House of Commons
CANADA

Standing Committee on Industry, Natural Resources, Science and Technology

INDU • NUMBER 066 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Thursday, November 24, 2005

Chair

Mr. Brent St. Denis

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● (0905)

[*English*]

Mr. Ronald Lund (President, Association of Canadian Advertisers): Bob Reaume will do the introductions.

The Chair (Mr. Brent St. Denis (Algoma—Manitoulin—Kapuskasing, Lib.)): Mr. Reaume, the clerk asks you to keep your remarks to five to seven minutes. If there is anything you miss getting in during your remarks, perhaps because I wind you up, please feel free to import those comments into the question-and-answer period.

Mr. Robert Reaume (Vice-President, Policy and Research, Association of Canadian Advertisers): Thank you.

Good morning.

Mr. Chair, members of the committee, we are very pleased to have the opportunity to appear before this committee again to share our perspective on recent proposed amendments.

We first appeared with our comments in March of this year. Since that time, there have been a number of significant developments respecting Bill C-19. First was the Retail Council of Canada's delivery of the opinion of Professor Peter Hogg to your committee. You will hear from the RCC today. It is certainly not our intention to pre-empt our colleagues in this regard. However, we do wish to address this issue briefly.

Professor Hogg's opinion confirmed the concern, which the ACA had raised previously, that administrative monetary penalties are a serious constitutional concern. Indeed, Professor Hogg, one of Canada's leading constitutional scholars, is of the opinion that "AMPs as amended would be unconstitutional".

It is rare in advance of enacting legislation that one has as clear and definitive a view by as eminent a scholar as Professor Hogg, as one has in the present case.

The ACA is not a legal organization. Rather, it is concerned about the impact of Bill C-19 on the economy in general, and on advertisers and the advertising industry in particular—and not with constitutional law. Nonetheless, the concerns that underlie Professor Hogg's opinion—that this kind of penalty is simply inappropriate in the context of a civil dispute—are exactly the concerns that underlie ACA's basic concern with this legislation.

The ACA says, and has said since the beginning, that this approach is counterproductive and unfair. Professor Hogg puts that concern in constitutional language, but comes to the same bottom line: that this legislation, as it affects advertisers who are not engaged in criminal wrongdoing, is inappropriate.

Secondly, since our last appearance before this committee, two government amendments have been proposed to Bill C-19: one with respect to the amount of fines in conspiracy cases, and the other with respect to market studies.

The ACA has no submission with respect to the proposed conspiracy fines, but is concerned with the market studies issue. We note firstly that the law already permits extensive market inquires. When six Canadians make an application, when the commissioner has reason to believe there is conduct contrary to the act, or when the Minister of Industry so directs, the commissioner can conduct an inquiry using all her compulsory powers.

She may also conduct market reviews without the use of compulsory powers, whether or not she has a concern that a provision of the act is being contravened. The cabinet may also refer economic matters to the CITT for study, using compulsory powers. Thus, there already exists an extensive power to conduct inquiries into marketplace behaviour.

In addition to redundancy, we believe that the market studies proposal contained in this amendment has the potential to distract the Competition Bureau from its core purpose of the investigation of conduct contrary to the Competition Act. As well, to permit the Competition Bureau to use compulsory powers against businesses, in circumstances where neither the minister nor the commissioner have a reason to believe there is a breach of the act, is to use the Competition Act for purposes for which it was not intended. It also subjects businesses to a very heavy burden, by way of both direct cost and distraction from their ongoing businesses.

The market studies power is likely to subject certain industries—most likely those that give rise to pressure on political actors—to frequent investigation. The gasoline industry has been formally investigated five times over the last number of years. The ACA does not believe that such treatment is appropriate for the gasoline industry, the advertising industry, or any other industry.

Indeed, there is some irony that Bill C-19 proposes to delete industry-specific provisions regarding advertising, but would reintroduce what are likely to be industry-targeted measures through the power to conduct market studies.

For these reasons, the ACA opposes the proposal to amend Bill C-19 to give the Competition Bureau the power to conduct market studies, absent of there being a reason to believe there is conduct contrary to the Competition Act.

Thirdly, since our last appearance before your committee, various amendments have been proposed to this legislation by parties other than the government, which would eliminate our concerns with respect to grossly inflated AMPs and the so-called restitution orders. We are pleased that members of the committee have heard our concerns in that regard, and urge the adoption of these amendments.

By contrast, other amendments have been proposed that would increase the amount of AMPs, even beyond $10 million. In that regard, we can only reiterate our original concerns, and add to them Professor Hogg's constitutional arguments. If $10 million in AMPs was wrong in principle, an additional layer of AMPs on top of everything else would be worse still. The ACA urges the rejection of all such proposals.

In summary, the 1999 amendments to the Competition Act were important and fundamental, but since then we have only a handful of cases, and fewer contested decisions, to flesh out those 1999 provisions. The ACA is of the view that it is far too early to reach a reasonable view that the provisions with respect to civil misleading advertising are in need of further reform.

Effectively criminalizing the civil misleading advertising provisions, as Bill C-19 would do, would be contrary to the intent of those provisions, enacted only five years ago. It would likely serve no useful purpose, might well injure the competitive marketplace, and would likely be unconstitutional.

Finally, it is of grave concern that despite an almost universal expression of alarm from business and industry over the initial proposals from such organizations as the Canadian Bar Association, the Retail Council of Canada, the Canadian Chamber of Commerce, the Canadian Council of Chief Executives, and many others, new amendments were proposed at the last minute that would serve to create an even harsher environment for business in Canada.

We urge that these changes not be implemented.

We wish your committee well in your deliberations and we thank you for the opportunity to present our views. We'd be pleased to try to answer any further questions you may have.

Thank you.

● (0910)

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

We're going to ask.... Madeleine, are you or Tamra going to speak?

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): I will start, and then Maître Renaud will carry on.

The Chair: Okay, thank you, Ms. Thomson. I'll ask you to proceed.

Ms. Tamra Thomson: Thank you, Mr. Chair and honourable members.

Today the Canadian Bar Association is pleased to appear for a second time on Bill C-19. We presented a comprehensive submission to this committee almost a year ago. Today we are addressing some of the amendments recently tabled before the committee.

The Canadian Bar Association is a national association representing over 34,000 members—lawyers, jurists, and academics—across Canada. Approximately 1,400 of those members are also members of our competition law section. It is on behalf of the section that we speak today.

Among the primary objectives of the Canadian Bar Association are improvement of the law and improvement of the administration of justice. It is with those objectives in mind that we have analyzed the amendments we are addressing today.

I will ask Maître Renaud to address the substantive matters on those amendments.

[*Translation*]

Mrs. Madeleine Renaud (Chair, National Competition Law Section, Canadian Bar Association): Good morning, Mr. Chair and honourable members.

[*English*]

Thank you for the opportunity to present the section's views on the proposed amendments to Bill C-19.

As an introductory comment, section members are concerned that new and very significant amendments to the Competition Act have been tabled at a late stage in the process, without the benefit of any public input. The Competition Act sets out important ground rules for Canadian businesses, and revisions to the act can have significant and unintended consequences for the economy generally and in particular for Canadian productivity and efficiency. Changes to the Competition Act should only be made after careful consideration, including an opportunity for study and comment by interested stakeholders.

Since the proposed amendments to Bill C-19 were made public only very recently, the section does not have enough time to fully analyze them. We wish, however, to share our brief comments on several of the proposals before the committee.

In summary, the section is of the view that the proposed amendments are not appropriate at this time because they will fundamentally alter the Competition Act and are not supported by cogent evidence and analysis.

With respect to the proposal to grant the commissioner the power to carry out market studies, the section is of the view that there is no concrete evidence that such a power would lead to any improvement in the Canadian economy. It is also of the view that such a power is likely to impose unnecessary burden to Canadian businesses and taxpayers, because experience has shown that such studies are very costly. The section is also of the view that there is no reason to grant such powers, which are not very well defined, to the commissioner in the absence of reason to believe that there is conduct that is contravening the act, and the commissioner already has broad powers in such a case.

In summary, the section is of the view that the market study powers are not an appropriate addition to the Competition Act.

A number of the proposed amendments relate to section 45 of the act, which is the conspiracy provision. As a general comment, the section believes that in view of the serious issues raised by stakeholders on the reform of Canadian conspiracy laws, the Competition Bureau decided last year that more work was needed before the bureau could recommend how section 45 should be amended. The Competition Bureau has undertaken further study on this issue, the results of which are not yet available. The section is of the view that any changes to section 45 should await the conclusions of the bureau's study on this issue.

The government proposes to increase the fine applicable to section 45 to $25 million. It is currently $10 million. While this amendment was designed in response to concerns over rising gasoline prices, it is not supported by any evidence of conspiracy among gasoline suppliers. Quite the contrary. The studies conducted by the bureau over the last years have not uncovered any evidence of conspiracy. Like other changes to section 45, the increase in fines should be considered under the continuing consultation process on amendments to section 45.

● (0915)

[*Translation*]

We are also proposing an amendment to section 45 to remove the term “unduly”, which would make any anti-competitive agreement a criminal offence. The proposal to remove the word “unduly from this section would effectively undo more of a century of jurisprudence and economic thought, and would extend liability to agreements with no significant impact on competition, which is not desirable, according to the section.

