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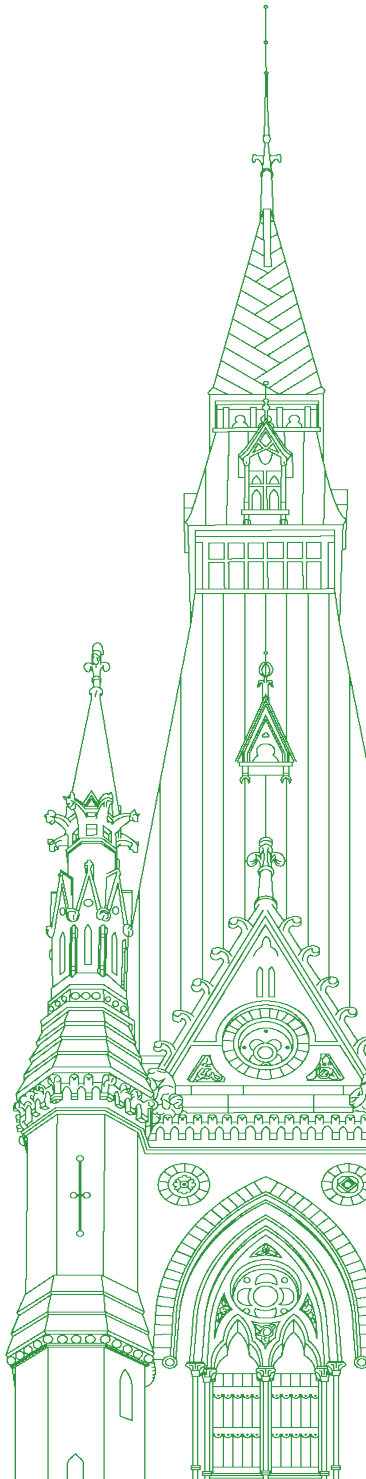

Chair: Mr. Joël Lightbound

Standing Committee on Industry and Technology

Monday, June 10, 2024

● (1100)

[*English*]

The Vice-Chair (Mr. Rick Perkins (South Shore—St. Margarets, CPC)): Welcome. I call the meeting to order. This is meeting 129 of the House of Commons Standing Committee on Industry and Technology.

I am your substitute chair for the next couple of meetings. One way to keep me quiet is to put me in the chair's spot.

Some hon. members: Oh, oh!

The Vice-Chair (Mr. Rick Perkins): Today's meeting is taking place in a hybrid format, pursuant to the Standing Orders.

Pursuant to the order of reference of Wednesday, February 7, the committee is resuming consideration of Bill C-352, an act to amend the Competition Act and the Competition Tribunal Act.

I'm not going to read all the bumf about the earpieces, but I encourage everyone, if they're not using them, to keep them down by the sticker so that we avoid the feedback and ear damage the interpreters can get. I appreciate everyone's co-operation.

With that, I welcome the witnesses for today, and I congratulate our clerk on becoming a grandmother yesterday—again.

The Clerk of the Committee (Ms. Miriam Burke): It's not again. It's the first time.

The Vice-Chair (Mr. Rick Perkins): It's the first time. That's even more important.

As for our witnesses today, we have Edward Iacobucci, professor and Toronto Stock Exchange chair in capital markets in the faculty of law at my alma mater, U of T. I didn't go to law school there; I was just an undergrad. We have Jennifer Quaid, associate professor and vice-dean, research, civil law section in the faculty of law at the University of Ottawa. We have Thomas Ross, professor emeritus at the Sauder School of Business, UBC, who's on video conference. From the Canadian Anti-Monopoly Project, we have Keldon Bester, the executive director. Finally, from OpenMedia, we have Matthew Hatfield, the executive director.

Thank you all for coming.

All sound tests have been done, and all witnesses appearing remotely seem to be successfully logged in.

I'll turn it over to our first witness, Dr. Iacobucci, for five minutes.

Mr. Edward Iacobucci (Professor and Toronto Stock Exchange Chair in Capital Markets, Faculty of Law, University of Toronto, As an Individual): Thank you for the invitation to speak with you today about this bill.

As everybody here knows, some of the proposals in the bill are already law and other versions are in other bills. Some of what's been passed already I have some hesitations about. Maybe I'll close with a couple of observations there, but I'll focus my remarks on the things that I think are still in play in this bill.

One thing it proposes is defining the financial penalties associated with cartelizing or conspiracy under section 45, which includes the possibility of fines up to 10% of the worldwide revenues of a firm convicted of price-fixing. My general approach to competition law reform in the last couple of years has been to support things that improve enforcement of the law—that is, stricter enforcement of good substantive law is welcome. I was supportive when the government increased the bureau's budget. I've been pleased with the expansion of private rights of action, including, importantly, the possibility of damages for private litigants. Increasing administrative monetary penalties also, in my view, has been a positive development. Greater financial penalties and damages and increased deterrence of anti-competitive conduct, in general, will improve competition law enforcement.

Especially in this area, when it comes to price-fixing cartels, which are quite difficult to detect, I'm a supporter of strict penalties for price-fixing—that kind of offence. I therefore tend to support what's in Bill C-352 for that. It defines these penalties in a way that is trying to encourage them to be higher than perhaps they've been in the past. It authorizes stiff penalties for that kind of conduct and I'm supportive of it.

As to the second topic I want to talk about, I'm a little less supportive of what's in the bill. It concerns the emphasis on market structures in evaluating mergers. In my view, it's not a good idea to put into the statute market share thresholds for evaluating mergers. There are two basic reasons why I'm reluctant to support that kind of move.

First, market shares are inevitably imprecise. They're not tightly connected to competitive outcomes in any given case. On the first point, it's not that markets have some sort of objective truth to them such that analysts can sweep away the dust and see the contours of a market. Rather, markets are crude heuristics that roughly capture the sources of competition. In the case of a merger, it's about the sources of competition on the merging parties. There will often be alternative, entirely defensible definitions of the market that could lead to very different market share calculations. There's inevitably a kind of arbitrariness to market definition and, consequentially, market shares.

How does one measure output? Do we measure revenues? Do we measure units sold? Do we measure capacity? When measuring output, over what time frame do we measure it—last year's numbers, last week's numbers, three months or the last decade? Importantly, how close a substitute do two products have to be to be included in the same market? Are Coke and Pepsi, Coke and ginger ale, or Coke and beer in the same market? There's no right answer to those questions. It's a question of judgment. They could even vary case to case.

Second, market definition does not fully account for intramarket product differentiation. Two firms could have very similar products and compete quite vigorously within a market, while two other firms may be defined in the same market, but their products are differentiated in a way that suggests they don't compete quite as vigorously. The kind of binary, in-or-out nature of market definition at least has the potential to be a bit misleading. There's no correct way to define the market. There's therefore no correct way to define market shares.

Moreover, setting aside the messiness of market definitions and market shares, concentrated structure, just as a conceptual matter, does not necessarily imply weak, competitive performance. Causation, for example, could run the other way. You could have intense competition, especially in a market where there are scale economies. You could have intense competition weeding out weaker suppliers and leading to more concentration. It's not that concentration is lessening competition; it's that competition may be lessening concentration. Existing market shares may not predict the future. There may be very low barriers to entry, for example. A concentrated market may not necessarily pose competition concerns. A firm may have a large market share now but a relatively weak product in the face of innovation, so predictably it will be less important over time.

● (1105)

For all these reasons, I think market structure, as I said earlier, is a useful heuristic when evaluating mergers. It's a good tool to look at when evaluating mergers. I support what the bureau has done historically. They have put out guidelines that rely in part on market share just to give the public a sense of the likely approach of the bureau to a particular merger. However, putting market shares in the statute gives them a kind of legal significance and potentially a pivotal legal significance—certainly Bill C-352 does—that in my view is misplaced.

I'll conclude my time by identifying two elements of Bill C-352 that have already passed that I have some hesitations about. One is calling excessive and unfair prices an anti-competitive act. I have a concern about that. For one thing, high prices don't undermine competition. They're not anti-competitive in and of themselves. Second, it is going to be very difficult to know what excessive and unfair is going to mean.

The other concern I have is that, as a consequence of, frankly, our case law, the latest statutory amendment to take out the competition test for finding an abuse potentially catches conduct that is harmful to competitors but is good for competition and good for consumers. I'm a little worried that abuse has become a little too easy to establish as a consequence of those changes.

I will stop there. Thank you.

● (1110)

The Vice-Chair (Mr. Rick Perkins): Thank you very much.

Professor Quaid is next.

Dr. Jennifer Quaid (Associate Professor and Vice-Dean Research, Civil Law Section, Faculty of Law, University of Ottawa, As an Individual): Thank you to the members of the committee for this invitation.

[*Translation*]

Testifying before you is always a pleasure, especially when it comes to competition law.

However, I won't hide from you that I was surprised to learn that the committee had decided to study Bill C-352, tabled by Mr. Jagmeet Singh in September 2023, since most of the provisions of this bill have been incorporated, in one way or another, into the bills tabled by the government, namely Bill C-56 and Bill C-59.

It is for this reason, and to better understand his concerns, that I listened carefully to Mr. Singh's testimony before this committee on June 3. It seems that three aspects of the Competition Act are of concern to him, as he makes three main proposals.

First, clauses 3 and 4 of the bill would modify the penalty imposed on those convicted under section 45 of the act. Second, clauses 8 and 9, which my colleague Professor Iacobucci has just discussed at length, deal with so-called “structural” presumptions linked to market share. Finally, the third proposal, and the least important, is to add, by means of clauses 7 and 10 of the bill, provisions to sections 90.1 and 93 of the act that take the wording of the exception provided for in cases of efficiency gains and place it instead in the main provision on the factors to be considered in assessing anti-competitive effects.

In this statement, I will focus briefly on the positive aspects of these changes and close with two remarks of a general nature on the competition reform process.

[*English*]

On clauses 3 and 4, I must confess that I am puzzled. In 2022, the Competition Act was amended to remove the previous $25-million cap on fines under section 45. This brought section 45 in line with section 47, which is the bid-rigging provision. It ensures that courts have maximum flexibility to set fines at levels that are proportionate in the circumstances to the gravity of the offence and the blameworthiness of the conduct.

