possibility they could be.

Mr. Joseph Volpe: A lot of things, Madam Chair, with all due respect, get put on the table when witnesses come before a committee. There's a wish list that goes on longer than the litany we used to recite when I was a kid at benediction. I never thought of them as being part of the agenda, that we had to formulate some of the amendments of...

I was a little puzzled, Mr. Hunter, because you were obviously defending a position of your company with some vigour. I was trying not to be a consumer when you were speaking because I wanted to be fair to you. But I wondered where this energy was coming from. You must have access to some amendments I hadn't heard about, yet I thought I was doing my homework.

Mr. Lawson Hunter: All I can say to my knowledge is that there was speculation in the press, and we knew that Mr. Beddoe had proposed amendments to the committee, but we unfortunately didn't know what they were because the transcripts of his appearance weren't out. We were advised by people in the government that there was consideration being given to amendments, but they wouldn't tell us what they were. So Air Canada is left...

Mr. Joseph Volpe: You might as well be a member of Parliament, because we don't know either.

Mr. Lawrence Hunter: But again, you can understand the anxiety, because we also understood—and as you know—the mandate of this committee is a bit unusual, in that the bill was referred to committee after first reading. You can make an amendment whenever you like and are not bound by the rule of relevance or whatever. So when Air Canada...

Mr. Joseph Volpe: This is typical of the usual parliamentary process; that's what you probably wanted to add, Mr. Hunter.

Mr. Lawrence Hunter: Well, not always. If it's after second reading, that's not... Anyway, the anxiety was that there might be amendments coming out of this committee, that Air Canada had not been consulted on them, and that they would directly affect Air Canada. So we thought we'd better come talk about it. The problem was that we didn't know what they were.

Mr. Joseph Volpe: You don't know what you're talking about. Yes.

On that happy note, thank you.

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

Just to clarify, though, all our meetings are posted in advance, and everyone knew WestJet was appearing. You were welcome to come and watch and hear what they had to say. It wasn't as if it was a closed-door meeting by any means. I wasn't aware that you hadn't received the blues transcripts; otherwise I would have been happy to give you a copy.

Mr. Bagnell, please.

Mr. Larry Bagnell (Yukon, Lib.): Thank you.

I apologize for being late; I had to speak in the House.

I don't know if Mr. Volpe was attempting to allay your fears, but I hope to raise them again. I'm sure everyone else said positive things about Air Canada, so I might have to add a little balance.

My major point is that I'm going to support any amendments that will improve competition in the airline industry, and I'll just explain why.

I'm not at this time necessarily in favour of cabotage or the entry of foreign carriers. I'm not in favour of regulation because I think it would dramatically raise fees. I don't mean to shoot the messenger, but just so you can take messages back for my constituency, which is the Yukon... A lot of them are quite furious with Air Canada for a number of reasons, and I'll just quickly list some of them.

One reason was the huge change in fee percentage a few months ago, which I actually brought up in the House of Commons. There was a time last year when a number of people couldn't get out for days at a time. Just so people know, Air Canada is the only jet service to Whitehorse at this time—in the winter, at least.

A voice: From the south?

Mr. Larry Bagnell: No, from anywhere. The hot meals were eliminated. Then people really got riled up when the point requirements were changed just before Christmas from 25,000 to 40,000 to get a flight out—which of course is our only way out, and people are used to getting out.

• 1725

You can imagine how upsetting that was. The result was that a week ago Sunday, I think, there were approximately 200 people who came out when the airline commissioner, Bruce Hood, came. Unfortunately, most of the comments weren't complimentary.

One of the big concerns historically relates to what one of the vice-presidents who came out a year or two ago told us—namely, that we wouldn't be charged any more than for a similar type of flight elsewhere. But we've since been told that this was not correct, that there is a larger profit margin than on a number of other routes, and that Air Canada makes a significant amount of money on that route. That's one thing that really upsets people.

I just want to show you the sense of frustration and why I would be in favour of competition as a way... If Air Canada is not willing to negotiate some of these problems away, why are the people so... I have to tell you, I haven't had complaints about any other company, other than one or two, in my time as MP.

Now, I have a question, and you may be able to remove a rumour that's probably not true. One person said to me, tell them to stop charging us so much on this route to subsidize their international travel. Maybe you could tell us about your profits on international travel as a percentage of revenue. I assume they're somewhat equivalent to the profits you make on domestic travel.

Mr. Stephen Markey: If I may, I'll respond to the first part of your statement, and we'll think about the latter question as we go.

The Yukon is very important to us as a market, and it has been for 35 or 40 years through either Canadian or currently Air Canada. We know that there is and has been a lot of criticism.

Last week the premier was in Ottawa. We met with her personally to try to review all the issues she's raised. We've been in constant contact with other people in the Yukon government, including Sue Edelman. The vice-president you referred to, Doug Port, has been up there in the course of the last year, and I make fairly frequent trips there as well. We have a manager of government relations who is focused very much on the issues that arise out of Whitehorse, Sandy Dexter, who's based in Vancouver.

The issues you talk about, Mr. Bagnell, are not in any way things we try to put entirely onto the Whitehorse trips. If you look at our meal reductions, you'll find them consistent across our network, and again it's in the context of trying to manage the costs John and Lawson talked about earlier. The issue of flights and their frequency to Whitehorse has been a constant issue for us, but the current level of jet service flights is slightly higher than it was in 1999. We're trying to maintain service and service levels to Whitehorse, and we believe that we've done so relatively well. It is of course very troubling when you hear the widespread criticism of the service. We're just going to continue to try to show Yukoners that it's a valuable piece of business, one we're intent on continuing to serve.

As to the profitability, Lawson, do you have...

Mr. Lawson Hunter: That's a difficult question, to be honest with you, and I don't feel well informed enough to give you a precise answer. Obviously, profitability does vary from route to route.

One thing again—and I don't want to lecture you. I don't intend to do that, and I'm afraid I'm being too much like that. But remember that this is a network carrier. Suppose a passenger starts in the Yukon and goes to Vancouver and then on to Hong Kong, Air Canada carrying them the whole way, and they're paying a fare for the whole distance. How do you allocate the profit you make on the route between Whitehorse and Vancouver as opposed to the route between Vancouver and Hong Kong? That is a key element of network airlines.

You could make the argument that all the profit—and in fact, even all the revenue—you get from that onward leg, that international leg, should be attributed to the Whitehorse route. If it weren't for that route, you wouldn't get it in the first place.

• 1730

It's not that simple to allocate the profitability between routes. You have to have some way of determining how you split the contribution level that clearly is made on the onward portion of the route. Of course, the longer the route, the chances are the higher the contribution may be. They're economies of scale or whatever. It's not that simple. All it says is the feeder routes are extremely important in the overall profitability of Air Canada.

Mr. Stephen Markey: Madam Chair, may I offer one short additional observation?

The study you refer to, Mr. Bagnell, is one that was done very recently by a consulting group in Vancouver known as InterVISTAS Consulting Inc. The full report has not been shared with us. Last week the premier said she would be doing it, particularly with respect to pricing on certain routes.

We've looked at the pricing on comparable routes from Whitehorse to Vancouver and other cities, in terms of population and stage length. We're fairly comfortable that the rates are relatively consistent.

In the InterVISTAS study, they used the comparison of Winnipeg to Toronto to validate their observation that the prices from Whitehorse to Vancouver are higher than they should be. We don't think it's a fair comparison in the kind of market we're looking at.

We've asked the premier to send us more information. She's agreed to. We're looking forward to reviewing it. We honestly don't believe we're doing anything that we're going to find questionable when we see it in writing.

It's the InterVISTAS report, I suspect, you may be referring to.

Mr. Larry Bagnell: In the two points I brought up, I wasn't talking about the report. It would be a whole new list of things.

To make sure people are aware, there are no complaints about the staff, who were former Canadian staff in the Yukon, Sandy Dexter in Vancouver, or her equivalent in Ottawa. They've been great to us.

I'm astonished that you haven't answered my question at all or even given a suggestion. Even though it's difficult to calculate, every company has cost accounting problems. You can give me a suggestion on at least your international routes. Your international is making money. You're not subsidizing it with your domestic work. You must know it to be able to run the company in major multi-million-dollar operations.

Mr. Lawson Hunter: Again, unfortunately, I don't think any of us here are on the financial side of Air Canada and could answer the question.

I do come back to the point I made about contribution. It isn't possible to be precise on how you allocate or attribute the contribution. It's one of the points, by the way, in the commissioner's case against Air Canada. He said it should be zero. The fact we get contribution on the onward leg is irrelevant to whether we provide the service from the Yukon to Vancouver in the first place. It seems, from a business point of view, not a very sensible proposition. Obviously you're going to take into account that if you didn't have the route, you wouldn't get the onward leg. It has to go into your calculation of the service you provide.

Mr. Larry Bagnell: Madam Chair, can I ask them to answer later?

The Chair: Actually, it's what I was going to suggest.

Could you submit an answer to us in writing? Is it possible?

Mr. Stephen Markey: Yes, absolutely, Madam Chair.

The Chair: Thank you.

Mr. Laframboise.

[*Translation*]

Mr. Mario Laframboise: Thank you very much, Madam Chair.

I'll come back to something you said in your opening statement. You said that competition did not necessarily mean two carriers on each route. I see that you think a lot about that. But there is a reality. Some collectivities receive a poor service. The act imposed on you some obligations and I have to say you have honoured them. But you have changed the time tables and a lot of things and you have cut your services, for meals and other things.

You can't be against the fact that a collectivity wishes to have two carriers. I think competition means that those who want to enter a market must have the possibility to do so.

You have also stated that as far as you know, you had nothing to do with the bankruptcy of Canada 3000, and I'm inclined to believe you. Tango has arrived quite recently. I don't have the impression that you were behind the bankruptcy of Canada 3000. On the other hand, for competition's sake, given that the government has announced that it might guarantee loans for the five major airlines, including Air Canada, if there was a difficult situation, would you be against the government granting a loan guarantee to the company that would buy Canada 3000, in whole or in part?

• 1735 

In order to promote competition, if the rules were the same for everybody, and if the new Competition Act did not restrict your activities, would you be in favour of allowing other businesses to buy Canada 3000 and to get a loan guarantee from the government?

[*English*]

Mr. John Baker: I think, Mr. Laframboise, we would ask for even-handedness in the application of any government direction and assistance. Clearly, earlier we talked about the situation Air Canada, as a much larger carrier, finds itself within this country and internationally. We are asking for even-handedness there. We would apply the same request in principle to a domestic competitor.

[*Translation*]

Mr. Mario Laframboise: Here is my last question.

I'll first tell you that there will be amendments. This is not the first time. Even today, in the House, there were ministers who weren't aware of the acts being passed. The Minister of Transport has made a number of statements. The Competition Act will be amended. If the amendments were those you have read about, would they hinder the operation of your airline?

[*English*]

Mr. John Baker: As Mr. Volpe indicated, we do not have precision as to what amendments, if any, might be proposed. The devil is in the detail. It would be premature and hypothetical for me to respond to it.

We will obviously look at all amendments proposed with great interest and in detail. We would love the opportunity to come back, if need be, on that basis.

[*Translation*]

Mr. Mario Laframboise: Mr. Baker, I want an answer. You have read in the press that some proposals had been made. I tell you that they are certainly serious since they have been made. In your opinion, are the proposals which have been mentioned in the papers a threat to your company?

[*English*]

Mr. Lawson Hunter: I think the answer is categorically yes. In our view, they are very extreme.

For example, my understanding is one of them was Air Canada could never price a product below its fully allocated cost. It doesn't make any business sense. If Mr. Beddoe operates his airline that way, I would be shocked. To impose it on Air Canada would be, in essence, unbelievably damaging.

On other proposals about penalties and when they could be imposed, absolutely, yes. Air Canada has to survive and raise capital.

By the way, don't underestimate the impact your comments today in the House and what the commissioner says have on Air Canada's ability to raise money in the financial markets.

We know a bit about what Mr. Beddoe said. Unfortunately, we didn't get the full transcript. If they are the ones, the answer is absolutely, yes. They are a major problem.

The Chair: Thank you, Mr. Laframboise.

I have a couple of questions before we close the meeting. I'd be happy to get the comments from the meeting. You could reply to them in writing, if you wish, as well.

Right now, I'm assuming you have Tango operating on the same routes as Air Canada. What happens when the Tango flight at one o'clock doesn't fly, but Air Canada has three flights flying later in the day? Do your Tango passengers stay there until the next day? Do you take their coupons on your other flights?

Mr. Lawson Hunter: I think I can answer. We may have to give you the precise answer, because I might get it a bit wrong.

They are protected. If Air Canada has an operational problem and the flight can't go, the passengers will be protected on an Air Canada flight, a non-Tango flight. I don't think you can interchange between Tango and Air Canada. It's the whole purpose of it.

The Chair: No. It was my question. If something happens and a one o'clock Tango flight doesn't go, do you take their coupons?

Mr. Lawson Hunter: Yes. If it's a mechanical problem with a plane or things like that, they are protected.

Mr. Stephen Markey: Fortunately, as of a couple of days ago, all the Tango flights had gone without any mechanical problems or other difficulties.

The Chair: I'm pleased to hear it.

Mr. Stephen Markey: We haven't faced it.

The Chair: My question is, would you?

My second question is would you do the same for WestJet?

Mr. Lawson Hunter: Would we take their passengers?

The Chair: Would you take their coupons if their plane doesn't go for mechanical reasons? What happens? Do the passengers get stuck there?

• 1740

Mr. John Baker: No, not generally. If we enter into a protection agreement with another airline, as we sometimes do, then that would be provided for. No, it's not transferable between arm's-length competitors.

The Chair: So we don't really have a discount airline operating under Tango, because it has the protection of another airline. I'm just trying to clarify this in my mind as to how it operates. I'm trying to clarify what the advantages and the disadvantages are between Tango and WestJet.

Mr. Bagnell raised a number of concerns, and I have very similar concerns. You've raised something that's causing me great concern, namely the fact that you have 14 months more to go before you can abandon routes. I'm really quite concerned by those kinds of comments. It sounds as if there's a clock ticking down, since there are 14 months more to go.

I have to tell you I'm very concerned, as I've already watched service slowly disappear in my own community of Windsor. Although you haven't abandoned routes, Mr. Hunter, you have lessened routes substantially. We used to have direct flights from Windsor to Ottawa to Montreal. We had 16 flights a day to Toronto. We're down to eight flights a day. It takes me six and a half hours to get home on a Thursday night for something that used to take three hours. I used to have four options. I now have two options on a Thursday. I really only have one if we have votes. It's quite disconcerting to me that pretty soon I might as well just drive, as it would be faster.

Mr. Lawson Hunter: I was not intending to say that Air Canada wanted to abandon those. But the question was whether there were things that were imposing costs on Air Canada, and that clearly is one.

The Chair: But let's go back to why it's imposing costs. There were people who wanted to buy those regional airline carriers, and Air Canada insisted that they be part of the package.

Mr. Lawson Hunter: Well, as you probably know, we went through a full arbitration with the commissioner over the sale of Canadian Regional Airlines. It was put up for sale and nobody came forward.

The Chair: No, I'm talking about Air Ontario. Air Canada insisted that it be part of the package that they be allowed to have Air Ontario. That was very clear, because there were people who wanted to purchase those airlines at the time.

Mr. John Baker: I don't know what you're referring to. The four or five companies that now comprise Air Canada Regional were all wholly owned companies of Air Canada. I'm not sure I understand any expressions of interest in acquiring from third parties in the last few years.

Mr. Stephen Markey: And, Madam Chair, the observation we made on service to communities in 14 months was simply to quantify the commitment that we made during the original merger. We recognize the importance of those communities to our network. Lawson made this point earlier. We have absolutely no plans to abandon them. In fact, we're going to be starting to try to work with communities in the coming months to make sure that does not happen.

The Chair: Well, I'm going to leave the conversation on Air Ontario, but I'm very familiar with what happened. I know that there was an offer to purchase Air Ontario—several in fact. Air Canada insisted that it had to be part of the whole package.

Let's go on to the last question I have. The commissioner has told the committee that even where he grants an injunction under subsection 104(1)—and this is very much on the record and very much available—Air Canada does not comply with his requests for information. As a result, he can't complete his investigation within the injunction period, which right now is set at a maximum of 80 days. The injunction lapses, and we then return to the status quo. I believe the commissioner is suggesting that Air Canada is almost thwarting the investigation process by dragging its feet. How do you respond to that, Mr. Hunter?