To offset the removal of the term “unduly”, we propose the addition of a line of defence which would enable the accused to establish the agreement in question as beneficial to society and conducive to a drop in prices. In the section's opinion, this criterion doesn't appropriately distinguish between anti-competitive agreements which should be subject to a criminal penalty and those which have no significant impact on competition.

The section is also concerned about the constitutionality of the proposed amendments, particularly with regard to the Charter of Rights and Freedoms.

The section considers three other points in the proposed amendments to be problematic. The proposal to alter the definition of anti-competitive acts for the abuse of dominance provision significantly reduce the effectiveness of section 79, by changing the focus of the provision. It would no longer protect competition, it would only protect competitors.

Secondly, the amendment requiring companies engaged in deceptive marketing practices or abuse of dominance provision to relinquish all profits owned in addition to remitting an administrative monetary penalty, reinforces the criminal nature of these penalties and would further add to doubts about their constitutionality.

Finally, permitting private litigants to commence proceedings under the sections 75, 77, 78, 79 and claim damages is a significant change to the structure of the act and should be made in the context of a broader consultative process.

[*English*]

As for the other proposed amendments, the section has not had enough time to consider them, but our lack of comments should not be interpreted as an endorsement of these proposals.

Mr. Chair, this concludes my comments on behalf of the competition law section.

The Chair: Thank you, Ms. Renaud and Ms. Thomson.

We're going to go ahead with questions. We have witnesses who are caught in this storm, so we'll just have to work them in as we go along, colleagues. We'll start with Brad, then I have Mark, and then Lynn.

Okay, Brad.

Mr. Bradley Trost (Saskatoon—Humboldt, CPC): Thank you, Mr. Chair.

As this is probably our last committee meeting, I find it ironic that I finally get to lead off for the Conservative side.

The Chair: Well, then, I'm very glad for you too.

Mr. Bradley Trost: Thank you.

I do want to note, before I start asking questions, your remark there at the end about not having enough time. As professionals, as lawyers, you deal with this on a day-to-day basis and are much more intimately familiar with the law than people like me. Essentially, this is a jury, not a group of specialists in competition law. We have an engineer, a geophysicist; we have quite the mixture here. I will say, if you think you haven't had enough time to try to grasp and understand this, have a little sympathy for the poor member of Parliament who's trying to juggle fifty different things and get his mind wrapped around what is and what is not good law. So with that editorial, I think I'll move to some of my comments.

One of the things I'm very interested in—and members on this side of the committee here have often asked about proof and evidence and so forth—was when you noted that in other jurisdictions with the market studies, it has been proven to be fairly costly and expensive. You noted that in your address. I was wondering if you have specific examples, because the concrete is always much more useful. I know this is such a broad area, and we haven't defined what market studies really are in this amendment, but could you take some examples from other places, since you noted that they were fairly expensive?

● (0920)

Mrs. Madeleine Renaud: I don't have examples from other jurisdictions as to cost, but I know that before the amendments to the act in 1986, when the Restrictive Trade Practices Commission conducted an inquiry into the oil industry, it lasted for many years and was extremely costly. I don't have the numbers with me, but maybe I could find them.

Mr. Bradley Trost: But the previous investigations into the oil industry would be a prime example of what this could entail—and of course it wouldn't just be the oil industry. Any fishing expedition for say a regional industry or something that needed to be targeted by the government for political purposes could be victimized by this amendment.

Mr. James Musgrove (Legal Counsel, Lang Michener, Association of Canadian Advertisers): If I may pick up on this comment, that's right. It would apply to any industry, obviously. It would be industries that tend to be high profile, which tend to attract public interest concerns. With the oil industry, we saw the hurricane-related events of earlier this fall as a classic example; if this power existed, it might well have been used at that time. Now gas is 83¢ a litre again.

Relatively recently they introduced these powers in the U.K. I don't know the cost, but from talking to colleagues in the U.K., I'm not sure why those of us in the private bar should be opposed to this exactly. As my friends in the U.K. described it, it's a wonderful opportunity to earn fees, in that everyone in the industry needs a lawyer and spends many tens of thousands and hundreds of thousands of pounds.

But who knows? As you say, we don't know exactly the structure of this, so we don't know how much it would cost, but it's only reasonable to think that it would be millions of dollars per inquiry.

Mr. Bradley Trost: The other aspect of it that I found interesting was the point about how it would end up diverting current resources from the Competition Bureau. So we would either have to divert current resources away from other projects, other work of the Competition Bureau, or massively expand the bureaucracy. Would that be a fair assessment?

Mr. James Musgrove: If you're going to do new work, you either have to take resources away from old work or add new resources. There's no magic to that.

Mr. Bradley Trost: I have another question. Again, I'm looking for generalities here, because as we know, this legislation is dead. What message does the business community, your clients and the association, take from this just as a signal of future intent, even if it doesn't go through? How would this affect their actions? This could possibly be, depending on the election results, read that we're all ready. Business will react to something before it even happens.

The potential of Mr. Chavez in Venezuela nationalizing the mining industry puts pressure on, even if he doesn't do anything. So is there any reaction in any of the industry, or are any clients already considering changing or possibly modifying behaviour, even if this doesn't go through, because it indicates a philosophy of the government or a philosophy of the bureaucracy in the Competition Bureau?

Mr. James Musgrove: Let me start, but I'm not sure if I fully understand your question and I'm not sure if I can help you very much. The particular power we were talking about here is market studies. I don't know of any—

Mr. Bradley Trost: In my question I was referring to both market studies and the AMPs.

Mr. James Musgrove: The act, as Maître Renaud said, is a foundation piece of our economic system. It sets the ground rules for competition. When you change the ground rules, as we did a few years ago in allowing private access for some of the reviewable practices, for instance, you change the incentives. You make it riskier to do things that economists, by and large, think are usually not a problem. Every time you move in that direction, you make it riskier; therefore, you discourage certain things.

It's a continuum, but I can't tell you that.... I, in my private practice, have not had any client tell me he or she is not going to do this because they're talking about changing the law.

I think that was your specific question.

Mr. Bradley Trost: That will do.

The Chair: We may have time for you to come back on.

Marc, please; then Lynn.

[*Translation*]

Mr. Marc Boulianne (Mégantic—L'Érable, BQ): Thank you, Mr. Chair. I'd like to welcome the two groups of witnesses.

We have heard from several organizations and, in my opinion, the testimony has been contradictory. Representatives from the Canadian Real Estate Association told us during their last appearance that they won't be interested in an investigation because, in their opinion, it carries a negative connotation.

In your report, and I'm talking especially about the first group here, you stated that you didn't want comprehensive studies to be carried out unless there was reason to believe conduct contrary to the law was involved.

The competition commissioner appeared before us on a number of occasions. I recall her giving us the example of at least four cases where complaints were lodged which did not lead to any outcome. She said that it was due to the fact that the Competition Bureau didn't have enough authority. The goal of this legislation is to give her that very authority. And the study is part of this.

I'll ask this question of both groups. Why are you afraid of the study which may benefit you and your organization's image? Apart from the arguments which you have put forward, I can't really see why this wouldn't work. Everybody fears this comprehensive study, even the Chamber of Commerce. What do you think the problem will be?

● (0925)

Mrs. Madeleine Renaud: I imagine your question is directed to the Association of Canadian Advertisers rather than to the Canadian Bar Association. Lawyers aren't afraid of these provisions, that's for sure. The question you're asking is interesting. The commissioner already has fairly broad powers under the Competition Act. The proposed market studies amendment would simply allow the commissioner to use powers already available to her under section 11, including compelling people to testify and provide documents and other information.

I don't see how the amendment would give her any more power, as the legislation doesn't provide for it. The legislation gives the commissioner the power to launch an investigation or a market study even if she doesn't have reasonable grounds to believe that there has been conduct contrary to the law. So, we wonder what the point of it would be.

You asked what people are afraid of. Well, the proposed amendment suggests that the Competition Bureau can deem that there is a problem within a particular industry, before even embarking on a study of it. Moreover, having been involved myself in investigations initiated under the commissioner's enforcement powers, I can tell you that the process is very costly for companies, especially when such studies often turn out to be unnecessary.

I don't know if Ms. Musgrove has anything to add.

[*English*]

Mr. Ronald Lund: I wasn't familiar with the comments of the commissioner, but I think that answers the question in itself—that is, first of all, as the bar association pointed out, there is enough power already to do the investigations as required. I think the kind of philosophical question, in answer to your question, is that if you're not afraid of something, why can't the police do investigations on you? Why can't people come into your home? It becomes an incredible infringement. I think the commissioner's comments about having more powers perhaps making it possible to prosecute those people in fact support the point of the bar association that if she thinks there's something wrong, we're going to go after someone. That's a very scary proposition for us.

[*Translation*]

Mr. Marc Boulianne: When something seems illegal or not as it should be, isn't it precisely the competition commissioner's role to use the tools available to her to conduct an investigation?

Mrs. Madeleine Renaud: When a complaint is lodged and she has reason to believe that conduct contrary to the law is involved, the commissioner is already completely empowered and able to proceed with an investigation pursuant to the legislation.

