House of Commons
CANADA

Standing Committee on Industry, Natural Resources, Science and Technology

INDU • NUMBER 026 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Wednesday, March 23, 2005

Chair

Mr. Brent St. Denis

Standing Committee on Industry, Natural Resources, Science and Technology

Wednesday, March 23, 2005

● (1535)

[*English*]

The Chair (Mr. Brent St. Denis (Algoma—Manitoulin—Kapuskasing, Lib.)): Good afternoon, everyone.

I'd like to bring to order our Wednesday, March 23 meeting of the Standing Committee on Industry, Natural Resources, Science and Technology, during which we are continuing our study of Bill C-19, which amends the Competition Act.

We are fortunate to have with us today a number of witnesses who are very competent in the field, as past witnesses have also been. We look forward to their testimony.

I know some of you were scheduled to be here in December. We appreciate your indulgence in having to wait some time to come back. It's always a challenge around here to schedule things, so we appreciate that. We also appreciate that you're here today.

We're going to use the order that is on the agenda. We have three individuals, and then we have the McMillan Binch law firm.

We're going to start with Paul Crampton, please.

Mr. Paul Crampton (Partner, Osler, Hoskin and Harcourt LLP, As an Individual): It's a real pleasure to have the opportunity to appear again before this committee and to share my views on Bill C-19.

As in my last appearance before you here in early 2002, just before I left for a two-year sabbatical at the OECD, where I was responsible for helping developing countries to draft competition laws and to strengthen their enforcement capacity in the competition law area, I'm appearing here today in a personal capacity, not on behalf of a law firm in which I'm a partner or any other organization.

I understand that you all have a copy of my written remarks, which I will therefore only briefly summarize in the short time available for making these opening comments.

By way of overview, I'd like to state that I'm supportive of most of what's in Bill C-19, although I believe the levels of maximum administrative monetary penalties—what I'll call AMPs—being proposed for both first-time and subsequent orders are too high. I also strongly encourage you to include the repeal of the price maintenance provisions in section 61 of the act, in the list of current criminal pricing provisions. Finally, I urge the committee to resist any calls that may be made for Bill C-19 to be amended to include a new power to commence inquires into the state of competition in an industry or to allow a private right of access to the Competition Tribunal for abuse of dominant position or a private right of action before the courts for this type of conduct.

Turning more specifically to AMPs and the repeal of the pricing practices in sections 50 and 51, by way of background, let me just say that in a genuine attempt to make a constructive contribution to this committee's review of the act, I suggested in the fall of 2001 that the committee's concerns regarding the shortcomings of the pricing provisions could be effectively addressed by, first of all, repealing them; second of all, giving the tribunal the ability to impose AMPs for conduct falling within the scope of the abuse of dominance provisions; and thirdly, repealing paragraph 79(1)(a), which requires a demonstration that the respondent substantially or completely controls a market, for lack of a better term.

Bill C-19 proposes two of the three amendments that I suggested to you at that time, all of which this committee endorsed in its final report to the House. On balance, I believe these two changes would create a more effective approach to the pricing practices that are currently addressed in sections 50 and 51, while reducing the chilling and red-tape effects that are described in my paper. However, I submit that the $10-million maximum AMP being proposed for first-time orders under section 79 and the deceptive marketing practices provisions in part VII.1 of the act, along with the $15-million fine being proposed for subsequent contraventions, is too high. These proposed maximum AMPs outstrip, certainly in the case of subsequent orders, even the $10-million maximum fine allowed for section 45 of the act for price-fixing and other hard-core cartel behaviour that's recognized around the world as being the most egregious conduct addressed by competition laws.

There are two reasons, really, why it would be undesirable to have AMPs for civilly reviewable conduct at the same level as the maximum fine permitted for the most egregious conduct. The first is that it sends all the wrong signals to the courts regarding the seriousness with which we want them to be looking at truly hard-core criminal behaviour. Indeed, the courts could very will interpret the enactment of the proposed maximum AMPs as an indication that Parliament views hard-core cartel conduct as just another regulatory offence—like deceptive marketing practices or abuse of dominance—and of no greater seriousness than any of the other non-criminal provisions of the act.

I would urge Parliament not to let the courts lose sight of the fact that hard-core cartel conduct is truly criminal and reprehensible behaviour, and it stands in a class of its own, a class by itself. I say that from the perspective of someone who has spent a lot of time trying to promote a greater understanding of the criminal nature of cartel behaviour in parts of the world where price-fixing and the like are not taken seriously by the courts and the consequences have been quite dramatic.

● (1540)

Secondly, I think setting AMPs in the range of $10 million to $15 million arguably would constitute a criminalization of the deceptive marketing practices provisions in part VII.1 of the act and the abuse of dominance provisions. That gives rise to a serious constitutional issue that others have addressed in their remarks.

I should just say in passing that it's also difficult to understand why the maximum AMP available under the civil deceptive marketing provisions of the act should be ten times the level of the highest fine imposed by a court in respect of the criminal branch of the deceptive marketing practice of misleading advertising, found in section 52. What we're proposing here is something that would be ten times higher than the maximum fine that any court has every levied in a criminal prosecution under section 52. We shouldn't lose sight of that.

In the short time that I have available, let me just turn to the price maintenance provisions in section 61. I respectfully submit that at a time when we're finally taking the long overdue action to repeal the other arcane pricing practices in the act, it would make a lot of sense to include section 61 in the package of reforms. The reasons why the criminal law is not well suited to dealing with vertical price maintenance were addressed in the 1999 VanDuzer report and accepted by this committee, which noted that

> [a]ll witnesses, except Bureau officials, whocommented on price maintenance had a recurring theme: vertical price maintenance shouldbe de-criminalized and horizontal price maintenance should be moved to the conspiracyprovision.

As a result, in its final report the committee recommended that section 61 be repealed. I would just encourage you to follow through with that and include section 61 in the amendments, which I understand you're able to do, given that we're looking at this bill at first reading.

To take another few seconds on this point, it doesn't make any sense economically to distinguish between vertical non-price behaviour and vertical price behaviour. A supplier can effectively achieve exactly the same thing by engaging in a non-price practice—such as exclusive territories—that would give the supplier's dealers enough freedom from intra-brand competition to invest in the types of services they need to promote the supplier's product appropriately. The way the act is structured right now, it basically forces suppliers to artificially structure their distribution practices in a way that may not be optimal from their perspective, but which achieves essentially the same purpose, in order to avoid committing a criminal offence. We should get rid of this unfortunate consequence. It really is a leftover—some might call it hangover—from a time bygone.

So those are my opening remarks, and I look forward to the exchanges in the rest of this session.

Thank you.

The Chair: Thank you, Mr. Crampton.

I failed to mention that we invite witnesses to speak for five to seven minutes. You were right on. You did that for us, so thank you.

We'll move next to Brian Facey.

Mr. Brian Facey (Partner, Blake, Cassels and Graydon LLP, As an Individual): Thank you, Mr. Chairman.

I'm going to make three points, and you should have my outline of materials handy.

The first point is that section 61, the price discrimination provisions, should be decriminalized. I'm not going to spend any more time on that, because I agree with my good friend Mr. Crampton. The second point is that the proposed AMPs are almost certainly unconstitutional, so I'll spend a great deal of time on that. My third point is that there is no reason to amend the abuse laws or impose these AMPs at this time.

Turning to my second point, which is that the AMPs are unconstitutional, I thought one way of doing this might be to suppose that we are talking about administrative jail time, administrative imprisonment, instead of an administrative monetary penalty. What rights would you have under the law? Under the charter, you would have the right to be presumed innocent, you would have the right to require proof beyond a reasonable doubt, you would have the right to full disclosure of documents, you would have the right for an order to be imposed by a judge, and the law must not be vague.

Why is it that we have those protections for administrative jail time? The answer is that it's a true penal consequence, so the question becomes whether a financial penalty can also be a true penal consequence. The answer is yes, and the Supreme Court of Canada has made that decision. For your researchers, it's the case of R. v. Wigglesworth, [1987] 2 S.C.R. 541.

I want to quote for one moment from Justice Wilson, where she describes how a fine can be a true penal consequence, with the result being that the Charter of Rights applies:

> In my opinion, a true penal consequence which would attract the application of s. 11

—that is, of the charter—

> is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

She goes on to quote Professor Stuart, who says:

> ...other *punitive* forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(*h*)

of the charter.