Mr. Lawson Hunter: First of all, I don't think that's what he is saying. In fact, I had a conversation with him today about this information business. I think I know what he's talking about.

First of all, I think he told me that he said, when he appeared before you, that in the Canada 3000 situation it had nothing to do with Air Canada. I know that he said it in the press—that Air Canada gave him the information he asked for. If you want to know the cost, if you have any idea how many hours have been spent in responding to requests from the commissioner to his subpoenas, Air Canada had to review every single e-mail of every senior executive in the company for three years. Imagine that. So to say Air Canada has not cooperated is just not true.

What I think he's talking about was in the CanJet situation. He was trying to find out what impact Air Canada's pricing was having on Tango and how many seats Air Canada was selling on those routes at the fares it introduced. It was a practical, logistical problem. It wasn't that

we weren't giving it to him.

• 1745

Believe it or not, for Air Canada... And remember, in L-class tickets, which were the ones that were used there, there are, I think, five, six, seven, or eight different fare basis codes, so you have to get the actual coupon to see what the fare basis code was. All of those Air Canada coupons are sent to Mexico. They are counted by people in Mexico and then they are sent back to Air Canada. That takes time, needless to say, so we were not able to give him the up-to-date information, because... I've forgotten what the delay was in getting those accurate numbers, because it was a long time ago. It wasn't that we were saying we wouldn't give it to him; we were saying we couldn't tell him until we got it.

The Chair: So 80 days is an inadequate timeframe to do this thing?

Mr. Lawson Hunter: No, I think on Tango he said Air Canada gave him everything he needed.

The Chair: But in this case, you just mentioned 80 days wasn't enough time to reply. It's not that you weren't trying to be cooperative; there wasn't enough time.

I'm just trying to understand if the 80 days is adequate or not. If you're telling me you did everything possible, that Air Canada is doing its best to comply—and I believe that's what you're trying to do—then I misunderstood his conversation. What he was saying is 80 days isn't long enough for you to comply.

Mr. Lawson Hunter: Yes.

But the other thing, by the way, is in that case, at the end of the 80 days, when we weren't able to produce this report because we hadn't had the Mexicans count all the coupons, Air Canada agreed with the commissioner that it would not reintroduce those fares until we'd given them the information.

The Chair: All I know, Mr. Hunter, is that in Windsor, at the end of the 80 days, I no longer had CanJet, and fares went way back up or stayed up for Air Canada. I think the consumer's lost both ways in my market, and I'm just a bit concerned with that.

But I have an understanding now that within 80 days you couldn't provide the information, although you did try. In other cases, you've been able to provide it more rapidly. It depends on the case, the situation. So perhaps the legislation, as it's presently worded with an 80-day maximum, should be worded very differently. That's what I'm looking at. I'm just trying to understand if the 80 days makes a whole lot of sense.

Mr. John Baker: The other thing I would say is that the case we're talking about was the very first case the commissioner and his staff were looking at, and it has been a huge learning curve for all sides on these issues since this commenced two years ago, or whenever.

I would say the bureau and its staff have the ability to be much more precise in their demands in what they're seeking from us, and we are equally better able to respond. I think that has been found to be the case.

As was also mentioned, in the Tango situation we responded in... I don't know, seven or ten days. I think it was on November 8 that we filed everything. I would suggest to you that had that request been made two years prior, it would have been a longer timeframe, in terms of both the precision of the request and in complying with it.

The Chair: Okay, so then things may be working better now within the existing timeframe.

Mr. John Baker: Yes, I think that's fair to say.

The Chair: Well, I appreciate very much your coming here, and I do understand the difficulty under which you're trying to answer our questions.

I have only one last suggestion on behalf of all my constituents. This is very personal, but I think customer service is very important.

I know how much you pay for meals, because I actually know someone who supplies them. It's so minimal, and the fact that they have been taken away to the detriment of your customers... It just boggles my mind as to why you would do that, because I think customer service is so important.

I see the difficulties you're enduring at the airports. We're all enduring them with the security checks. We know some airports are much quicker than others. We know you've had to deal with timeframes, but I think it's important... I think you had a very good commitment to customer service that was announced last summer. I'd ask you to take another look at that. I believe it was a very good thing to do, and I hope Canadians will benefit from air service in this country the way they need to. I don't want to end up like our colleagues in the United States.

Having travelled on both airlines on many occasions, I actually think Air Canada does have a wonderful service, and I hate to see it not stay that way.

We look forward to meeting with you again.

Mr. John Baker: Thank you.

The Chair: Thank you very much.

The meeting is adjourned.



This is Exhibit “40” 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
CHAMBRE DES COMMUNES
CANADA

INST COMMITTEE MEETING

Notices of Meeting include information about the subject matter to be examined by the committee and date, time and place of the meeting, as well as a list of any witnesses scheduled to appear. The ***Evidence*** is the edited and revised transcript of what is said before a committee. The ***Minutes of Proceedings*** are the official record of the business conducted by the committee at a sitting.

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December 4, 2001

Minutes | Evidence | Meetings (INST)

Meeting 59 | Meeting 60

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Tuesday, December 4, 2001

• 1543

[*English*]

The Chair (Ms. Susan Whelan (Essex, Lib.)): I'm going to call the meeting to order.

We will discuss Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

Today we have, from the Department of Industry, Konrad von Finckenstein, the Commissioner of Competition, from the Competition Bureau. And we have Mr. Chris Martin. I'm sorry, I don't know your position, Chris.

Mr. Chris Martin (Acting Assistant Deputy Commissioner of International Affairs, Department of Industry): I'm the acting assistant deputy commissioner of international affairs.

The Chair: Thank you.

We also have with us, from Justice Canada, Louise Faille, legal counsel for the competition law division, Industry Canada.

Everyone has a set of amendments in front of them now. I would propose we move to our clause-by-clause. As we reach each clause, if anyone has any questions on the clause or any questions on the amendment, we would then have the witnesses discuss them and answer any questions. Is everyone okay with that?

That being said, we'll move to clause-by-clause consideration.

(Clauses 1 and 2 agreed to)

The Chair: There is a proposed amendment for a new clause 2.1.

[*Translation*]

Mr. Drouin.

Mr. Claude Drouin (Beauce, Lib.): Thank you, Madam Chair.

• 1545

We are proposing to amend Bill C-23 in clause 2.1(1) by adding a paragraph e) to subsection 29(1) of the Competition Act.

Committee members have the text of the proposed amendment. Do we need to read it?

[*English*]

The Chair: Actually, why don't you read the amendment?

Mr. Claude Drouin: Me?

The Chair: Read the amendment, please.

[*Translation*]

Mr. Claude Drouin: Fine then. We propose the following paragraph (e):

> (e) any information provided voluntarily pursuant to this Act.

[*English*]

The Chair: Monsieur Drouin, could you read the entire wording of the amendment?

[*Translation*]

Mr. Claude Drouin: Okay:

2.1(1) Subsection 29(1) of the Act is amended [...] by adding the following after paragraph (d):

(e) any information provided voluntarily pursuant to this Act.

How's that, Madam Chair?

[*English*]

The Chair: I have something different. The English is different from the French.

Are the English and French different? Does it make sense?

Mr. von Finckenstein, could you clarify?

Mr. Konrad von Finckenstein (Commissioner of Competition, Competition Bureau, Department of Industry): Yes.

The content of the two amendments is the same. They were originally drafted in each language, and the drafting style is slightly different. Therefore, you do not have the identical numbering, but the content and effect are absolutely the same.

(Amendment agreed to)

The Chair: Shall the new clause 2.1 carry?

(Clause 2.1 agreed to)

Mr. Konrad von Finckenstein: Madam Chair, I think there was another part to the motion just now that you also have to vote on. It's proposed subsection 29(2), to be amended to replace the exception.

The Chair: We moved G-1 as an entire amendment, I thought.

Mr. Konrad von Finckenstein: You moved the entire amendment?

The Chair: Yes.

Mr. Konrad von Finckenstein: Okay. Sorry.

The Chair: Correct?

Amendment G-2 is for Bill C-23 in clause 3 to be amended by replacing lines 26 to 29 on page 3 with "for which it was requested".

[*Translation*]

Mr. Drouin.

Mr. Claude Drouin: Madam Chair, we move that Bill C-23, in clause 3, be amended by replacing lines 26 to 29 with the following:

for which it was requested.

[*English*]

The Chair: Are there any questions? Mr. Strahl.

Mr. Chuck Strahl (Fraser Valley, PC/DR): While I'm catching up, exactly what's the purpose of it?

The Chair: Madam Faille.

Ms. Louise Faille (Legal Counsel, Competition Law Division, Department of Industry): The purpose of this is to ensure that when the foreign state receives documents, they would promise to not use the information they receive for any other purpose. We wanted to guarantee there would be no ambiguity by adding any other reasons, such as "like" and "unless", etc. It was taken out. It's strictly "for the purpose for which it was requested".

The Chair: I think it reflects the evidence we heard.

(Amendment agreed to)

The Chair: There's another amendment to clause 3, amendment G-3.

• 1550

[*Translation*]

Mr. Drouin.

Mr. Claude Drouin: Yes, Madam Chair.

We move that the bill be amended in clause 3 by adding the following after line 31 on page 20:

> Records or other things already in Commissioner's possession
>
> 30.291(1) For greater certainty, any evidence requested by a foreign state under an agreement may be obtained for the purposes of giving effect to the request only in accordance with the agreement and the procedures set out in this Part, even in the case of records or other things already in the possession of the Commissioner.
>
> (2) This section [...]

section 2,

> [...] does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

[*English*]

The Chair: Monsieur Drouin is moving amendment G-3, as you see it in front of you. Does anyone want an explanation?

Is there any explanation?

Ms. Louise Faille: This was to address any concerns people had. If the commissioner already had some information in his possession, he would automatically give the information to the foreign state. It is not what we had intended. For any information to be obtained, we would

have to follow the procedure set out in part three.

(Amendment agreed to on division)

(Clause 3 as amended agreed to on division)

(Clauses 4 and 5 agreed to)

(On clause 6)

The Chair: We have clause 6 next.

Monsieur Drouin.

[*Translation*]

Mr. Claude Drouin: We move that Bill C-23 be amended in clause 6 by replacing lines 7 to 10 on page 22 with the following:

> mail or by any other means a document or notice in any form, if the document or notice gives the general impression that the recipient has won, will win, or will on doing a particular act win,

[*English*]

The Chair: Mr. Drouin has moved the amendment you have in front of you known as amendment G-4. I believe it was in response to evidence we heard.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: Yes. You heard evidence that innocent contests might be caught by this, where people answer and become eligible. Therefore, we put the words "doing a particular act". You have to do a positive act in order to qualify for the contest. This was done in order to address concerns some of the witnesses before you raised.

(Amendment agreed to on division)

(Clause 6 as amended agreed to on division)

(Clauses 7 to 11 inclusive agreed to on division)

The Chair: We have amendment G-5. Mr. McTeague.

Mr. Dan McTeague (Pickering—Ajax—Uxbridge, Lib.): I move that Bill C-23 be amended by adding after line 13 on page 27 the following subclause:

> 11.1 The portion of subsection 75(1) of the Act before paragraph (a) is replaced by the following:
>
> > 75.(1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> (2) Subsection 75(1) of the Act is further amended by striking out the word "and" at the end of paragraph (c), by adding the word "and" at the end of paragraph (d) and by adding the following after paragraph (d):

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market.

(3) Section 75 of the Act is amended by adding the following after subsection (3):

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

11.2(1) The portion of subsection 77(2) of the Act before paragraph (a) is replaced by the following:

(2) Where, on application by the Commissioner or a person granted leave under subsection 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is wide spread in a market, is likely to

• 1555

(2) Subsection 77(3) of the Act is replaced by the following:

(3) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

(3) Section 77 of the Act is amended by adding the following after subsection (6):

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

The Chair: Thank you, Mr. McTeague. Do you want to speak to that, or should Mr. von Finckenstein?

Mr. Dan McTeague: I can speak to it.

This simply gives light to the amendment we had given in the four defined areas that would provide effective access, private access, in the limit-constrained areas that we have debated and discussed before this committee.

I'll leave the rest to the commissioner.

The Chair: Commissioner, did you have anything to add to that?

Mr. Konrad von Finckenstein: Yes. These amendments pick up the principles put forward by Mr. McTeague, which were subject to discussions over the last couple of months. A couple of refinements were specifically made to make sure there can't be any misuse of these provisions.

Let me deal with it globally, rather than just this specific amendment, because it's true through several amendments.

Basically, we have made sure that there are full loser-pay costs. If anybody brings one of these actions that's unsuccessful, the court may award costs against that person.

Secondly, the tribunal has to grant leave, and when it grants leave, the criteria are spelled out —that is, the tribunal has to have reason to believe there has been a violation, or there has been conduct that could substantially be a violation of the act, the same test that I have to apply before I go on an inquiry.

Thirdly, there's a provision there against double jeopardy. If a private party brings an action, the commissioner can't bring an action; if the commissioner brings the action, the private party can't. So in effect, if this matter is litigated, it will only be litigated once, not twice.

Also, in section 75, the jurisprudence made it clear that you can't bring such a case unless it adversely affects competition. We wrote that into the law by this amendment so that it's clear that this is a test that should be applied. Also, there's a 15-day waiting period before such an application can be brought.

Those are the refinements that have been built around the principles that Mr. McTeague put before you, and the result of it is that you will now have private access in four areas, the four areas set here: refusal to deal, tied selling, exclusivity, and market restriction. A person will have to get the leave of the tribunal; the tribunal will have to make a determination that there is a potentially valid case; the case will proceed; it can only result in an injunction, no damages; and at the end of the day, if the party is unsuccessful, it may have costs awarded against it.

The Chair: Thank you very much, Mr. von Finckenstein.

Mr. Martin.

Mr. Pat Martin (Winnipeg Centre, NDP): My only question would be if the courts may award costs, what would then be the test for how it is seen as a malicious, vexatious, or frivolous complaint? Where is the safeguard here that somebody won't get dinged with costs when their intentions were quite honourable?

Mr. Konrad von Finckenstein: Presumably, since that same court has given them leave to come before it, first of all, it can't be vexatious, otherwise the court wouldn't have given them leave. So you can't then turn around and ding them with costs for vexatious proceedings. So you're protected fully against that.

Mr. Pat Martin: Good enough. Thank you.

The Chair: Mr. Strahl.

Mr. Chuck Strahl: Just two things, for clarification. One, we heard testimony this morning about possibly making the commissioner have to put rulings in writing and make them available ahead, on an ongoing basis.

• 1600

It says here, in "Inferences", under subsection (4), that "...the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action...". I'm wondering, if we want to address that issue of the commissioner making a written ruling, so to speak, on application, whether we do this in here or at another place. I'm not sure the committee wants to deal with it, but it was brought up again this morning and we've heard it several times, about possibly asking you, or the commissioner, to make those rulings public.

Mr. Konrad von Finckenstein: First of all, we make all our rulings public. They are on the website. But this one is for a different purpose. This contemplates a situation where somebody has applied to us and said, please bring this case on a refusal to deal. We look at the situation, and we come to the conclusion that we won't proceed further. So that person says he is going to take it on his own to the tribunal. He should be entitled to do it, and the fact that we have not proceeded should not draw any adverse inference. He shouldn't have to overcome also our reluctance to proceed. He has to make his case to the court, but the opponent can't say that the commissioner didn't bring the case, ergo it's automatically not valid. No, the fact that we didn't bring a case is totally irrelevant to the consideration by the tribunal. That's what this is supposed to do.

Mr. Chuck Strahl: Just to clarify for myself, when you don't take a case, do you publish the reasons?

Mr. Konrad von Finckenstein: We publish the reasons when we take a case, when we make a settlement, and when we don't make a case.

Mr. Chuck Strahl: Okay. That was a concern this morning. So that clears it up.

The other thing on which I want clarification for myself is on the second page, under subsection 77(3), where we talked about "substantially lessen competition". Is that the same as anti-competitive behaviour? Is it clear in your mind what that means? Lessening competition is not necessarily the same as anti-competitive behaviour.

Mr. Konrad von Finckenstein: Essentially, lessening competition is a test that is used in a large portion of the act—for instance, when you look at a merger and decide whether to approve it or not. Will it substantially lessen competition? It's also used in section 77. That has been in the act for a number of years and has not been changed by these amendments.