The amendment which you are considering gives the commissioner the power to launch a market study on a particular sector or subsector of the economy without her necessarily being convinced that there is a problem with the industry. I should add that this amendment doesn't stipulate what would happen with the findings of such a study. Would they lead to a report being published, to charges? What will be done with the information the commissioner collects?

It's almost tantamount to casting the first stone. In addition to achieving nothing, this is dangerous. As Mr. Lund, from the Association of Canadian Advertisers just said, it's as if one day, on a whim, the police decided to come and check out your home.

● (0930)

Mr. Marc Boulianne: I don't think that's exactly true. Regardless, the committee doesn't agree on that point.

What distinction do you make between a comprehensive study and an investigation?

Mrs. Madeleine Renaud: An investigation is used to determine, under a particular statute, whether there is a problem. For example, an investigation is carried out on a given industry to determine whether any conspiracy between parties would be subject to charges being laid under section 45.

Furthermore, the amendment doesn't really state what a comprehensive study may lead to. That's what I said before.

Mr. Marc Boulianne: Thank you, Mr. Chair.

[*English*]

The Chair: Merci, Marc.

Marlene is next, then Michael.

[*Translation*]

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you. How much time do I have, Mr. Chair?

[*English*]

The Chair: You have five minutes, plus or minus.

[*Translation*]

Hon. Marlene Jennings: Thank you very much for your presentations.

Just like my colleague Mr. Boulianne, my questions will focus on market studies and the proposed amendments which will give the Commissioner additional new powers. Under Section 11 of the current legislation, she can require that companies disclose information which would otherwise be confidential. And yet, from what I know of the current legislation, the Commissioner cannot use this power when carrying out a market study, for example.

I have no objections to the Bureau conducting market studies. To my mind, a study is totally different from an investigation. An investigation is conducted specifically when there are grounds to suspect irregular or illegal conducts. In such cases, it is wholly justified for the Commissioner to make use of her enforcement power, and so on.

Moreover, I am of the opinion, that the purpose of a study is to do just that, study a particular market or a real situation. So, here are my questions. Should the Competition Bureau in fact be empowered to compel disclosure of documents? And if so, should there be provisions to protect the interest of parties required to submit such documents? I am also concerned about the impact such studies may have. There are some which are currently under way. I presume that companies subject to an investigation by the Competition Bureau are able to say how much it costs the industry. This will help us to draw comparison and to clearly indicate just how much these studies may cost.

We have been told about models used in Great Britain and the European Union. Bear in mind that their population is such that their corporations are far bigger and indeed more numerous than in Canada. That concerns me. In the vast majority of sectors, our economy depends on small and medium-sized businesses. Even if we put aside for a moment any potential increase in powers, this issue remains a matter of concern to me.

I was wondering if any of you have represented companies being investigated or studied, where confidential information has not been disclosed. I think this might be very useful information for my colleagues.

[*English*]

The Chair: Let's get an answer. We're going to come right back to you anyway.

Hon. Marlene Jennings: We're so few here....

The Chair: We're going to come back to you anyway.

Go ahead.

Mr. James Musgrove: I wonder if I can start to address some of the points raised.

Nobody is arguing that the powers that exist are inappropriate—at least no one's arguing that today—when there is an appropriate reason to belive there is a violation of the act. Then they exist, and then, I can tell you, the costs for someone who is responding to that investigation are more than $2 million and less than $10 million. It's in that kind of range. It depends how extensive it is, but they're very significant. They're subject to what is a criminal investigation. They are defending themselves.

The same proposed powers would apply in respect of these market studies. What exactly would it cost in any case? It's hard to know, but it's not insignificant. You get lawyers; you produce documents; you review them; you give your answers very carefully, because you want to be absolutely accurate, of course—you don't know how it's going to be used against you in the future. This is the reality of life.

● (0935)

Hon. Marlene Jennings: May I interrupt for a second?

Am I mistaken in believing that under the system as it now stands, the commissioner has the authority to conduct a market study without the use—

Mr. James Musgrove: Without the use of these compulsory powers—that's correct.

Hon. Marlene Jennings: Exactly. So the question I'm asking is, if the commissioner already has that authority and has in fact conducted market studies where disclosure is voluntary, what's the cost to the companies in that case?

Mr. James Musgrove: I can't tell you, because in fact I've been involved only peripherally in those. They aren't that common. I think it is less than it would be with all the compulsory powers. You can understand that it would be, but from my own experience I can't tell you that.

I don't know, Madeleine, whether you can.

Mrs. Madeleine Renaud: I'm not aware that the commissioner has the power to conduct market studies now. This may be my lack of knowledge. I didn't think she—

Mr. James Musgrove: But, for instance, these five studies of the gasoline industry over the past whatever years.... It's informal; it's a review—

Mrs. Madeleine Renaud: No, they have been studies conducted following complaints.

Mr. James Musgrove: Some of them—

A voice: There have to be complaints.

Mrs. Madeleine Renaud: Yes, under the current system—

The Chair: There has to be a complaint.

We're going to come back to you, Marlene. We'll have Michael and then come back to you.

Michael Chong, and then Paul.

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

I just have some questions of general import.

This is for the panel. Maybe you could give this committee a bit broader overview of the changes to this legislation over the decades so that we have something that puts it into perspective.

The anti-combines act of predecessor legislation was first introduced about a hundred years ago, during the first war. Maybe you could tell this committee—I don't know whether you know or not—and if not over that sweep of time, maybe more recently, what the changes have been to the Competition Act and why they were brought about.

Mr. James Musgrove: Well, I'll start. I'll do what I can.

There were major amendments made in both the mid-1970s and the mid-1980s—and these followed very detailed studies, such as the Skeoch and McDonald report, the 1969 Economic Council of Canada report—to modernize the act, to move it from a piece of criminal legislation to a more modern economic framework. For instance, monopolies were criminal, and therefore it was impossible to do anything with it.

These amendments brought in a series of these reviewable practices we've talked about that are now subject to private access, like refusal to deal, tied selling, etc. They brought in a civil monopolization provision, called abuse of dominant market position, which has been subject now to a number of cases brought by the commissioner. They brought in a civil merger regime, which is a very active part of the act, and some mergers are now stopped or restructured, and that's a new phenomenon since the mid-1980s.

So there were major overhauls at that time that really changed the act, really made it a live act. Other than conspiracy enforcement and price maintenance, there wasn't a lot to the act prior to that. Other than those two criminal aspects, there wasn't much to it.

At the same time, the act was split, so the Competition Bureau became the enforcement mechanism—the police force, the investigative force—and we created something called the Competition Tribunal to decide the things. Prior to that, it had all been together in the Restrictive Trade Practices Commission, and that was unconstitutional and created problems, because they were doing the investigation and the judging.

So we set up this regime. We had the investigators and the civil court, and then, of course, we continued to have the criminal court for criminal matters. Then, in the late-1990s, we created a new regime called civil misleading advertising. Until that time, all misleading advertising was criminal. At that point, it was decided that misleading advertising was not typically criminal and that they wanted a more expeditious, more efficient way to proceed against honest advertisers who make a mistake. They maintained the criminal regime for true fraudsters. That is structurally what we've had over the last 25 years, anyway. I don't know if I can give you the history before that.

Madeleine, do you want to supplement that?

● (0940)

Mrs. Madeleine Renaud: Just to add to what Mr. Musgrove just said, when the act was moved from criminal to civil legislation, the intent was to keep as criminal provisions conduct that economists felt was truly prejudicial to the economy—so prohibit those as precisely as possible. All the civil non-criminal provisions—where conduct is sometimes beneficial and sometimes prejudicial—would only prohibit conduct if it was prejudicial, if there was a negative effect on competition. The only sanction was a prohibition order, an order to stop doing what you were doing, because it was felt that to impose sanctions like fines or anything would not be appropriate where conduct was ambiguous.

Mr. Michael Chong: Now, these two studies that were done in the seventies and that drove changes to the Competition Act were done by the Government of Canada.

Mrs. Madeleine Renaud: Yes.

Mr. Michael Chong: What's driving the changes in this act? Have there been large studies done?

Mr. James Musgrove: The Competition Bureau, of course, has done various studies and reviews, some of them arising out of the initial work of this committee, at the invitation of this committee. There is a permanent amendments unit within the Competition Bureau that considers the law and proposes changes. I'm an outsider to government, so from where we sit in the private bar, the changes appear to be driven by activity within the Competition Bureau and at this committee, primarily.

Mr. Michael Chong: The studies that were done in the seventies and eighties that drove significant changes to the legislation, did they have data to support the changes? In other words, did these studies include a quantitative analysis of the marketplace that showed a need for these significant changes?

Mr. James Musgrove: They were, by and large, based on the testimony of expert economists and expert people in trade. The volumes are thick. I have not looked at them in some time. So yes, but don't ask me to quote anything.

The Chair: Marlene, and then Paul.

Hon. Marlene Jennings: I'm still trying to understand. I had a certain understanding, and now it's becoming a little cloudy after listening to the witnesses.

Right now, the commissioner can study anything she wants, except that if it's not an investigation following the complaint of at least six people, for instance, she does not have the authority to use section 11, which allows her to force disclosure of documents by companies who work in the area she's studying. Let's call that an investigation. If she decides to study anything, she can study anything, but she cannot force disclosure of documents.