So the question becomes how we know if something is for the purpose of redressing a wrong to society. Justice Wilson says that you look to the magnitude of the fine. She also gives another indication later on in the next paragraph:

> One *indicium* of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the *Royal Canadian Mounted Police Act*

—which was under consideration in that case—

> the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the Force, it is more likely that the fines are purely an internal or private matter of discipline.

Turning to this case here, Wigglesworth tells us we have to look at the size of the fine, and it's huge here. Everybody says that. Secondly, who is it paid to? Here, it's paid to the general revenue fund. Subsequent cases, like the case of R. v. Martineau, have added the question of whether or not sentencing factors are used in imposing the fine. Finally, is there a stigma? As I've mentioned, the fine here is huge. Who is it paid to? The general revenue fund. Are sentencing factors used? Yes, they are.

Clause 8 of the bill has a laundry list of factors that are to be considered, and they are very similar to the criminal sentencing guidelines or procedures that the courts use in sentencing for crimes, the most important of which is proposed paragraph (c), which talks about the history of compliance with any provision of the act, which is the classic question of whether the offender is a recidivist.

And last is stigma. I think it's an open question as to whether or not there's any stigma attached to being an abusive monopolist. My sense is that there probably is.

So if it is true that this penalty is of such a magnitude as to make it a true penal consequence, what does that mean for the proceedings?

● (1545)

Presumption of innocence? You don't have that in the tribunal. Proof beyond a reasonable doubt? You don't have that. Do you get full disclosure of documents in these proceedings? You don't have that.

The order is to be imposed by a judge. Well, under the abuse provisions, it's possible the order could be imposed by the two lay members on the tribunal and the judge could be dissenting.

Lastly, the law must not be vague. In my submission, this law is vague until the tribunal has heard the case and ruled on whether the behaviour is permissible. That's why it's a reviewable practice, permissible until after the tribunal has heard a case.

My third point, just to wrap up, is simply that there's no reason to amend the law or impose these AMPs. I'm not aware of any evidence that we need to change the law. I don't think much has been made of the remedies that are there now. Currently the tribunal, after finding an abuse of dominance, can make an order for divestiture. That has to be a very serious order. It can be ordered to divest shares or assets.

In addition, they can make behavioural remedies. In other words, they can stop the conduct and make any other order that's reasonable. In my submission, that's enough.

Thank you, sir.

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

We'll move now to Richard Annan.

● (1550)

Mr. Richard Annan (Head, Competition Law Group, Goodmans LLP, As an Individual): Thank you, Mr. Chair and members of the committee, for taking the time to hear my views. You have my written comments, so I'm just going to spend a few minutes highlighting some of the important parts of those.

I believe Bill C-19 deserves your support. While further amendments to the act are required, in my view, Bill C-19 is an important advance over what exists today, for the reasons I will touch on now.

Firstly, in terms of the pricing provisions of the Competition Act, it has been long recognized that the price discrimination provisions of the act are inappropriate, since price discrimination can be welfare-enhancing if output is increased. Differential pricing is common in the Canadian economy. In my view, a comprehensive economic analysis is requiredto determine under what circumstances price discrimination is anti-competitive. This is the kindof inquiry that should be done by the Competition Tribunal under a civil competitive effectsstandard. By repealing paragraphs 50(1)(a) and 50(1)(b) and section 51, Bill C-19 accomplishesthis objective, as such practices can be examined under the abuse-of-dominance provisions.

Secondly, in terms of predatory pricing, predatory pricing is certainly one of the most difficult areas of competition law. It is very difficult todistinguish aggressive competition from truly predatory conduct. Mistakes of over-enforcementcan deprive consumers of lower prices. In my view, with its economic and business expertise, the Competition Tribunal is betterequipped than the general criminal courts to judge the detailed economic and accountingevidence required to isolate predatory pricing from competitive pricing by an efficient rival,and to determine its competitive effects. In addition, a criminal sanction risks chilling competitivepricing, the very conduct the Competition Act is designed to promote and protect.By repealing paragraph 50(1)(c), Bill C-19 removes the criminal predatory pricing provision.It can be examined under the abuse-of-dominance provisions.

Turning to abuse of dominance, to my mind section 79 raises the basic question of incentives. Essentially, what is the incentive of a dominant firm to not engage in anti-competitive conduct if the sanction at the end of the day is to stop the conduct? If anti-competitive practices are indeed lessening or preventing competition substantiallyand are therefore likely highly profitable, why would any firm stop unless ordered to do so? The possible imposition of penalties changes this calculation.

The imposition of administrative monetary penalties would bring Canada more into line with theanti-trust regimes of Europe and the United States. The European Commission can imposepenalties of up to 10% of revenue for abuse of dominance. As you can imagine from the case the European Commission had recently involving Microsoft, that can run into penalties of hundreds of millions of dollars. In the United States, deterrence is provided by a civil cause of action that allows plaintiffs to recover up to three times theirlosses that result from such anti-competitive conduct.In addition, this committee recommended in 2002 that a private right of action should be extended to section 79. In my view, this would be a worthwhile addition to public enforcement of the abuse provisions, and Bill C-19 could be amended to include this change now.

In terms of administrative monetary penalties, Bill C-19 proposes to dramatically raise the AMPs for deceptivemarketing practices. The setting of a penalty level is more of an art than a science. Recent settlements—I'm thinking of the Forzani case, which was $1.2 million plus $500,000 in costs, or the Suzy Shier case, which was $1 million—certainly suggest that the current $100,000 maximum limit is inadequate. A $10-million penalty, however, is considerably more than $100,000 and does seem disproportionate.

I might also mention that some have commented on the $10-million level proposed for section 79, in that it may be inappropriate because it's at the same level as section 45. Again, you have to think about the kinds of corporations and fine levels that we're talking about here. In section 45, the limit of $10 million was put in place in 1986. In my view, that limit is far too low in today's environment. For example, Hoffmann-LaRoche paid penalties of about $48 million in total. Under section 46, which is a companion provision to section 45, some other corporations have paid more than $10 million in single-count indictments. And even if inflation adjusts the $10 million, today it would be something like $16 million, so I think the section 45 and section 46 limits could be a lot higher. The $10-million limit is also not that inappropriate given, for example, what's done in Europe and the United States.

● (1555)

In conclusion, I think Bill C-19 proposes some significant improvements to the Competition Act. The elimination ofthe criminal predatory pricing and price discrimination provisions, the elimination of the airline-specific provisions, and the creation of an administrative monetary penalty for section 79 areworthwhile amendments. Increased penalty levels for deceptive marketing practices are appropriate, but the levels chosen are, in my view, questionable. In addition, allowingprivate parties, with leave of the Competition Tribunal, to be applicants under section 79 is aworthwhile amendment.

Thank you very much. I look forward to your questions.

The Chair: Thank you, Mr. Annan.

We'll move to our last witness, Mr. Campbell.

Dr. A. Campbell (Partner, McMillan Binch LLP, Competition Policy Group): Thank you, Mr. Chair.

I appreciate the opportunity to appear before the committee this afternoon. I appear on behalf of the Competition Policy Group. You have a written submission from the group, which sets out a little bit of background. In the interest of time, I won't repeat it here.

The group has been active for more than 30 years on all the major competition policy changes in Canada. The group's particular focus or interest in Bill C-19 is around the administrative monetary penalties being proposed for abuse of dominance. I propose to focus my remarks on that issue.

In the written submission, you will see that we support the decriminalization, or repeal, of the criminal pricing offences. We note a concern about the planned future reform of the conspiracy offence because of the extreme difficulty of finding a workable way to create a so-called per se offence. We share the concern you heard earlier about industry studies. I think those effectively are a great make-work program for lawyers but would do very little for the Canadian economy.

Let me turn to the central focus on administrative monetary penalties, or AMPs. I want to make three basic points. The first is that these AMPs, I think more properly described as “large fines”, are not necessary or desirable. Secondly, if AMPs of some sort were to be introduced, the maximums are far too high. Thirdly, we believe there is an important need for a technical amendment to avoid a double jeopardy problem. The other reviewable practices of refusal to supply, tied selling, exclusive dealing, and market restriction, which were deliberately left out of the AMP regime in Bill C-19, may in fact be subject to AMPs indirectly, because that conduct can be brought within the scope of the abuse of dominance provision in section 79 in many cases. I'll propose an amendment that would, we think, be consistent with the intent of not catching that conduct.