Mr. Chuck Strahl: So it doesn't need anything added to it. As you say, that is adequate.

Mr. Konrad von Finckenstein: That is a standard test that's applied in an awful lot of jurisprudence, what "substantially lessen competition" means.

Mr. Chuck Strahl: Thank you.

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

Mr. Lastewka.

Mr. Walt Lastewka: For clarification, are we approving amendment G-5 or the government's amendment in this section? They don't read the same.

The Chair: We're approving amendment G-5. You should have it in front of you in this form.

Mr. Walt Lastewka (St. Catharines, Lib.): What about this 11.1?

The Chair: That's just a summary of the actual amendment. It's an explanation. It's not word for word. It's a bit confusing. That's why we have the word-for-word in front of you.

The discussion is actually on a little bit more than amendment G-5 right now. We're talking about the issue of private access and how it has been refined. Okay?

Mr. Rajotte.

Mr. James Rajotte (Edmonton Southwest, Canadian Alliance): Thank you, Madam Chair.

I want to clarify something. You may have actually said this, Commissioner, but if you were already conducting an investigation, then under this, someone would not be allowed private access if you were already conducting an investigation on them?

Mr. Konrad von Finckenstein: When somebody applies for leave to bring an action, I get notified. I have to say within 48 hours whether we are under inquiry or whether we were under inquiry and have settled the case. If either of those situations occurs, then the party may not proceed. If, on the other hand, I say we are not inquiring, or we looked at it and we discontinued the inquiry, then the person is free to proceed.

Mr. James Rajotte: I know you said if you decide not to proceed with the case, the reasons for you not proceeding should not then bias the Competition Tribunal against the person bringing private access. But should that not then just be part of the general evidence that goes forward to the Competition Tribunal?

Mr. Konrad von Finckenstein: This section shouldn't bias the tribunal in terms of determining whether to allow that person to go forward, bring leave or not.

• 1605 

Once the actual action takes place, assuming he gets leave, then undoubtedly the defendant will introduce the fact that whether we had looked at it and nothing had.... Again, the idea here is that the case should be conducted on its own merits at that point in time.

The section in front of you only relates to the leave application. Once the actual case is proceeding, the defendant will say the commissioner looked at it. Presumably, the tribunal will say he is not here and what we're looking at are the facts that are alleged before us. So that's totally another one to us. We wanted to make sure that for the leave application, also, it could not be used against any applicant. That's why that negative influence clause is in here.

The Chair: Okay.

Mr. James Rajotte: Just to go one further on that, then, will the defendant then be able to present the reasons why you did not?

Mr. Konrad von Finckenstein: No. As I say, when you apply for leave.... The plaintiff first asks for leave. The fact that we inquired and discontinued may be not be adduced and no inference shall be drawn. When the actual case comes along, it's never a relevant fact, because when the actual case comes before the court, the court will look at the evidence as adduced

before it. The defendant may want to try to adduce evidence that we looked into it or not. We would not be party, unless we chose to be, and I certainly don't see why we would take sides in a private lawsuit. It would not be our job to do that.

The Chair: Mr. Strahl.

Mr. Chuck Strahl: I agree with this idea about double jeopardy—it does seem to me that's the proper way to do it. But there was at least one witness I talked to who argued that we shouldn't restrict that, that if somebody wanted to allow you to start your investigation and start a private access at the same time, why not let them do it? In fact, his suggestion was that you might even want to join his action or join the proceedings as things moved along. Maybe you could just explain why you don't think it's healthy to have both happening at once.

Mr. Konrad von Finckenstein: It seems to me there's an issue to be litigated. It will be litigated either by us or by the private party. It doesn't need to be litigated twice. Nothing prevents us from joining a private party that has obtained leave and becoming an additional plaintiff in that matter. We couldn't separate or subsequently do it, so it will be once before the courts, either jointly or only by the plaintiff.

Mr. Chuck Strahl: You can still join if you feel it's necessary and in the public interest, is that right?

Mr. Konrad von Finckenstein: I can't imagine why we would, but the possibility is there.

Mr. Chuck Strahl: Okay. Thank you.

(Amendment agreed to on division)

The Chair: Now G-6. Mr. McTeague.

Mr. Dan McTeague: Madam Chair, I move that Bill C-23 be amended by adding after line 13 on page 27 the following:

> 11.1 Section 77 of the act is amended by adding the following after subsection (3):
>
> > (3.1) For greater certainty, the Tribunal may not make an award of damages under the section to a person granted leave under subsection 103.1(7).

The Chair: Mr. von Finckenstein.

Mr. Konrad von Finckenstein: This section is put there for clarification. As we said all along, if the prior party brings an action, the person should only have damages.

The act right now provides that when you bring an action the court may issue an order saying that the conduct has to stop, or any other order, in order to restore the competition. Some private practitioners have said that you could read into this any other order to restore competition the award of damages. That's not intended. Therefore, for clarification it says here, for greater certainty, that this does not mean that you may avoid damages.

(Amendment agreed to)

The Chair: Now G-7. Mr. McTeague.

• 1610

Mr. Dan McTeague: I move that Bill C-23 be amended (a) by adding after line 13 on page 27 the following:

11.1 Section 79 of the Act is amended by adding the following after subsection (3):

(3.1) Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than $15 million.

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account the following:

(a) the frequency and duration of the practice;

(b) the vulnerability of the class of persons adversely affected by the practice;

(c) injury to competition in the relevant market;

(d) the history of compliance with this Act by the entity; and

(e) any other relevant factor.

(3.3) The purpose of an order under subsection (3.1) is to promote practices that are in conformity with this section, not to punish.

11.2 The Act is amended by adding the following after section 79:

79.1 The amount of an administrative monetary penalty imposed on an entity under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that entity in a court of competent jurisdiction.

The Chair: Thank you.

Are there any questions on G-7? Mr. Volpe.

Mr. Joseph Volpe (Eglinton—Lawrence, Lib.): I wonder if the commissioner knows whether this is the amendment that caused one of the witnesses such great consternation last week.

Mr. Konrad von Finckenstein: If you're referring to the witnesses from Air Canada, yes, that's the clause.

This clause is meant to deal with anti-competitive air conduct in the airline industry, and it provides that.... As you know, Bill C-23 before you already provides that you can get a written opinion from us, a binding one, on conduct. But where a company engages in anti-competitive air conduct, notwithstanding our opinion or because they didn't get one, and the court finds, indeed, that they have engaged in anti-competitive conduct, the court can prohibit that conduct, and it can award an administrative monetary penalty up to $15 million so as to make it clear that this is an act that should be abided by and the rules should be followed and the court is not willing to tolerate anti-competitive conduct.

Now, it will look at the circumstances, will look at the frequency and duration of the practice, as well as the ability or the class of person affected, the injury to competition, the history of compliance etc.

This basically allows us, when we move against a player in the airline industry who has engaged in anti-competitive conduct, to tell the court to prohibit it and to award an administrative monetary penalty in order to ensure further compliance because of these factors. It is up to the court to decide whether to award an administrative monetary penalty and the amount.

Mr. Joseph Volpe: In the climate in which we find ourselves with Tango and WestJet, is that amount sufficient to ensure compliance?

Mr. Konrad von Finckenstein: I think an administrative monetary penalty in any amount is something a company wants to avoid. It affects its reputation and it is something that is not appropriate, but the court will have to decide what the appropriate amount is.

As you probably remember, not too long ago there was undue disclosure by Air Canada to some investment bankers, and the Ontario Securities Commission awarded a penalty of around $1 million. Administrative penalties in these amounts are not uncommon. It depends on the gravity of the situation of the conduct, but it's certainly something that any responsible company wants to avoid. I don't believe there's any airline company that wants to have an administrative monetary penalty awarded against it. It's also something that is just another nuisance. It's appropriate that the court has to decide, but I really think the fact of the penalty is just as important as the amount.

Mr. Joseph Volpe: Thank you.

The Chair: Mr. Strahl.

Mr. Chuck Strahl: For clarity, then, subsection 55(1) of the Canada Transportation Act defines those domestic services as what, as airlines? Just airlines?

• 1615 

Maybe for the record, maybe you could explain why airlines are singled out in this section. We just passed something there saying there wouldn't be any damages awarded and so on, but this is the one grouping that is going to have the possibility of, if not damages, certainly monetary penalties. Could you just explain why the airline industry, as opposed to any other industry, needs to be singled out for that?

Mr. Konrad von Finckenstein: As you mention, they are not damages, they are administrative monetary penalties. They're already in the act, by the way, under section 74 for misleading advertising. They're now extended to the airline industry in the same way, in previous amendments....

We have a crisis in the airline industry. I think everybody knows that. It's also an industry with extremely high mobility of assets, where anti-competitive conduct is relatively easy to engage in and change from location to location because you have many routes. Therefore, the government thought it was necessary here, in order to—as subsection (3) says—promote

conformity and compliance, to remind people in the airline industry that if they engage in anti-competitive conduct, not only will there be a prohibition order issued against them, but there may be, if the court deems it appropriate, administrative monetary penalties.

Of course it's felt that it's very important that we have proper competition in the airline industry and not anti-competitive acts.

The Chair: Mr. Strahl.

Mr. Chuck Strahl: What would you say to those people who argue that we shouldn't single out airlines, that we should let transport policy, transport ministers, and transport regulations handle this, and the Competition Act should be framework legislation that's not industry-specific? Is this just something you have to deal with, or do you think this is the best way to deal with anti-competitive behaviour in that industry?

There's no doubt it has some problems. People have suggested it shouldn't be industry-specific in framework legislation, that there should be general terms and general principles, and by being specific in here we're asking you to become an expert in singling this one out. What do you say in response to that?

Mr. Konrad von Finckenstein: The intent here is to make sure there's no anti-competitive conduct in the airline industry. The idea is not to regulate or make us the regulator of the airline industry, but to make sure the provisions of the framework legislation that apply to all industries, but particularly in the way they apply to the airline industry, are being adhered to and respected.

This is one of the few industry-specific provisions in the Competition Act, primarily for constitutional reasons, because most industries fall under provincial jurisdiction. Airlines are clearly in the federal jurisdiction, therefore you can put them in here. That's why they're here.

As I mentioned before, you should ask the ministers who proposed these amendments, but the principal reason is obviously because we have a crisis in the airline industry.

The Chair: Mr. Strahl.

Mr. Chuck Strahl: As my final comment on this, because of subsection (3.2) you may find someone has either done it continuously or deliberately, or they have a history of problems, and so on, that will affect the amount of the recommendation on this monetary penalty. But when the tribunal investigates, do they make recommendations on changes to regulations, or do they just say, "Given the regulatory framework we're given, this is what we find"? Do you make recommendations on changing recommendations in another act or in another minister's bailiwick?

Mr. Konrad von Finckenstein: We have two roles under the act. One of them is enforcement of the act and making sure people comply with the provisions. Second, we have a policy role. We are asked to make recommendations to any federal decision-maker on competitive issues that may fall under that. In that capacity, we make recommendations. We have made recommendations on airlines, telecom, energy, etc. Those are really two quite separate functions.

Mr. Chuck Strahl: Do you make those public?

Mr. Konrad von Finckenstein: Yes.

Mr. Chuck Strahl: Thank you.

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

• 1620

Mr. McTeague.

Mr. Dan McTeague: Because it is a proposal that is timely, there are sections of the Competition Act that are industry-specific. There are some on the banks, and some others under section 78 are illustrative. For instance, freight equalization is industry-specific to the Canada Transportation Act, and has found its way into the Competition Act.

That's just a clarification for you, Mr. Strahl.

Thank you.

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

Mr. Rajotte.

Mr. James Rajotte: Thank you, Madam Chair.

Commissioner, I just want to ask you, specifically under paragraph (3.2)(b), "the vulnerability of the class of persons adversely affected by the practice", if you can explain why that is in there and its implications.

Mr. Konrad von Finckenstein: If you look at the present act, in section 74, you will see the same language. The idea is that when you award the administrative monetary penalty you look at the overall conduct, the frequency, the effect of competition, and to what extent people in that class are vulnerable and therefore have left the market, thereby reducing the competition.

Since the overall purpose of the whole act is to have competition and maintain it, you have to take into account the consequence of the anti-competitive act. Part of it is the severity of the act, part of it is the vulnerability of the people who are at the receiving end of the act.

The Chair: Is that okay, Mr. Rajotte?

Mr. James Rajotte: Yes.

[*Translation*]

The Chair: Go ahead, Ms. Girard-Bujold.

Ms. Jocelyne Girard-Bujold (Jonquière, BQ): The following is noted in the proposed amendment to subsection (3.2): "... the Tribunal shall take into account the following:". The text goes on to list several things, including in (e) "any other relevant factor". What exactly do you mean by "any other relevant factor"?

[*English*]

Mr. Konrad von Finckenstein: This is basically a catch-all provision because you don't know right now what the other factors may be. You don't want the court to be precluded from looking at anything except (a), (b), (c), and (d). If there is another issue that is relevant that the court should take into consideration when assigning the penalty, either up or down, it may do so. That's why you have the subsection in it.

Ms. Jocelyne Girard-Bujold: Okay.

(Amendment agreed to)

The Chair: There are a number of amendments for clause 12. We're at G-8.

Mr. McTeague.

Mr. Dan McTeague: I move that Bill C-23 in clause 12 be amended by replacing line 16 on page 27 with the following:

> 103.(1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application at section 75 or 77.
>
> (2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.
>
> (3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought
>
> > (a) is the subject of an inquiry by the Commissioner; or
> >
> > (b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.
>
> (4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.
>
> (5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.
>
> (6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).
>
> (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly or substantially affected in his or her business by any practice referred to in one of those sections that could be subject to an order under that section.
>
> (8) The Tribunal may set the time within which the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

• 1625

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in the matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

103.2 If a person granted leave under subsection 103.1(7) makes an application under section 75 or 77, the Commissioner may intervene in the proceedings.

103.3(1) Subject to subsection (2), the

The Chair: Mr. McTeague just moved amendment G-8, as you see it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: These are the rules of double jeopardy, which you've just discussed at great length after pointing out that you can only proceed once on these matters. The last part made it clear—to the question put by Mr. Strahl—that the commissioner can intervene in proceedings started by a private person.

(Amendment agreed to on division)

The Chair: Mr. Strahl.

Mr. Chuck Strahl: We just got these amendments 20 minutes ago, so on the rest of these, I'd like to go on division. Clearly we've never had a chance to look at them. We're taking everybody's word here that this is how it's going and this is what they mean. I don't have any reason to doubt honourable members, and certainly not the commissioner. When we say on division, it's not because it's opposition. I'll go over them tonight, when I do my midnight reading, to know how they fit into the bill.

It's hard to visualize this, because—

The Chair: We'll let Mr. McTeague speak to this for one second.

Mr. McTeague.

Mr. Dan McTeague: Thank you, Madam Chair.

Mr. Strahl, much of what I am reading here is the basis, almost word for word, of what I proposed to give light and effect to private access. There are some things that have changed, for instance the times and dates—10 days rather than 15 days; one year rather than two years. They are substantive changes, but they are nevertheless agreeable to the committee.

I understand your reasons for asking for division, but I want to assure you that what I have proposed here are in fact just the slight modifications that were inferred by the presentations, including that of the commissioner.

Mr. Chuck Strahl: As long as you understand why I—

Mr. Dan McTeague: It's perfectly understood.

The Chair: Mr. Strahl, just to clarify, I had agreed that after the commissioner's appearance, he would work closely with Mr. McTeague, because it was Mr. McTeague's original proposal to ensure the wording was well understood. I apologize that you didn't receive it sooner than 20 minutes ago.

Mr. Chuck Strahl: It wouldn't be prudent of any of us to just say all in favour. I have no idea if it's exactly the same words. I trust Dan—

The Chair: Maybe I could ask them to spell out the differences as we go through. I apologize. I'm having them read the amendment to ensure everyone has it word for word. Maybe it would be better if I had them point out the differences.

Mr. Chuck Strahl: No, no. If something huge and awful is in the works, we'll be expected to find that before we vote on it in the House. But I don't anticipate that. "On division" just covers that off. Thank you.

The Chair: Okay. We have amendment G-9.

• 1630

[*Translation*]

Mr. Claude Drouin: I move that Bill C-23 be amended in clause 12 by:

(a) replacing line 20 on page 27 with the following:

paragraph 10(1)(b), issue an interim order

(b) replacing line 27 on page 27 with the following:

order if it finds that the conduct or measures could be of the type described in paragraphs (1)(a) and (b), respectively, and that, in the absence of an

[*English*]

The Chair: Mr. Drouin has just moved amendment G-9 as you see it in front of you.