On your concern, for instance, about the commissioner being able to embark on a study and at some point decide it should no longer be a study but should actually be an investigation into alleged wrongdoing, and all the charter rights kick in, similar to, say, revenue.... The CCRA can conduct an audit, and if in the course of their audit they come to believe they have some evidence of criminal activity, or whatever, all the charter rights kick in, and then the proceedings take a whole other direction.

Is that what you're concerned about, that this does not make clear at all where or at what point the protections are there for the individuals—and when I say individuals, I mean companies—that would be forced to disclose information under a study that normally should not be of a criminal nature?

● (0945)

Mr. James Musgrove: Let me start, but, Madeleine, jump in.

If six persons make a complaint, if the commissioner has reason to believe there's conduct contrary to the act, or if the minister directs her to inquire as to whether there's conduct contrary to the act, then she has those section 11 powers.

Hon. Marlene Jennings: I understand that.

Mr. James Musgrove: But if she does not have reason to believe there's something contrary to the act, then she does not have those powers.

But you're right, she can ask people for things. She can proceed on a voluntary basis.

Hon. Marlene Jennings: Right.

Mr. James Musgrove: As I said earlier, I have not been involved as counsel on matters of that sort, so I can't give you personal experience as to how that works, but I think, in broad principle, that's right. That's how it exists now.

I guess the concern that those of us in the private bar and also the ACA, who I'm here with today, have is that if you give these compulsory powers to come through the door, which is the analogy, to say, “Well, we don't know you're doing anything wrong, but hand over everything and we'll have a look”, that seems contrary to a basic presumption that you're entitled to your privacy until someone has reason to believe you're doing something wrong.

We know, as a practical matter, it's going to be very expensive, because we know when those things are conducted as an investigation they are very expensive.

Do any of us in this room have any serious doubt that if those powers had existed this fall when gas prices went up, the oil industry would have been in its sixth formal inquiry with no evidence whatsoever that they did anything wrong? We just know it would be used that way, to alleviate pressures when they arise, even though these industries have done nothing wrong. We just know that as a fact. That's our concern.

Mr. Ronald Lund: If I could just add to that as well, I think the idea that this would only be a study is not the experience now. I think in fact that once a study can be there, the organization or company would have to treat it like an investigation. So I don't think it would just be a matter of, oh, there are a few questions. Instead, they are going to have to conduct themselves as if it's an investigation. That's one point.

The second point, which goes to your point, is that good legislation generally comes out of something being wrong with the system. It's been our point of view, I think, and that of most of the other organizations—the Canadian Bar Association, the Retail Council of Canada, and many others—that the system in place, as far as we know, basically seems to encompass what's come before us. So we get very perplexed by what we think are very draconian measures and by most responses to the effect that, respectfully, sir, if you've got nothing to hide, don't worry about it. It sends a major chill down industry, because accidents can be a very expensive mistake.

Hon. Marlene Jennings: Yes, I understand that, but it exists already in other jurisdictions.

So are you telling me that in other jurisdictions, both where there's no authority to force disclosure—and where it's therefore voluntary disclosure—and jurisdictions where they do have the power to force disclosure when you're doing a market study, the companies involved in that conduct themselves as though it's a criminal investigation?

● (0950)

Mr. Ronald Lund: The one thing I can never account for, because I'm not a lawyer, is to say what's happening in another jurisdiction. One of the things I've been particularly proud about, being a Canadian, is that our Canadian solutions seem to work for us, not for what powers there are in other countries. So I don't know how we're organized currently compared with those other countries. All I know is that because there are not massive complaints, what we are doing seems to be working quite nicely. On top of that, the system that we have on the advertising side of this argument, in terms of Advertising Standards Canada and its trade dispute mechanisms, seems to work quite well. That would be one of the underpinnings that would go away with such legislation.

The Chair: Okay, thank you, Marlene.

Paul, please.

[*Translation*]

Mr. Paul Crête (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, BQ): Ms. Jennings, thank you for bringing up that issue.

We realized, as legislators, that an important tool was lacking. You have said the opposite of what the minister said in House. It is also the opposite of what the Commissioner told us, when she said, that as a general rule, she does not have the investigative power to be able to be proactive and find out what is happening in... What is more, her predecessor said exactly what we have been saying.

Nevertheless, we are trying to add to a legislation which already includes a punitive legal approach, at least in spirit, a proactive component enabling the Commissioner to embark upon an assessment of a given situation. We must never lose sight of the fact that this legislation is not there to protect companies, but rather consumers, by giving them access to an adequate competition framework. We realize, as a result of what occurred in the petroleum sector—and the same may occur in other sectors—, that we need an approach which is not punitive.

In yet, under the proposed amendment, I can see how a company would be punished or how this would have a negative effect on its stocks. Assessors have come here and told us the opposite; newspaper articles, too.

Do you feel that this tool is currently lacking? It is true, that we are not able to speculate on what is needed to make a particular market work better, without the first being a legal conduct. WIth this amendment, we are not trying to find a way of making the legislation more punitive, we just wanted to allow it to be more corrective, so that positive things can be done without a punitive approach.

Mrs. Madeleine Renaud: As I pointed out earlier, one of the problems with the proposed amendment is that it provides no real direction for the authority. The amendment allows the commissioner to undertake an investigation and to compel the production of information. However, nothing is said about what happens after that. What if the commissioner investigates and discovers, for example, that the law has been broken? Could she then assume the role of a police officer and lay a charge?

You say you would like to see an improvement in the way in which the markets operate, but what type of power is that? We are in the process of changing what is essentially the "competition police" into a regulatory body. Is that what the investigative power is all about? You want the markets to operate more smoothly, but there is no end to this type of power.

Mr. Paul Crête: That is an interesting reaction. I think the committee will always be open to the idea of adjusting a motion in order to make it clearer. Obviously, we want to add something that will allow for an assessment of a situation, without having to undertake a criminal investigation. It is a snapshot. Instead of a criminal charge, a simple snapshot of the shop could be taken in order to see what is really happening so as to determine exactly how the market is operating.

In the oil industry, for example, the same phenomenon occurs every two years: the price goes up, it levels off, the public calms down, and then the prices take off again. This penalizes the entire economy. We would like the Bureau to have a mandate to examine this so as to set a benchmark for the market, without any negative connotation. No one is going to think that a sector is about to be penalized because the commissioner is looking into it. It could simply be for the purpose of better understanding the sector in order to determine what should then be done.

Mrs. Madeleine Renaud: Let's make a comparison. The police undertake an investigation when someone breaks the law. This investigation can lead to charges, if necessary. If you want to know what happened in a given area, you ask the coroner to investigate. But the same organization is not responsible for everything.

● (0955)

Mr. Paul Crête: But the coroner's inquest is always based on a criminal activity.

Mrs. Madeleine Renaud: Not necessarily. In Quebec, there is no power to assign blame. In this motion there is no such direction.

Mr. Paul Crête: Let's continue with your example. I understand that something must happen or a complaint must be made before the coroner can begin an inquest.

Mrs. Madeleine Renaud: The decision to have the coroner investigate is based on something.

Mr. Paul Crête: On an occurrence.

Mrs. Madeleine Renaud: I don't think the commissioner will decide to investigate something just for the fun of it.

Mr. Paul Crête: In the House of Commons, as well as here in committee, we are constantly asking why there has been no investigation of the oil industry, for example. We are told, year after year, that it could not be done because the law did not permit it.

Finally, after the scandalous events in August and September, they decided to act. The text itself is interesting. We should not interpret it as a way to penalize some sectors. Nothing that is said will be incriminating. We are prepared to consider some clarifications if necessary. Nevertheless, I think we should have an additional tool.

The Chair: Would someone like to comment?

[*English*]

Mr. James Musgrove: If I could just address the point briefly, the commissioner's role is to investigate and to enforce the law. That is an important role, but if you also give her the role of doing a broad study of the marketplace, those roles are inevitably going to be confused, and one is going to lead to the other in ways that are worrisome.

Mr. Paul Crête: Why?

Mr. James Musgrove: Because, as Madeleine says, the commissioner will investigate or probe this and that at great expense, and then might find a mistake and say okay, now we'll prosecute. It leads one to the other. They are different roles.

Secondly, you make reference to there being a terrible problem in the petroleum industry. We know the petroleum industry has been investigated many, many times. In fact, the petroleum inquiry, which we were discussing earlier, was the paradigmatic horror show for these kinds of market investigations, and yet nothing is found to be wrong with the industry. What happened in the fall, when there were hurricanes and there was a constriction in refining capacity, is that the market worked exactly as it should—not as it shouldn't. It worked as it should: prices go up when there is a restriction of supply, and prices have come back down when there is not. The market works properly. But we know that if these market-study powers existed, the petroleum industry would now be in the midst of a multi-million-dollar investigation, for no good reason.

[*Translation*]

Mr. Paul Crête: How can you say that the market worked properly? How can you say that when money was taken from the economy as a whole? I don't say that it is theft or that there was any type of collusion, that is not what I am saying. I'm saying that this is a market phenomenon that will absolutely have to be avoided in the future, because we came very close to a catastrophic situation, and it could have caused an economic recession. Government must have the tools to face that type of situation.

[*English*]

The Chair: Merci, Paul.