Mr. Singh wants to reimpose an upper limit on fines. The previous $25 million would be reinstated, but then proposed subsection 45(2) would allow for an alternative, scalable penalty based on either three times the value of the benefit derived or, if that can't be calculated, up to 10% of the person's annual worldwide revenues. The objective is to communicate to courts the importance of imposing a quantum of fine that has enough bite to have an impact on the offender.

While I understand Mr. Singh's motivations, the modifications proposed will not produce the outcome he seeks and are likely to be counterproductive. The proposal is based on a misunderstanding of how criminal sentencing works in Canada, particularly the purpose of maximum sentences and how fines are calculated in cases of economic crime involving business organizations. I've done a lot of research in this area, so I'm happy to take questions on this. I would urge you to reject clause 3.

As for clause 4, I don't have any objection to it, but the provision—section 49 on financial institutions—has never been applied. I wonder why you wouldn't just have a fine at the discretion of the court given the size of financial institutions, relatively speaking, rather than having a $25-million maximum.

On clauses 7 and 10, I will say two things. I agree with the commissioner that reviving the old phrasing of the efficiencies defence may indirectly import back into the law some of the legal interpretations that came with that defence, such as an undue emphasis, in my opinion, on quantification and a judicial preference for a total surplus standard when assessing whether efficiencies are pro-competitive. However, I disagree with the commissioner that relying on the so-called basket clause, paragraph 93(h), is the best way to ensure that going forward, how we evaluate pro-competitive effects and how they're factored into merger law evolve in a manner consistent with the expectations that were created by the repeal of the efficiencies defence. I think this is an example of where enforcement guidance is going to be essential.

With regard to clauses 8 and 9, you have the benefit of two fine economic minds here, Professor Iacobucci and Professor Ross. They are better positioned than I am to speak to the frailties of relying on market share data alone as an indication of market power. I will simply echo the comments of my colleague from the Université de Montréal, Pierre Larouche—who appeared before you last week—that market shares are an incomplete picture and they can both overstate and understate market power. Bill C-59 also includes structural presumptions, but they are based on different measures than just market share.

This brings me to my final two points.

The first is that the debate over clauses 8 and 9 underscores a more fundamental problem, and it's one that Professor Larouche already talked about. I won't have time to get into detail here, but on the debate about what measures to put in the act, to me, they're secondary to whether or not we should have an act full of these kinds of details. There is a real problem with how the act is designed. I am a bit disappointed, I must confess, that this reform process didn't give an opportunity to start over with some basic general principles and develop a law that is far more rationally coherent and not with so many details and provisions from all over the place. Unfortunately, that's not what happened.

The final thing I want to say is that I hold out hope, but it's not going to happen this time around, that.... We still haven't really answered the fundamental question: What are we trying to do when we promote competition? We've skipped over the first question, which is, why are we doing this? That would inform the remedies we want, the choices we make, the emphasis we might put on different parts of law or what kinds of considerations would be relevant. Any discussion of the purpose clause ended with the Wetston consultation. Professor Iacobucci actually wrote about it. After that, there really wasn't much else there. There is no agreement on it, but I think it's an opportunity lost.

I'll stop there, but I welcome your questions in both official languages.

● (1115)

[*Translation*]

The Vice-Chair (Mr. Rick Perkins): Thank you very much.

[*English*]

Professor Ross, if you're available, you have five minutes.

Professor Thomas Ross (Professor Emeritus, Sauder School of Business, University of British Columbia, As an Individual): Thank you to the committee for this invitation to appear before you to talk about something that I care a lot about, which is Canadian competition policy.

I am an economist and professor emeritus at the Sauder School of Business. I've been working, studying, researching and teaching in the area of competition policy for about 40 years. I spent a year as the T.D. MacDonald chair of industrial economics at the Competition Bureau and have worked with the bureau on and off over the years since.

This is a very exciting time to be involved in competition policy in Canada. I can't remember a time quite like this, except maybe the mid-1980s when we got the Competition Act. We were prepared to look at so many different changes. There's a lot that I like about what has happened and some that has given me pause.

In my remarks, I want to focus on a couple of things. I'm going to echo a lot of the comments made by my colleagues Professor Iacobucci and Professor Quaid, but perhaps coming from an economist, it will have a bit of a different spin to it.

I want to focus on two areas—and I'm going to use the same language Professor Iacobucci used—that I think might still be in play to some extent given that many things seem to be more or less settled. I want to start with the structural presumptions from clauses 8 and 9. I'll talk mostly about mergers; that's really where they bite.

I like the idea of providing structural guidance to merging parties that is based on market structure, but like Professor Iacobucci, I think they belong in guidelines. To put them in the law gives them weight and suggests a false precision that I think could be counterproductive. It risks turning, if you go to a litigated matter, a dispute that should be about effects on competition into a debate about what the market definition is.

Economists are even retreating a bit from the whole market definition exercise because we realize, for reasons Professor Iacobucci gave, that it's very messy and very imprecise, and we don't think people should rely on it too much. If you want to measure market shares or concentration, you have to start with a market definition: What's in? What's out? How do you measure shares? Professor Iacobucci did a good job referring to those challenges. I would like them in the guidelines.

I have two recommendations about this. The first would be to put them in the guidelines and not in the law. If they are in the guidelines, all the presumptions, in my view, should be rebuttable. Bill C-352, which takes away the rebuttable feature for mergers above 60%, is problematic in my view. There are going to be mergers where you invoke the greater than 60% share, and the tribunal would not even have discretion, as I read this clause.

There are many circumstances in which a merger with 60% could actually be pro-efficiency and benefit consumers. You could think about a situation where a large firm is buying a small firm that was otherwise about to go out of business—a failing firm, as we might say—or two firms might merge that have zero overlap in their businesses, which I think is an example Professor Iacobucci gave. You would expect no competitive impact from that. If I'm understanding it correctly, it could even block a large firm from divesting some of its assets and businesses because it would still cross 60%, even though it's actually reducing its size. That's subject to interpretation, I suppose, but for those reasons, I'd be very concerned about structural presumptions in the law.

The other area I wanted to mention, which Professor Quaid also pointed to, is efficiencies as a factor. Here, again, it's mergers that I'm going to focus on mostly, although it does come up in the competitor collaborations area.

I was always a fan of having efficiencies considered in a merger review. I'm a little disappointed that it got pulled out, but I recognize the challenges it has presented. I would really like to see some recognition of efficiencies left in the law, however. For that reason, I'm happy that Bill C-352 leaves them in as a factor. However, I'm also with Professor Quaid, and the commissioner to some extent, on the fact that the way they're left in as a section 93 factor with a lot of the old language—for example, the “greater than” and “offset” language—could be somewhat problematic. It could bring back some old challenges with the old defence, and they could plague us again.

● (1120)

My preference is to have efficiencies recognized in some way. I worry that if they're not in there somewhere, the tribunal will think that Parliament took out efficiencies as a consideration; it was suggested that they make it a factor, and they chose not to do it. They might wonder how much weight they as a tribunal should put on efficiencies. We recognize that efficiencies are a prime motivator of many mergers and a prime impact of many mergers. When they come through, they improve things for consumers and the firm. I applaud the fact that Bill C-352 still recognizes efficiencies, but we might want to think about the way they do that.

I'll leave my opening remarks there. I'm happy to engage in any other elements of the bill.

Thank you.

The Vice-Chair (Mr. Rick Perkins): Thank you very much, Professor.

Our next presenter is Mr. Bester from the Canadian Anti-Monopoly Project.

Mr. Bester, please go ahead.

Mr. Keldon Bester (Executive Director, Canadian Anti-Monopoly Project): Thank you to the committee for inviting me to speak with you today.

My name is Keldon Bester, and I'm the executive director of CAMP, a think tank dedicated to addressing the issues of monopoly power and building a more democratic economy in Canada.

We appreciate the opportunity to appear before this committee to discuss the proposed amendments to Canada's competition law contained in Bill C-352. After nearly four decades of proconsolidation law, Canada is turning the corner on competition policy. With the passage of Bill C-56 last year, Bill C-59 being studied in the Senate and Bill C-352 being studied by this committee, this government and, in fact, all parties have made much-needed improvements to Canada's competition law.

Canada is on track to having a tougher stance against harmful takeovers, abuses of corporate power and practices designed to deceive consumers. These changes should be understood as the first step—echoing the comments of Professor Quaid—in rebalancing the relationship between dominant corporations and Canadian consumers, workers and entrepreneurs. The work of improving competition in Canada is really just beginning, and I want to take the opportunity to zoom out on some of the mechanics that might make that possible.

As important as strong laws are, just as important is the effective execution of those laws to the benefit of Canadians. The Competition Bureau is putting powers gained through Bill C-56 to work in investigating the use of property controls in the grocery sector. Along with the recently opened market study in the airline sector, also the result of Bill C-56, the investigation is an early sign that the Competition Bureau understands that its efforts need to be focused where competition matters the most to Canadians. These efforts raise an important point for the future of Canada's competition law: the need for a quick resolution of competition issues and greater transparency in the work of the Competition Bureau.

Our strengthened laws cannot help Canadians unless they quickly address practices that harm competition. Today, competition law investigations are a multi-year process. The ongoing investigation into Google's practices in the digital advertising market has been expanded after four years, with no timeline for the conclusion of the expanded investigation. For news organizations dependent on a competitive digital advertising market, four more years may be too much to wait.

When investigations become litigation, Canadians can expect to wait another three to seven years for a resolution of practices potentially harming competition. If property controls are indeed weakening competition in the grocery sector, Canadians should not have to wait for up to a decade for more competition in such a critical market.

Accordingly, the committee should consider ways in which the investigation and litigation processes could be reformed to speed up the resolution of competition cases. One step would be to improve the information-gathering powers of the Competition Bureau with powers more akin to the Office of the Privacy Commissioner or the provincial securities commissions. If an investigation leads to litigation, the ability to stop parties from engaging in potentially problematic conduct while the litigation is ongoing should be strengthened. Finally, for the speedy resolution of litigated cases, the process of litigation should be streamlined, and the future role of the Competition Tribunal should be a topic of study.