Mr. von Finckenstein, do you have any comments?

Mr. Konrad von Finckenstein: This deals with the application for interim cease and desist orders. The *ex parte* now refers to section 10. It is now limited to paragraph 10.1(b). This is where the commissioner goes on an inquiry because he has reason to believe there's a violation of the order.

Paragraph 10.1(a) is when he's directed by the minister, and paragraph 10.1(c) is when there are six resident complaints. The idea here is that we cannot ask for a cease and desist order except where we have gone on inquiry because we believe there's a likely violation of the act. That's just a clarification of the first part.

The second part deals with the decision of the tribunal and makes it clear this tribunal has to come to the conclusion that the conduct or measures are of the type described in paragraphs 10.1(a) and (b), i.e., refusal to deal, tied selling, exclusivity, or market restriction. If the competition tribunal and council does not come to the conclusion that these are conducts or measures that could be of that type, then it won't grant it. That's all.

The Chair: Mr. Volpe.

Mr. Joseph Volpe: Commissioner, what specific case are you thinking about in this one?

Mr. Konrad von Finckenstein: This is the counterpart to what we have in airlines. In airlines we can issue a cease and desist order because of the high mobility of assets and the crisis that we have in the airlines.

In all other industries where we feel a conduct should be stopped while we investigate, we actually make an application to the tribunal. We would say to the tribunal that we believe there's a minimal case here, and ask them to please order this conduct be stopped while we investigate because if they don't, by the time we finish our investigation, this company may have gone out of business.

That's the situation in any industry. It depends, obviously, on the fact that we feel this is a fairly dramatic anti-competitive act and that there are likely to be dramatic consequences in very short period of time. That's why we would move.

Mr. Joseph Volpe: That's not a response to my previous question about the current situation in the airline industry.

Mr. Konrad von Finckenstein: No.

(Amendment agreed to on division)

The Chair: Now we go to amendment G-10. Mr. Drouin.

[*Translation*]

Mr. Claude Drouin: Thank you, Madam Chair.

I move that Bill C-23, in clause 12, be amended by replacing lines 38 to 44 on page 27 and lines 1 to 3 on page 28 with the following:

Consultation

(3) Before making an application for an order to prevent the continuation of conduct that could be the subject of an order under section 75 to 77, 79, 81 or 84 by an entity incorporated under the Bank Act, the Insurance Companies Act, the Trust and Loan Companies Act or the Cooperative Credit Association Act or a subsidiary of such an entity, the Commission must consult with the Minister of Finance respecting the safety and soundness of the entity.

[*English*]

The Chair: Mr. Drouin has just moved amendment G-10 as you see it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: This provision deals with applying for cease and desist orders against financial institutions. These are, of course, all subject to regulation by the Department of Finance and the Superintendent of Financial Institutions.

Just the mere fact that we would start such an action could have serious implications for the financial institution. Since the Minister of Finance is charged with the overall safety and soundness of the financial market, this makes it mandatory for us to consult with him on the safety and soundness of those institutions before we would undertake an action.

Given the nature of the dual responsibility for the financial sales industry, it was felt it would be prudent to make sure nothing would be done without consulting with the Minister of Finance, to avert any action that could affect the safety and soundness of an entity.

• 1635

(Amendment agreed to on division)

The Chair: G-11, Mr. Drouin.

[*Translation*]

Mr. Claude Drouin: I move that Bill C-23, in clause 12, be amended by adding after line 13 on page 28 the following:

Application to Tribunal for Extension

(5.1) The Commissioner may, before the expiry of the second 35 day period referred to in subsection (5) or of the period fixed by the Tribunal under subsection (7), as the case may be, apply to the Tribunal for a further extension of the interim order.

Notice of application by Commissioner

(5.2) The Commissioner shall give at least 48 hours notice of an application referred to in subsection (5.1) to the person against whom the interim order is made.

Extension of interim order

(5.3) The Tribunal may order that the effective period of the interim order be extended if

(a) the Commissioner establishes that information requested for the purpose of the inquiry has not yet been provided or that more time is needed in order to review the

information;

(b) the information was requested during the initial period that the interim order had effect, within the first 35 days after an order extending the interim order under subsection (5) had effect, or within the first 35 days after an order extending the interim order made under subsection (7) has effect, as the case may be, and

(i) the provision of such information is the subject of a written undertaking, or

(ii) the information was ordered to be provided under section 11, and

" the information is reasonably required to determine whether grounds exist for the Commissioner to make an application under any section referred to in paragraph (1) (a) or (b).

Terms

(5.4) An order extending an interim order issued under subsection (5.3) shall have effect for such period as the Tribunal considers necessary to give the Commissioner a reasonable opportunity to receive and review the information referred to in that subjection.

Effect of application

(5.5) If an application is made under subsection (5.1), the interim order has effect until the Tribunal makes a decision whether to grant an extension under subsection (5.3).

[*English*]

The Chair: Mr. Drouin has moved G-11 as you see it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: Yes, G-11 and G-14 are the same amendments. One is for all industries; G-11 is for the airline industry. When we apply for cease and desist order, here in G-11 the tribunal can grant it for a maximum period of 80 days. Now, it sometimes happens that the information that we need in order to decide whether to bring a full application to the tribunal or not has not been rendered to us; it has not been rendered to us by the alleged perpetrator of the anti-competitive act. So this provision allows us to apply to the tribunal and say, "We need to make a decision, and we can't make a decision because we don't have the information. We have requested it from the alleged perpetrator and they have not furnished it to us. Because of that we can't make a decision, but the cease and desist order is running out. We're coming to the end of the 80 days."

Therefore we can make out that case. The tribunal gets the power to extend those 80 days for as long as is needed for us to get the information and a reasonable time period on top of it to make a decision whether to drop the case or proceed and make a formal application. It's up to the tribunal to decide whether to grant us or not. Of course our obligation is to make out the case that this is vital information; we have requested it; it's in the hands of the alleged perpetrator and has not been delivered to us within the 80 days.

The Chair: Just so I understand you, sir, this would be the same as G-14.

Mr. Konrad von Finckenstein: Yes. G-14 is the same for airlines. In airlines it's not a tribunal that issues a cease and desist order, but the commissioner. But again after 80 days, if the information is not in our hands and we have demanded it and it is in the hands of the alleged perpetrator, then we can go to the tribunal and say this is the situation; please extend it for sufficient time for us to get the information, so we can make a decision. The tribunal again can decide whether to co-steward it, grant it, or not.

The Chair: Okay. Are there any questions on G-11?

Mr. Strahl.

Mr. Chuck Strahl: Mr. Commissioner, I submitted an amendment basically to accomplish the same thing. This is for the tribunal. G-14 would be the amendment that works exclusively under your power to do so. That covers it off.

• 1640

The intent of the amendment that I put forward is covered under this. As you described it, if the company is not coming forward with the information and they're being obnoxious about it, and you can convince the tribunal about it, then the order stays in effect until such time as they comply.

Mr. Konrad von Finckenstein: They shouldn't be able to benefit from their own tardiness.

(Amendment agreed to on division)

The Chair: Amendment G-12. Mr. Drouin.

[*Translation*]

Mr. Claude Drouin: I move that Bill C-23, in clause 12, be amended by replacing, in the English version, line 31 on page 28 with the following:

[*English*]

> On the day on which the order confirming the interim order is made; and

The Chair: Mr. Drouin has moved G-12 as you have it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: Thank you.

The provision right now says "on the day on which it is made", and we are now changing it to "the day on which the order confirming the interim order is made". It may not have been clear there what "it" referred to. In order to clarify it, it has been redrafted to make it absolutely clear. It is "the day on which the order confirming the interim order is made".

The Chair: Are there any questions?

[*Translation*]

Have you a question, Ms. Girard-Bujold?

Ms. Jocelyne Girard-Bujold: Yes, I do.

Is the purpose of this amendment to bring the English version in line with the French version?

Mr. Konrad von Finckenstein: Basically, yes. The French doesn't need to be amended because it is clearer. We merely need to amend the English.

Ms. Jocelyne Girard-Bujold: Thank you.

[*English*]

(Amendment agreed to on division)

(Clause 12 as amended agreed to on division)

(On clause 13)

The Chair: Amendment G-13 amends clause 13.

[*Translation*]

Mr. Drouin.

Mr. Claude Drouin: I move that Bill C-23, in clause 13, be amended by

(a) replacing line 17 on page 29 with the following:

> R.S., c. 19 (2nd Supp.), s. 45; 1999, c. 2, par. 37 (z.12)
>
> 13.(1) Subsection 104(1) of the Act is re-

(b) replacing lines 21 to 23 on page 29 with the following:

> an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75 or 77, may issue such interim order as it

« adding, after line 27 on page 29, the following:

> R.S., c. 19, (2nd Supp.), s. 45; 1999, c. 2, par. 37(z.12)
>
> (2) Subsection 104(3) of the Act is replaced by the following:
>
> Duty of the Commissioner
>
> (3) Where an interim order issued under subsection (1) of the application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

[*English*]

The Chair: Mr. Drouin has moved the amendment G-13 as you see it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: The effect of this amendment is to make sure that the interim orders do not apply in private access, that a party who applies for private access cannot ask for an interim order. The only person who can ask for an interim order....

Yes?

The Chair: Madame Faille, did you wish to...?

Mr. Konrad von Finckenstein: My apologies, I answered you too quickly.

The Chair: Okay. We're at G-13.

Mr. Konrad von Finckenstein: The purpose is interim orders right now under the section in your Bill C-23 only apply where the commissioner applies. Since we have now put in private parties and given them the right, this type of interim order, as contemplated by one or both, would also apply to private parties.

The Chair: Any questions? Mr. Strahl.

• 1645 

Mr. Chuck Strahl: Just for clarification, under private orders, would the commissioner issue the interim order or the tribunal?

Mr. Konrad von Finckenstein: It's always the tribunal that issues the order.

Mr. Chuck Strahl: Okay. So if they issued an interim order during the process of a private application, that's what they would do with it.

Mr. Konrad von Finckenstein: Basically you have to distinguish between cease and desist orders. Cease and desist orders are only available to the commissioner, whether they are issued by the commissioner or whether he applies for the tribunal. Those are not available to private parties. But when a private party goes to litigate, the court of course in the process of a full hearing can make interim orders. This section has now been amended to make sure that the private party has that right.

Mr. Chuck Strahl: Thank you for that.

(Amendment agreed to on division)

(Clause 13 as amended agreed to on division)

The Chair: Mr. Strahl, I believe you have the next amendment.

Mr. Chuck Strahl: I have that amendment here, just for clarification. I'm not sure if it's still necessary.

The Chair: This is the 20 to 30 days.

Mr. Chuck Strahl: Right. Under G-14, though, we can do one of two. G-14, as the commissioner has explained, has the same effect as—

The Chair: Do you wish to withdraw your amendment then?

Mr. Chuck Strahl: Well, assuming that we're going to pass G-14, and I'm open to the commissioner's suggestion as well. This was an attempt to do exactly what we did under our G-11.

The Chair: Under our G-11 already.

Mr. Chuck Strahl: Yes. Basically this is for the commissioner himself, as opposed to the tribunal's ruling. So I take the commissioner's advice on this. Obviously it's more extensive on G-14. The effect was to allow it to be extended indefinitely if necessary.

The Chair: Mr. von Finckenstein.

Mr. Konrad von Finckenstein: I thank you, Mr. Strahl.

Your amendment puts that power into the commissioner. G-14 puts it into the tribunal. We have to apply to the tribunal and make out the case for such an extension. I believe this is fairer, because we can do it up to 80 days. So I think we should accept G-14.

Mr. Chuck Strahl: I'll withdraw my amendment. That's the effect I wanted. I think it's covered in G-14, if it's the same as we just went through on G-11.

The Chair: Okay. That amendment is not moved.

If I understand correctly, the wording in G-14 is the same as the wording in G-11. Is that correct?

Mr. Konrad von Finckenstein: Yes. As I say, in both the wording is the same. It's an extension of a cease and desist order.

The Chair: I was just going to have Mr. Drouin move it, but maybe we could take it as having been read, as it's in front of you, if it's already been read in G-11.

Monsieur Drouin.

[*Translation*]

Mr. Claude Drouin: May I move the proposed new clause 13.1, Madam Chair?

[*English*]

The Chair: If you could move G-14.

Mr. Claude Drouin: Yes, okay.

The Chair: You don't have to read it all. You just have to move the amendment.

Mr. Claude Drouin: I so move.

The Chair: Mr. Drouin's moved the amendment that you have in front of you, G-14, as if read.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: I apologize. I said the wording is the same, but the time periods are slightly different in this one from the other one.

The Chair: Could you explain the difference?

Madam Faille.

Ms. Louise Faille: In the interim order of G-11, the order's 10 days and then there are two possible extensions of 35 days. In this case we've taken into account that the first order is 20 days, and then there are two possible extensions of 30 days. That's the only basic difference. We've just taken into account the respective provisions.

(Amendment agreed to on division)

The Chair: We have amendment G-15. Mr. McTeague.

Mr. Dan McTeague: I'm sorry, which one are we at?

The Chair: G-15. Oh, wait. I have G-16 and then G-15. G-15 is next. Do you have G-15?

Mr. Dan McTeague: Yes, I have it. Thank you.

I move that Bill C-23 in clause 14 be amended by (a) replacing line 34 on page 29 with the following:

> 103.3 or a temporary order under section

(b) by replacing line 11 on page 30 with the following:

> 103.3, 104.1 or consent agreement under section 106.1 on application by the Com-

• 1650

(c) by adding after line 27 on page 30 the following:

> 106.1 (1) When a person granted leave under section 103.1 makes an application to the Tribunal for an order under section 75 or 77 and the terms of the order are agreed to by a person in respect of whom the order is sought and consistent with the provisions of this Act, a consent agreement may be filed with the Tribunal for registration.
>
> (2) On filing the consent agreement with the Tribunal for registration, the parties shall serve a copy of it on the Commissioner without delay.
>
> (3) The consent agreement shall be published without delay in the *Canada Gazette*.
>
> (4) The consent agreement shall be registered within 30 days after its publication unless a third party makes an application to the Tribunal before then to cancel the agreement or replace it with an order of the Tribunal.
>
> (5) Upon registration, the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.
>
> (6) On application by the Commissioner, the Tribunal may vary or rescind a registered consent agreement if it finds that the agreement has or is likely to have anti-competitive effects.

(7) The Commissioner must give notice of an application under subsection (6) to the parties to the consent agreement.

The Chair: Mr. McTeague has just moved amendment G-15 as you see it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: This is the area-of-consent agreement I spoke to you about when I appeared before you last time. Bill C-23 now suggests that a consent agreement may be registered and that it may include terms whether or not they could have been opposed by the tribunal. It has now been changed to make it clear that a consent agreement has to be consistent with the provisions of the act; i.e., it has to be a consent agreement the tribunal could have issued.

This is a consent provision private parties may enter into, and they have to be consistent with the provisions of the act, the same as any consent agreement the Commissioner enters into—which we will get to in a moment. Upon filing it, we get notice of it, and it becomes effective within 30 days of a registration unless the third party makes an application to vary it. This is basically in order that private parties who engage in litigation don't have to litigate it to the bitter end. They can make a deal, and they can register it. As long as that deal is consistent with the act, it becomes a consent judgment of the tribunal.

(Amendment agreed to on division)

The Chair: We're on amendment G-16. Mr. Drouin.

[*Translation*]

Mr. Claude Drouin: I move that Bill C-23, in clause 14, be amended by replacing lines 38 to 40 on page 29 with the following:

the Tribunal against that person.

[*English*]

The Chair: Mr. Drouin has moved amendment G-16 as you see it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: We just spoke about consent agreements. These are now consent agreements that are made by the commissioner, and again, the words "and may include other terms, whether or not they could be imposed by the Tribunal", which are now in Bill C-23, are being removed.

(Amendment agreed to on division)

The Chair: We're on amendment G-17. Mr. Drouin.