Are there any comments?

Mr. James Musgrove: Thank you.

I guess we will agree to disagree on the point.

What we had was a restriction in supply. When there is less supply and more demand, the prices go up; when the supply comes back on, prices go down. That's exactly how markets allocate scarce resources.

We may just have to disagree.

The Chair: Thank you, Mr. Musgrove.

Okay, there are a couple of minutes for Michael to wind us up for the first hour of this session.

Mr. Michael Chong: Thank you, Mr. Chair.

I have a bit of an unrelated question to my previous queries. Do you think there are monopolistic tendencies in large sectors of the Canadian economy? In particular, I'm thinking about agriculture right now, where a couple of years ago we had the border closure. This suddenly highlighted the fact that secondary and tertiary production in this country was sorely lacking, and where it did exist, one or two large processors had the entire market. I don't think this is unique to that one part of agriculture.

I think there are some concerns about that kind of stuff going on. My question is that if there is a problem, do you think the existing legislation can deal with it, or do you think it's beyond the scope of the existing statutes?

Mr. James Musgrove: First of all, let me say there is no problem whatsoever in the advertising industry. I'm conscious I'm here with the advertising industry, but in fact it's a highly competitive sector.

Let me briefly address the broader question, if I can. Compared especially to our neighbour, we are a relatively small economy—no secret there. We have fewer participants, and in order to have economies of scale, they have to be relatively large in order to operate efficiently in the world. We also benefit from the fact that we get competition from south of the border and usually other parts of the world.

But as you say, you gave an example where the border was closed in certain agricultural markets, and all of a sudden the market was made smaller than it previously was, at least for a time, and therefore had fewer competitors. I'm not an expert in those markets, but I suspect there really were issues, because you have a natural market, which is North American-wide or broader, and then, because of trade problems, the market was smaller than it previously was, with fewer competitors. I make no comment about any particular industry, but in theory and in practice, yes, that can be a problem.

● (1000)

The Chair: Thank you very much.

Michael, you'll have other chances in the next round.

Thank you very much for your participation.

We're going to suspend for one minute, then invite our witnesses from the Retail Council of Canada, the Competition Policy Group, and the Canadian Federation of Agriculture to the table.

Thank you very much to the advertisers and the bar. Thank you.

We are suspended for a minute.

● (1000)

(Pause)

● (1005)

The Chair: I call to order again this November 24th meeting of the Standing Committee on Industry, Natural Resources, Science and Technology.

We're continuing our study of Bill C-19.

I'll repeat my brief remarks. First of all, thank you all for appearing. Be aware that regardless of what happens Monday as far as the election being called, your testimony today will be on record. The next government or the next committee would have every right to bring all this testimony forward. I would expect this bill to be brought back in a future Parliament, so there's nothing lost.

The Retail Council of Canada has made it through a late flight, I guess, and thank you for getting here to help us out—along with the CFA and the Competition Policy Group.

We'll start with the Retail Council.

The clerk has probably advised you to try to keep your remarks between five and seven minutes, so there's time for questions. Should you fail to get something in because I've had to cut you off, feel free to import what you've otherwise missed into your answers.

We'll start with you, Mr. Nighbor.

Mr. Derek Nighbor (Vice-President, National Affairs, Retail Council of Canada): Thank you, Mr. Chair. I'd like to begin by thanking not only you, but also members of the committee, for allowing the Retail Council of Canada to return to present the views of our over 9,000 members on the amendments made to Bill C-19.

I'd also like to thank those around the table for the interest they have paid to this file and the attention they've given the many letters that RCC members have sent to them, letters that outline our members' serious concerns with this piece of legislation, which I believe was well intentioned, but which clearly misses the mark.

As you are aware, the Retail Council of Canada is the country's voice of retail. We are a not-for-profit association with over 9,000 members, who represent all formats of retail—small, middle, and large. It's important to note that 90% of the Retail Council of Canada's members are independent retailers who own their own store. It's also important to note that the retailers who join RCC tend to be the dynamic, responsible retailers who are hard-working, law-abiding, and very much involved in their communities.

Our supplementary submission was circulated to you in advance, in both official languages, and I'd like to thank the clerk for her help in facilitating that process.

Mr. Chair, RCC continues to have serious concerns with the proposed massive increase in administrative monetary penalties, or AMPs, especially the proposed increase from $200,000 to $15 million for deceptive marketing practices, which are rather vaguely defined.

Heightening our concern is the fact that these multi-million-dollar penalties will apply to civil offences, which often stem from unknown or inadvertent actions. Today, the Competition Bureau does not have to be clear from the outset as to whether it's pursuing an action, be it in the criminal stream or the civil stream. That is a huge threat to retailers, especially when the civil course carries not only the proposed multi-million-dollar penalties but also has no charter protections whatsoever, with no presumption of innocence, no full disclosure of evidence by the crown, no right to silence, and no remedy if the defendant is found to be innocent. Peter Hogg has said that the massive increases in AMPs will not withstand a charter challenge; the RCC agrees.

With respect to the amendments before us today, we are most concerned with the government's amendment to institute a market studies provision. In its 2003 public consultations, the Competition Bureau heard almost unanimous negative reaction to this measure, so much so that it was not included in Bill C-19. Currently, RCC believes that the Competition Bureau has adequate investigative authority, and believes that the bureau has not demonstrated the need for this wide-sweeping power.

Let me be clear: the Retail Council of Canada supports fair business practices and adequate protections for consumers; we expect nothing less from our members. This past year, the RCC partnered with the Government of Ontario when it introduced its new consumer protection legislation. We have a longstanding record of working with the Competition Bureau on files, from scanner accuracy to ordinary price claims. We enjoy a positive working relationship with the bureau and look forward to continuing that relationship, regardless of the outcome of this bill.

What concerns us about the market study power, beyond the fact that it was introduced at the eleventh hour, is the fact that it clearly paves the way for exploratory investigations by the bureau. In this case, the bureau has the police—without a search warrant—and the judge as one in the same. Gazetting an investigation is hardly an accountability measure, but it would definitely be an effective way to paralyze a business or a business sector, for possibly no reason at all. As I said before, 90% of RCC's members are small, independent business owners. They are not people who have their own in-house legal counsel. They are not people who have large marketing departments. They are not people who have the time or financial resources to withstand invasive, whimsical studies by the bureau.

The RCC remains very concerned that this market study provision is far too expansive, that it is void of accountability measures, and that it could have a paralyzing effect on sectors of the economy, including small retail business—a vital sector of our economy that some members of this committee have suggested would benefit from this provision. The RCC believes that small businesses will be put at significant legal and financial risk.

Mr. Chair and members of the committee, thank you for this opportunity today.

The Chair: Thank you for that very concise presentation.

Mr. Rowley, from the Competition Policy Group.

Mr. J. William Rowley (Chairman, Competition Policy Group): Thank you, Mr. Chair.

I've filed speaking notes in both languages, which I believe have been distributed. I thought what I would do today is speak to the three points of concern, which relate to abuse of dominance and AMPs, the market studies, and an amendment to remove "unduly" from the conspiracy offence.

Before doing so, I thought it might be useful to tell you a bit about my background. I've been practising law for 35 years. I started as a special assistant to the then director of investigation and research in the 1960s, when I was in law school. I've continued to practise in this area, both in Canada and internationally. I've been the chair of the International Bar Association's anti-trust committee, and I continue as the head of the IBA's global competition policy forum. I've had the advantage of seeing competition laws and application throughout the world.

Also, I think it's important for this committee to know—as I'm sure it does—that competition law is a comparatively new thing. Canada has a rich and long history in competition law; most countries don't. In the last decade and a half, we've had approximately 100 competition laws introduced around the world. A decade and a half ago, there were not ten operating competition laws in the world. So they're new. Canada, the United States, and latterly the European Union have long had competition laws, so I will talk about where we are in relation to them and some of the new laws.

First I'll speak about abuse of dominance and the AMPs. Basically, the introduction of administrative monetary penalties turns the system upside down. In my estimation, and the estimation of many others, Canada has a jewel in the crown of a competition law and an approach to competition policy. One of those jewels was the introduction of reviewable practices in 1976 to decriminalize important areas of distributive activity, of getting to the market.

In 1986, monopolization—which used to be a criminal offence—was added to this reviewable practice. The whole concept was that the approach should be remedial. That is to say, because 95% of the time all these practices, including those listed in abuse, were either pro-competitive or neutral, we should not have an offence. When they are occasionally misused, we should have the ability to bring it to an end. That's what we've got, and that's what's worked.

In abuse of dominance, this is a very fine line. What we as Canadians and international consumers want is the toughest possible competition around the world to get the most efficient use of our resources and get products to market inexpensively. Occasionally a market participant with a dominant position will abuse that position. In the last twenty years there have been only nine cases in Canada. In the last ten years, there were only nine cases in the United States—I'm talking about federal cases. This is very rare stuff.

If I may, I'm going to read you two quotes, because in the previous testimony there was some question about where all this came from. In the proposals for a new competition policy for Canada, the first stage.... This was the book published by the Government of Canada at the time. On page 43, there is a quote I thought would be useful to have here this morning:

> The Economic Council, which had decided to recommend a civil rather than a criminal approach to such problems, emphasized that these practices were capable of being used constructively and none of them should be regarded as an offence, or banned as such....