On the first point, that AMPs are not necessary or desirable, the fundamental starting point is an economic one, in our view—namely, that all of us as Canadians benefit from aggressive competition. That is a great wealth enhancer. It's key to our standard of living. The abuse of dominance provision is a particularly important but difficult provision in the Competition Act, because the line between aggressive but fair competition and abusive or anti-competitive activity is very difficult to draw, as indeed is the line between when a firm is dominant or not, given the difficulty in ascertaining the proper definition of a relevant market.

In that context, it is particularly important not to create a legal regime that will cause businesses to pull their punches and that will chill aggressive competitive activity. We believe the establishment of AMPs will do exactly that in this area, which is primarily an area in which conduct is pro-competitive or neutral, and only in the rarest cases is anti-competitive.

The second point we would ask you to consider is the enforcement history, which I think speaks very directly to that point. The Competition Bureau receives hundreds of complaints on the reviewable practices provisions of the act. You can see that, in an average year, they deal with perhaps two or three cases in which they consider an abuse to have occurred. When they find that, they usually obtain a settlement. The firm usually will modify its behaviour and agree to stop. When it doesn't, the Competition Bureau has been very successful, despite one recent loss, in litigating abuse of dominance cases.

That is not a history that creates any basis for saying that there is a rampant problem, or indeed any problem, of large businesses running amok, abusing dominant positions. There simply isn't a documented problem.

● (1600)

And in that context, the third point we would ask you to think about is that the law as currently designed, as designed in the mid-1980s with a remedial focus, is a thoughtful way to deal with the balance between pro-competitive and anti-competitive conduct, and the difficulty of drawing the line.

And the line is nicely drawn in a case where you can intervene and stop anti-competitive conduct, and of course there is already a temporary injunction power available to the Competition Bureau to do so. Again, we go to the history, and we look; and there's only one case in which the bureau saw a pressing need to bring an injunction. So we believe this law is sound as it is.

My second point is that the fines are too high. I think this has been dealt with well by my colleagues. I would ask you to consider that this is a law for all businesses in Canada; it is not just a law for large corporations. You can be a dominant firm while still being a small business in a small local market or in a narrow product market. We give some examples in the submission.

The fines that are being talked about are large, we believe, by the standard of any company, large or small, and particularly so in a context where companies may find it very difficult to ascertain in advance, without an extremely detailed factual investigation and analysis, whether something is pro-competitive or anti-competitive. There is as a result a burden effect—as well as a chilling effect—when you have companies worrying about the fines they may incur from entertaining plans like an aggressive pricing or discounting structure or a loyalty program or whatever the case may be.

The last comment—and I'll just touch on it very briefly—is the proposal that the committee consider an amendment that would make it clear that if AMPs are to be introduced, they should not be available for conduct that falls within the existing definitions of section 75 and section 77 reviewable practices. In other words, those were deliberately left out of the proposed scope of the AMPs for section 79, and the Competition Bureau should not have the opportunity to try to bring AMPs or use threats of AMPs in respect of that conduct. It should use simply the standard remedies under those sections.

Those are my comments, and I'll be pleased to speak to any questions.

Thank you very much.

The Chair: Thank you, Mr. Campbell.

All of you have been very succinct and clear, and we appreciate that.

We're going to start our questioning with Mr. Schmidt.

Mr. Werner Schmidt (Kelowna—Lake Country, CPC): Thank you very much, Mr. Chairman.

Thank you, gentlemen, for probably one of the best presentations consistently across the board from all our witnesses so far—brief, to the point, and I think using words of the English language that were actually meaningful and directly to the point. I was very impressed, actually.

The question I have has to do with the penal nature of the fine, which I think Mr. Facey raised, suggesting that this is really not a fine but a penal imposition on the individual. I think, on the other hand, there's a suggestion that, well, perhaps a disincentive to engage in inappropriate competitive behaviour is actually a pretty good thing, and you have to make the fine large enough so that in fact there is a disincentive not to so behave. So my question really has two parts.

If, on the one hand, it's penal in nature—and I understand the argument very well—the question I would have is, if it is penal nature here, then does it follow that the penalties under the criminal act, which are relatively the same, are too low?

● (1605)

The Chair: I'm not sure if you asked anybody in particular.

Mr. Werner Schmidt: Well, they're all lawyers, so anyone can deal with that one.

Mr. Brian Facey: I'm happy to start in on that one.

On the criminal side, we're really dealing with different conduct. We're dealing—as of course you know, sir—with the conspiracy-type area. I think people talk about the $10 million fine for conspiracy as the benchmark. Mr. Crampton was mentioning that's sort of the worst kind of behaviour, and that fine is at $10 million.

I think your question, sir, was is $10 million enough?

Mr. Werner Schmidt: That's right.

Mr. Brian Facey: In my submission, $10 million is enough, and here's why. There are two reasons.

First, if you look at the history of fines of late, even in that hard-core price-fixing area, they have been quite large. By way of example, there was a vitamin cartel, and I believe that at least three of the four of us on this panel were involved for one or another client in that matter. The fines totalled, in that case—although there were multiple counts—in the order of $80 million, the highest fine, I believe, in any area of law. So I don't think the $10 million limit per count is really stopping fines from becoming huge. That's point one.

Point two is that on a per-count basis, even for price-fixing, most fines have been below that level. It's hard to say, because the parties almost always settle, so they plead guilty to a number without fighting it out.

For those two reasons—first, we're seeing very high fines, and second, for those cases that could be prosecuted, it's not likely that they're going to get up to the $10 million range—that's still a big fine, in my submission.

Mr. Richard Annan: Maybe I can add a little to that.

It's not surprising that I take a bit of a different view. As I mentioned in my remarks, I think the levels actually are too low. It is true that in the vitamin cartel, for example, Hoffman-LaRoche did pay $48 million for multiple counts. It's a great reflection, really, of the success of the immunity programs that have been in place in the United States, Europe, Canada, and other places. Firms have agreed to pay these amounts even though the statutory limits are actually quite a bit lower.

To me, that provides evidence that if you actually had to prosecute a case and ask a judge to set a penalty, it should be well in excess of $10 million because that's what corporations are willingly agreeing to pay today as a result of these immunity arrangements. Secondly, there have been some cases under section 46 where the limits, even for one count, were actually in excess of $10 million.

Again, that provision was put in place almost 20 years ago. Even adjusted for inflation, it would be about $16 million today. I think there's some good evidence that the level should actually be raised. That's not what's being proposed today, but it may be for a future amendment.

The Chair: Mr. Crampton.

Mr. Paul Crampton: Let me take a slightly different tack on it. I noticed that a similar question was raised—I think a couple of weeks ago—the last time this committee met to discuss Bill C-19.

This whole area of section 45 is very complicated. It has been the subject of extensive consultation for a number of years. I know the Competition Bureau is continuing to look into it and model different approaches. Committee members may be thinking that if they just tweak the fine level in the criminal provisions we won't have the problems I was alluding to in my remarks. I think that wouldn't be the best way to deal with it. Section 45 and perhaps section 46 ought to be dealt with when the issue is ripe, when the Competition Bureau has completed its studies, and when the consultations are ready to move forward.

I would really encourage this committee, at this particular point in time, to look at what's before you right now and to evaluate what's before you on its merits. To the extent that what is being proposed would put civilly reviewable conduct in a category that is similar, in terms of the fine, to the most egregious conduct that anybody can think of under the Competition Act, that would be wrong.

As I suggested in my paper, a more reasonable level of AMP would be something like $5 million. I think that would reduce the force of the constitutional argument while giving you, at the same time, the reinforcement of the civil provisions this committee was looking for when it determined that the criminal pricing practices were not sufficient to address the conduct the committee believes is widespread and isn't being addressed under the current act.

That's what led to the three-year review of the act. If you want to solve the problem that you concluded exists, the best way of the various ways of reinforcing the civil provisions is through a modest AMP for section 79.

● (1610)

The Chair: Mr. Campbell.