Along with a more rapid resolution of competition issues, Canadians also deserve greater transparency into the activities of a strengthened Competition Bureau. Balancing the needs of confidentiality and accountability, Canadians should not be left in the dark about the investigations that the Competition Bureau is currently engaged in. A positive step in this direction would be a repeal of the language. This requires the bureau to conduct its investigations in private, which introduces ambiguity with the Competition Act's existing confidentiality requirements. While this would still leave transparency in the hands of the Competition Bureau, it would be an important signal to Canadians that more transparency is desired and a first step towards a Competition Bureau that is more open with Canadians.

The work of this committee has resulted in a competition law better equipped to promote competition and protect Canadians. A necessary next step is to think about improving the systems responsible for executing that law.

Thank you for your time. I look forward to your questions.

● (1125)

The Vice-Chair (Mr. Rick Perkins): Thank you very much, Mr. Bester. You're just a little under time.

Our final presenter today is Mr. Hatfield, from Open Media.

Mr. Matthew Hatfield (Executive Director, OpenMedia): Good morning. I'm Matt Hatfield, and I'm the executive director of Open Media, a non-partisan grassroots community of nearly 270,000 people in Canada who work for an open, affordable and surveillance-free Internet. I'm joining you from the unceded territory of the Sto:lo, Tsleil-Waututh, Squamish and Musqueam nations.

I confess that I'm at a disadvantage in textual analysis compared to my fellow witnesses, whom we've just heard. I'm neither an economist nor a lawyer. Consider me a representative of ordinary Canadians in the room, reminding you of why this all matters. In that light, I'm very pleased to see this committee continue its work to strengthen our competition laws by studying Bill C-352. Bill C-56 and Bill C-59 have made a strong start to getting competition right in our country, but alone they are not sufficient to rebalance our laws to truly serve Canadians first.

Canadians do not believe that our competition laws are serving them. Last year, we conducted a Mainstreet Research poll that found that nearly 70% of Canadians believe our existing competition laws are designed to serve the interests of oligopolies more than those of ordinary Canadians. That was not a partisan finding. Majorities of Canadians who vote for each party felt that our laws serve large corporations ahead of them. A full 92% of Canadians believe that Canada's extremely high market concentration in many sectors is a key driver of our very high consumer prices. Again, there was a very small partisan difference.

Within telecommunications, OpenMedia's specialty, we have decades of evidence from across the country that prices track the number of competitors in a market. Prices go down when there's a third or fourth provider, and they spike when a company leaves the market. Put briefly, no matter who you come to this committee to represent, your constituents and your voters are looking to you to deeply reform the rules of the game in Canada to drive more competition between companies and more fairness for Canadian consumers.

Supporting Bill C-352 will demonstrate your commitment to better market competition. Placing the onus on large companies to demonstrate that their merger is unlikely to harm competition; giving the bureau expanded power to study what's going wrong in a sector and recommending how to improve it; and providing more meaningful penalties for subverting competition law and longer periods to undo damaging mergers are all smart, proportional proposals that we believe will meaningfully improve competition in Canada in ways that ordinary Canadians will feel in their daily lives.

Strengthened presumptions against mergers in already overly concentrated sectors in particular will be a very powerful tool against deals like the Rogers-Shaw buyout, which this committee condemned and which was soon followed by price hikes for many of Rogers' mobile consumers. With Bill C-352 passed, the Competition Act will continue to afford large businesses many opportunities to defend and successfully carry out mergers and buyouts that are in the public interest.

When I wrote my opening remarks, I expected that some witnesses would tell you that this set of amendments would place some of Canada's largest companies on the defensive when they contemplate buying each other out, uncertain that a merger and acquisition strategy will succeed. I know that some have. That's good. They should be on the defensive for a change. Businesses out-competing each other through vigorous market competition is much healthier for our economy and Canadian consumers than businesses solving their competition problems by financing buyouts and mergers and by reaping monopoly rewards for it. Some flexibility for the bureau and tribunal to examine different models of defining a market, for example, is a good thing, in OpenMedia's view, for better enforcing competition.

For decades, we've deferred to a very narrow view of how to define markets and identify competition problems. That has served us very poorly. Many democracies have gotten competition wrong over the last four decades, assuming that competition mostly sustained itself and that disruption would always come from market leaders. That has not happened. Competition is very powerful, but it requires an active and intervening regulator to sustain itself, particularly in sectors with naturally high investment costs, like telecommunications and tech. Canada has had the weakest competition laws in the OECD for many decades, and Canadians are paying proportional costs for that. From telecommunications to groceries to housing, we're a world leader in consumer costs, but we're far from a world leader in the quality of what we receive or the incomes we have to pay for it.

We believe that Bill C-352's remaining amendments that are not yet passed are modest and proportional to Canada's competition problems. If what's left seems bold to you, I encourage you to be bold. The scale of Canada's problems does not call for small, edge reforms. Nearly 24,000 Canadians have endorsed OpenMedia's anti-monopoly charter, which calls for our government to permanently block the formation of larger oligopolies in Canada. Bill C-352's strong presumption against mergers would be a powerful tool to this end. On behalf of our community, I ask you to support and pass it.

I welcome your questions.

● (1130)

The Vice-Chair (Mr. Rick Perkins): Thank you, Mr. Hatfield and all the witnesses.

We'll now begin the opening round of questioning. We'll start with MP Williams for six minutes.

Mr. Ryan Williams (Bay of Quinte, CPC): Thank you, Mr. Chair. You're doing a great job so far.

Thank you to our panellists. This is a super panel on competition. It's great to have everyone here.

Dr. Quaid, you asked the question of why we are doing this. That's a really good question. I think Canadians right now understand that we have little competition. We have been spending the last few meetings specifically talking about what Canadians are seeing from the mergers that have been approved. This government approved HSBC and RBC, WestJet and Sunwing, and Rogers and Shaw. They really had little to do with the law.

Of course, Rogers-Shaw went through the tribunal. This panel was the one that said it didn't want to see that go through. We thought it would be uncompetitive. It still went through the tribunal, but the government had the chance to say no. The NDP could have stood up to the government—they have a supply agreement—to say no. That didn't happen.

Mr. Hatfield, it's been over a year now since that merger went through, and this government is claiming that prices have plummeted. From your angle at OpenMedia, are prices and bills down for Canadians?

Mr. Matthew Hatfield: Overall, no. What the government is referring to when they talk about that is that data caps have gone up for many Canadians. However, if you go from 10 gigabytes to 20 gigabytes and the government calls that a halving of prices, that's not a fair way of looking at your bill. Most people's bills have gone down very little, if at all.

It's a key point that the wired Internet plans many people are using have gone down maybe a couple of dollars over the last couple of years, but in many similar states, such as the U.K. and the U.S., they've gone down by about half. Even if we see a very small decrease in Canada, we're actually falling further behind compared to international competitors.

● (1135)

Mr. Ryan Williams: When we look at the numbers, the ARPU—the average revenue per user—for Rogers has gone up over the years. It is showing that they're making massively more dollars. Competition is important.

Dr. Quaid, you're right on. You've had some thoughts on changes. I'm going to let you expand on some amendments you'd make to this bill that look at clause 3 and others. Can you expand on that, please?

Dr. Jennifer Quaid: I'll try to do that as efficiently as possible. Thank you for the question.

I would really like to see clause 3 stay with what was done in Bill C-19. I'm preparing a brief with a little more detail. I'm sorry that's not ready right now. If need be, there can be further guidance provided in other ways, but I am very reluctant to go back to having a cap on the fines because, unfortunately, maximum penalties are not minimum penalties.

There was a lot of discussion last week that seemed to treat this maximum penalty as some kind of minimum and it's not. Believe me, you do not want to have a mandatory minimum because this provision applies to individuals and corporations, and you will immediately trigger a charter argument. Whether it succeeds is a different question. I think giving courts the maximum flexibility is the better way to go. If there are preferred ways of calculating fines and preferred ways of dimensioning what would be appropriate punishment, those things can be put together in judicial training.

You could even have the bureau develop further its immunity and leniency programs. There was a lot of discussion of the Canada Bread case. I won't have time to get into it now, but the thing you need to know about corporate sanctions is that they're negotiated settlements that come under the immunity and leniency program. The first one in gets immunity and the second ones get leniency. Even if you had a maximum fine and you started with the maximum fine, which is what happened with Canada Bread, there is still a 30% discount because that's part of the leniency program.

People are talking about 10% of revenues. That's the maximum. Courts never impose the maximum, especially with a first-time offender, which is what mostly happens with corporations, and especially when you have other factors like co-operation. We need the co-operation of the participants in a cartel to get anywhere with these investigations. The idea that you would hit these maximums is fantasy. We need to dimension our expectations differently. That doesn't mean courts wouldn't benefit from help figuring out the right way to calculate the right kind of fine.

I'm going to leave the structural presumptions to the economists. I tend to agree that guidance on thresholds is helpful, but it shouldn't be in the law. That's my view. It's part of the larger question of having principles in the law and operationalization in guidelines.

The other thing is about the efficiencies defence, but I don't really want to talk about it that way. It's the recognition of pro-competitive benefits. It's a mistake to think that pro-competitive benefits shouldn't be explicitly recognized in the law. I just think taking the old language is not the right way to do it.

I'm going to loop around to my main question, which is that we haven't thought about what we're doing. In order to give any kind of context to how you're going to assess pro-competitive benefits, you need to ask, “Pro-competitive in relation to what?” One thing we've had in the way the efficiencies defence was interpreted in the past was a total surplus model, which says that we only care about whether the pie is bigger; we don't care who gets what piece. If you want to add into that a concern for consumers—like a consumer surplus type of model—then perhaps you need to be more explicit about that in guidelines. However, I wouldn't put it in the law.

Things like that are given content when courts interpret the words. We can get ahead of that by thinking about what it is about pro-competitive effects that we want recognized and when they are important. I also think efficiencies and so on are more complex than just—

Mr. Ryan Williams: I have a quick question.