[*Translation*]

Mr. Claude Drouin: I move that Bill C-23, in clause 14, be amended by

(a) replacing line 8 on page 30 with the following:

Rescission or variation of consent agreement or order

106.(1) The Tribunal may rescind or vary a

(b) adding after line 27 on page 30 the following:

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

• 1655

[*English*]

The Chair: G-17 is moved by Mr. Drouin as you have it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: It can be here in the consent agreement. The previous amendment made sure that it had to be an amendment that was consistent with the act. Now a person who is directly affected by a consent agreement and who feels that this judgment is not consistent with the act is given the right to go to the tribunal within 60 days after the consent agreement has been registered and ask the tribunal to vary or rescind that consent agreement.

Basically, the commissioner can make a consent agreement with any party as long as it's consistent with the act. Anybody directly affected by that agreement who feels it's inconsistent with the act has 60 days to go to the tribunal and challenge that consent agreement.

The Chair: Are there any questions on G-17? Mr. Strahl.

Mr. Chuck Strahl: Just for greater clarity, is it if you make a ruling or if the tribunal makes a ruling?

Mr. Konrad von Finckenstein: We start an action against the company. The company comes to us and says, why don't we settle this? We make a consent agreement, we draft it, we register it, and it becomes a judgment of the court. If somebody else is directly affected by that and says that we shouldn't have done it, that this was something the tribunal couldn't impose, they have 60 days to go to the tribunal to challenge the agreement.

Mr. Chuck Strahl: If you use the current sexy issue, which is airlines, let's suppose there were some sort of interim agreement agreed to between two parties, but somehow we'd forgotten to think of some little guy who's flying to Victoria from Abbotsford. If he feels that it's somehow compromising his future and contravenes the act, then could he apply under this grace period here, the 60-day period?

Mr. Konrad von Finckenstein: If he could prove that he's likely affected by it and that what we did was outside the act, yes indeed, he could do it.

Mr. Chuck Strahl: So he couldn't just ask to be included in the interim order. It would have to be a case where it contravenes the intent of the act.

Mr. Konrad von Finckenstein: Precisely.

Mr. Chuck Strahl: And if he wanted to, he could start his own further action, I suppose. Otherwise, the interim order as it affects him....

Mr. Konrad von Finckenstein: To take your hypothetical situation, let's say we have an action with Air Canada and we settle it. If we settle it to the detriment of some other airline, presumably, and our settlement is outside the terms of the Competition Act, then it could be attacked.

Mr. Chuck Strahl: Good. Thank you.

(Amendment agreed to on division)

(Clause 14 as amended agreed to on division)

(On clause 15)

The Chair: We're on amendment G-18.

[*Translation*]

Mr. Drouin.

Mr. Claude Drouin: I move that Bill C-23, in clause 15, be amended by replacing line 23 on page 31 with the following:

> Reference by agreement of parties to a private action
>
> (3) A person granted leave under section 103.1 and the person against whom an order is sought under section 75 or 77 may by agreement refer to the Tribunal for determination any question of law, or mixed law and fact, in relation to an application or interpretation of Part VIII, if the Tribunal grants them leave. They must send a notice of their application for leave to the Commissioner, who may intervene in the proceedings.
>
> Reference procedure
>
> (4) The Tribunal shall decide the questions

[*English*]

The Chair: Amendment G-18 is moved as read by Mr. Drouin.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: As you know, the act right now has provisions for references if there's an issue of fact or law where both parties to an action want to settle rather than start a whole law suit. Where everything really turns on some interpretation or some definition, they can bring it before the tribunal and the tribunal can make a ruling.

Now that we've opened the act to private parties, the provision here that basically allows two private parties engaged, unless they refuse to deal in a case where there is a question of interpretation of the act or its application.... They can by consent go to the tribunal and say, "Just decide this one issue for us, because everything turns on it. There's no need to bring it to a full case."

The reference provisions that are in Bill C-23 in proposed section 124.2 now have been extended to also allow private parties to avail themselves of these reference proceedings.

The Chair: Are there any questions on G-18? Mr. Strahl.

• 1700

Mr. Chuck Strahl: We talked again this morning about the usefulness of the guidelines, the advisory bulletins that the commissioner and the tribunal put out. Does this affect that in any way, other than that it expands to include those that are initiated by right to private access? Is that what it does? Or does this change it?

Mr. Konrad von Finckenstein: The act uses some very vague language. How do you apply it to specific provisions? Very often everything falls on how you determine one or two words. What Bill C-23 does is allow us, rather than start a whole full-scale institution costing maybe a million dollars, to have just this very limited litigation on the interpretation of that section, because everything falls from it.

What we're saying here is why should this be restricted to the commissioner? If two private parties are now disputing an issue and have the same uncertainty about an interpretation, they can do it. It has nothing to do with our guidelines. Our guidelines are generally to help people interpret; they just tell them what our position is. They may not agree with our position, of course.

(Amendment agreed to on division)

The Chair: Mr. McTeague.

Mr. Dan McTeague: I have a question and perhaps even a motion—but I don't want to spring this on my colleague here—on clause 15. It refers to an amendment I had made earlier regarding the International Trade Tribunal and a reference there by the commissioner. It is contained in the package originally given to us. I just want to read the motion; I'm leaving it open to the committee whether or not to deliberate it at this time—we didn't have much discussion on it. The motion is that Bill C-23 be amended in clause 15 by adding after line 27 on page 31 the following:

> 124.3(1) The Commissioner may ask the Canadian International Trade Tribunal to inquire, in accordance with terms of reference approved by the Minister, into the state of competition and the functioning of markets in any sector or subsector of the Canadian economy.
>
> (2) The Canadian International Trade Tribunal shall conduct the inquiry, submit a report to the Commissioner and the Minister and cause notice of its submission to be published in the *Canada Gazette*.

(3) The Minister shall cause a copy of the report to be tabled before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is submitted.

Madam Chair, the reason I'm moving the motion is for obvious reasons. We've heard a number of witnesses come before us to suggest Canada's international competitiveness is in question. There have been a number of incidents, particularly with the airline industry, but also with gasoline and other industries, where there may be sectoral concerns. Currently the commission does not have this discretion, but it may very well be put to some use.

I'm advancing it on the presumption that this is not something that has created a lot of fire and incendiary remarks, and I think it's something we may well want to entertain, with the consent of the members of Parliament here. I'll gladly withdraw it, though, if there's a lot of objection.

Perhaps the commissioner would like to also comment on it while I'm putting it on the floor.

The Chair: Before the commissioner comments, Monsieur Drouin wishes to comment on it.

[*Translation*]

Mr. Claude Drouin: Thank you, Madam Chair.

Since the committee hasn't really worked on this, I think it would be better to defer our study and come back to this matter later. Therefore, I move that we defer consideration of Mr. McTeague's motion.

[*English*]

The Chair: Mr. von Finckenstein, did you have any comments on it?

Mr. Konrad von Finckenstein: I have followed the proceedings of your committee very closely. I don't believe there was any discussion or debate on this particular amendment. Mr. Drouin will know better, but I don't believe the government supports it; it's not being put forward as a government amendment. Maybe this is an amendment that should have the benefit of full discussion before being moved.

The Chair: Mr. McTeague.

Mr. Dan McTeague: Madam Chair, under the circumstances, I withdraw the motion in accordance with what we've heard here.

The Chair: The motion is not moved.

(Clause 15 as amended agreed to on division)

(Clause 16 agreed to on division)

(On clause 17)

The Chair: The next amendment is G-19.

[*Translation*]

Mr. Drouin.

Mr. Claude Drouin: I move that Bill C-23 be amended by adding after line 34 on page 31 the following:

> 1999, c. 2, s. 41
>
> 16.1 Subsection 8(1) of the Act is replaced by the following:
>
> Jurisdiction
>
> 8. (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the Competition Act and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under 124.2(2) of that Act.

• 1705

[*English*]

The Chair: Mr. Drouin has moved amendment G-19, as you have it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: The purpose of this clause is to give the Competition Tribunal authority to hear references under part VII.1, part VIII, and part IX of the Competition Act. There was some doubt after our consultation with the tribunal whether the Competition Tribunal Act, as it stands right now, does give them the power to hear references under part IX. Putting this section in makes clear that they have that capacity.

(Amendment agreed to on division)

The Chair: On clause 17, Mr. Strahl, we have your amendment and then we have amendment G-20. I'm not sure.... We can't pass both of them. Do you want to move your amendment first, or did you want to withdraw your amendment?

Mr. Chuck Strahl: Well, I—

The Chair: Did you want to move your amendment? Go ahead.

Mr. Chuck Strahl: I move that in Bill C-23, clause 17 be amended by replacing lines 4 to 7 on page 32 with the following:

> *Competition Act* on a final or interim basis.

Basically, what I did with that amendment was take the clause—this deals with awarding costs of proceedings—and remove the phrase "if it finds that the proceedings are frivolous or vexatious or that any step in the proceedings is taken to hinder or delay their progress." It just basically eliminates that.

As for its purpose, we heard testimony from several witnesses—certainly it was quite clear, for example, from Jack Quinn, who is one of the lawyers who testified—who mentioned that the standard of the bill now, which includes "frivolous and vexatious", is not going to work very well to ensure that the private litigants' incentives are aligned with the public interest, because a frivolous and vexatious test is a very high standard to meet on a cost award.

The intent of this amendment is to take out "frivolous and vexatious" and leave the common law rules to apply to it. But in the amendment that follows—the government amendment—they are more specific. They add the words "in accordance with the provisions governing costs in the Federal Court Rules, 1998."

I'm not familiar exactly with what that does, but I don't think it obviates what I'm trying to do here, which is just to take "frivolous and vexatious" out and allow this to be covered by the common rules. If that's the intent, I'll withdraw my motion, and we can go with the government one.

The Chair: That's okay with you?

Mr. Chuck Strahl: I believe so. I'm not a lawyer, but my understanding is it covers it by general Federal Court rules.

The Chair: Mr. von Finckenstein, is that correct?

Mr. Konrad von Finckenstein: You should be a lawyer; your understanding is absolutely correct.

The Chair: All right, then. Mr. Strahl has withdrawn his amendment—not moved it. We will go to Mr. Drouin for amendment G-20.

[*Translation*]

Mr. Claude Drouin: I move that Bill C-23, in clause 17, be amended by replacing lines 4 to 7 on page 32 with the following:

> Competition Act on a final or interim basis, in accordance with the provisions governing costs in the Federal Court Rules, 1998.

[*English*]

(Amendment agreed to on division)

(Clause 17 as amended agreed to on division)

(Clause 18 agreed to on division)

(On clause 19)

The Chair: On clause 19, we have an amendment, I see—amendment G-21. This should do it.

[*Translation*]

Mr. Drouin.

Mr. Claude Drouin: Thank you, Madam Chair.

I move that Bill C-23, in clause 19, be amended by replacing line 7 on page 33 with the following:

> 4.1(2) or (4) or 100(1), section 103.1, 103.3 or

[*English*]

The Chair: Mr. Drouin has moved amendment G-21, as you have it in front of you.

Mr. von Finckenstein.

• 1710

Mr. Konrad von Finckenstein: Yes. This section of the Competition Tribunal Act allows the chairman or a single judicial member to sit alone to hear applications. We have now created a new type of application, an application for leave to bring a private party action. This is a consequential amendment, saying such a member sitting alone can also hear leave applications for the private member actions. It's a consequential amendment. Since we created this new leave-type application, we also have to empower somebody to hear them.

(Amendment agreed to on division)

(Clause 19 as amended agreed to on division)

(Clause 20 agreed to on division)

The Chair: Shall the title carry?

Some hon. members: Agreed.

Some hon. members: On division.

The Chair: Shall the bill carry?

Some hon. members: Agreed.

Some hon. members: On division.

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

Some hon. members: Agreed.

Some hon. members: On division.

The Chair: Shall the committee order a reprint for use at report stage?

Some hon. members: Agreed.

The Chair: I want to thank the commissioner and the other witnesses for being here today. I want to thank all the witnesses who attended and all the members for their cooperation on this bill—in particular Mr. McTeague for all his hard work, but others as well. I also want to thank our researchers and our clerks.

Mr. Strahl.

Mr. Chuck Strahl: Madam Chair, we heard a lot of testimony over the last while about the need for resources for the commissioner. I wondered if he would care to comment, based on this amended bill, on whether he feels there will be additional resources required because of this amended bill, and if so, whether he'd like to give us some idea as to what he thinks the extra obligations will mean to him and his budget.

The Chair: Mr. Strahl, I'll be happy to let Mr. von Finckenstein answer that, but in fairness, he wasn't at the roundtable meetings we had for about four hours this morning. We will be inviting him to meet with us once we have an opportunity to schedule more meetings.

Mr. von Finckenstein, if you'd like to, comment.

Mr. Konrad von Finckenstein: Thank you.

Just generally, I understand from my observer this morning that there was lots of testimony as to the insufficient resources of the Competition Bureau. Indeed, we are under-resourced and we have an enormous task, and stretching it out costs all industries of the economy. These provisions per se will undoubtedly mean extra work for us, but the problem of resourcing the bureau is not with this bill or the additional duties. It's just generally that we are under-resourced for the tasks we carry out.

As Madam Chairman said, I wasn't prepared for this question. I'd gladly come back to you in a more detailed manner.

The Chair: Thank you very much.

I want to remind members we have a meeting tomorrow afternoon at 3:30 on the small-business lending. There will be no meeting on Thursday, and Tuesday morning we will have a future business meeting. If you could, think about that for next Tuesday.

Thank you very much. The meeting is now adjourned.

This is Exhibit “41” 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



CANADA

House of Commons Debates

VOLUME 137 • NUMBER 125 • 1st SESSION • 37th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Wednesday, December 5, 2001

Speaker: The Honourable Peter Milliken

Hon. Lawrence MacAulay (Solicitor General of Canada, Lib.): Mr. Speaker, Canada condemns all terrorist acts and any organization that supports terrorists. Like the British, we added the military ring of Hamas to those groups with assets that were frozen in Canada. We will continue to take any appropriate action.

Mr. Brian Pallister (Portage—Lisgar, Canadian Alliance): Mr. Speaker, I look forward to seeing tax breaks for terrorists in red book four. It will be a good plank for members opposite.

Yesterday the Prime Minister refused to condemn Yasser Arafat for condoning terrorism and harbouring terrorists. Today in Geneva, a one-sided United Nations declaration singling out Israel for censure was passed. Sadly the government supported that resolution. This spineless position will allow opponents of peace to undermine the bilateral peace process. It will be used by terrorist groups to legitimize their attacks against Israeli civilians and it will jeopardize Canadian neutrality.

Is that what the Liberals mean by a balanced approach?

Right Hon. Jean Chrétien (Prime Minister, Lib.): Mr. Speaker, we were present but some decided not to be there. We believe in the policy of being present. Our representative there made it clear that the resolution, as far as it concerned Israel, was completely unacceptable. We believe it is better to be present and speak than not to be there and let the resolution go without anybody talking against it.

* * *

[*Translation*]

VOLUNTEERS

Mr. Robert Bertrand (Pontiac—Gatineau—Labelle, Lib.): Mr. Speaker, my question is for the President of Treasury Board. Today is International Volunteer Day, the closing day of the United Nations International Year of Volunteers

What has the Government of Canada done to fulfill its commitments made in the 1999 Speech from the Throne to improve relations with volunteers and the community sector?

● (1500)

Hon. Lucienne Robillard (President of the Treasury Board and Minister responsible for Infrastructure, Lib.): Mr. Speaker, this morning the Prime Minister of Canada signed an accord with the volunteer sector and announced funding of $50 million over five years for the Canada volunteerism initiative.

This accord will help enhance our relationship with the volunteer sector, a relationship of co-operation, trust and partnership.

[*English*]

We all value the contribution of volunteers in our communities. I would encourage all members of parliament to volunteer themselves and to support voluntary organizations in their communities.

* * *

AIRLINE INDUSTRY

Mr. James Moore (Port Moody—Coquitlam—Port Coquitlam, Canadian Alliance): Mr. Speaker, thanks to the transport minister and the government, Air Canada has a virtual monopoly on air service in this country on the domestic side. In response, the transport minister said yesterday "It is untenable from the point of view of government and parliament; I would suspect it is untenable from the point of view of the public who want a choice". His policy to back up that statement and the idea that he floated yesterday was that Air Canada should be given a monopoly for domestic service on major routes.

Why is it untenable for Air Canada to have 85% of the market, but the government now supports giving it 100% of the domestic service in this country? How does that work?

Hon. David Collenette (Minister of Transport, Lib.): Mr. Speaker, I am getting used to the hon. member uttering false statements in his questions.