Dr. A. Campbell: I'd like to make a brief additional comment.

I don't accept that there is that established problem. I actually don't think it has ever been documented—with the greatest respect to Mr. Crampton, who has a very distinguished history in this area in Canada—that there is rampant anti-competitive behaviour under the abuse section or the reviewable practices section in general. It's that myth that makes it easy and attractive to say “Let's put up a major potential fine as a disincentive to discourage this activity.” But the activity isn't documented in the history, unless your working assumption is that the Competition Bureau is absolutely incompetent, which I believe is not a correct assumption.

So I think that's an incorrect starting point, and to the extent that one wanted to use an AMP at all, in my opinion, a modest AMP is something of the sort that currently exists in part VII.1 for deceptive marketing practices, such as $100,000 on a first infraction. I think there is a logic to a more significant penalty on a repeat infraction. We actually have no instances of people engaging in repeat abuse to date.

The Chair: Werner.

Mr. Werner Schmidt: That's almost.... No, I don't want to do that. That is probably hitting below the belt, so I'm not going to go there. I am going to go to another area.

I totally disagree with you, by the way.

The other point I'd like to raise has to do with flexibility. We have this very interesting phenomenon that where a minimum punishment, as you described, is in some kind of an act, that generally becomes a maximum. In this case, we have a maximum, and it is assumed by pretty well all the witnesses who have appeared that the maximum is the one that's going to be applied all the time. That seems to be the difficulty here, when in fact the bureau is clearly given the authority to go up to, but not necessarily to, that level. I think we have to be very careful with that.

I really like the point that appeared at the bottom of page 2 of the presentation made by Mr. Annan. It has to do with penalities of up to 10% of total revenue for abuse of dominance. That seems to me a very commonsensical kind of approach, so that there's some kind of relationship between the penalty and the benefit from that particular abuse. So it seems to me that rather than have a direct dollar figure attached to this, some kind of relationship ought to be established. Somehow that makes some sense to me. On the other hand, I can also see that there should perhaps be a range. So I'm not sure.

Given the experience that you gentlemen have had in the field of business and also in the courts and in the administration of law and the application of law, is this kind of thing too open, and you need to have clear definitions like from zero, let's say, to $10 million or $15 million for a second offence?

The Chair: Thank you, Werner.

Are there any comments?

Mr. Annan.

Mr. Richard Annan: Perhaps I can start. I guess what I can tell you is that's the regime that is in place today in Europe and has been for quite a number of years, and it seems to be working for them. It has an advantage of having, as you say, proportionality in terms of the size of the company and its ability to pay and the nature of the practice. On the other hand, there is a bit of open-endedness to it in terms of uncertainty, because you're not exactly sure what level that might be at the end of the day.

All I can say on this point, basically, is that it's an alternative that could be considered. Certainly there's a very large anti-trust regime in the world that does it today, and it seems to work for them.

The Chair: Does anyone else wish to comment?

Mr. Campbell.

Dr. A. Campbell: Just as an observation, the European system relates to the size of the company, which doesn't relate necessarily to the size of the conduct, which can be very problematic. If you look at it from the point of view of a company in Canada that may be faced with consequences, if you are dealing with an issue in a small part of your business and facing a fine that is based on total revenues, you're in a position where you essentially have to settle the case. The stakes are too high to litigate it, because you face something that may be totally disproportionate to what's at issue. I think there is a concern about leverage that the prosecutorial agency has when you have large fines available.

● (1615)

The Chair: Very good.

Paul Crête, and then Lynn and Brian.

[*Translation*]

Mr. Paul Crête (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, BQ): Thank you, Mr. Chairman.

I looked at your briefs and one thing struck me: some of you say that there should not be another investigation power in the act. I wonder if we are living on another planet because, generally speaking, Canadians believe that the Competition act is ineffective and does not give them the results they expect.

Mr. von Finckenstein himself, the previous Competition Commissioner, has spoken in this committee against this sentence from your brief, Mr. Crampton : "... the Commissioner herself can start such an inquiry whenever she believes on reasonable grounds that either of these circumstances exist." This is referring to legal circumstances. Mr. von Finckenstein stated that if there had been no formal accusation...

Could you clarify your opinion? From my experience with certain cases, especially gas prices, it seems obvious to me that there is a fundamental problem with the present system because an inquiry can only be launched if there is a formal accusation. So there is a whole field that remains untouched and for which Canadians have repeatedly expressed their frustration and dissatisfaction.

How do you suggest we resolve this problem?

[*English*]

The Chair: Mr. Crampton.

[*Translation*]

Mr. Paul Crampton: I have been the first one to suggest the approach we are discussing today, that is the creation of AMPs rather than the criminal approach. I do not believe that the problem is as serious as you think but, if you believe that it is serious and that it is widespread, the best thing to do would be to decriminalize the pricing provisions of sections 50 and 51 and to deal with this behavior with the dominance provisions.

Mr. Paul Crête: I don't understand very well, perhaps, or I did not express myself correctly. In practice, we have seen that there are cases that cannot be dealt with in-depth in order to see if there should be some type of regulation. When we tell people to act under the Competition Act and that the Competition Tribunal replies that they do not have sufficient evidence to lay an accusation, this doesn't mean that there aren't enough grounds to start an investigation. Mr. von Finckenstein told us, about gas prices, that he wished he had this investigative power which should go further than the limits established for the penalties. That might be the solution or we should perhaps be thinking of giving that responsibility to someone else.

I would like to know your opinion. From what I understand, after reading your briefs, you all believe that the present system is quite satisfactory.

Mr. Paul Crampton: I sincerely believe that the Commissioner already has all the powers she needs. Normally, if there is a problem, you could find at least six persons to send a complaint to the Competition Bureau...

Mr. Paul Crête: On the basis of legal evidence, of a formal accusation.

● (1620)

Mr. Paul Crampton: I don't believe that the Act includes such a requirement. If you read section 9(1), it says:

[*English*]

"Any six persons resident in Canada who are not less than eighteen years of age and who are of the opinion"—they just have to be of the opinion—"that a person has contravened an order" or that "grounds exist for a making of an order", or that "an offence...has been...committed"....

So six people, if they're of the opinion that an offence has been committed—and normally people are convinced that an offence has been committed—may file an application and the commissioner has to start an inquiry.

[*Translation*]

Mr. Paul Crête: A preliminary inquiry.

[*English*]

Mr. Paul Crampton: Yes, but it's the same type of inquiry.

[*Translation*]

Mr. Paul Crête: On the basis of illegal behavior.

Mr. Paul Crampton: Yes but the Commissioner has to launch an investigation. I don't think she needs any additional powers.

Mr. Paul Crête: I believe that inquiries should occasionally be launched simply to check if there is enough competition in the market, without requiring a formal accusation.

Mr. Paul Crampton: I had always stated in this committee that the Competition Bureau needs more resources because it does not have enough to deal with all the existing offences under the Act. I'm not asking for more powers for the Bureau since it doesn't have enough resources at the present time to deal with the existing offences.

Mr. Paul Crête: So, if the Competition Bureau had enough resources, do you think the Act would be adequate?

Mr. Paul Crampton: If it had enough resources, the Act would be adequate.

You referred to gas prices but I've heard other examples several times. I cannot image that a problem would exist within an industry and that nobody would complain. Either you find six persons to lay a complaint or one of them calls the Bureau to describe the problem, and I know that many members of the Competition Bureau would then launch an inquiry.

Mr. Paul Crête: I'll give you an example. You're driving on the highway and you're overtaken by someone doing 160 kph. You could call the police to lay an accusation against that person but, in practice, you know that it would be impossible for you to resolve this kind of situation. Therefore, you drop it.

With the Competition Act, Canadians believe that they are powerless if they do not have huge financial resources.

Mr. Paul Crampton: I think it is more a matter of resources than a matter of powers.

As a taxpayer, I would not want my money to be used to launch inquiries if nobody had complained. If a member of the staff of the Competition Bureau decided one morning to launch an inquiry about an industry, I would find that unacceptable, as a taxpayer, especially at a time when the Bureau does not have enough resources.

Mr. Paul Crête: I wonder if the other witnesses have any comments.

Is there a way to assess what resources are needed?