● (1010)

Ten years later, when we introduced abuse of dominance, the three leading competition law professors in Canada, professors Dunlop, Trebilcock, and McQueen, published a book. In that book, *Canadian Competition Policy: A Legal and Economic Analysis*, they had this to say about abuse:

> Throughout the list of examples in section 50,

—now it is a changed number—

> it is clear that the object or purpose of the behaviour is an essential element in rendering it anti-competitive.

And here I emphasize:

> This recognizes that in many cases the behaviour itself should be considered as pro-competitive or neutral and that it is the purpose that makes it objectionable.

That's the difficulty. When you have a fine possibility of $15 million in respect of conduct that may be pro-competitive or may not be, you are going to impose an enormous chill and you are going to do a disservice to competition and to getting the best possible prices in Canada.

I'd like to say a few words about—

● (1015)

The Chair: I don't want to interrupt you, as your depth of experience probably justifies a much longer presentation time, but we sadly are limited. I'll just get you to wrap up. Just be sure to include in your answers to questions any points you didn't make.

I'll let you go ahead a little bit longer, Mr. Rowley.

Mr. J. William Rowley: I quite understand. I don't wish to impose on the committee. I'll just say a few words about market studies.

It would be useful to give you the real-world example of the last big market study that led to the Parliament of Canada saying let's get rid of this, and that was the gasoline prices inquiry. I'll give you a few data points, and then I'll be quiet and I'll respond to questions.

The data points are fascinating, and they're taken from the report that was published in 1986. The inquiry started in 1973, thirteen years earlier. There were searches and seizures in 1973, 1974, and 1978. There were examinations under oath in 1975. In 1981, the director filed a seven-volume report of complaint to the commission. In that, he alleged at the time a $12-billion rip-off. He supported it by a hundred volumes of evidence. The $12-billion rip-off became the catch phrase of the newspapers.

The commission then held hearings in 1982 and 1983, with 200 witnesses, 200 days, 50,000 pages of transcripts, and 1,800 exhibits, one of which was 100 volumes long. In 1986 the report concluded that the director was wrong, that the industry was sound, that it was competitive.

Now, I'll give you an estimate of the cost, $50 million. In today's terms, that would be $150 million. The motion picture inquiry that we went through a couple of years ago was about $25 million. These are expensive proceedings.

The Chair: Thank you, Mr. Rowley. We appreciate you sharing your experience with us.

From the Canadian Federation of Agriculture, will it be Mr. Paul Mistele.

Mr. Paul Mistele (Vice-President, Ontario, Canadian Federation of Agriculture): Thank you.

I'd like to thank the committee for the opportunity of speaking this morning on behalf of the farmers right across Canada.

The Canadian Federation of Agriculture is an umbrella organization representing more than 200,000 farm families right across Canada. In agriculture, farmers are the model of efficiency and competition in the Canadian economy. Over the last decades, Canadian farmers have increased output, export sales, productivity, cost per unit, etc. Canadian farmers compete by the hundreds of thousands, both domestically and internationally. As a result, Canadian consumers achieve the lowest cost and highest-quality food baskets in the world.

Despite this progress, farm incomes continue to fall. It is a primary goal of all Canadian producers to achieve sustainable incomes from the marketplace. Unfortunately, in today's markets this has become extremely difficult. While farmers compete by the thousands, the same competitive model does not exist with its production chain partners. Upstream and downstream partners are large, and exercise local monopoly power. This imbalance in power has regulated farmers to price takers and its partners to price setters. The exercise of monopoly power on the supply side or the demand side in a value chain is neither efficient nor beneficial to the Canadian economy.

Competition and the Competition Act are tools to achieve efficiency and to work to maximize the benefits of the Canadian economy. Today, the Canadian Federation of Agriculture is asking only for equality in the application of the Competition Act, to uphold the principles of competition to achieve an efficient economy and allow Canadian farmers to achieve stronger standing in the marketplace.

The CFA makes three requests. First, the Canadian federation supports the amendments to increase the administrative monetary penalties to sections 74 and 78, dealing with deceptive practices and abuse of dominance. However, there are two more sections, 75 and 77, “Refusal to Deal” and “Tied Selling and Market Restriction”, that are also significant anti-competitive acts. We ask the committee to also apply the application of AMPs to anti-competitive acts outlined in 75 and 77.

Second, the Competition Act is aimed primarily at consumers, and thus wording within the act deals almost exclusively with anti-competitive behaviour of suppliers. Squeezing, exclusive dealing, refusal to deal, market restriction, and abuse of dominance, as anti-competitive acts from dominant players, also have significant impacts on competition and the efficiency of our economy. We ask the committee to apply the principles of the Competition Act equally to suppliers and buyers in the economy, and to include the term “buyers and demand” with every use of “suppliers” and “supply.”

Finally, we ask the committee to support the proposal for market references. The proposal works to allow the government to inquire into the state of the competition and the function of markets in a sector of the Canadian economy. To have knowledge of one's economy is only prudent. Without that knowledge, solutions and policy change for improvement from the government would be like the blind leading the blind. Imperfect information, where one knows more than others, also leads to inefficiencies in the economy. Knowledge of our economy is essential to making sound decisions for the future.

We thank the committee for the chance to present our views. Again, Canadian farmers seek only to achieve sustainable incomes from the marketplace. Upholding the principles of competition and the act as a tool to achieve efficient outcomes in the Canadian economy will aid farmers in achieving that goal.

Thank you very much for your time.

● (1020)

The Chair: Thank you, Mr. Mistele, for your concise presentation.

We're going to start with Brad, please, and then Marc.

Mr. Bradley Trost: I'll be brief, Mr. Chair.

I want to thank you gentlemen again for appearing. I'll make a few comments. I don't really have tons of questions, since a lot of what we have covered continually gets covered over and over again.

I have a comment for the Retail Council of Canada. I found it fairly interesting, you noted all the small firms involved in your occupation and so forth. People tend to have the view that it can only be big operations, etc., engaging in non-competitive behaviour, or perceived to engage in non-competitive behaviour, or be affected by this. Having lived and worked north of 60, where you basically have a massive economy struck minor.... It could very easily affect the small chain of stores in northern Canada. They could be hauled into court and basically bankrupted by this. It's more theoretical, but if it's political, something like that could happen. I'm just putting that out as a general comment.

The other thing is, Mr. Rowley, you were running short of time, and for anyone else who wants to make some comments, I'm interested, on just general broad competition, what else you would like to have seen in the bill, etc., or in competition law in general. This is the last meeting on this legislation before it dies. Do you have some general principles to help some of us who may be coming back and may be dealing with this again from one side of the House to the other? So I'd ask for general comments on what was missed overall in Bill C-19 and what you would like to see added. And this would be fairly general, because—and I've stressed this before— you're not dealing with first-rate lawyers, not even first-rate laws. I'll throw that open to everyone involved.

Mr. J. William Rowley: I'll respond, if I may, to your question on the general principles.

I think there are three that would remain, if I were a parliamentarian, uppermost in my mind. It's a bit like going to the court of appeal and being told you can have a number of arguments. I'd start with the proposition that Canada has a very good competition law. I think it does, and I can give you chapter and verse if we want to get into it. For example, in the cartel area, we've had an extraordinary record of enforcement in the last 15 years because we have very good, sound law and we have a very good immunity policy, which brings people forward. We've collected something in the area of $200 million in the last decade or so in fines. So we have a good law.

That leads to the second principle: if it's not broken, don't fix it. Don't fiddle with a good law.

The third principle is if somebody comes to this committee or comes to Parliament—and I include in this the commissioner of the day, because it is the commissioner of the day who has been behind the changes to the law in the last decade or so, and you've had the enforcement arm of the law seeking change—then you say, “It's a good law; if it's not broken, we don't want to fix it.” If the person coming before you is proposing changes, he or she will need to give you substantial evidence as to the need for those changes.

● (1025)

Mr. Paul Mistele: Could I comment?

The Chair: Yes, go ahead.

Mr. Paul Mistele: We feel that we've reviewed this document at this time fairly accurately with our staff. There are always things that you can add, but certainly the tools we have that you want to make right now would go a long way in the agricultural sector in Canada. We need this. The year 2005 is the first in which we're going to have negative income in Canada right across the board—I mean, below zero.

We need some changes. As was experienced with BSE—and this was pointed out earlier—when we're getting ten cents a pound for an animal, and the product is going to the supermarket higher in price than what it was before the BSE border closing, something's wrong, something is amiss.

Also, I would like to outline the fact that as a broiler producer, a chicken producer, and as a farmer, I buy my chicks from a hatchery. I use a processing plant, but I buy my feed from a different company. One company owns the chick hatchery and the other owns the processor, and I'm waiting for one of them to come into the lane and say, don't you think you should use our feed out of our feed mills? They haven't yet, to their credit, but I am waiting for that to happen eventually. What options will I have as a producer? None—not with that company, and that company has a huge reputation for quality chicks.

What we see in front of us today is very much geared to primary agriculture. It's what we need to take care of some of the ills that we see out there. And I don't want to solve world peace here today, but as a sovereign nation we need our own food supply. Without the sustainability and profitability within the agricultural community, everyone in this room will be affected by depending on imported food in the year 2020.