You've mentioned in the past that this government promised a revamp of the whole act. I think you've said it's supposed to be 2.0—the whole thing.

When was this promised? When were you told it was going to be delivered, and how delayed is it?

Dr. Jennifer Quaid: No one made me any specific promises. I'm an academic.

I had hoped when it was first announced that there would be phase 1 and phase 2. Phase 1 was Bill C-19. We all expected that was going to be mostly small changes. I had hoped with the announced consultation, before the details were announced, that we were going to step back and ask what we were doing. Are we modernizing the act? As soon as I saw the consultation document, I realized that we were leaving unchanged the basic structure of the act and, more importantly, what the goals of competition were.

There was more optimism, in my view, after the Wetston consultation, which was much more informal and fewer people participated in. It was like the sky was the limit. Everyone just said, “Let's figure out what we want for the 21st century.” By the time we had the consultation, we'd already taken off the table considering the purpose clause and considering the basic organization of the act. I thought that was too bad, personally.

● (1140)

Mr. Ryan Williams: Thank you.

The Vice-Chair (Mr. Rick Perkins): Thank you. MP Williams.

MP Turnbull will begin the next round.

You have six minutes.

Mr. Ryan Turnbull (Whitby, Lib.): Thanks.

Ms. Quaid, I'm going to start with you. I appreciated your opening remarks, and I appreciated specifically you outlining what pieces of Bill C-352 have overlap and remain as questions we can consider. Where I'm starting this conversation is that with Bill C-56, Bill C-59 and Bill C-19, to some degree, we've dealt with rounds of reforms to the Competition Act. We've had lots of debate about that. I think there are some very good steps forward.

Perhaps all of the panellists today have different opinions about different pieces of that, and I get that the legal community is not always going to agree. Neither are politicians. I think the debate is important.

I want to hone in on your comment because I found it a useful structure. You looked at clauses 3 and 4 as a package, although they're different. I think you said that you're not sure they are going to get the desired outcome.

Could you explain what you think the intended outcome was from listening to Mr. Singh's appearance? Then, could you explain specifically why the two changes being proposed to those clauses would not get the outcome that was intended?

Dr. Jennifer Quaid: I will start by saying that I can't climb inside Mr. Singh's mind. I listened to what he said, and this is my interpretation of what he said. I certainly stand to be corrected if I've misinterpreted him.

I understood that what he wants to see is greater accountability in the form of a higher quantum of fines that's more closely related to the capacity to pay, essentially. If you are a multi-billion dollar company, a $25-million fine is not going to make a sufficient financial impact. I understand what that reflects. Mr. Singh was very concerned about the punishment imposed in the Canada Bread negotiated settlement. I might use that as an illustration.

One thing we have to be very careful about is that changes to criminal law that make it more severe or change the substance are prospective only. The change in Bill C-19 to make the fine at the discretion of the court applies to cartels or conspiracies entered into after June 23, 2023. Most cartels are not discovered immediately. The bread cartel—this is a lesson in how long it takes for things to come into effect—involved counts in 2007 and 2010. The applicable fines were those applied in 2007, which were $10 million. In 2010, they just squeaked into the new provisions, so you had $25 million.

The court worked with the maximum, and it was very surprising. They applied the maximum in those cases, and I think it was a recognition that they were butting up against the highest amounts. However, normally, courts do not treat the maximum as where they're starting. That's not how sentencing works. Sentencing starts with the idea that a sentence has to be proportionate to the gravity and culpability involved.

We can agree that conspiracy, in section 45, is targeted at morally reprehensible conduct. One of the functions of the penalties—and on that, I agree with Mr. Singh, but I don't think the discretion of the court was a problem; I think that's a better signal—is to convey seriousness. It's not an accurate measure, but an offence that carries a maximum 14-year imprisonment connotes a serious amount of gravity. Not many other provisions in the Criminal Code are economic in nature and carry that kind of sanction, so it's a very severe sanction.

The expectation that the application of sentencing principles is going to result in something that hits up against the 10% is unrealistic. That's not how it happens. My research shows that when courts apply the sentencing factors adapted to business organizations in section 718.21, they're all over the map. They're not consistently applying them as aggravating or mitigating. What happens is you do not necessarily get the outcomes you want.

Here's the solution. If you really want courts to be more thorough and to apply and get to sanctions that are adapted to reality, you have to give more than what you can give in a law. The law is going to be too simple, and it's not going to give enough detail. Left with that, you won't get the results you want. You're going to need judicial education and a lot more structure.

The final thing I'm going to say is that we are not a jurisdiction that uses sentencing guidelines. I don't think a change in the Competition Act is going to change sentencing policy in this country. If you want to change criminal law, you have to start with the Criminal Code. I know this is the Competition Act, but when you're talking about using criminal law for an extremely serious offence, you cannot get away from the structure of criminal law.

I'm sorry for the long answer.

● (1145)

Mr. Ryan Turnbull: Thank you for that very detailed answer.

I'm going to switch to structural presumptions and ask Mr. Iacobucci and Mr. Ross a question about that. I think they made some really good comments.

I understand that Bill C-56 repealed the efficiencies exception. However, the tribunal can still consider whatever factors it deems relevant under the merger review. In essence, it can still consider efficiencies. I think both of your statements were that reintroducing elements of efficiencies into the statute would be problematic.

Have I misunderstood that, Mr. Iacobucci?

Mr. Edward Iacobucci: I didn't mean to speak about the efficiencies treatment in Bill C-352. I think Professor Ross did. However, perhaps I could, quickly, start with this. I agree with the concerns about the wording we see for the efficiencies factor that's reproducing the efficiencies defence. It could lead to issues, especially given the Tervita case, which you're all familiar with. I agree with that.

I'm less concerned—and maybe this is what your question is getting at—about whether efficiency is explicitly listed as a section 93 factor, partly because it's quite a different kind of consideration. All the other considerations in section 93 go to the kinds of competitive conditions in the market. You could have, as the old efficiencies defence suggests, a merger that is both efficient—it produces efficiencies—and quite anti-competitive. They move in different directions. It's unlike the number of competitors: The more there are, the more you tend to think there's more competition, all things equal. Introducing efficiency as a factor is a bit like a fish out of water or a square peg in a round hole—take your tortured metaphor. It doesn't quite fit there.

To get back to your question, Mr. Turnbull, efficiencies will get there in the sense that the merging parties need a theory of their case as a strategic matter, as a tactical matter, so they'll have some story about how they're doing this not because of competition but because of efficiency. I'm not sure that's something the tribunal needs to consider. The burden is on the bureau to show it's anti-competitive.

I would leave it at that. I think efficiencies might introduce confusion. That's my sense of things.

Mr. Ryan Turnbull: I would have gone to you next, Mr. Ross, but I'm out of time.

The Vice-Chair (Mr. Rick Perkins): You can in the next round, perhaps.

[*Translation*]

Thank you.

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

Mr. Jean-Denis Garon (Mirabel, BQ): Thank you, Mr. Chair.

Please allow me to take a few seconds to acknowledge and thank all the witnesses for being here today to participate in this very interesting analysis.

I'll start with you, Mr. Ross. I'd like to talk about the 60% threshold related to combined market share. It seems to me that forcing competition authorities to prevent a merger or acquisition that would result in a combined market share of 60% or more would actually take away tools from the Competition Bureau to make a real assessment of the economic effects of a merger or acquisition, for example.

Last week, I asked Mr. Singh if he had any examples of mergers or acquisitions that had led to a combined market share of over 60% and had been detrimental to consumers. Clearly, Mr. Singh had done a poor job on his bill, since he had no examples to provide to me.

For my part, I have some questions, particularly about idle assets. There are assets for which we can allow mergers and acquisitions so that there is ultimately only one player in a market, without which there would probably be none, because we need to achieve an economy of scale. I know this has already happened in the case of cinemas, for example.

Also, I raised the question of regional quasi-monopolies. Think of grocery or hardware stores in remote areas, which can only survive if they have no competitors. This is what we call a natural monopoly.

On the other hand, I wonder how market share is defined. Canada is a country that goes from coast to coast and back again. Some companies are regional, while others are pan-Canadian.

So I'm wondering, and I'm asking you, ultimately, if preventing mergers and acquisitions that would result in a combined market share of 60% or more might not cause detrimental effects for consumers, particularly those in remote communities?

● (1150)

[*English*]

Prof. Thomas Ross: I agree with everything you said.

For reasons that Professor Iacobucci articulated in his opening remarks, market definition is a very messy enterprise. Reasonable people can disagree about how to define the market, and once you've done that, you're going to get different answers about market share and concentration.

If you have a merger, what you should care about, as you have suggested, is the impact of that merger. How will the market be after the merger compared to what it would have been absent the merger? That information only comes from studying the merger and studying its competitive implications. Some hard-and-fast rule that says you can't merge when you get to a certain size and a certain market share runs the risk of blocking mergers that could be very efficient.

You have mentioned small geographic markets. That is a concern. Sometimes when we use the term “natural monopoly” our minds tend to go to great big firms that dominate their industries. In the old days, we used to think about the electric companies and the only telecommunications company we had. We thought of them as natural monopolies. However, in fact, there are many natural monopolies in small markets. The market is just not big enough to support more players. You might start with very large market shares, so you should allow the bureau and the tribunal, using discretion and giving the tribunal the authority to make decisions on this rather than ordering it to issue an order—

[*Translation*]

Mr. Jean-Denis Garon: Please allow me a follow-up question on this. In fact, I'm going to put my question to Ms. Quaid.

It seems to me that elsewhere in the world, there is a tendency to establish a framework within which competition authorities can work, determining their own tools to avoid the unintended consequences of very rigid criteria, as we tend to do in the Canadian framework. It's a preconception or an impression I have, but it seems to me that, in the Canadian framework, there's a tendency to always add very rigid criteria, which means that, in the end, the Competition Bureau is less effective in its analyses. It can equip itself with fewer of the new tools that appear in the scientific literature, which opens the door to numerous and very lengthy disputes in which, by virtue of this multitude of criteria, companies always end up with a case before the court. The competition authorities always end up winning to the detriment of the consumer, after very long delays.