[*English*]

Mr. Brian Facey: I would like to address your first question, sir, just briefly, because I know that with respect to the price of gasoline—I am a taxpayer and also a gas user—whenever the price of gas goes up on a long weekend in the summer, everybody calls the Competition Bureau and asks, "Why aren't you doing something about this?" I've spoken to people at the Competition Bureau, and I don't think it's a question of resources or even the law. It's really just a fact of life as to how the gas business works. As it was explained to me before, the question is, if there's a conspiracy among the gas companies, then why is it that these price spikes are global? Why are they happening all over the world at around the same time? And second, why do prices come down later?

● (1625)

[*Translation*]

Mr. Paul Crête: I don't intended to put the gas industry on the spot but, rightly or wrongly, people keep asking us every year, and I have been a member of Parliament for 10 years, to look at this issue because the existing tools do not allow them to get an adequate answer.

Some people have suggested that there be an Oil Products Surveillance Bureau that would not to be a Price Control Bureau; it would be an independent Bureau that would be able to look at how the market operates.

The other option would be to include in the Competition Act some power of investigation that would not be criminal but would allow us to take stock of the situation.

I believe that some resources might be wasted at the present time because we are obliged to answer those requests when nobody has demonstrated that they were not justified. In this case, appearance may be as important as reality.

[*English*]

Mr. Brian Facey: I agree with you, sir. Where I was going with that was to say that competition law really can't fix everything. So I think you're right; it's outside the scope of the Competition Act, because within the scope of the Competition Act we do have, once there has been a complaint and once the commissioner goes on inquiry, quite extensive powers. There are things called section 11 orders, which require the production of information. They require compelled testimony, and there's also a search procedure. But I think that is outside of what you're addressing, which is what you can do when you are questioned by your constituents, and people want to know what's happening in this industry. My response, sir, is that I don't think the Competition Bureau is the right place for that.

The Chair: Okay, Mr. Annan.

Mr. Richard Annan: I just wanted to add one other comment, which is that I thought you were asking about a general research power into the state of competition of a particular industry. That power did exist under the Combines Investigation Act before 1986, and it in fact was used on many occasions. It's something the Federal Trade Commission in the United States has the authority to do, and I think it's something the Monopolies and Mergers Commission in the U.K. can do from time to time.

So there is precedent for that kind of general research inquiry, if you like, in other anti-trust regimes around the world, and it is indeed something that we had before 1986. And I think in the current consultation on amendments there was a suggestion of having some sort of research capability, but done by the CITT instead of the Competition Bureau.

[*Translation*]

Mr. Paul Crête: Do I have any time left?

[*English*]

The Chair: Yes.

[*Translation*]

Mr. Paul Crête: Let's move to a completely different issue.

We are talking of higher fines to, basically, prevent fraud. If we want to prevent fraud, there has to be some kind of disincentive.

Do you believe that the new higher fines will have this effect or would we be better off implementing a system based on a percentage of the money obtained through fraud, without any ceiling?

[*English*]

The Chair: Thank you, Paul.

Mr. Crampton.

[*Translation*]

Mr. Paul Crampton: I believe that the AMPs are the best approach because they are...

Mr. Paul Crête: What is an AMP?

Mr. Paul Crampton: It is an administrative monetary penalty. When I was at the OECD, several countries had chosen to establish penalties based on the amount of the illegal profits. However, it is always very difficult to prove that there have been illegal profits. People kept asking us to suggest a better system because the existing one was not effective at all.

Mr. Paul Crête: So, if I understand correctly, the best approach, according to you, is the one in the Act, except that you do not agree with the levels.

Mr. Paul Crampton: Exactly.

[*English*]

The Chair: Merci, Paul.

Lynn, please, and then Brian.

Mr. Lynn Myers (Kitchener—Conestoga, Lib.): Thank you, Mr. Chairman.

I want to thank the witnesses for appearing today.

I wanted, Mr. Facey, to ask you first of all whether it's a fair statement to say that your firm represents large corporations that do business internationally. I think that's a fair statement.

Mr. Brian Facey: That is a fair statement, sir.

Mr. Lynn Myers: Are they prevented from doing business in the United States, for example, where treble damages are available, or in the European Union, where AMPs can be 10% of annual turnover?

● (1630)

Mr. Brian Facey: No, I don't believe they are, sir.

I would describe our client base as being of two types. Some are multi-jurisdictional multinationals that are based elsewhere but with Canadian operations, and some are large Canadian companies that also have foreign operations.

Mr. Lynn Myers: In light of what you said today, do you find that a bit of a contradiction?

Mr. Brian Facey: I'm not sure what you're referring to, sir, but I don't find it a contradiction in this sense. If you're getting at the issue of whether large Canadian corporations compete effectively in other jurisdictions despite other jurisdictions having different laws, I would say that our Canadian businesses need all the help they can get.

We've heard that there's this ability to impose AMPs, etc., in Europe. It's not really AMPs; it's a percentage of turnover. And in the United States you can proceed criminally with a monopolization charge, which is what they call abuse of dominance, but it's never done. In the United States the government does not proceed criminally, does not seek fines.

Even in the Microsoft case, whereas in Europe Microsoft is subject to a fine, in the U.S. they're subject to a behavioural remedy. At one point it was discussed to even have a structural remedy, where they'd divest part of the business. That was rejected as being contrary to innovation in the United States, so they settled for a behaviour remedy.

So I don't think my position is inconsistent with our client base in that sense.

Mr. Lynn Myers: I see.

Just on the Microsoft case, that was in 2004, right?

Mr. Brian Facey: Yes.

Mr. Lynn Myers: And they were assessed $700 million Canadian, is that correct? Or thereabouts, I think.

Mr. Brian Facey: In Europe, I think it was something in that magnitude, yes.

Mr. Lynn Myers: I'd also like to ask Mr. Campbell this question. Despite that penalty of $700 million, Microsoft is still doing business there, right, sir?

Mr. Brian Facey: That's a real hot issue right now. That's a real live one.

Mr. Lynn Myers: So what I don't understand, in my little farm mind—I still live on a farm—is why AMPs in the range of $10 million would chill business activities when in fact Microsoft doesn't see it as a problem.

Then I'd like to ask Mr. Campbell the same question, because it's my understanding you have clients, for example Ford Motor Company, General Electric, and IBM. So I'd be interested in your response as well.

Mr. Brian Facey: On the issue of chill, not every client is Microsoft, unfortunately. I would say that an interesting example is the recent Canada Pipe case, which was the most recent decision by the Competition Tribunal under the abuse provisions.

Canada Pipe is a company that began to be investigated by the Competition Bureau in 1997, and a decision was released by the tribunal just this year, just last month. Even though the commissioner had alleged they were engaged in anti-competitive behaviour, the tribunal said no, it wasn't anti-competitive behaviour, that in fact it had a legitimate business purpose. There was increasing competition; prices were falling.

Now, if they had also faced the prospect of a $15 million fine, maybe Canada Pipe—and I don't represent Canada Pipe—would have settled the case and would have stopped engaging in what the tribunal said was a legitimate business practice.

So I think that's one example of how this type of fine may chill business activity.

That really was not my central point. My central point was more along the constitutional question, but maybe I should turn that over to Mr. Campbell.

Mr. Lynn Myers: Yes, Mr. Campbell.

Dr. A. Campbell: Yes, thank you.

I think the difficulty with chilling is that it's a host of companies engaging in a host of business practices that are hard for us to see and assess. You can see the Microsoft case as a particularly large, unusual example, but what we're talking about here is the day-to-day pricing, marketing, and distribution decisions of large and small businesses all over Canada—some national, some local. In those contexts, if you are unsure...and it is difficult to know in advance how the Competition Bureau or the court or the Competition Tribunal will come out on a case, because there is so much evidence that comes to bear before you can finally figure it out. But if you're uncertain and looking at a large fine, you are likely to err on the side of pulling your punches.

I think that's the nature of the chilling effect that we see, and we see it being more likely in the cases that are, if you want, less large than Microsoft, which I think is a company with an unusual worldwide situation.

● (1635)

Mr. Lynn Myers: I noted, Mr. Campbell, that you have a history of coming before committees and arguing about the chilling effect. I think back in 2001 you appeared before us, not before me in particular, but before the committee in this House on Bill C-23. Is that correct?