The Chair: Mr. Mistele, that's a good point. Thank you.

We have time for a very quick comment from Mr. Nighbor.

Mr. Derek Nighbor: Mr. Chair, very quickly, what we would like to see, if we had our way, would be full disclosure by the commissioner throughout any proceedings, whether civil or criminal. This is the only guideline the bureau has set in this regard. It's up to the commissioner's discretion. It's quite a threat whether it's going to go down the civil or criminal stream. We'd like to see a bit more clarity there.

I think you have to remember that in the big picture, this is a law of general application. This is a law that applies to businesses no matter what size they are or what sector they're in. I think we have to keep this in mind as well.

Very quickly, picking up on Mr. Trost's point about retail, I was reading through Mr. Janigan's comments from Tuesday. One of the things he talked about was the fact that this market study is not specific to one business but to an entire industry. For the sake of using a practical example, let's use Leon's Furniture. If this is an investigation into the furniture retail industry, that also captures a mid-range business like The Bombay Company, and it will capture small independents in St. Jacobs in Mr. Myers' riding. We have to look at this in a holistic way.

The Chair: Thank you, Mr. Nighbor.

Marc, and then Lynn.

[*Translation*]

Mr. Marc Boulianne: Thank you Mr. Chairman.

Welcome. I would like to congratulate you, Mr. Rowley, for your excellent brief. It is unfortunate that you did not have the time to read all of it.

You answered my first question when you responded to my colleague. You said that you had taken a look at what is done elsewhere, in Europe, the United States, Australia, and you had asked some lawyers for information on the system. I was wondering how their situation compared to Canada's, and you said that we had a good Competition Act.

My next question is about one of your quotes. When speaking about Prof. Hogg, you said that you were struck by his characterization of the AMP scheme as violating the Charter of Rights. You also said that you were surprised by the commissioner's opinion, when she said that it was not criminal. You then said that there was no difference between a $15 million fine and a criminal offence.

Can you tell us a little more about that?

● (1030)

[*English*]

Mr. J. William Rowley: Let me start by saying that I'm not a constitutional lawyer. I have given constitutional opinions before, and I've obviously looked at the constitutionality of elements of this act and at most of its predecessors—because a number of the changes that we've seen proposed since 1970 have been questionable constitutionally.

Peter Hogg is probably our foremost constitutional authority in Canada. I imagine you have read his opinion. It's a short opinion, direct and very readable. He says this is simply unconstitutional. I agree with that. There is no question that if I advise a business and that business sees it's at risk of a $15 million penalty, then it is facing an offence—and a penal offence. That's what Hogg is saying. I'm not aghast at his opinion. I would have been very surprised if he had reached any other opinion. What was a surprise to me was that the commissioner came back before you and responded to the Hogg opinion by saying, well, you know, when we draft legislation it is looked at by the Department of Justice, an obviously it's been vetted and it's fine, and it's fine because we're not trying to penalize, but we're trying to encourage compliance.

Well, forgive me, but if I were a betting man, which I am, I'd bet that if this were passed and it went to a court, the court would side with Professor Hogg—not Commissioner Scott or the Department of Justice. I think it's simply unconstitutional.

Now, the real worry about this is that if we pass this law and it is unconstitutional, or it is as likely to be questioned as it will be—and the very first client that I have will bring a constitutional case, and we'll take it to the Supreme Court of Canada—that means you're going to have tied up this law for a number of years in uncertainty. That's highly undesirable.

[*Translation*]

Mr. Marc Boulianne: A little further on, you gave some rather strange advice for a lawyer. You said that in that type of situation, clients must be advised that they could be fined, rather than encourage them to comply with the law.

[*English*]

Mr. J. William Rowley: Encouraging a client to comply with legislation: I'll try to deal with that in terms of abuse of dominant position. When a client comes to me and is contemplating a set of actions in the marketplace, whether they be to ask a distributor to have an exclusive arrangement or to tie one product to another product, we'll look at the reviewable practices area to see if there is likely to be reason for a complaint from somebody and the Competition Bureau bringing a case before the Competition Tribunal.

In the course of that, one of the very first things we'll do is look to see if that client could be said to have a dominant position. Whenever we see that kind of set of actions that are borderline, we say there is a risk and ask why they want to do this. Most of the time they want to do this because they are the producer or the distributor of a product and they think this is the best way of getting their product to the market and the most efficient way of selling the most product. They're doing it for competitive reasons.

Occasionally—and I have represented people in dominant positions—you will have somebody who says they want to drive that person out of the market. Well, that won't immediately put me on my guard. Why not? Because it is the natural thing for you to want to drive your competitors out of the market and own the market. That's what competition is all about, and it's only when a line is crossed that is truly exclusionary that we need to be concerned. It is because that line is so very hard to define that a remedial way of going about things in Canada is so economically sound.

We say, on the very few occasions the line is crossed, we prohibit it, but that's not all. Under the present law the Competition Tribunal has the power to make any other order it needs to restore the state of competition, so there's not just prohibition. There can be any number of mandatory steps as well. It has very extensive powers.

● (1035)

The Chair: Merci, Marc.

Lynn, then Michael.

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

I wanted to thank all the witnesses for appearing and giving such good and fine testimony this morning.

Mr. Mistele from the federation, I think I heard you say you're a chicken farmer.

Mr. Paul Mistele: Yes, and broiler producer.

Mr. Lynn Myers: Very good. I was born and raised and still live on the family farm, and I chair the dairy caucus for our party. I feel strongly about supply management and what's happening in that sector and such, and I just wanted to let you know that.

I was interested when you talked about sustainability of income in the marketplace and how important that is for equality and the principles of competition and such. I just wondered if you could elaborate on that in terms of the family farm overall, what it means, and how best to proceed in that way. I just want to get more of that testimony on the record.

Mr. Paul Mistele: I'll try to stay away from a speech, with all the possibilities on this one.

When you look at economic sustainability in the marketplace, you're also looking at the fact that on the farm, we have to have the income for a number of reasons. We have the highest standards of law on on-farm food safety in the world. I have regimens that I have to adhere to, and binders and binders of paperwork that I have to produce for every production period, and they are audited every third year to make sure we have on-farm food safety. We have environmental standards on our farms that are the highest in the world, and we have to compete with other countries that have lower standards, but that's another discussion for another day.

Also, there are the labour standards with the employees that I have at my farm. I have two. Since I have no family working with me and I'm here today, somebody is home doing chores.

The fact is that if we don't have that sustainability, if we can't get our dollars from the marketplace, then we are in jeopardy of letting down society. But the agricultural people in this country are the best stewards of the land. We are the most economically efficient way of maintaining the environment. If you maintain our dollars that we get down to the family farms, then we can maintain our role in society as suppliers of safe food and stewards of the land.

I'd also like to comment on Mr. Rowley's comments. Some of the documentation I find quite interesting, and the numbers, but I feel they are somewhat outdated.

You have some numbers there from 1986, I think, that you've reported and what not. That's all fine and well, but I feel this is also part of the issue. We need information that is current, that's timely, that is right there. If I depended on the genetics of five years ago, I would be out of business today.

The other aspect was the fact that he would take the issue to the Supreme Court of Canada. An individual like me or a group of individuals like me would wilt in that kind of light, because what do we have? We don't have those resources. I don't want to plead poor-boy here, but that is a reality, as part of the system today. How are we going to take these individuals on, and what aspects do we have to go for?

So let's focus on what's before us here today. If we get these tools in place, I'm not saying they're perfect, but certainly they're a step in the right direction toward helping to sustain that income in Canada.

Thank you very much.

● (1040)

Mr. Lynn Myers: That was a good stump speech.

Mr. Paul Mistele: I just went through an election.

Mr. Lynn Myers: Mr. Nighbor, in terms of the market studies and the amendment that would allow the commissioner to conduct some of those studies into the state of competition, I wanted to ask you if you thought that would give him or her the power to conduct fishing expeditions even if there's little evidence of any anti-competitive process.

Mr. Derek Nighbor: I think that's a big concern. We strongly believe the tools are in place for the Competition Bureau and the commissioner to investigate areas in which there's believed to be anti-competitive behaviour. Anybody who is concerned just needs to get five of their friends together to bring forward an application, as I believe Mr. Rajotte has said in the past.

There have been five investigations into the petroleum industry since 1990. In working on this file, there are some days that I'm wondering why we are doing this.

What's very concerning to me is beyond the fishing expedition. It's also the fact that you're capturing all of an industry. I understand the popular nature of kicking around the big guys, but the reality is that while these measures would hurt large retailers, they'd kill small retailers. When you capture all in the same, in the end that's really what we're worried about.

Mr. Lynn Myers: You'll be happy to know, then, that this is going to die on the order paper.

Mr. Derek Nighbor: There you have it.

The Chair: Thank you, Lynn.

Michael, please.

Mr. Michael Chong: Thank you, Mr. Chair.

In the study of this bill, I found it interesting that we have a huge grey area. A lot of the practices that are reviewable and regulated by the Competition Act are actually in fact good practices, in that they're pro-competitive practices. But in certain cases they become anti-competitive practices when they're inappropriately used.