Am I right in saying that we're constantly going in the wrong direction, using an approach whereby Parliament knows everything and the competition authorities must comply?

Dr. Jennifer Quaid: I'll try to answer this question briefly, because I know you don't have much time.

A priori, there's also an approach establishing a link between the legislative framework and the enforcement framework. I certainly have a vision that is inspired by my training in civil law. We start by implementing coherent principles. Later, there may be more detailed rules, but there is, in a way, a structural organization of rules.

I think that initially, when the law was created in 1986, legislators had an idea in mind and a common thread. We may agree or disagree, but I think over the years things have simply been added, mostly details. This style of drafting is fairly typical of common law countries. Instead of stating the general principle, we're afraid, so we make lists.

The problem is that, subsequently, the lists influence the way the general provision is interpreted.

● (1155)

Mr. Jean-Denis Garon: I would add that lists age badly.

Dr. Jennifer Quaid: That's right.

I want to add a comment on a subject that causes me disappointment, and I know I'm going to repeat myself a few times. I would say, *a fortiori*, that my disappointment stems from the fact that we didn't start by asking ourselves what we needed to foster a competitive economy in light of the realities of the 21st century. We should have had that discussion.

There are a host of little references to workers and work, for example, but no thought was given to whether this should be one of the aims of the law. Maybe it isn't, but no one raised the question. Little things were added here and there, and, in my opinion, this makes it more difficult to interpret the law consistently.

I tend to think we'd have a better fit between principles and implementation if we could separate these two elements, but that's a professor's dream. I know it won't happen.

The Vice-Chair (Mr. Rick Perkins): Thank you, Mr. Garon.

[*English*]

The next questioner is MP Masse for six minutes.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair. It's good to see you.

I think there's a misunderstanding or lack of understanding about how a private member's bill takes place and the scope that a private member's bill can have. This is the way we got here. Basically, Bill C-19, Bill C-56 and Bill C-59 were pieces of government legislation that had various changes. Ironically, some of the changes we tried to get in the first set of laws are finally being included in Bill C-59—15 years later. However, many people came here from different institutions and spoke against those changes, quite frankly. When you go back and look at Hansard and the blues, there's been a consistent public outcry for improved competition laws, but there has not been consistency in academia and the private sector with regard to how to do so. That's been the challenge.

This bill is part of what a private member can do after being selected in a lottery system, but legislative issues have to be scoped. They can't include increased funding, taxation and a whole series of other things. Also, we're left with a bill that later on was eclipsed by another piece of legislation, which took some of the ideas of this bill. Here we are today trying to see whether we want to continue to increase competition laws for Canadians. This is the opportunity we have for amending parts of the bill to get some improvements that the Competition Bureau, the commissioner and many others continue to advocate for.

My first question, Mr. Hatfield, is on what you're hearing from the public. If we do not use this opportunity to at least make some improvements to the Competition Act, do you think Canadians would be disappointed? Although it has been raised that we need a more comprehensive process—even the Competition Bureau commissioner mentioned it—we still have tools available in front of us right now. With Parliament winding down, having a bill selected high enough in the Order Paper to try to squeak through in five years, if we last that long.... I'd like to know what your outreach can tell us about public confidence in institutions like the Competition Bureau.

Mr. Matthew Hatfield: I think many people in the public don't know about the Competition Bureau, because the bureau has had very few opportunities to score triumphs that get them in the public eye. Many people know that they opposed Roger-Shaw, but that didn't work out.

When we look at how competition law has played out to date, it has very deeply hamstrung the bureau's ability to function. At the end of Bill C-59, but also with some of Bill C-352's ideas, it would be healthy to see some interpretive flexibility and scope for the bureau to do things like assess market definitions in a way they think makes the most sense for Canadian consumers.

In terms of the threshold question we were just discussing, it could be in the legislation or we could amend the legislation to establish a principle that would imply what the guidelines should be on that threshold. However, I think there's a signatory effect of saying that you better have a really strong case if you think you'll get a merger above a 60% threshold, which peer review does accomplish. I worry less that small businesses and small towns would be caught up by that, because the bureau could just look at the market in different ways to make sure they aren't hurting folks in those very specific circumstances.

● (1200)

Mr. Brian Masse: Mr. Bester, can you speak to the bright line merger rule of 60% and the issue over structural presumptions? Superior Propane is one example, but there are other ones out there, especially in the telecom industry, as we've seen. Perhaps you can enlighten us on the need to at least go in a direction that's less defensive. In the Rogers-Shaw situation, the Competition Tribunal asked for damages from the competition commissioner to go to Rogers, costing Canadians millions of dollars, after it fought to have the merger, which many of us were opposed to. It was more like a takeover, really. Perhaps you can enlighten us on that.

Mr. Keldon Bester: You're highlighting a good point. The structural presumptions are a response to the bias against intervention and against the bureau blocking mergers, which has persisted over the past four decades, since the introduction of the Competition Act. To refer to some analysis, of the eight mergers challenged by the bureau, seven resulted in market shares above 60% and four of them in near or literal monopolies. Only two of them had any sort of remedy, and none of them were blocked. We think of the structural presumption as strengthening the position when the bureau decides to challenge a merger, rather than imposing a stricture on the Competition Bureau.

It's important to note that the bureau doesn't approve mergers; it makes the decision about whether or not to challenge a merger. The structural presumptions—the 30%, rising up to the 60% in extreme cases—are a way of rebalancing the foothold of the bureau when it seeks to challenge one of these mergers. Again, it's in response to the four decades of bias towards consolidation. That's most evident in the efficiencies defence, which was removed in C-56.

Mr. Brian Masse: It's a bit of a change in philosophy, I suppose, in the sense that the public interest comes first versus being reactionary. You can tell me if that's a bad analysis, but it's where I see some of this going. We always seem to be in a reactionary mode with the Competition Bureau, as opposed to setting a precedent for what we should expect in the Canadian market to protect consumers.

Mr. Keldon Bester: I frame it as a move away from a belief that more consolidation is the way we need to go to advance economically and deliver benefits to Canadians. We've engaged in that experiment for four decades now, and I think across a number of markets, we're not pleased with the results. If there's a change in philosophy, I think it's about turning the page on that.

Mr. Brian Masse: Thank you.

Mr. Chair, do I have any time left? I can wait for my next round.

The Vice-Chair (Mr. Rick Perkins): You've gone a little over, but that's okay.

That concludes the first round.

We'll begin the second round with MP Généreux.

[*Translation*]

Mr. Généreux, you have the floor for five minutes.

Mr. Bernard Généreux (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, CPC): Thank you, Mr. Chair.

I'd also like to thank all the witnesses.

I will render unto Caesar that which is Caesar's. This morning, I decided to ask my assistant, Ms. Aya El Farouk, to do something for me. By the way, she's here, right behind me. Ms. El Farouk is a new Canadian who studied at the University of Ottawa. Yesterday, she received her master's degree in criminology. I'm warning each and every one of you: Don't come and take her from me.

I'd like to take this opportunity to thank her for her work, and I'd also like to thank all the assistants, from all parties. We never, or hardly ever, highlight the effort and work they do to help us prepare for our meetings, among other things.

So, I asked my assistant to prepare the questions that follow.

Ms. Quaid, you expressed your disappointment with the competition laws and the government's failure to modernize them. Can legislative changes that still seem insufficient solve the competition problems facing Canadians?

These are questions for all the witnesses. Is legislative oversight alone enough? Is there anything else the government can do to create and promote competition in Canada?

Ms. Quaid, these questions are addressed to you, but I invite all witnesses to answer them as well, if they wish.

Dr. Jennifer Quaid: Thank you for your question. It goes to the heart of the matter and, what's more, it's very well formulated. I congratulate Ms. El Farouk on it.

In my other areas of expertise, I've already written that, precisely, to believe that a legislative reform ends with the adoption of a law is to see things backwards. In fact, a reform begins with the adoption of a law, but it must be accompanied by the necessary support to ensure that its implementation, interpretation and application will be respectful of what motivated the reform.

I think that here we are in the presence of a great willingness to undertake a reform of the Competition Act. However, I question the means we have taken. I'll say this for the last time: In my opinion, we should have started by asking ourselves what we wanted to achieve. Do we really have a law that is flexible enough and designed to adapt to the needs of the future in a rapidly changing world? The economy and the nature of human society are changing at a much greater pace than before. That's my perception.

On the other hand, and this is more pragmatic, we need to ensure that the authorities are vested with the power to enforce the act, which includes, of course, the Competition Bureau, but also the Public Prosecution Service of Canada, which enforces the criminal provisions. It's not the Competition Bureau that enforces these provisions. We need to ensure that we have the institutional resources to make decisions. Of course, this is a matter for the Competition Tribunal. With all due respect to the members who sit on that tribunal, I say it's not a functional tribunal, and I'd like to see something different, namely a tribunal that has more expertise and can act faster.

However, this doesn't just mean demanding that it be faster. We also need to have provisions that lighten the load, particularly when it comes to reversing the burden of proof. Even if I don't agree with relying solely on market share, I think it's a step forward to tell the party holding the information to provide the proof. I think that in this respect, these are good ideas.

Finally, we shouldn't forget the fact that a change of culture is also necessary. The Commissioner of Competition talks a lot about the need for a competition mentality in government. I'd say that beyond that, we need to look after competition, because it's part of the country's economic policy. So we need a cross-functional approach. We recently created the Canadian Digital Regulators Forum, which brings together the Competition Bureau, the Office of the Privacy Commissioner and the Canadian Radio-television and Telecommunications Commission, or CRTC. This will touch on data and artificial intelligence, and other issues, if you manage to complete your study. We can't stop there. I think we need to keep an eye on what comes next. The law is a start. I'll stop here.

● (1205)

Mr. Bernard Généreux: I invite other witnesses to speak, if they wish to do so.

Mr. Iacobucci, did you want to add any comments?

Mr. Edward Iacobucci: Thank you.