Dr. A. Campbell: Correct.

Mr. Lynn Myers: I think at that time you argued that there would be a chilling effect with respect to private access. That never materialized.

Dr. A. Campbell: The bill was modified in some ways to try to safeguard against that, and I think that remains to be seen.

What we are seeing now is a beginning of a flow of private cases involving refusals to deal, which is one of the types of cases that we expected would occur. I think they have not occurred in the quantity that we suggested they would in our original submissions, and we would say that is in part because some safeguards were amended into the bill at that time.

Mr. Lynn Myers: So you cried wolf, but the jury is still out.

Dr. A. Campbell: No, I think we asked the committee to consider balance, and we felt the committee did make some changes that did add balance. And I think you're correct, the jury is still out. Because we are still in a period in Canada when there is a general increase in the breadth and sophistication of the competition litigation bar, if you want, and we do see that generating more competition litigation in a number of forums already. How much will continue remains to be seen.

Mr. Lynn Myers: It remains to be seen, indeed.

Mr. Annan, I wanted to talk a little bit about Jetsgo. Jetsgo recently exited the flying business, I guess it's fair to say. It's gone. Would you say it's wise to repeal the airline-specific provisions at this time, when there are fewer players in the market? Will a general AMP provision for abuse of dominance be sufficient to deter anti-competitive behaviour in this industry, for example? Can you comment on that?

Mr. Richard Annan: Sure, I'd be happy to.

I think it is time actually to remove those provisions for a number of reasons. First, even though Jetsgo has left the market, the fact is that competitive conditions have improved dramatically from where they were in 1999. At that time, with the failure of Canadian and the subsequent merger with Air Canada, I think Air Canada's market share was well in excess of 90%, based on revenues, and certainly over 80%, based on capacity. Even with Jetsgo's recent demise, their market share is down to probably the mid-60s as a percentage in terms of the capacity, and maybe 70% in terms of revenues or passengers.

So you have significant competitive pressures now from both WestJet, which has done extremely well since 1999, expanding into eastern Canada, Toronto, Hamilton, and so on, and also CanJet. It had some problems. It was there, it was gone, it was back again, and it is providing a fair bit of competition in eastern Canada.

So I'd say, number one, the competitive conditions have improved. Second, I think in general the Competition Act is not designed to be industry-specific. It's a law of general regulation. That's certainly what I believe. It should be an act of general regulation; it should not be industry-specific. We had this temporary provision that was recognized as a temporary provision when it was introduced in 1999 as a result of the fallout from the Air Canada and Canadian merger, and I think we've gotten past that, as I said.

Third, in terms of the specific things that are being amended or are currently in the act, one, you have a temporary order power, which is more of a general power now. It's not something the commissioner can use, but it's something the Competition Tribunal can give. So that provision is certainly of assistance to airlines or other industries.

Of course, on the administrative monetary penalty of $10 million and $15 million for airlines, if you had the general provision of $10 million then it could be used in the airline industry or any other industry, and that's probably another reason for an administrative monetary penalty in section 79.

My final point here is that quite frankly, the most important thing that can be done for the airline industry today is what the Minister of Transport is currently considering, which is opening up the market to foreign competition and cabotage. I think that would do far more for competition in that industry than changes to the Competition Act would.

● (1640)

The Chair: Mr. Crampton, do you want to jump in?

Mr. Paul Crampton: Yes.

I would like to say, first of all, that I wholeheartedly embrace everything my colleague just said, but also I would like to bring some information to your attention, which is that at the OECD's competition committee, which comprises the heads of the competition agencies in the OECD countries, it was generally accepted that competition laws should be laws of general application and should not contain industry-specific provisions. In fact, this committee heard a number of representations on that very point in the course of its three-year inquiry into the act. Our review of the act ultimately concluded that the act should not contain industry-specific provisions. So I think those two additional points ought to be kept in mind.

Mr. Lynn Myers: Thank you very much.

I have a quick question, Mr. Crampton, to you. You're a member of the Canadian Bar Association?

Mr. Paul Crampton: I believe I am again, yes. I was before I went to Paris, and I should be, if I'm not.

Mr. Lynn Myers: They were before this committee recently, and their representatives said that they spoke on behalf of all the members, of which you were one.

They are against AMPs, and you're in favour. I just wonder if you can jibe that contradiction.

Mr. Paul Crampton: I believe that position was thrashed out while I was still in France.

Some hon. members: Oh, oh!

Mr. Lynn Myers: When in doubt, feign ignorance, yes.

The Chair: Thank you, Lynn.

Mr. Campbell.

Dr. A. Campbell: Perhaps I can just make a small comment about the industry-specific issues, but actually relate them to Monsieur Crête's comment earlier about industry studies. It seems to me that a competition act normally deals with cartel behaviour and it deals with dominance or monopolization behaviour and various distribution practices, and it will deal with mergers and it will deal with advertising practices. That's what our act does, and that's very conventional coverage for general application competition law around the world.

When you get into the problems in a particular industry, it seems to me you are effectively into an issue of industry regulation, which I think does not fit well into the Competition Act. I think if you were asking yourselves about whether to create an industry study power connected to the Competition Act, you have to ask what you could do with it. If it is only to study things that are already within the realm of the act, there is no need for it, because the Competition Bureau does have a good range of laws, and a very wide range of investigative powers to deal with the things that fall in that area. If you are looking at industry-specific competition issues, you're going to be into regulatory solutions, which I would urge you to think of as something that does not belong in the Competition Act.

The Chair: Thank you, Dr. Campbell. Thank you, Lynn.

Brian, please.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair.

I'll start with Mr. Crampton and Mr. Campbell. To start with, in terms of AMPs again, I'll go back to a favourite subject, and I invite you, as well, to respond.

You're all suggesting to Mr. Campbell to reduce it to $5 million. I think we have to be clear here: it's at a discretion of up to $10 million. I think it's erroneous to leave the impression that every fine is going to be $10 million.

Your suggestion to either eliminate or reduce it must be based on some evidence that the current process is unfair to those that have been judged in this model right now, and thus that the Competition Bureau and the Competition Tribunal shouldn't have this power. Do you have some examples you can provide of cases in which fines have been placed that have not been fair to those particular individuals?

Mr. Campbell, you've noted that there haven't been widespread problems, but at the same time, you have suggested that we can't trust the current system to make adequate judgments of monetary fines. Do you have any evidence of those situations?

Mr. Paul Crampton: For my part, my point was slightly different. My point was that if you have an AMP that's at the same level as the maximum fine available under the basic conspiracy provision for the most egregious conduct that can be engaged in under the Competition Act, you're sending the wrong signals to the courts as relates to criminal conduct. That's my point.

The reason I support AMPs is because there's a perception within this committee that the criminal pricing practices are ineffective for dealing with what this committee perceives to be a widespread problem. So if the committee is of a mind to strengthen the Competition Act somehow, in my view, the best way to do that is through the creation of a power for the tribunal to order AMPs. But I believe that AMPs at a maximum level of $10 million give rise to the problem I just described.

● (1645)

Mr. Brian Masse: Mr. Facey and Mr. Campbell might want to comment on that.

Mr. Brian Facey: I don't have a comment on that.

Dr. A. Campbell: I think that the evidence, historically, has to be based on the system that we have had in place for twenty or so years. As I say, we've studied that carefully, and we think it shows that there isn't the abuse problem that has become a sort of myth underlying the impetus for AMPs.

The issue of chilling perhaps can be made a little more concrete in a practical sense by talking about an individual situation. You are quite right that a maximum is a maximum, and it doesn't automatically follow that there will be a $10 million fine. But when a company is considering a business practice and considering whether or not to engage in it, the advice that lawyers will give them is that it may be an abuse of dominance, but that it's very hard to tell without in-depth investigation and analysis, and there is a potential maximum fine of $10 million.

If you take those simple pieces of information and you're a business that is looking at something where your alternative, to have a comfort level, is to invest a fair bit more money in factual and economic and legal analysis in order to get an opinion, the $10 million maximum fine does hover over you as a consideration in thinking about whether you're prepared to compete aggressively, or whether to pull that punch and do something that is a little more relaxed in the marketplace.

Ultimately, I come back to our group's submission. The underlying point is that the vast majority of activity in the marketplace is competitive, not anti-competitive, and we all benefit when that competition is aggressive.