Mr. Nighbor and Mr. Rowley, I know that in your opinion and in the opinion of many other witnesses, the act works well. It encourages healthy competition in Canada and ensures that anti-competitive behaviours are appropriately dealt with. But one sector where I think there is some cause for concern is agriculture.

I'm going to direct my questions to all of you, but in particular to Mr. Nighbor and to Mr. Rowley, because I think that the Canadian Federation of Agriculture and Mr. Mistele are well aware of the challenges facing agriculture.

This is not exclusively a problem that has to do with anti-competitive behaviour in agriculture. In other words, anti-competitive behaviour is not the sole cause of problems in agriculture. We've got overproduction in commodities, international trade issues, and the like, but this sector is certainly in serious trouble.

Having grown up working on the farm and currently living on a farm, I can tell you that at the rate we're going, we're not going to have any family farms left in the next 10 to 15 years, other than supply management. We're going to turn rural Ontario and rural Canada into a Disneyland for wealthy urbanites to go to on their weekends, with vacant tenancy landlords running the country. That's what it's going to turn into.

The problem I see is that public policy in agriculture is contradictory. We have public policy that is geared towards primary producers to encourage a perfect market. Hundreds of thousands of producers are competing against each other to produce a consistent commodity product, and that's perfect competition. Yet on the input side and on the output side, on the supplier side and on the buyer side, we are doing the opposite. Because of international markets, we're encouraging ever-increasing large companies, with ever-increasing large efficiencies, and it's structurally causing a huge problem in the agricultural economy.

I think it's a structural problem, but there are also some issues around competition. I don't have the empirical data in front of me on this, but there are two areas that immediately come to mind. One is on issues of exclusive dealing, where in Ontario and in many parts of the country there are two or three large retailers that supply 90% of the retail grocery market. They don't want to deal with you because you can't supply them year-round, and you're out of luck. If they don't like you, they'll let your whole field of vegetables rot. I've heard stories about that. I've heard first-hand stories, where a big buyer decides to buy from somebody else that year, and it's tough luck if you've put a hundred acres of cabbage or a hundred acres of vegetables into the ground.

The second area that I think might be a cause for concern is monopolistic tendencies in the secondary processing of the beef markets, with the recent closure of the border and again with grocery retailers. I don't have evidence to support it, but this is what I'm hearing from primary producers. They don't feel there are enough buyers out there for their products, and they're beholden to dealing with one or maybe two buyers on that front.

I'd be interested in comments from Mr. Nighbor and Mr. Rowley on what I've brought up.

● (1045)

Mr. Derek Nighbor: I'm happy to start.

Our association is mainly general merchandise and specialty retailers. We're not the Canadian Council of Grocery Distributors nor the Canadian Federation of Independent Grocers. I can't speak to some of those details, but I think it goes back to a couple of my previous points.

First, there are tools in place. If those injuries are being realized in the market, there are tools in place. Market study provisions do nothing to increase the ability of the commissioner to act in that regard.

The second point is that this is a law of general application. I would encourage the government if there was a concern about the specific sector. Farmers are good for retail business, because we need them to come into the retail stores and shop. There's no doubt that we are for sustainable agriculture in this country. But I think the big concern we have is that if there are issues in agriculture or petroleum that need to be dealt with, they should be dealt with directly and not by way of a law of general application, painting the entire Canadian business structure with the same brush.

Mr. J. William Rowley: Mr. Chong, I have to say the question you pose is a very difficult one for anybody to answer. You're talking about the agricultural business being squeezed because they're small, they've got big buyers and big suppliers, and they have to buy from these big suppliers. I think Mr. Mistele was worried about a tied purchase. Then they have to sell to these customers, and there are not many of them.

What happens when the supplier asks for too much—what they can't afford or what they can't sell at the end of the day at a profitable price? You're stuck in the middle, aren't you? It's a dreadful place to be.

It's not just farmers, though; auto parts manufacturers who deal with big manufacturers of cars are being forced every day to produce a less expensive part. Why? It's because the auto manufacturers are facing competition from people who are more efficient than they are, and they have to get their prices down.

My first reaction to what you say is that it's a very tough competitive environment out there, but it's not just in Canada and it's not just the agricultural community; it's every community. I include the law, for example; our customers ask for better prices all the time, and they don't have to deal with us. People we've represented for years come to us and tell us they'd like to do an RFP, and suddenly we'll lose a very important customer, yet we have the juniors and associates there whom we're going to pay in any event, so it's tough.

I don't think the agricultural business is alone in its troubles.

● (1050)

The Chair: Thank you, Mr. Rowley.

Marc is next. We may have a moment for you, Michael, at the end.

Briefly, Mr. Mistele, please go ahead.

Mr. Paul Mistele: I'd like to agree with my neighbour, Mr. Nighbor here, simply because I do support a lot of small community businesses. I feel we're partners in this idea that we have to be sustainable in the rural communities, so we're very much in key with aspects with your association; we just can't go down the road all the way, hand in hand.

The Chair: Thank you, Mr. Mistele.

Marc, please.

[*Translation*]

Mr. Marc Boulianne: Thank you Mr. Chairman.

I have a question for Mr. Mistele. Mr. Myers spoke about supply management. If you had been watching the House of Commons yesterday, you would know that the Bloc Québécois voted in favour of a motion to maintain supply management. We have always defended the current agricultural principles.

You said that the Act was intended mainly to protect consumers. However, you seemed to imply that it does not go far enough in protecting buyers. You had even made a recommendation in that area. You said that the Act should include consumers and buyers or buying, respectively.

Can you tell us a little more about this?

[*English*]

Mr. Paul Mistele: We're certainly pleased with the support we've received on supply management from all parties within the government. That's been key to the success of supply management, and we'll continue to be on that side.

What we're saying in this presentation today is that this is very much focused on the consumer aspect of the economy. We're asking that you look at the production side of it, the primary production side of it. We also see this when we look at CFIA product issues; it's consumer-oriented. It's about the safety of consumers and safe food. That's what we all want in this country—safe food.

In answer to your question, that is why we want that included. It gives a balance with not only the consumer side of the equation, but also the production side of the equation. I hope I've answered your question.

Maybe Clinton would have something to add to that.

Mr. Clinton Monchuk (Policy Analyst, Canadian Federation of Agriculture): On the maintenance of the buyer and seller chains, we saw, as was mentioned earlier with the beef markets, that there was such dominance in the packing capacity in Canada that once the border was closed, you had no options. As a cattle producer from Saskatchewan, I had one option to sell my cattle to, and that was it. What we're trying to get out of this is that when we're talking about suppliers, we have to include buyers as well.

[*Translation*]

Mr. Marc Boulianne: Thank you Mr. Chairman.

[*English*]

The Chair: If there are no others, we're going to finish with Michael for a couple of minutes, and then we'll give the room back to the justice committee.

Mr. Michael Chong: Thank you, Mr. Chair.

It's more a point of information that I'd like to go on the record, because I think it's important to put this in perspective for people who may not have agricultural backgrounds. I've thought about this over the last year, because there are a lot of agricultural producers in my riding.

And, Mr. Rowley, I note that you mentioned the competition you face in the law sector and how cut-throat it is.

Supply management is one of the parts of agriculture that's actually working. There are certain problems within it, but generally speaking it's working. I'm a strong believer in it, and it's the only part of agriculture that is allowing the family farm to produce a decent income. But there are many detractors of it. I find it very interesting, because I think there are parallels that can be drawn between supply management and the legal and medical professions.

I come from a family of doctors. Medicine is actually, or basically, supply management. You've got import controls: doctors south of the border can't jump up to Canada and start practising here. As a matter of fact, it's a big issue, because we have a lot of foreign-trained doctors driving taxi cabs.

We've got a quota. Ontario is a perfect example of what happens when the province restricts a quota, as Premier Rae did ten years ago: we now have a massive shortage of family physicians in the province of Ontario, because the province essentially sets a quota through restricting medical school enrolments.

And we have price-setting. The Ontario Health Insurance Plan sets the prices, in negotiation with the OMA, as to what doctors get paid.

So we have supply management medicine. Yet I don't hear people attacking this sacred cow as some sort of system that should be done away with because it's unfair to Canadians.

The law is very similar. We don't have price-setting in the law, but we certainly have a quota system. Clearly, the enrolment in law schools across the province of Ontario and admittance to the Law Society of Upper Canada are somewhat of a quota system. By nature of the law, we have somewhat of an import control on the practice of law in this province, just by the nature of our common law and our statute laws, and the like.

So I would just put on the record here something that people outside of agriculture should remember, that it's not just a part of agriculture being protected that's unique, but there are many other sectors of the Canadian economy that are regulated like it.

Thank you, Mr. Chair.

● (1055)

The Chair: Thank you, Michael.

Is there a final very brief comment from any of our witnesses, before I say thank you to you?

Mr. Mistele.

Mr. Paul Mistele: I would certainly like to thank you again for the time in front of you here today. We're trying to put forward the message on agriculture. There's a first ministers meeting going on in Regina, as we sit here, to address the issue. Hopefully, this issue on competition will come up.

Thank you.

The Chair: Well, thank you, colleagues.

Thank you very much to our witnesses, especially those who had to travel through bad weather to get here.

To those colleagues who we may or may not have a chance to chat with before Monday night, have a good weekend, and best wishes to all.

Thank you.

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

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