[*English*]

Prof. Thomas Ross: I'd be happy to add a couple of words on that. I agree with what Professor Quaid said. I also want to hearken back to what the commissioner said when he spoke to you.

As ambitious as this reform process has been with the number of changes that have come forward—many of them good—there may be a bit of a missed opportunity. As Professor Quaid said, we didn't really revisit the goals we're trying to achieve with this, which could make our efforts seem a bit muddled and disconnected from each other. We also didn't think very much about the institutions. I think Professor Quaid was hinting at that. Do we have the right system here or should we move to more of a commission administrative structure where decisions can come out more quickly, as other jurisdictions have?

As the commissioner himself said, if we really want to push competition in Canada, we need a "whole-of-government approach". I know the commissioner told the committee this. We need all levels of government to get on board to change the way we regulate, control and protect certain industries and sectors.

He mentioned the Australian Productivity Commission. Something like that could be a very positive thing. That's been suggested for Canada before and has not happened. It's something that goes beyond competition policy. The Competition Act, the bureau and the tribunal just take care of one big slice of competition in Canada, not the whole pie, so I'm with the commissioner on our need for more of a whole-of-government approach.

Mr. Edward Iacobucci: I was just going to say that, but Tom said it better.

I'm thinking about the role of ownership restrictions, regulatory barriers to entry and internal trade. Free trade has been one of the greatest things for competition in Canada, but we still don't have it internally. There's supply management. There are a lot of things undermining competition in this country.

I will say this. What has been bold and coherent about the approach of the government to reforming the act has been to make enforcement stricter. A number of things have moved all in the same direction. Some other things could have made it even more coherent—I agree—but to understate the changes in the way things are going to be enforced would be a mistake. I think these changes have been coherent and positive.

The whole of government is the way to go.

● (1210)

The Vice-Chair (Mr. Rick Perkins): Thank you.

MP Gaheer, you have five minutes.

Mr. Iqwinder Gaheer (Mississauga—Malton, Lib.): Thank you, Mr. Chair, and thank you to all the witnesses for appearing before the committee.

Professor Iacobucci, my questions are for you.

In your opening testimony, you mentioned that price-fixing cartels are hard to detect. I think it was Mr. Hatfield who spoke about the ordinary Canadian, perhaps a Canadian who is not an economist or a competition lawyer. In their minds, if a small number of firms have similarly priced products and increase their products at a similar rate, that's enough for them to have an intuition that perhaps there's a bit of price-fixing going on. Why is it not that simple?

Mr. Edward Iacobucci: It is not that simple.

There can be that intuition, but what you'd expect in vigorously competitive markets is for prices to move in parallel with one another. If I lower my price and want to gain market share from others, they're going to react. The competition will react to that cut in price to match my cut in price so they don't lose market share to one another.

What competition does is push prices closer to cost. One thing that could happen is costs could all vary at the same time, and if they all vary in similar ways, competitive markets will result in similar price movements. The observation of parallel behaviour is not sufficient to conclude that there's been price-fixing.

The other thing that gets very complicated and hard to deal with is that business people might recognize that there may be less than perfect competition. They might recognize that they don't want to be too aggressive on price. They could afford to be a bit aggressive on price, but they're worried there will be a response from another firm in the market and they'll match the cut in price. Then neither of them is going to be ahead. There's what's sometimes referred to as “conscious parallelism”. It's not collusion, it's not price fixing and they're not getting together. They're all just acting in their own economic interest, but it's resulting in less than perfect competition.

There are different possibilities that exist that make it difficult to observe parallel behaviour and infer any kind of price-fixing arrangement.

Mr. Iqwinder Gaheer: We know that Bill C-352 would require the Competition Tribunal to make an order to dissolve or prohibit a merger if the result would be a combined market share of 30% to 60%, or reverse the burden to the merging parties to prove that the merger would not substantially prevent or lessen competition.

You spent a big chunk of your opening testimony talking about how market share or concentration is not necessarily competition. Did you want to expand on that a bit?

Mr. Edward Iacobucci: I think there's a disconnect. There's something known as the structure-conduct-performance paradigm. A certain kind of structure will lead to a certain kind of competitive conduct, which will lead to bad outcomes. If it's a concentrated market, it leads to less competition and bad outcomes.

What I think economists have realized over the years is that sometimes really competitive and vigorous competition causes the market structure to be more concentrated. If you have really tough competition, the weaker performers fall away. Then you can look at that and say there's a concentrated market; it can't be that competitive, when in fact it was competition that led to the concentrated market.

The direction is not always the same. A concentrated market is a reason to look further if you have a merger, to be sure. However, it's more complicated than thinking it all moves in one direction.

Mr. Iqwinder Gaheer: If this bill is predominantly focused on market share, would you consider that an inherent flaw?

Mr. Edward Iacobucci: I think putting market share in the statute is a flaw. When considering mergers, for the bureau, enforcement agencies and indeed the tribunal to take market share seriously as a possible indicator of problems or even a suggestive indicator of problems is not a worry, but I would not want to see that in the act itself.

● (1215)

Mr. Iqwinder Gaheer: I'd like to ask the rest of the panel if they think adding market share to the bill is a flaw.

Prof. Thomas Ross: I'll jump in quickly to say that I did speak to that. I feel, for the same reasons as Professor Iacobucci, that market shares are very weak indicators of market power. They're useful. They belong in guidelines but not the law. I'll just leave it there.

Dr. Jennifer Quaid: I share the opinion of my colleagues in economics on that. I think we have to be careful. It's not that market shares are not useful information. As to all the things that especially Professor Ross said about the complexity of determining what playground you're looking at, who's being bullied in the playground and where the problem is, they're a considerable issue. I don't want to understate that. However, I think trying to have these hard rules in the law makes it harder for the tribunal to engage in a nuanced, sophisticated analysis. The temptation is that the reversal of the burden of proof will be handy, but we have to be really careful about fixing these things in the law given how infrequently this law historically has been modified. That would be a real danger.

There are other things in the law where the amount, for example, is determined by regulations. That's the threshold for merger prenotification. I don't know whether that's necessarily the right approach because I don't agree that market share is the right indicator, but you could cut the apple in half that way.

I'm sorry. I'm thinking in French.

Mr. Keldon Bester: Perhaps I can offer a counterpoint to that. Market share and concentration measures are imperfect measures, but when we get into the messy business of enforcing competition law, we need to balance the data we can have and the analysis we can do quickly with the realities of the market. That's the case even with existing competition law. Understanding them as an imperfect indicator, market shares and concentrations still point us frequently in the right direction of where we should be focusing enforcement resources.

The other thing is that the guidelines in Canada don't play the same role as in other jurisdictions. We are much more directive within our own law. I think putting market share statistics in the guidelines would be largely ineffective.

Mr. Iqwinder Gaheer: Mr. Hatfield, do you want to add anything?

Mr. Matthew Hatfield: Yes.

The Vice-Chair (Mr. Rick Perkins): Go ahead, Mr. Hatfield. We'll finish up this round with you.

Mr. Matthew Hatfield: There's tremendous value in reversing the burden of proof in these kinds of situations. We're in a situation where somehow the rules are written such that the house always loses, the house in this case being the Competition Bureau. It's been so easy in many cases for businesses to counter the bureau's case. We need to make them do the work of showing that what they're proposing will not hurt Canadian consumers, or we'll see many more harms to Canadian consumers in the future from these deals.

The Vice-Chair (Mr. Rick Perkins): Thank you very much.

Monsieur Garon, you have two and a half minutes.

[*Translation*]

Mr. Jean-Denis Garon: Thank you, Mr. Chair.

I'm going to take a second to tell Professor Quaid that thinking in French is fantastic. You have to keep doing it, especially in Ottawa.

I now turn to Mr. Iacobucci.

We've talked about the concept of structural presumption. As I understand it, some competition authorities may have a presumption against mergers and acquisitions. So, in their minds, companies that want to merge may be wrong by default.

This concept would be operationalized differently in many places. For example, in the U.S., competition authorities are often considered to have a pro-consumer presumption, but there is no quantified, quantifiable and very rigid test to operationalize it. As a result, the commissioner, or the commissioner's equivalent, has more latitude, the authorities have less to justify, and their decisions are less likely to be challenged in court and overruled.

In Canada, is there a way to make the structural presumption against mergers and acquisitions so that it's easier to protect the consumer, while not imposing a 65%, 60%, 58% or 57% test, which is too rigid for the commissioner?

[*English*]

Mr. Edward Iacobucci: I apologize; I'll answer in English.

This is an important question. To start at the beginning, we've been hearing that sometimes, as Mr. Bester raised, some of the contested mergers have not gone the commissioner's way. That is true, and I think there are some decisions there that I disagree with, but it is important to understand that the bureau has a lot of informal power when it comes to mergers, because the number of firms that are willing to go to litigation to resolve a dispute is relatively small. Mergers are often very time-sensitive, so there is a lot of clout there, and a lot of mergers over the years have been resolved informally. Many more mergers get resolved informally than formally. Thinking that we need structural presumptions to give the bureau more heft might be missing an important part of the picture, which is that the bureau has a fair amount of heft in its ability to say, "Slow down. We may take this to the tribunal and negotiate a settlement." I think that's an important first part.

The other point that you raise, which is a good one, is that there have been times—and I can think of cases like Tervita—when the courts have been insufficiently attentive to the importance of competition. Professor Quaid spoke of judicial education. Maybe it's something like that. Mr. Bester and Professor Quaid spoke of possible institutional reform to make sure that adjudicators are quite sensitive to the importance of competition.

Those are just two of the other ways that we could be thinking about the importance of competition without adopting numerical tripwires.

● (1220)

The Vice-Chair (Mr. Rick Perkins): Thank you, MP Garon.

We'll now go to MP Masse for two and a half minutes.

Mr. Brian Masse: I think Mr. Hatfield wants to make a comment, so I'll open with you, Mr. Hatfield, if you want to respond.

Mr. Matthew Hatfield: I just wanted to add that OpenMedia does not think condition-setting works well. For the Rogers-Shaw deal, many conditions were put on the deal by the government, and there wasn't a specific condition for bidding price increases. Rogers started cranking up prices almost immediately.