Mr. Brian Masse: You're advocating to ensure that there's going to be aggressive marketing and that it's going to benefit consumers and generally the economy. If we take away that aggressive behaviour, then we lose on that. Can you give an example from one of your companies of something it may not do because of that and how that could affect consumers?

Dr. A. Campbell: The kinds of conduct at issue in these cases are things like the Canada Pipe case. Canada Pipe chose to continue to run its loyalty program, which was a program that offered incentives—cost reductions for distributors—and was a form of aggressive competition.

Many other companies might choose not to pursue a loyalty program if they feel it is a risk that could be subjected to proceedings under the Competition Act and a fine. I have been in cases where companies have elected not to do that. I can't give you names, obviously, because of privilege and confidentiality. Those kinds of normal distribution practices are what we mean when we talk about a whole range of ordinary commercial conduct that companies are engaging in that is normally quite beneficial to all of us.

Mr. Brian Masse: Like loyalty programs, as a specific example.

Dr. A. Campbell: Many, many different kinds of contractual—

Mr. Brian Masse: That helps. I'd like to go through all these research questions, and that gives me a lead to go.

Dr. A. Campbell: There many types of distribution practices. The practices relating to exclusivity, for example, are very often beneficial to the smaller businesses who typically are distributors or dealers in a distribution system. They typically like exclusive territories. They often want some of the exclusivity provisions.

Those are the kinds of contractual provisions that can sometimes be attacked as anti-competitive. Very often, when properly looked at they're actually pro-competitive in allowing a company and its distributors or dealers or resellers to make investments to compete effectively against others in that kind of an industry. Those would be similar types of examples.

Mr. Brian Masse: Okay.

I guess I'll turn this over to anyone who would wish to comment in terms of.... I still believe that AMPs should be part of the process, and I will look at the issues you've raised as to what we're doing here today. The concern I get is in terms of removing the $10 million first cap that's available. Once again, it's a cap, a threshold. I hear from smaller businesses that they feel they won't be represented right in this regime, because if the judgment is then limited for larger corporations and companies, that actually often affects their business operations because they can't do the same type of marketing and penetration that's necessary. Then they feel at a disadvantage because the penalties.... If the commission at the end of the day is restricted to the damage that's done to others, then it's not fair to the smaller operations that might engage in another activity that they got a penalty where there wouldn't be that threshold. The fine could be relative to what the penalty really was in that capping.

So I turn that over: What do we say to smaller businesses that might feel it's not fair for larger corporations to get capped to a level where the penalty doesn't fit the crime, whereas they won't have that threshold, being a smaller organization?

● (1650)

Mr. Paul Crampton: Personally, if we started with something more modest, in the range of $5 million, that's a serious deterrent, I think. We're starting from zero penalty today and jumping all the way to $5 million. Even that would be unprecedented in the history of the act. What I'm suggesting is not something that can be lightly taken or can be scoffed at, by any measure. I think that's a credible response to what this committee has found to be a problem with the act.

Mr. Brian Masse: So even if.... Sorry, go ahead.

Mr. Richard Annan: I was just going to try to take it from a small-business perspective and the abuse-of-dominance provision. First, you have to be dominant in some relevant market. That alone probably means that most small businesses aren't going to be that. Second, you have to show a substantial lessening of prevention of competition. So in fact it's probably fairly rare that you're going to find this provision applied to a small business.

I think that's probably one answer to that question.

Mr. Brian Masse: It has come to me from different businesses, though, that feel that if they want to penetrate into the market and get there, their ideas might be stolen or undermined, and that's what they're looking at in terms of wanting the penalties to be higher.

Mr. Richard Annan: Higher?

Mr. Brian Masse: Yes. I guess the problem is you're saying $5 million, but what if the penalty at the end of the day was $6 million, and they couldn't be subjected to it because the cap was at $5 million?

Picking these numbers out of the air is the whole problem.

Mr. Paul Crampton: Exactly. Finding the optimal level requires the wisdom of Solomon. I've suggested $5 million, and another reasonable person could suggest something different.

My only point is that $10 million is much too high, and I think you've heard that from most of us here today.

A voice: I don't agree, of course.

Mr. Paul Crampton: That's why I didn't say all of us.

A voice: I think $10 million is just fine.

Mr. Brian Facey: May I just address that for a moment? This is just to come back to this issue, and I take where you're coming from.

International clients I have tend to comply with the law now, so I want to go back to this issue of whether this is really needed. I have not had a client say, oh, well, I could only be ordered to divest myself of some assets or stop what I'm doing; if there was a fine, I might think differently. Clients tend to want to obey. A lot of them are European clients, and I've seen them just import their compliance policy directly into Canada without changing it.

Second, there is already the power to prohibit companies from doing what they're doing and to order divestiture of shares or assets if that other order is not enough. Arguably, a small industry player or a small business might even prefer that, because, who knows, they could buy some of the divested assets and become a competitor. I'm not sure a fine is the right answer.

I'm not sure who these small and medium-sized enterprises are, but I would wonder if they've been to the Competition Bureau and been turned away, because regardless of whether there is a fine or not, they have to satisfy the substantive criteria to fall within the section.

I just wanted to add those few points.

● (1655)

Mr. Richard Annan: I just wanted to add one rebuttal point. Section 79 has this theoretical possibility concerning asset divestiture and so on, but it's never happened and I think it's very unlikely it ever will happen. That section is basically about behaviour, and the essential order you get is to stop doing what you're doing. Yes, they might order you to change the terms of your contracts with customers and so on, but it's very rare that they're going to actually pursue it and look at divestiture of assets. In fact, the section says you can only do that if it's absolutely necessary, so I'd say it's a pretty remote possibility in most cases.

Mr. Brian Facey: If I could, I'll add two more incidental points.

It was done in the A.C. Nielsen abuse of dominance case, where the company was ordered to divest itself of historical scanner data, so it has been done, point one.

Point two is that if it's there and there's the right case, the tribunal can make it happen, so it's not just a theoretical possibility. As I said before, you have to meet all of the other criteria before even an AMP fine or whatever it's called is going to be imposed. It's not as if you can walk in and all of a sudden there's going to be an AMP imposed; you're going to have to meet all the other criteria beforehand.

The Chair: Thank you very much.

Mr. Campbell.

Dr. A. Campbell: May I just comment very briefly just on the point about the smaller businesses trying to get into markets with bigger businesses and so on?

What makes this abuse of dominance provision so difficult to work with is that it is designed with such breadth that it is very often used by competitors who actually would like to be protected from tough competition. Very often, being able to differentiate that is very difficult. It may be a smaller business coming up against a larger business or it may be a large business against a large business that sees this law as being convenient to use to try to get a little shift in the playing field, if you want. Certainly, in competitive markets where one firm is competing aggressively, that will put pressure on other firms.

What we're trying to find in terms of economic benefit for Canada is those rare situations where there is really a dominant firm engaging in abusive activity as opposed to just competing hard, which is putting pressure on others to compete hard, which is to the benefit of all of the customers of all of the firms.

The Chair: Thank you.

Michael Chong, please.

Mr. Michael Chong (Wellington—Halton Hills, CPC): Thank you, Mr. Chair.

My first question is about the constitutionality of the AMPS. I know Mr. Facey suggested this was unconstitutional. I know one of your colleagues, Mr. Kennish, appeared in front of our committee a number of weeks ago on behalf of the Canadian Chamber of Commerce. He suggested that as well, but he suggested it wasn't unconstitutional vis-à-vis the charter but was unconstitutional vis-à-vis the Bill of Rights. I'm wondering, Mr. Facey, how strong you are in your assertion that it is unconstitutional. You have two very different viewpoints on why it is unconstitutional, and I wonder if it's a bit of a stab in the dark or how confident you are in that.

Mr. Brian Facey: Sir, I'm very confident.

Let me first say that Mr. Kennish is not one of my colleagues. He is a colleague of Mr. Crampton's at Osler—

Mr. Michael Chong: My apology.

Mr. Brian Facey: That's okay. I still have a lot of regard for Mr. Kennish and his views, although I think he'd acknowledge he's not a constitutional scholar.