The fact of the matter is that the policy of the government, endorsed by his party in the year 2000, was working before September 11. On September 11 there was an incident which caused grave harm to the airline industry not just in Canada but around the world. I would hope that he would work with us to try to find a solution instead of making those false accusations in the House.

Mr. James Moore (Port Moody—Coquitlam—Port Coquitlam, Canadian Alliance): Mr. Speaker, part of the solution is certainly going to be a new transport minister, which is something the government will not agree with.

The transport minister, rather than blaming September 11 which his government does for everything, needs to look in the mirror and blame himself. He gave $100 million to Air Canada for its out of pocket costs. It took that money, launched Air Canada Tango and knifed Canada 3000 out of business.

It is because of the transport minister and the government that airline competition is dead in two-thirds of the country. Why does the government not take responsibility for its own actions in the death of competition in our skies?

Hon. David Collenette (Minister of Transport, Lib.): Mr. Speaker, one would think the member would be on his feet praising the government for bringing in tougher measures with respect to the Competition Act, to allow airlines like WestJet from western Canada to come into eastern Canada and give the service that people deserve.

* * *

[*Translation*]

OFFICIAL LANGUAGES

Mr. Benoît Sauvageau (Repentigny, BQ): Mr. Speaker, despite the fine words of the Minister of Transport concerning the respect of the Official Languages Act by Air Canada, the government set us straight yesterday with the statement that there is no specific penalty relating to non-compliance with this legislation.

[*English*]

Pursuant to its order of reference of Wednesday, September 26, the committee has considered Bill C-15B, an act to amend the Criminal Code (cruelty to animals and firearms) and the Firearms Act and has agreed to report it with amendment. I thank members of the committee and staff for great work in very short order.

TRANSPORT AND GOVERNMENT OPERATIONS

Mr. Ovid Jackson (Bruce—Grey—Owen Sound, Lib.): Mr. Speaker, as chair of the Standing Committee on Transport and Government Operations I have the honour to table, in both official languages, the eighth report of the committee.

Pursuant to its order of reference of Friday, November 20, the committee has considered Bill C-44, an act to amend the Aeronautics Act and reports the bill with amendment.

As well, pursuant to its order of reference of Friday, November 20, the committee has considered Bill C-43, an act to amend certain acts and instruments and to repeal the Fisheries Prices Support Act and reports the bill, in both official languages, with amendment.

INDUSTRY, SCIENCE AND TECHNOLOGY

Ms. Susan Whelan (Essex, Lib.): Mr. Speaker, I have the honour to present, in both official languages, the seventh report of the Standing Committee on Industry, Science and Technology on Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act. The committee reports the bill with amendment.

I thank all witnesses, committee members, researchers and everyone for their hard work and co-operation throughout the proceedings with respect to the bill.

* * *

BUSINESS OF THE HOUSE

Hon. Don Boudria (Minister of State and Leader of the Government in the House of Commons, Lib.): Mr. Speaker, I rise on a point of order, now that the committees have reported. There has been consultation among House leaders and I believe you would find unanimous consent to the following order to offer convenience to hon. members. I move:

That notwithstanding any standing order or usual practice, the report stages of Bill C-15B and Bill C-44 may be taken up on or after Thursday, December 6.

In other words, the bills that were just reported could be taken up tomorrow.

● (1525)

The Speaker: Does the hon. government House leader have unanimous consent of the House to propose the motion?

Some hon. members: Agreed.

[*Translation*]

The Speaker: Is it the pleasure of the House to adopt the motion?

Some hon. members: Agreed.

(Motion agreed to)

[*English*]

CANADA ELECTIONS ACT

Mr. Janko Perić (Cambridge, Lib.) moved for leave to introduce Bill C-418, an act to amend the Canada Elections Act (voting in place of a mentally incapacitated elector by power of attorney)

He said: Mr. Speaker, I am pleased to rise today to introduce my private member's bill, an act to amend the Canada Elections Act.

The proposed amendments would permit an individual to possess a legal power of attorney certificate on behalf of individuals for whom he or she is legally responsible. A case such as this arose during the 2000 federal election in my riding of Cambridge. I encourage all members of the House to support the bill.

(Motions deemed adopted, bill read the first time and printed)

Mr. Peter Adams: Mr. Speaker, if the House would give its consent I would move that the 41st report of the Standing Committee on Procedure and House Affairs regarding the review of the radio and television broadcasting of proceedings of House committees presented to the House on Monday, December 3, be concurred in.

The Speaker: Does the hon. member for Peterborough have unanimous consent of the House to propose the motion?

Some hon. members: Agreed.

An hon. member: No.

Mr. Keith Martin: Mr. Speaker, in an effort to avoid the imminent massacre of thousands of innocent black civilians in Zimbabwe, I ask for unanimous consent of the House to move that the government, in co-operation with other international states, freeze the personal assets of President Robert Mugabe of Zimbabwe; ban all international travel by Mr. Mugabe and his ministers; suspend Zimbabwe from the Commonwealth; and call for an arms embargo on Zimbabwe.

The Speaker: Does the hon. member for Esquimalt—Juan de Fuca have unanimous consent of the House to propose the motion?

Some hon. members: Agreed.

An hon. member: No.

* * *

PETITIONS

TERRORISM

Mr. John Duncan (Vancouver Island North, Canadian Alliance): Mr. Speaker, I have a petition signed by 150 individuals from my riding of Vancouver Island North. The petitioners ask parliament to fight terrorism in a just manner and to exert a restraining influence on those who would retaliate with violence.

PERSONS WITH DISABILITIES

Mr. John Maloney (Erie—Lincoln, Lib.): Mr. Speaker, pursuant to Standing Order 36 I have three petitions to present that deal with protecting people with disabilities.

The petitioners call upon parliament under section 51 of the Canadian Charter of Rights and Freedoms to uphold the Latimer decision of the Supreme Court of Canada.

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This is Exhibit “42” 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



CANADA

House of Commons Debates

VOLUME 137 • NUMBER 127 • 1st SESSION • 37th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Friday, December 7, 2001

Speaker: The Honourable Peter Milliken

I will mention again without hesitation Mothers Against Drunk Driving. This is one of the most dedicated and hard-working organizations in the fight against impaired driving. However, there are a lot of other organizations with the similar vision of eradicating our highways of impaired drivers.

The more we can do on this issue, the better we will feel about the safety of our streets and communities. We will all sleep soundly and be proud that we contributed in the fight against drinking and driving.

Mr. Loyola Hearn (St. John's West, PC/DR): Madam Speaker, I listened very closely to what my hon. colleague from the Canadian Alliance had to say. Quick passage of this legislation is essential because we are at the time of year when drinking and driving, unfortunately, is a very serious factor of everyday life. If I had it my way, it would not be .05% either. It would be if people drink, they do not drive. I have seen too many people injured or killed because of drunk drivers behind the wheel. However drinking and drinking, specifically, is a great social cost to our country.

To educate our people as to the seriousness of this issue, we should be doing more at the school level. Unfortunately, more and more young people are drinking before they are legally allowed to and many of them end up behind the wheel.

First, would the member agree that this legislation should be passed quickly and hopefully implemented for this coming holiday season? Second, does he think we should educate our young as to the dangers of drinking and driving?

● (1255)

Mr. Richard Harris: Madam Speaker, I am sure we could pass the bill right now.

My. hon. colleague spoke about education in the schools. I believe, and the government can correct me if I am wrong, that there is a provision in the bill or a recommendation in the committee report that funding would be provided to various organizations to ensure there is early education.

It should be a co-operative effort between the federal and provincial governments, with the federal government providing some obligated funding, which I think it certainly does not have a problem with, the provincial government is throwing in some. We will all work together and get this thing beat.

The Acting Speaker (Ms. Bakopanos): Is the House ready for the question?

Some hon. members: Question.

The Acting Speaker (Ms. Bakopanos): The question is on the motion. Is it the pleasure of the House to adopt the motion?

Some hon. members: Agreed.

The Acting Speaker (Ms. Bakopanos): Accordingly, the bill stands referred to the Standing Committee on Justice and Human Rights.

(Motion agreed to, bill read the second time and referred to a committee)

Hon. Don Boudria (Minister of State and Leader of the Government in the House of Commons, Lib.): Madam Speaker, there has been consultation among all parties, and I want to thank in advance all colleagues for their co-operation on the bill. Following that consultation, I believe you would find unanimous consent for the following motion. I move:

To deem Bill C-46 to have been referred to the committee of the whole, reported without amendment, concurred in at report stage and read a third time and passed.

The Acting Speaker (Ms. Bakopanos): The House has heard the terms of the motion. Is there unanimous consent?

Some hon. members: Agreed.

(Motion agreed to)

(Bill deemed considered in committee, reported, concurred in, read the third time and passed)

* * *

COMPETITION ACT

The House proceeded to the consideration of Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

SPEAKER'S RULING

The Acting Speaker (Ms. Bakopanos): There is one motion in amendment standing on the notice paper for the report stage of Bill C-23.

[*Translation*]

This motion was reviewed, and the Chair is of the opinion that it meets the criteria stated in the note to Standing Orders 76.1(5) regarding the selection of motions in amendment at report stage.

[*English*]

Motion No. 1 will be debated and voted upon by itself.

[*Translation*]

I will now put Motion No. 1 to the House.

MOTIONS IN AMENDMENT

Ms. Madeleine Dalphond-Guiral (Laval Centre, BQ) moved:

Motion No. 1

That Bill C-23 be amended by adding after line 16 on page 28 the following new clause:

"11.31 The Act is amended by adding the following after section 77:

77.1 (1) A person who alleges that they are directly affected in their business or are precluded from carrying on business due to their inability to obtain adequate supplies of a product anywhere in a market may, with leave of the Tribunal, make an application under section 75.

(2) A person who alleges that they are directly affected in their business by exclusive dealing, tied selling or market restriction may, with leave of the Tribunal, make an application under section 77.

(3) No application may be made under section 75 or 77 by a person referred to in subsection (1) or (2) more than two years after the practice has ceased.

(4) Any person making an application under section 75 or 77 shall serve the person in respect of whom the order is sought and the Commissioner with a copy of the application for leave.

(5) The Tribunal shall give notice to the Commissioner of its decision on an application for leave pursuant to this section.

(6) Within thirty days of the granting of leave to a person to make an application under section 75 or 77, the Commissioner may become a party to the application but, after thirty days, may do so only at the request of or with leave of the Tribunal.

(7) Where an application is made to a court for an order under section 75 or 77 and the parties agree on the terms of the order and such terms are in accordance with the terms of this Act, whether or not any of the terms could have been imposed by the court under this Part, the order agreed to may be filed with the court for immediate registration.

(8) On being filed under subsection (7), an order shall be registered and, when registered, shall have the same force and effect, and all proceedings may be taken, as if the order had been made by the court."

She said: Madam Speaker, I suppose you are rather surprised to see me rise to speak to Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act, at report and second reading stage.

As you know, I am much more comfortable dealing with issues regarding health, culture, citizens' relationships and pedagogy. But the House being a forum for pedagogy, you will see that I am very comfortable talking to Bill C-23.

Every day, as private citizens, we are faced with competition. With globalization and the opening of markets, competition is often fierce, and it is not rare to see the little guys being swallowed up by the big guys, at the expense of consumers. Competition is a rather neutral concept. It all depends on how we use it. We all know that this neutrality is all the more delicate as the interests involved are greedy.

I often go for advice to my friends the dictionaries, *Robert* and *Larousse*—you know, the one that *scatters to the winds*. They are a wealth of information that never cease to enrich me. Here is the definition of competition that can be found in the *Larousse* dictionary.

Competition: Competing interests between several persons creating a competition and, in part, between merchants or firms trying to attract clients with the best price, quality, etc.

It goes on to say:

Free competition: An economic system without any intervention from the state to limit industry and trade freedom, and under which producers coalitions are viewed as a crime.

That is it for definitions. In the end, competition is a bit like what Aesop said about the tongue as being the best and the worst of things. A twisted tongue is as troublesome as unfair competition.

As a matter of fact, Bill C-23 is aimed at improving, albeit slightly, the competition framework. In this area as many others, rules are needed as people should have access to quality products and services at acceptable prices instead of being the victims of practices favouring the corporate bottom line.

If I may, I would like to take a minute to read the summary of Bill C-23, which goes like this:

This enactment amends the Competition Act and Competition Tribunal Act. The amendments include the following:

amendments to facilitate cooperation with foreign competition authorities for the enforcement of civil competition and fair trade practices laws;

amendments prohibiting deceptive prize notices;

amendments streamlining the Competition Tribunal process by providing for cost awards, summary dispositions and references;

amendments broadening the scope under which the Tribunal may issue temporary orders; and

some housekeeping items.

The Bloc Quebecois supports the objectives of Bill C-23 because they are in the interest of the public, since the parameters set in the bill should respond to the legitimate needs of small and medium size businesses and protect the rights of consumers to enjoy the benefits stemming from healthy competition.

Recent events have given us a telling example of what can happen when competition turns into a trade war. Indeed, the softwood lumber issue that comes up regularly, where the Americans impose excessive surcharges on Canadian softwood lumber exports to the United-States, clearly shows the negative and unfair consequences of decisions made in the context of fierce competition.

Another example, just as flagrant as the previous one, is the poor state or even the non-existence of air service to remote communities due to the fact that Air Canada has a quasi-monopoly on air service in this country.

● (1300)

The only way to calm those with an insatiable appetite for profit is to legislate both domestically and within international trade organizations and to be ever vigilant in all spheres of human activity.

Everyone recognizes that Bill C-23 is a step in the right direction, but we could go even further. Indeed, many aspects should be considered by the legislator, including price fixing practices and the merger review process, as well as proceedings before the competition tribunal.

In that spirit, I will read an excerpt from testimony given before the Standing Committee on Industry, Science and Technology on October 17 by a representative from the Association québécoise des indépendants du pétrole. He raised a real concern with regard to the fact that, and I quote:

—access to the Competition Tribunal [would be closed] except in situations of "usual trade terms". We put it to you that suppliers of petroleum products would only have to illustrate that they cannot supply products because of abnormal trade conditions to stall access to the Tribunal.

We propose instead that the new provisions for access to the Tribunal provide for markets where trade terms are not usual. For example, should there be a relative shortage, supply should be provided to all undertakings on a prorated basis, in keeping with the way that the market usually operates. If, for instance, the amount of product available makes it possible to respond to only 80% of normal needs, the majors and the independents should each be able to obtain 80% of their regular supply. In this way, both types of undertakings would be subject to the same conditions and none would be forced into bankruptcy because of a lack of stock. Given the uncertain international situation at the moment, such a situation might easily arise.

Therefore, it was my great pleasure to introduce in the House, seconded by my colleague, the member for Verchères—Les-Patriotes, an amendment to respond to the concerns of small independent retailers. Since the Speaker did not treat us by reading the amendment in her lovely voice, I should like to take a moment now to read it for the House:

That Bill C-23 be amended by adding after line 16 on page 28 the following new clause:

"11.31 The Act is amended by adding the following after section 77:

77.1 (1) A person who alleges that they are directly affected in their business or are precluded from carrying on business due to their inability to obtain adequate supplies of a product anywhere in a market may, with leave of the Tribunal, make an application under section 75.

(2) A person who alleges that they are directly affected in their business by exclusive dealing, tied selling or market restriction may, with leave of the Tribunal, make an application under section 77.

(3) No application may be made under section 75 or 77 by a person referred to in subsection (1) or (2) more than two years after the practice has ceased.

(4) Any person making an application under section 75 or 77 shall serve the person in respect of whom the order is sought and the Commissioner with a copy of the application for leave.

(5) The Tribunal shall give notice to the Commissioner of its decision on an application for leave pursuant to this section.

(6) Within thirty days of the granting of leave to a person to make an application under section 75 or 77, the Commissioner may become a party to the application but, after thirty days, may do so only at the request of or with leave of the Tribunal.

● (1305)

There are two sections left that I will read quickly:

(7) Where an application is made to a court for an order under section 75 or 77 and the parties agree on the terms of the order and such terms are in accordance with the terms of this Act, whether or not any of the terms could have been imposed by the court under this Part, the order agreed to may be filed with the court for immediate registration.

(8) On being filed under subsection (7), an order shall be registered and, when registered, shall have the same force and effect, and all proceedings may be taken, as if the order had been made by the court."

This is an amendment in which we recognize the great work done by our colleague from the riding of Ajax—

An hon. member: Pickering—Ajax—Uxbridge.