You could say that we need more conditions; there is some way of fixing this, but it turns out to be easy for companies to find a workaround for whatever conditions the bureau or the government has applied to them. There's really no better way of stopping competitive impact than preventing a merger.

Mr. Brian Masse: Mr. Hatfield, I'm not aware of any organizations that track mergers over five to 10 years later. Even when conditions are put in, I don't know whether consumer research or other types are capable of doing a more long-term analysis of the elimination of competition and its effects. We see that right away with Shaw-Rogers, but maybe you can highlight a bit of that. Is there anything out there we're missing in subsequent long-term follow-up?

Mr. Matthew Hatfield: Almost no one, including the bureau, has the resources to do that kind of tracking, and it's a huge issue. Five years is pretty long for a condition; many are shorter. In many cases, companies will say, “These five years are the cost we have to pay to do a deal, but after that, we'll do whatever we want.”

Mr. Brian Masse: I only have a minute left.

Quickly, Mr. Ross, as imperfect as this process is, it's what we have in front of us. This is a private member's bill. We can pretend all we want. We wanted the government to do something different with regard to taking a more comprehensive approach, but we have only two committee meetings and have amendments coming. Complaining about the democracy we have isn't really helping consumers, because as broken as this system is, it's better than the alternative, in my opinion.

To your point about guidelines specifically, with the limited time I have, can you touch again on why you believe guidelines would be a better option? At least that's a suggestion for what we can control. I can't control the other stuff, but I can control what's in front of me.

Prof. Thomas Ross: Thank you for that.

It's quite an industry now for competition agencies around the world. After a law has been implemented, they have to come out with a bunch of guidelines to help explain to businesses how at least the authority plans to implement the law until courts tell it to do something differently. Guidelines can be extremely useful at providing guidance—the lawyers on the panel should maybe speak to this—to clients who are wondering whether their behaviour is appropriate and whether a merger is appropriate. Guidelines have an advantage: They can be constantly updated with new information and new techniques for, say, evaluating the effects of mergers as they come along. You can blend them into new guidelines. If we're introducing into law something as messy as a market definition and the associated market shares of concentration, given that we know how messy it is, my preference would be to put them in guidelines where they don't carry quite the same weight.

Cases won't be won or lost based on what a guideline says the market shares are or should be. However, that still provides a lot of guidance for firms when they come into the bureau to see whether the bureau is going to be nervous about a particular situation, and that can start a discussion. Then, if it is litigated, the focus can remain on the expected effects of the transaction.

I hope that's helpful.

● (1225)

The Vice-Chair (Mr. Rick Perkins): Thank you very much, MP Masse.

We will go to MP Vis for five minutes.

Mr. Brad Vis (Mission—Matsqui—Fraser Canyon, CPC): Thank you, Mr. Chair.

Thank you for a great panel today.

I'd like to reiterate MP Généreux's comments about the staff today. It's been a really long year at the industry committee, but we've done a lot of great work for Canadians. I want to thank all the staff for their extended efforts, especially on Bill C-27.

I'll pose an open-ended question to the witnesses today.

There has been great discussion on Bill C-56, Bill C-352 and Bill C-59, but when we bring this to our communities and our constituencies, the number one thing I'm asked—and that I'm sure pretty much every politician in Canada is asked—is when we are going to see lower grocery prices.

With Bill C-56, Bill C-352 and Bill C-59, have we done enough to lower prices for Canadians so their paycheques will take them a bit further every month?

Mr. Keldon Bester: I'll just jump in quickly.

Bill C-59, Bill C-56, Bill C-352 and Bill C-19 are all very sound investments in the future of competition law in Canada. They're not a silver bullet. We're not going to turn the tap on and have competition increase tomorrow. However, in grocery and markets well beyond it—and I'll reference again the bureau's investigation into property controls in the grocery sector and the market study on airlines—these are foundational improvements that are going to pay off for generations to come.

The Vice-Chair (Mr. Rick Perkins): Mr. Ross, your hand was up.

Prof. Thomas Ross: Yes, thank you.

I'm supportive of the last comments. I think we've taken some very good steps. There are challenges in knowing what the source of high grocery prices is. You've heard all the stories about supply chain disruptions and people pointing to the fact that prices are higher around the world. It's not really clear what the source of high prices is in Canada. However, one of the great contributions—one thing I like about Bill C-352, in fact—was the enhanced market studies power, something that I think a lot of us have been arguing for for some time. That will go a long way in opening our eyes towards certain industries and practices that might be counterproductive.

Using that, I'll mention a point that came up earlier. These kinds of studies can also be retrospective in the sense that they can be used to look back at past decisions of mergers that went through and at what the implications may have been of mergers that were allowed either by the bureau or by the tribunal if contested. You can use the expanded market studies power to bring a lot of new information to bear on which markets are and aren't competitive in Canada and, for the uncompetitive ones, on what's getting in the way.

Mr. Brad Vis: I'll just follow up on that. In October, the Competition Bureau published a report examining the general state of competition across Canada, and it concluded that competitive intensity decreased substantially from 2000 to 2020.

In your opinion, with your expertise—just so that my constituents are aware—what sectors of the Canadian economy do you believe experienced the largest decline in competitive intensity in that period of time?

Prof. Thomas Ross: That's a tough question. You noticed that the bureau itself in the report didn't really segment out industries.

● (1230)

Mr. Brad Vis: Exactly.

Prof. Thomas Ross: That was a deliberate decision on their part. I don't have any kind of inside information on that. I haven't really studied it.

A lot of us are still trying to digest that report. It was an amazingly informative and useful document they produced, but it's just the start of a discussion about concentration and market performance in Canada. It showed some effects of increasing concentration and maybe some margins going up, but there's other research in other countries now suggesting that when you see higher margins, it's often because costs have fallen, not because prices have risen.

We still have a lot of work to do in Canada to know where the real problems are. The ones that always jump out to us are the ones in regulated, protected industries.

Mr. Brad Vis: I have one more very quick question.

The Vice-Chair (Mr. Rick Perkins): Mr. Vis, just a moment. I see Mr. Hatfield has his hand up, so I'm wondering if he could chime in.

Mr. Brad Vis: How much time do I have left, Mr. Chair?

The Vice-Chair (Mr. Rick Perkins): We'll get your last question in.

Mr. Brad Vis: Okay.

Mr. Hatfield, please go ahead.

Mr. Matthew Hatfield: I want to plus-one Professor Ross's comment that market studies powers for the bureau are very important. It's unclear to me how far what they have now is going to take them. They're shifting from an agency that sometimes prevented some lessening of competition to one leaning further into their promoting and intensifying competition mandate.

The ability to do a market study and then recommend changes and ban certain practices that are anti-competitive and anti-consumer is really important. This commission should look at it again in a couple of years and see how far they've gotten and if more changes are needed. Especially for global tech firms, Canada is not in a position to change their size. We need a much faster study and response for what they're doing than the five or seven years it's taking currently.

Mr. Brad Vis: Thank you.

I think I'm good, Mr. Chair. Thank you.

The Vice-Chair (Mr. Rick Perkins): Thank you.

Mr. Van Bynen, go ahead for five minutes.

Mr. Tony Van Bynen (Newmarket—Aurora, Lib.): Thank you, Mr. Chair.

I certainly appreciate the breadth and depth of knowledge we have from our witnesses today. I'm finding very interesting the concepts you're bringing forward.

My first question will go to Professor Iacobucci.

I believe you defined the issue of market share such that it's not so much that you can define it; it's about market power. What are the challenges in trying to define market power as better than trying to define market share?

Mr. Edward Iacobucci: There might be different ways of answering that depending on something Professor Quaid raised: What are we concerned about under the Competition Act? It's something I've expressed concern about as well. We're not entirely clear on that. Let me start there.

Market power, as most economists would think about it, is the ability to act independently of competitors to a significant extent. It's being able to raise your prices above marginal cost in a way that is harmful to consumers, because consumers who would be willing to buy something at a competitive price are priced out of the market and there's a loss to them as a consequence. That, to me, at least if you're thinking about it economically, is the concern that lies at the heart of the Competition Act. We're worried about people not being able to participate in markets because some firms have control and can act independently of competitors. Competitors aren't driving down prices in a way that disciplines them, so they can act independently.

Market power may not be present even with significant market share if there's a significant threat of entry, for example. If entry is really easy and you raise your prices, you'll attract entry. There's a kind of discipline there, even if in the moment you have a significant market share. That's just one example.

Another would be that you have a significant market share but have a product that's not as good as one that was just innovated. Your market share is good now, but it's going to decline over time because you're facing discipline from competitors that prevents you from exploiting your customers.

Market share can be an indicator of market power, to be sure, but as I think Professor Ross put it, it's a very weak indicator. There are other things going on that matter too.

Mr. Tony Van Bynen: Ms. Quaid, do you have a comment on that?

Dr. Jennifer Quaid: Dr. Iacobucci provided an excellent explanation of how economists understand market power. I will just add a bit of colour to that.

The economy we have now, which has been transformed forever not just by digitization but by the adoption of technology and data-driven practices in the way business is conducted, does present some challenges for those of us who want to understand where market power is and how it's exercised. It's coming up in different guises than it used to.

One thing others have come up with—it's not my idea, but I'm going to put it out there—is that now we see sectors of the economy characterized by the presence of economic ecosystems dominated by perhaps one or two firms. Often it's one firm. Because they control adjacent sectors, they're able to dictate the terms of participation. We call it an ecosystem. We call them gatekeepers or platform operators. It doesn't necessarily have to be the billion-dollar ones that we all know the names of.

One of the interesting cases in the United States involves Live Nation and Ticketmaster. It shows that the way the economy is evolving may present challenges for us when using these concepts. It doesn't mean they're not relevant. It just means that we have to be attentive to the new ways they may present themselves. New tools might be needed to understand and make sure that we're targeting things where market power is a problem, not stifling things that should happen or that might radically change the economy for the better.

We don't have a crystal ball. There's always room for error. That's the other thing that's important to keep in mind. The economy is evolving and changing quite rapidly, and we need to keep on top of that.