I too am not a constitutional scholar, although I have represented clients in constitutional cases in the competition area. But my colleague Peter Hogg, who is our scholar in residence and who has taught most of us and most lawyers in the country constitutional law, will be appearing before you. He is also very confident in his view that these are almost certainly unconstitutional.

Mr. Michael Chong: I'll carry on with that question to the other three witnesses. Are you of the view this is unconstitutional or potentially unconstitutional, and if you are of the opinion it's unconstitutional, why?

Dr. A. Campbell: I'll answer very briefly by saying our group, knowing others were focusing on that issue, just chose not to do any independent work on it. I believe there is at least a serious issue but I don't have any additional view or input for you.

Mr. Paul Crampton: I would agree there's a serious issue, and the seriousness of the issue could be diminished if you decreased the level of the AMP. If somebody can come before a court and say, look, the maximum fine for the most egregious conduct under the act is $10 million, and if this newly enacted provision that allows the Competition Tribunal to impose an AMP also sets the AMP at $10 million, it certainly won't be a leap for a court to connect the dots and say, you know, you have a good point there. If you are of a mind to move forward with these AMPs and if you want to minimize the risk the AMPs will ultimately be struck down, I would recommend that you diminish the scope for that argument by reducing the level of the AMPs.

● (1700)

Mr. Richard Annan: I'll just throw in my two cents' worth again. I'm not a constitutional expert. I'm sure the bureau and the Department of Justice have done their homework and have a view about why it is constitutional, and you should probably ask them. I just find it a little odd, as I said.

Basically, to me the question really comes down to one of incentives, and at what level—$3 million, $100,000, $7 million, or $10 million—does that become penal? That's not entirely clear to me in today's economy, considering $10 million versus the size of some of the larger companies and so on. Others can opine about whether there's a magic number that makes it penal versus not being penal, but I don't have a particular view on that.

Mr. Michael Chong: My other question has to do with the level of the AMPs if we are going to have AMPs. I know, Mr. Annan, you had suggested they're not high enough in the proposed legislation and should be $50 million. Mr. Crampton, you suggested maybe half the amount is appropriate. Then, Mr. Campbell, in reading your submission, I think I read—correct me if I'm wrong—that somewhere in the range of $100,000 to $500,000 for first and second offences was appropriate. I didn't really get any indication from you, Mr. Facey, of what the appropriate amount was.

One of the things I didn't hear but that has been suggested here to us in committee by prior witnesses is that maybe we shouldn't have any levels of AMPs prescribed in the legislation, that the legislation remain silent about it, and that it prescribe AMPs but not prescribe maximum amounts. I'm just wondering what your opinion is on that approach.

Mr. Brian Facey: Part of the problem is that the tribunal doesn't have the kinds of disclosure rules you get in a normal court. Not surprisingly, my view is that until you have proper procedural protections in place in the tribunal, almost any AMP—currently it's $100,000 and $200,000 in the misleading advertising sections—could be challenged.

I have to think having an unlimited ceiling on it would be worse because it would mean the highest fine could be $1 billion or whatever. I have to think that if it was completely open-ended, it would have to be worse than even having a limit of $10 million, which I still think is unconstitutional.

Mr. Michael Chong: Maybe just before the other panellists respond, aside from the other process issues within the Competition Tribunal, if those were changed or addressed, whether they be disclosure of all the documentation and the other concerns you've addressed, you would still have an issue with not prescribing the ceiling on these AMPs.

Mr. Brian Facey: No, I think that if those issues are addressed, you've basically created a court out of the tribunal. Then, if you have all of the other procedural protections, like the presumption of innocence and documentary disclosure, you'd have to have a judge appointed under section 96 of the Constitution. If you had all those other protections, technically as legislators you can do what you want.

But the second question is, what happens when you do just have a fine of $10 million and you're in front of a tribunal like the Competition Tribunal? That's where we get into the problem of those protections just not being there. So I think no matter what level of fine you have, you can't really make it right.

Right now, even in the misleading advertising sections on the civil side, I think you will probably see a constitutional challenge; someone will challenge it. If you do this, I think for sure that someone will challenge it. In *The Financial Post* last week, there was an article talking about the Canada Pipe case, and the counsel for Canada Pipe was saying that he hoped there would be AMPs in place so that he could bring a constitutional challenge.

● (1705)

Mr. Michael Chong: Does anybody want to respond to the prior question about whether it would be a good idea not to even prescribe any amount for the AMPs?

Mr. Richard Annan: I just have one clarifying comment and one suggestion about that.

Actually, I wasn't suggesting that the AMP level should be $50 million; what I was saying was that there was actually a case under section 45 where that level was basically agreed to. I agree with Paul to the effect that fine levels for section 45 activity should be the highest in the act—and I would argue that in fact they probably should be higher than $10 million. In terms of the level of AMP for section 79 being $10 million, I didn't express a particular opinion. It seems to me that would be about right. As he said, you could reasonably say it could be higher or lower; but again, it comes down to questions of incentives.

In terms of just leaving it completely open-ended, there are some provisions in the Competition Act that do that. On the criminal side, for example, section 46 has no limit; it leaves it up to the discretion of the court. So that's clearly an option. Some people think, though, that by setting a limit it's actually providing some information content and guiding the decision-makers to what the maximum level Parliament would consider for the most egregious activity under that provision.

Mr. Paul Crampton: In fact, I think that is why they put in a $1-million limit way back, I think it was, in the sixties in respect of the basic conspiracy provision—which was then raised to $10 million in 1986. But prior to it being $1 million, I believe it was unlimited; Parliament wanted to send a signal to the courts to get the fines up, so they did that by having a specific limit.

Dr. A. Campbell: I don't think the concept of no limit is consistent with the concept of an administrative monetary penalty. Even AMPs with maximums of the magnitudes being proposed in Bill C-19, or even the $5 million Mr. Crampton proposes, are not AMPs, in my view. It is turning the abuse of dominance into a very serious quasi-criminal offence, and I think that's inconsistent with sound economics in the modern economy.

The Chair: Do you have anything else, Mike?

Mr. Michael Chong: No, that's it. Thank you.

The Chair: Thank you.

The last person on my list for a short question is Lynn Myers.

Mr. Lynn Myers: I just have two quick questions, one to Mr. Crampton and one to Mr. Facey.

Mr. Crampton, based on your experience, etc., I wondered if you would or could support adding additional powers to the Competition Act to obtain, for example, information on industries and markets without grounds to believe that an offence has been committed.

Let me ask quickly, on the heels of that, would there be possible ways of doing that?

Mr. Paul Crampton: Well, in fact my own strongly held view is that there ought not be powers to start investigating and compelling the production of information and witnesses, unless you have grounds to believe.... Grounds to believe is a fairly low threshold, and it's a discretionary threshold, so it would be very difficult to challenge.

I trust the commissioner's exercise of that discretion. If the commissioner feels that she can get on an inquiry by asserting that she has grounds to believe, she then has the full range of the formal powers available to her under the act. If she doesn't have grounds to believe, I would argue she ought not to be exercising those powers—which are very invasive.

Mr. Lynn Myers: Thank you.

Mr. Facey, you said something about abuse of dominance. I wanted to ask you about this. The fact that there are no financial penalties for engaging in abuse of dominance means that it must in fact be part of your risk assessment to your clients. Is that a fair statement?

Mr. Brian Facey: Yes, I think that's fair.

Mr. Lynn Myers: That's fair.

Thank you very much.

The Chair: Thank you very much to our witnesses. You've been very helpful to us today, and with any luck we may be able to complete our study of Bill C-19 with a couple more meetings over the next couple of months, given other things we have to do. So we thank you very much.

I just want to mention to colleagues before I adjourn that Brian Masse has asked that we have John Efford, Minister of Natural Resources. If there are no objections, I think we can schedule that for May 16. The clerk will send out an amended schedule.

We will proceed with Bill C-19 on April 6, since we're uncertain about S-18 coming from the Senate. The day we're having Minister Emerson here, we would tack on a half hour at the end for Mr. Comuzzi, the minister of FedNor. It's in your schedule.

With that, we're adjourned.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

Also available on the Parliamentary Internet Parlementaire at the following address:
Aussi disponible sur le réseau électronique « Parliamentary Internet Parlementaire » à l'adresse suivante :
http://www.parl.gc.ca