Mrs. Madeleine Dalphond-Guiral: —Pickering—Ajax—Uxbridge. All these riding names are complicated and very long. He has worked very hard and I believe that the bill before us is the concrete result of his commitment to work for the good of Canadians and Quebecers.

● (1310)

[*English*]

Mr. Pat Martin (Winnipeg Centre, NDP): Madam Speaker, I too will join in the debate at the report stage of Bill C-23 and on Motion No. 1 which seeks to amend the bill.

We believe the issue brought forward by the member for Laval Centre would benefit the bill and strengthen the intention of the amendments put forward at the committee stage.

I would like to remind all members that there was a great deal of co-operation at the committee stage. We agreed with the general thrust of the motions brought forward at that time. I see nothing in this motion that does anything but augment the direction in which we wanted to go at committee. I admire the hon. member for taking the trouble to introduce it at this stage.

I noticed that sections 75 and 77, which the hon. member seeks to amend, would have the effect of strengthening the private access to the Competition Tribunal for the offences that she mentioned: tied selling, market restrictions and exclusive dealing, and a number of the issues that came forward as being offensive to most Canadians and most Canadians I think wanted the industry committee to deal with these issues in a very strong way.

We look forward to the motion getting the same sort or co-operative support that many of the other amendments received at the committee stage. We hope to approve the amendment as it has been brought forward. I extend my compliments to the member for Laval Centre.

Hon. Brian Tobin (Minister of Industry, Lib.): Madam Speaker, it gives me great pleasure to take the opportunity to participate in report stage consideration of Bill C-23. As colleagues have said, this is a bill that is a result of a great deal of very good work by members of the Standing Committee on Industry, Science and Technology. No doubt the bill has been very much improved as a result of the collaborative approach that members have taken and their commitment to working together to make this a much better bill.

The main elements of the bill comprise the prohibition of deceptive prize notices, enhanced mutual international assistance in civil competition matters, streamlining improvements to the Competition Tribunal process, broadening the scope under which the tribunal may issue an interim order, a limited right of access to the tribunal and specific measures to protect competition in the Canadian airline industry.

On the issue of private access there has been a great deal of debate. There have been a great many witnesses and those who spoke who were diametrically opposed to each other with respect to the right of private access. I will come back to that issue in just a moment and refer specifically to the amendment being proposed by the hon. member who spoke just a few moments ago on behalf of the Bloc Quebecois.

First , I want to talk about deceptive practices. The amendment to prohibit deceptive prize notices addresses unscrupulous promoters who mislead their victims into believing they have won a prize without disclosing the excessive costs associated with collecting the prize. The commissioner has testified that this is a growing problem in Canada and the bureau, quite literally, receives thousands of complaints each year.

We have all heard of Canadian seniors receiving scratch and win cards in the mail. People scratch the card and discover they have supposedly won a prize. They then follow instructions and place a telephone call in order to claim their prize. However, they are not forewarned and they cannot know or be aware that the cost of placing the call is generally greater than the value of the so-called prize.

In short, senior citizens across the country are being targeted by corrupt and unscrupulous individuals seeking to quite literally take advantage and to steal their saved, hard-earned monies.

The approach proposed in Bill C-23 sets out a balance between capturing improper conduct and the legitimate practices of the majority of the business community. No doubt there are legitimate prize contests that do in fact treat citizens appropriately.

With respect to foreign evidence gathering, Bill C-23 proposes amendments that will facilitate the gathering of evidence from foreign jurisdictions with respect to civil competition matters. This is similar to what already exists for criminal matters under the mutual legal assistance treaty to which Canada and several dozen other countries are signatories. I believe these amendments will help us do a better job in a wide variety of areas but notably with respect to these corrupt so-called competitions or prize scams.

On a more technical side, the bill proposes to streamline the tribunal process and broaden the powers available to the tribunal. First, the amendments will permit the commissioner and the person who is the subject of an inquiry to refer to the tribunal any question of law in relation to the application or interpretation of the act. This is also available to private parties that agree to refer a question to the tribunal related to part VII.1 through to part IX of the act.

Also, the tribunal will be able to assess costs. The initial position of the government was limited to the assessment of cost by the tribunal in the case of frivolous or vexatious litigation intended to hinder or delay procedures before the tribunal.

Many witnesses before the committee urged the adoption of the ordinary cost rules of commercial litigation in order to have a proper deterrence against strategic litigation. Therefore the government tabled a motion to reflect this concern. Other changes permit the tribunal through summary disposition to rapidly deal with unsubstantiated matters.

The last amendment proposed with respect to tribunal improvements addresses interim orders. We have heard that certain anti-competitive practices cause irreparable harm to the Canadian economy.

● (1315)

Up until now the commissioner could not apply to the tribunal during an inquiry to obtain a cease and desist order to stop anti-competitive conduct. First he had to obtain sufficient evidence to make a case before the tribunal. The problem is that these inquiries are time consuming and they are resource intensive.

The amendments proposed will now allow the tribunal, when certain conditions are met, to render an interim cease and desist order. The order will be issued for an 80 day period with the possibility of extension where the commissioner has not received the information necessary to complete his inquiry and to determine whether an application should be made before the tribunal.

I want to address the matter of private access. Under the current system, the commissioner is the only person who can submit an application before the tribunal. This monopoly has been the subject of several studies over the past three decades. Many proposals have been made to permit the right of private access to the tribunal without involving the commissioner. One of these proposals was contained in a private member's bill tabled here by our colleague, the member for Pickering—Ajax—Uxbridge, and was part of the public policy consultation.

A great deal has been said about private access, during the consultations and again during the committee hearings. There were strong views expressed and, I think it is fair to say, a division, primarily between those who belong to the small and medium sized business community and those who belong to Canada's largest corporations, those that are members of the chamber of commerce. On the one hand, there is a concern for a right to private access, and on the other, the concern that Canada not become a litigious society where strategic litigation occurs primarily for reasons of corporate warfare rather than genuine need or concern. The committee worked very hard to try to resolve both, on the one hand the request for private access, and on the other the concern about not creating an overly litigious corporate environment in Canada.

The amendments that we now see and the manner in which private access is described is very much the result of the good work of the committee and very much the result of the compromise which has been reached between the parties that had diametrically opposing views on the matter as they testified before committee. It is for that reason, because we now have, I think, a measure of harmony and a measure of agreement after a great deal of hard work, good work, by members on all sides of the House,. that I would submit that further amendments or further changes at this stage of the game may very well undo, although that would not be the intention, the consensus and the compromise that has now been reached.

There is one other matter I want to speak to during the time that is available to me and that is that the last set of amendments added to Bill C-23 are specific to the airline industry. This industry was severely affected by the tragic events of September 11. Canadian airline passenger volumes have dropped. Airlines have lost passengers to alternative tourist transportation methods. In the midst of this turbulent period, airlines in Canada and abroad are trying to continue normal operations while adjusting to the impact of the events of September 11.

All the airlines have been affected. At the time of the collapse of Canada 3000, the commissioner had sufficient evidence to issue a temporary cease and desist order against Air Canada for abusing its dominant position to the detriment of Canada 3000. Air Canada's competitors, starting with WestJet, identified shortcomings in the Competition Act that could and, they submitted, should be remedied.

The events, as we all know, attracted much media coverage and commentary across the country, especially after the news that additional amendments would be added to Bill C-23 to address the airline industry specifically. We need to remember that since the coming into force of Bill C-26 in 2000, the Competition Act has included a specific regime for domestic air transport. The amendments tabled today will close a potential gap that was created by Bill C-26 and will encourage compliance with the abuse of dominance provisions of this act.

● (1320)

The commissioner has indicated that based on his experience in the use of the temporary cease and desist power he obtained in Bill C-26 it was possible that the order would expire before an application could be made before the tribunal. The commissioner has an 80 day window in which to determine whether to make an application before the tribunal with respect to an abuse of dominant position by a dominant air carrier, but that determination is dependent upon having the necessary information in his hands.

The perverse effect of the rules as they currently work is that if information is not forthcoming and if in fact an investigation is not completed, the dominant carrier to whom an order is made can return to the abusive conduct the day after the commissioner's order expires. Hence, we have amendments designed to extend the cease and desist period, amendments designed to give real teeth to the powers available to the commissioner, amendments which are timely in the context of returning Canada's airline industry to a stable operation.

[*Translation*]

Mr. Yvan Loubier (Saint-Hyacinthe—Bagot, BQ): Mr. Speaker, I am pleased to speak to Bill C-23 at report and second reading stage.

First of all, I would like to say that we support this bill. Amending the Competition Act, certain provisions of which go back to the last century, is a step in the right direction.

However, we find it somewhat unfortunate that every time there is an opportunity to improve a situation, to improve a bill, to give it more teeth, and there are often arguments in favour of a complete overhaul, the government prefers a strategy of baby steps.

As I mentioned, this bill is a step in the right direction. But it is the same as the reform of the criminal code, where the government had to take two runs at it before it finally came around to what the Bloc Quebecois had been arguing for a long time.

So it is with the Competition Act. It is entirely to the minister's credit that he accepted these amendments to the Competition Act, which is toothless in Canada, if we compare it to the U.S. legislation. But the government could have gone much further.

As for what is good about this bill, one good idea is encouraging private access since, in the previous legislation, competitors were not allowed to take a case directly to the competition tribunal on their own behalf. I think that this is one notable improvement. It also improves the effectiveness and handling of complaints.

This is limited to four areas. However, they are major ones, if compared to all the complaints referred to the competition tribunal in recent years, including complaints regarding the refusal of suppliers to sell in an anticompetitive context, exclusive dealing, tied selling, and market restriction.

Tied selling is a very important matter. There was a loophole in the legislation with respect to the definition of tied selling, as well as the precise situations in which tied selling could be said to exist, and the measures which were proposed to reduce the risk of the practice.

I will give an example of just how important tied selling is. You are clients of a financial institution. You go to this institution for a loan and you are forced, or strongly encouraged, as a precondition to obtaining the loan, to buy insurance or other financial products offered by the same financial institution.

This kind of tied sales strategy by financial institutions or others is illegal. In that regard, we now have an additional tool to at least reduce the possibility of tied sales, without eliminating it completely, of course, since that is practically impossible.

The fact that interim orders can be issued in cases where a business is suspected of anti-competitive practices is a good idea. Monetary penalties also give more teeth to the legislation, particularly with regard to air carriers.

As I was saying, this is not enough. A few moments ago, the minister promised to continue reviewing the act and to look at further amendments. I would like to mention to him that the first improvement that should be made concerns section 45 of the act. This section, which dates back to the end of the 19th century, allows some form of collusion between multinationals to fix prices or to carry out other anti-competitive activities, such as predatory practices or market segmentation. These practices are totally shameful when one considers what has happened over the years in the oil industry.

Then there are price fixing practices. Our legislation does not have enough teeth to prevent that. We may have our doubts about certain price fixing practices, but we do not yet have the necessary tools to lodge formal complaints in that regard. We saw that in the oil industry in particular.

There is another element missing, namely the merger review process.

● (1325)

Two years ago, there was a major debate on mergers, particularly bank mergers. The debate was very productive, because it gave us a better understanding of what was going on in the industry and what its future might be in light of globalization and the opening up of markets.

On that point, we discovered some flaws in the legislation dealing with competition and we also discovered that parliament lacks the authority to review these merger issues, other than through the Minister of Finance's office, which has the final say on any merger plan and on the analysis resulting from its refusal or approval.

Moreover, when mergers are approved, we do not have the required criteria, analysis mechanisms or legislative tools to deal with any unfair practice that might occur once the mergers are completed.

The minister should examine the issue more thoroughly and maybe, in a way, copy the U.S. legislation, which offers several more remedies than the Canadian legislation.

Finally, as the minister mentioned earlier, the Liberal member for Pickering—Ajax—Uxbridge put forward amendments pertaining to normal trade conditions.

In the legislation, with regard to suppliers, for example, who are in a monopolistic situation where businesses have to buy their input from them, or in an oligopolistic market where three or four suppliers control most of the market, a provision allowing recourse to the Competition Tribunal, which requires, however, that complaints be made in a context of normal business conditions, is not good enough for this kind of market.

I will give an example. In the oil industry, the major oil companies control 85% of the wholesale market for oil products. Then what are the normal conditions in their case? Can they rely on the fact that there are abnormal market conditions, which prevent them from supplying independent retailers, small retailers for example, with crude oil or more refined oil? They can argue that conditions are abnormal, but they forget that they are the ones setting the conditions, determining the market conditions.

So, we would have liked the minister, right from the start, to accept the amendment, which came initially from one of his colleagues and which was picked up by the Bloc, because we are non partisan when the time comes to stand up for the interests of consumers and the industry.

We accept the notion that a Liberal can have a good idea. It happens from time to time. But we would have liked the Minister of Industry to accept this amendment of ours right away. There is still time to do so.

The minister could accept this amendment, which would better protect independent retailers, particularly in the oil industry. It is not really any big deal, just a small additional amendment for the government—the minister is able to do it—to remove the issue of normal conditions, and that is all.

But you can rest assured, Madam Speaker, and I would ask you to speak for us to the minister, that we will make a positive contribution to improving the legislation, because it has needed to be updated for years. It needs to be given some muscle, more teeth, in order to better protect independent retailers in a market often dominated by the big boys. We especially need to protect entrepreneurs and consumers, ultimately, from anti-competitive predatory practices, such as price fixing, as we have seen over the years in the oil industry.

By the way, the price of gas today is at 55 cents per litre, approximately. But we are still not protected—due to shortcomings in competition legislation—from practices that we believed to be predatory in the past, and that allowed gas prices to be set at unprecedented levels, to the detriment of consumers, independent truckers and the economy as a whole.

● (1330)

[*English*]

Mr. Charlie Penson (Peace River, Canadian Alliance): Madam Speaker, I am happy to take part in the report stage debate on Bill C-23. The bill has had a lot of work, as many members have already identified.

Four main components were originally identified in Bill C-23. They are: the co-operation between Canadian and foreign competition authorities; the prohibiting of deceptive notices of prizes; streamlining of the tribunal; and also the broadening of temporary orders. We have added an important fifth category, that of right of private access. The Bloc members are trying to make some amendments today through Motion No. 1, which I want to speak to in a moment.

It seems to me that the amendments to be made to Bill C-23 regarding co-operation between Canadian and international authorities really just are a reflection of the nature of business. More and more business is international in scope and therefore we need co-operation in these areas. These amendments concern the civil competition matters and essentially mirror existing arrangements that we already have on criminal matters with the Mutual Legal Assistance in Criminal Matters Act. This just applies to the civil aspect.

The change will assist the Competition Bureau in gathering information it needs to make decisions affecting competition in Canada. It will ensure that the decisions about domestic competition matters are made in Canada. We support that.

We are a little more ambivalent to the second category of prohibiting deceptive notices of prizes, We cannot hold people's hands; they have to take some responsibility for their own lives. If this would help, I guess we could go along with it. There needs to be more individual responsibility. When people get a phone call and are told that they have won $100,000 but they are going to have to send in $5,000 to get it, they should be pretty wary of what is coming at them.

The third category is the streamlining of the Competition Tribunal process by providing the tribunal with the power to award costs. I think this is an excellent one especially as we move into the area of private access in order to make sure that no frivolous actions come before the tribunal. It needs that.

It also has the power to make summary dispositions and hear and determine references. The summary dispositions essentially just mean that the tribunal can consider whether it wants to hear the case or not. If it is a trivial matter or one designed to find out what the competition is doing, the Competition Tribunal can dismiss it out of hand.

In order to deal with a couple of other aspects of broadening the powers of temporary orders, that is important, especially in the case of the airline industry where a huge industry can be put out of business in a matter of a few months. The cease and desist orders do need to be strengthened with perhaps longer periods of time. This is also aimed at putting severe penalties against those companies which embark on practices essentially to put a competitor out of business. If they ignore the cease and desist order they will be hit with severe penalties.

These are all important elements. However, I would suggest that competition law, although very important, is no substitute for competition. Sometimes Liberal members on the industry committee and here in the House tend to reflect on the idea that we do not need to have healthy conditions to allow business to operate here in a very competitive manner; we can just substitute that with regulation and intervention. If that were to work in the airline industry, this country would have a thriving airline industry. We know that it has not worked.

Intervention and regulation has hurt the airline industry. It hurts most industries. I believe that competition will flourish if we have the necessary business environment to allow that to happen. That means low taxes and low regulation. Also, things like interprovincial trade barriers have to be eliminated so that we can do business inside our country as well as we can do business outside our borders.

It seems to me that while we need to have this competition law, for those who will not abide by the competitive process, it is no substitute.

● (1335)

I want to deal for a moment with the Bloc amendment to Bill C-23. Our concern is that we think several of the amendments are redundant because they are already in Bill C-23. They are specifically subclauses 1, 3, 4 and 5.

In regard to subclause 2, currently under the refusal to deal provisions, the tribunal can order a supplier to do business with a distributor under usual trade terms. If the amendment were passed, it would cause the tribunal to become a trade regulator which is exactly what we are trying to avoid.

It seems to me that the people who came before the committee and who probably caused this amendment to happen were from the independent petroleum producers. I asked them whether the right to private access satisfy them. They agreed it would. They said that in the past the competition commissioner would not take their case up and bring it forward. He was acting as a gatekeeper. I asked specifically if they had the right to take the case directly to the tribunal, would that satisfy them. The answer was clearly yes. Having said that, they should pursue that option and not try to make more regulations. Let them make their case before the tribunal and determine who is right or wrong on the issue and live by it.

Subclause 6 would limit the commissioner's ability to participate in a private access case. He would get 30 days to intervene and after that he could only do it if the tribunal requested it. That is not necessary.

Subclause 7 would require consent agreements to be filed with the tribunal. Then it would be as though the tribunal had ordered an agreement.

We disagree with those aspects. The others as I named before, subclauses 1, 3, 4 and 5, are already in the bill. We do not support the amendments to the bill that are presented today.

Largely, we believe that the competition policy is serving us well. It is not meant to protect a competitor; it is meant to protect competition throughout the country.

It is very clear to the Canadian Alliance that there is no substitute for a healthy business environment. All the competition policy and law in the world, all the regulation, is not going to accomplish what we can accomplish by allowing as many competitors as possible to be in business. That is the best insurance that there is good, healthy competition across the country, lots of companies competing on a healthy market basis. They will provide the kind of assurances that we need in terms of competition policy.

● (1340)

Ms. Val Meredith (South Surrey—White Rock—Langley, PC/DR): Madam Speaker, it is my pleasure to stand during second reading of Bill C-23, the amendment to the Competition Act, and speak not only to the amendment of the member for Laval Centre but to the entire bill.

As mentioned by the Minister of Industry, the amendments were proposed to make it easier for the government to co-operate with foreign competition tribunals. In the global economy it is important that governments have the ability to co-operate with each other when dealing with multinational organizations.

The bill was also introduced to prohibit deceptive notices of prizes. The member for the Canadian Alliance mentioned that it was the responsibility of the individuals receiving such notices to know there was a scam and that they were being set up. A lot of the people who respond tend to be elderly people who are lonely, who are by themselves, who do not get much mail and who in many cases are not completely aware of what is happening in the world and have no reason to suspect a it may be a sham.

For a lot of our older generation that is not part of the culture it grew up in or is one of which it is aware. It seems to be a relatively new phenomenon that letters go out telling people they have won a prize but must put money into it to collect. It is important that we have measures to limit and legislate against that kind of deception through the mail.

Bill C-23 was also introduced to streamline the Competition Tribunal process. Lord knows that any process dealing with quasi-judicial bodies needs to be streamlined. It was interesting to hear the minister's comments about not wanting to establish a culture of unnecessary litigation. His government seems to think it is quite all right to take Canadians to court and get into the litigation process. It will be interesting to see whether the government will take note of the amendments it has put into the Competition Act to limit unnecessary litigation.

The bill was also introduced to broaden the tribunal's ability to issue temporary orders. I know from my days as transportation critic that the competition commissioner and tribunal need to be able to react immediately to situations, even if the actions are temporary, to put cease and desist orders in place and allow some kind of remediation to occur.

Bill C-23 has already been to committee. It was dealt with at the committee level. Witnesses from the business community and elsewhere appeared at the committee to give their impressions of how the amendments might affect them. Two additional amendments were recommended at committee so we now have two amendments to the legislation that was originally put before committee.

One of these concerns is the private right to access. We have heard how important it is for companies, corporations, small business people and individuals to have the ability to advance their causes even though the Competition Tribunal may not think they are as important as other issues. As in many cases, once something is put on the back burner the damage is already done before it can be dealt with. It is important that private right to access be added to the legislation.

There are also tough new measures to deal with anti-competitive practices in the airline industry. Canadians across the country know the difficult times the airline industry has been through. We have recently seen the demise of the second largest air carrier in Canada, Canada 3000. Although the competition commissioner was prepared to put a cease and desist order, the process of applying for the order and having it put in place is often not quick enough to stop the damage that takes place through predatory or overtly anti-competitive practices.

● (1345)

The private right to access is extremely important. It allows private parties to apply directly to the Competition Tribunal for remedies concerning refusal to deal, tied selling, market restriction and exclusive dealing.

As I mentioned earlier, it is important for people to be able to challenge what is considered to be unfair practices by a competitor trying to put out a smaller competitor simply through the use of these kinds of tactics. It is very important to the well-being of members of the small business community to be able to fight back. This legislation will provide them with an opportunity to challenge larger businesses that are trying to put them out of business. It is a very healthy thing in the bill.

Private access also means that if the competition commissioner feels that something is not as important as, say, airline restructuring, it can still go through the process and it is not be tied up for years.

The legislation will create additional case law that will provide the business community with a better understanding of what the laws of the land are and how they might fall under the practices considered not to be in the best interests of competition. It will develop case law that can be used for the furtherance of fair business practices.

The amendments will allow for new penalties, including fines of up to $15 million for an airline acting in an anti-competitive manner. One of the concerns we heard in reaction to Canada 3000 going under and other complaints before the commission, was that the legislation had no teeth to allow the competition commissioner to respond in a way that would stop predatory behaviour. It is nice to see that the legislation will finally contain teeth so the competition commissioner will have some meaningful input into keeping anti-competitive behaviour at bay.

The ability of the competition commissioner to extend cease and desist orders beyond the current 80 days is very important. Because of the time it takes to prepare a case and to bring the complaint against a competitor, it is very timely and sometimes the application has not been processed before the cease and desist order expires. We are very pleased to see this extension because it will make the process more meaningful.

I want to bring up the fact that Air Canada is objecting to the amendments. It feels that it is not right that the competition commissioner or Competition Act would single out one industry, it being the industry being singled out.

Letters were sent from one of its bankers to members of the transport and industry committees claiming that this amendment will prevent the issuance of new equity shares to assist the airline in raising new funds. It should be noted that this would appear to have been very poorly handled by the company seeing as it was the Prime Minister's former chief communications officer who forwarded the letter to members of parliament. The letter which was forwarded to members and both the transport and industry critics was seen by some to have the appearance of a threat. From my discussions with many government MPs, it would appear that there is not a great deal of fondness for the message from the Prime Minister's former chief spin doctor.

The airline is concerned that these amendments were tabled after its appearance at the industry committee. I would think that is a legitimate complaint.

● (1350)

Some have sympathy for the airline because it was not given an opportunity to respond in kind to the industry committee after the fact. The industry committee would probably be wise to allow Air Canada to appear before it and have its case heard.

This is important legislation. We must make sure there is competition, particularly in the airline industry. The coalition will be supporting Bill C-23 at second reading.

[*Translation*]

Mr. Stéphane Bergeron (Verchères—Les-Patriotes, BQ): Madam Speaker, I too am pleased to rise to speak to bill C-23. Before I begin, I will say how happy I am to have this opportunity, as this legislation has been in the making for a long time.

First, I would like to congratulate my colleague from Laval Centre. The amendment she put forward is, in my view, quite relevant and interesting. By putting forward this amendment, I believe she proved how competent and multi-talented she is. My colleague from Laval Centre excels in a number of areas, including culture and health care, as she said herself. But I did not know she had such expertise in the area of competition. I want to congratulate her and tell her how happy we are to be able to debate this brilliant amendment in the House today.

That being said, we must give credit where credit is due. Although the government is unable to do so, for our part, we routinely recognize the value and merit of our opponents' work. This bill is the result of the work done by a number of members who do not belong to cabinet. They put forward private members' bills that caught the eye of the government to such an extent that it decided to include them in what I would call an omnibus bill, as it deals with various aspects of the Competition Act, with a view to amend and improve it.

The bills I refer to are Bill C-402 inroduced by the member for Pickering—Ajax—Uxbridge, Bill C-438 by the member for Kitchener Centre, Bill C-471 by the member for Notre-Dame-de-Grâce—Lachine and Bill C-472, again by the member for Pickering—Ajax—Uxbridge.

I am not sure that we need to conclude from this listing of the work by members, which the government has decided to use as a basis for drafting is Bill C-23, that the government is not interested in, or does not take into consideration, or does not choose to use, anything but suggestions from its own members. We must, however, be glad that the work done by MPs on an individual basis, or in other words the private members' bills and motions can gain momentum and end up with a positive outcome in the House, as is the case with Bill C-23.

I hope that the minister is lending an attentive ear to what we are saying this afternoon, because his very careful attention to the first speeches was obvious. Let us hope that same attention has been given to the last ones. I think he was justified in pointing out that the bill is the outcome of conscientious and non partisan efforts by departmental staff, of course, but also and primarily by the Standing Committee on Industry, Science and Technology. For some months now, the committee has been addressing a potential review of the legislation and of the options and avenues that might be envisaged to tighten up Canada's Competition Act .

● (1355)

It is fortunate that, at the conclusion of this work, we were able before its examination to debate Bill C-23, which, as I was saying, is intended to act on certain suggestions.

However, it is unfortunate that the bill did not go further and that this pre-examination did not allow us to go further. The pre-examination should have allowed us to do so, because we had not accepted the principle of the bill. We could therefore have possible expanded the scope of concerns and the various amendments that could have been proposed.

It is also regrettable that the minister, while his speech was very carefully worded, if I can put it like that, set a rather partisan tone at the end of the debate, because, as he had indicated, up to that point the debate had been non-partisan.

We worked together as a committee to improve the bill. I think the amendment by my colleague from Laval Centre would have had the effect, the advantage, of improving the bill substantially. But since this amendment, it appears, did not come from a government member, arguments that I consider fallacious were cited to reject it, politely, I must say, but reject it nevertheless.

But it is not quite true that this amendment came from a member who is not a government member. And no, I am not announcing publicly that my colleague has decided to cross the floor of the House. However, her amendment was largely based on the work done by the hon. member for Pickering—Ajax—Uxbridge. This work resulted in certain provisions being included in Bill C-472, which sought to protect small retailers, particularly in the oil industry, and small businesses against bigger ones.

In this regard, when they appeared before the Standing Committee on Industry, Science and Technology, the representatives of the Association québécoise des indépendants du pétrole mentioned—and the minister should reread their evidence—that some provisions in Bill C-472 seemed to promote their interests, including their access to the resource.

Right now, we have a quasi-monopoly in which the resource—crude oil, oil, gas, refined product—is provided by a very small number of companies. These companies are in a position to drive independent retailers out of business.

Bill C-472 included provisions which eliminated this power of the major oil companies over the small independent businesses. The Association québécoise des indépendants du pétrole had just one small reservation and its concerned the expression standard market conditions used in Bill C-472, which it wanted to see removed from the bill.

Why? Because the standard market conditions are defined by the major oil companies in this instance. These companies determine what these conditions are. So, they could have argued before the competition tribunal that the demands of the independent companies went against the standard market conditions they themselves established.

Also, as I said, with extraordinary prescience, my colleague from Laval Centre took from Bill C-472 the relevant provision but without the expression standard market conditions. She presented this amendment, which the hon. member for Pickering—Ajax—Uxbridge had himself considered, to the House.

● (1400)

Therefore, the minister should be more open to this motion in amendment since it came initially, not from an opposition backbencher but from a government member.

I invite the House to vote in favour of this amendment, which I believe is important for small businesses, independent distributors and everyone who is faced with a monopolistic or oligopolistic situation. I hope all members will support this amendment.

[*English*]

The Acting Speaker (Ms. Bakopanos): Is the House ready for the question?

Some hon. members: Question.

The Acting Speaker (Ms. Bakopanos): The question is on Motion No. 1. Is it the pleasure of the House to adopt the motion?

Some hon. members: Agreed.

Some hon. members: No.

The Acting Speaker (Ms. Bakopanos): All those in favour of the motion will please say yea.

Some hon. members: Yea.

The Acting Speaker (Ms. Bakopanos): All those opposed will please say nay.

Some hon. members: Nay.

The Acting Speaker (Ms. Bakopanos): In my opinion the nays have it.

An hon. member: On division.

The Acting Speaker (Ms. Bakopanos): I declare the motion lost.

Hon. Don Boudria (for the Minister of Industry) moved that the bill be concurred in at report stage and read the second time.

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

Some hon. members: Agreed.

(Motion agreed to)

* * *

● (1405)

AN ACT TO AMEND CERTAIN ACTS AND INSTRUMENTS AND TO REPEAL THE FISHERIES PRICES SUPPORT ACT

The House proceeded to the consideration of Bill C-43, an act to amend certain acts and instruments and to repeal the Fisheries Prices Support Act, as reported (with amendment) from the committee.

Hon. Don Boudria (Minister of State and Leader of the Government in the House of Commons, Lib.) moved that the bill, as amended, be concurred in.

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

Some hon. members: Agreed.

Some hon. members: No.

The Acting Speaker (Ms. Bakopanos): All those in favour of the motion will please say yea.

Some hon. members: Yea.

The Acting Speaker (Ms. Bakopanos): All those opposed will please say nay.

Some hon. members: Nay.

The Acting Speaker (Ms. Bakopanos): In my opinion the yeas have it.

Some hon. members: The yeas have it?

The Acting Speaker (Ms. Bakopanos): I am just checking if everybody is awake. We are going very fast. In my opinion the nays have it.

An hon. member: The nays have it?

The Acting Speaker (Ms. Bakopanos): Let us start all over. In that way we will get it right.

Is it the pleasure of the House to adopt the motion?

Some hon. members: Yea.

The Acting Speaker (Ms. Bakopanos): All those in favour will say yea; all those opposed will please say nay.

Some hon. members: Yea.

Some hon. members: Nay.

The Acting Speaker (Ms. Bakopanos): Well, the yeas have it this time.

On division, since there is only one member who stood.

(Motion agreed to)

Mr. Ken Epp: Madam Speaker, I rise on a point of order. I am well aware that I cannot challenge the Chair, but I question conducting a vote twice when a decision was already called.

The Acting Speaker (Ms. Bakopanos): The hon. member has the right to challenge the Chair, I agree. On the other hand, it was not clear who was standing and who was not standing in the House. If the hon. member wants to take it up with the Speaker, he can take it up with the Speaker, I believe.

When shall the bill be read the third time? By leave, now.

Some hon. members: Agreed.

Hon. Don Boudria moved that the bill be read the third time and passed.

He said: Madam Speaker, my remarks are brief. All members of the House supported the bill at second reading. I thank them for that. All members of the House of course also supported the bill in committee, at least in the form it was when it eventually left the committee. I want to express my appreciation to all members.

The bill deals with a number of technical amendments. I thank the entire House for its support. Those will conclude my comments.

[*Translation*]

As I was saying earlier, this is a bill that only brings technical amendments to some bills. Since it has been supported by parliamentarians at all stages up until now, I take this opportunity to thank all members of the House for their support.

[*English*]

Mr. Loyola Hearn (St. John's West, PC/DR): Madam Speaker, to listen to the government House leader speak about the bill it is as if there is nothing to it and we should just say yea and leave here. I guess it does not matter whether we say yea or nay, we will have to say whatever the government side wants us to say anyway, it appears.

There are a couple of very interesting points in the bill. Under clause 4, subsection 19(1) of the act is about the Atlantic Canada Opportunities Agency. The Atlantic Canada Opportunities Agency is what a lot of people refer to as the government engine in Atlantic Canada. It is an agency that over the years has done a tremendous amount of good, but it is also an agency that has been manipulated by the government to carry out its wishes rather than fulfil the needs of the people who live in the Atlantic region.

When we hear members in general and the public talk about government abuse of money and about all the money dumped into Atlantic Canada, quite often those of us from Atlantic Canada can stand up and defend what the government is doing, but there are times when we cannot because of the manipulative processes the government uses in funding through agencies such as the Atlantic Canada Opportunities Agency. However, it is an agency that has tremendous potential to help Atlantic Canada.

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Published under the authority of the Speaker of the House of Commons

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