● (1235)

Mr. Tony Van Bynen: During his appearance at the committee on June 3, Jagmeet Singh, the sponsor of the bill, mentioned that the bill draws inspiration from competition practices in international jurisdictions such as the European Union and Australia.

The competition policy ratified by the European Parliament bans all anti-competitive agreements under article 101 of the Treaty on the Functioning of the European Union. What are the similarities between Bill C-352 and the European competition policy? Are the measures taken by other jurisdictions considered as stringent as those in Bill C-352?

I'll start with Mr. Bester.

Mr. Keldon Bester: I'm admittedly more familiar with the Canadian and American bodies of law than the European one.

One lesson to take away is that the European approach, certainly for abuses of dominance, which includes excessive and unfair pricing, is much stricter than how Canada has approached it in the past. Perhaps there's a spiritual alignment, but the details and the structure of European law are different. It's much more pared back and less directive. It relies on nations such as Germany to pursue their own competition law policies.

It's very difficult to compare these approaches directly. If there's a connection in philosophy, that tighter approach to the abuse of dominance is in line.

The Vice-Chair (Mr. Rick Perkins): Thank you, Mr. Van Bynen.

The next round is for Mr. Williams, for five minutes, please.

Mr. Ryan Williams: Thank you, Mr. Chair.

I want to swing back to some changes that have already happened and some that we're looking at in this bill. Bill C-56 gave new powers to the minister to do market studies. Mr. Bester, I'm not sure if you're aware, but a letter went out. The Competition Bureau was going to study airline competition, which was great news for everyone. Then a letter went out from the industry minister saying that, while this was great, it should focus on domestic competition and stay away from the airports. We had concerns in this committee that maybe giving all of this power to the minister was a bad idea, and we're seeing that.

The Competition Bureau was here the other day, and I asked them a question. I didn't get a direct answer online, but off-line they said that yes, the terms of reference have to be made with the industry minister. Should the minister be involved in directing where the bureau should be looking with an important piece like airline competition?

Mr. Keldon Bester: That's a good question.

With Bill C-56, we argued for the commissioner's independent authority to pursue market studies. I think this airline market study will be a good first test of that independence.

Bill C-56 was amended to allow the bureau a freer hand. We do have a balance between the elected officials' oversight of the Competition Bureau and the independence of the commissioner. Focusing on the independence of the commissioner is important, and the airline market study is a first test of that.

Mr. Ryan Williams: Mr. Ross, I want to get your insight. This is a little different from what we're looking at, but it's going to be the future of the Competition Bureau.

I'm looking at global mergers and the interconnectedness of markets. That's about how we're looking at tech giants and the emergence of them, pharmaceutical companies, automotive, finance and retail. In the future, depending on how the world economy goes, we'll probably have to look at how global mergers are happening and how we're handling them not only through our own Competition Act, but in working with other jurisdictions.

Given that this is probably going to come up later, how do we ensure that the Competition Act is adapted to address cross-border anti-competitive practices to ensure coordination with international regulatory bodies?

● (1240)

Prof. Thomas Ross: That is a very important question and has been probably for a few decades. People have recognized that international mergers pose significant challenges for domestic competition authorities, particularly in smaller jurisdictions. If you're the United States or Europe, you may have enough clout to deal with the mergers as you wish. For a smaller authority, such as the Canadian Competition Bureau, you have to co-operate.

I'm no expert on the mechanisms of co-operation. I know it's in the legislation that they are allowed to co-operate, but there are sometimes limits put on the degree to which they can co-operate and share information. Obviously, it's more sensitive in criminal matters than it would be in merger reviews. I can tell you that all international agencies that I know of are very seized with the need to coordinate.

One of the reasons the commissioner wanted some changes to our merger review was to put our system more in line with the Americans so that we weren't passing on mergers that the Americans were going to block. Sometimes you might like to free-ride on the others, but you want your own voice in these fights. I think we need to worry about that.

The Vice-Chair (Mr. Rick Perkins): MP Williams, I think Professor Iacobucci has a comment on this.

Mr. Edward Iacobucci: I think that's a great question, so I just wanted to throw in my two cents.

There are some matters where co-operation might help. There are other issues for which, to me, there is a key question when you think about global economic activity: Are there jurisdiction-specific remedies that can be ordered? Europe takes its own approach to abuse. It tends to be much more aggressive than Canada. It imposes multi-billion euro fines that are paid to Europe. That doesn't interfere with what they're doing elsewhere. Similarly with mergers, sometimes there's a local divestiture. If one country objects and another country doesn't, maybe you can order a divestiture in the local country and, as it's perceived, that will take care of the competition problem in that country.

You've identified a critical problem, and I don't know that it has an easy solution or any solution. It's a global merger that has an impact across the globe that can't have a jurisdiction-specific remedy. That's a real problem. You can co-operate, but what happens if Europe and the U.S. disagree, as they do frequently? All it takes is one person to say “no merger” and the merger can't go ahead.

I think you've identified a really important problem. It's nuanced, depending on context.

Mr. Ryan Williams: Ms. Quaid, from a legal perspective, a remedy might be formal agreements, say, with the FTC and the EU when it comes to this. For that, do we need to look at provisions that consider the global impact of mergers and anti-competitive practices as a global phenomenon? We know we have to look at the act as a whole. Without getting into all the details, is this recommendation needed when we revamp the whole act?

Dr. Jennifer Quaid: I completely agree with Professor Iacobucci and Professor Ross that this is an important area and that, increasingly, when we consider the size of certain global firms and combinations of firms, there is going to be a global dimension and you have to be able to deal with that.

I don't know that I have a magic solution to propose except to say that the Competition Bureau does co-operate and regularly collaborate. Over and above individual cases, they are part of the International Competition Network. They collaborate via the OECD and other mechanisms. There's a compendium of authorities that recently published two reports—I don't think there's a third one—on the realities of digital markets and they compare practices. It's not just investigation-specific. It's also the larger conversation about where the problems are and what techniques we can use, because that may prevent up front some of the alignment problems that occur later.

I totally understand where Professor Iacobucci is coming from. The challenge is that every country will have things that it's particularly fussy about. One of the reasons you have to have your own domestic policy—and I think Professor Ross is right on this—is that you do need to identify up front what things you can't give up. What things are so important to us as a nation that, even if others say they're okay with these things, we're going to stand up for them? I can't make that list for you, but it is an important thing to keep in mind to ask. When we object to mergers, what things are we paying attention to? That might be specific.

In terms of tools, you have structural remedies and behavioural remedies. There are risks with behavioural remedies, because you have to keep tabs on them. I would say the complement to this—and I'll stop on that—is that you have to make sure your bureau is well resourced and has a strong, independent mandate.

To chime in on the question that I didn't get to answer, I believe that an increased separation of the bureau from ISED would be a very positive step. I do not like political interference in competition enforcement as a general rule.

● (1245)

The Vice-Chair (Mr. Rick Perkins): Thank you very much.

MP Williams, that's the end of your round.

For the next round, we'll go to MP Bradford for five minutes.

Ms. Valerie Bradford (Kitchener South—Hespeler, Lib.): Thank you, Mr. Chair.

Thank you to the witnesses. It's been a fascinating discussion.

I am a guest here today, so I'm going to take the perspective of the consumer. Since we're looking at protecting the consumer from higher prices, that might be okay.

I'll address this to Mr. Hatfield. In your opinion, to what extent would Bill C-352 address costs and consumer choice, particularly in grocery stores?

Go ahead, Mr. Bester.

Mr. Keldon Bester: Is this for Mr. Hatfield or me?

Ms. Valerie Bradford: I'm sorry; I want to hear from both of you, so I don't care who goes first.

It would be interesting to hear perspectives from both of you.

Mr. Keldon Bester: The big piece of Bill C-352's contribution is on the defensive side, which is still important. When we look over the past 20 or 30 years, there has been a steady consolidation of the grocery industry, particularly in more remote communities.

Merger enforcement, for better or for worse, really is about a strong defence. The question that Bill C-352 answers is whether we are going to stop this march of consolidation. The answer to that is yes, in this bill. The question then is how we spur more competition and more expansion, potentially through the things we're seeing in, as I mentioned before, the property controls investigation and through unlocking competition from the existing market.

Ms. Valerie Bradford: Before I turn to Mr. Hatfield, I have a second question for you. What measures or amendments could be proposed to better meet the needs of the people living in Canada?

Mr. Keldon Bester: I'll return to my opening statement. The focus we should shift to now, and it's possibly bigger than this conversation, is making the mechanics of competition law work faster, more efficiently and more transparently. Improving the information-gathering powers of the Competition Bureau and changing the transparency requirements could speed up the process of resolving competition issues in one way or another. Maybe we find there's not an issue, but still we find it faster. Then we can give Canadians more confidence because they have a better understanding of what's going on and what the government is doing for them.

Ms. Valerie Bradford: Mr. Hatfield, I'll go back to you. In your opinion, to what extent would Bill C-352 address costs and consumer choice, particularly in grocery stores?

Mr. Matthew Hatfield: Properly speaking, our mandate is telecom and the Internet. We've sometimes been dragged into commenting on groceries because it's so obvious to us in our communities that many of the issues are shared across both.

I don't want to overstep my expertise on this, but in addition to strengthening the bureau's hand in dealing with mergers in general, I think the market study power is important for looking at what's going on with groceries. We can't be sitting here three or four years from now being unsure about what component of price is due to consolidation. We need some hard study of this issue.

To return to the remarks Mr. Bester made, we need an effective timeline for it. As we've seen at the CRTC, studies or decisions that are delayed indefinitely often amount to not dealing with the problem at all. We can't be waiting five years for these kinds of studies. They need to happen within a year or two.

Ms. Valerie Bradford: Mr. Bester, MP Vis was addressing some questions to Professor Ross with respect to the study that came out about how the lack of competition is getting worse and worse. Have similar trends been observed in other countries over that same period, from 2000 to 2020? If not, what has been done in these countries to maintain or increase their level of competitive intensity? Are we the only ones experiencing this?

Mr. Keldon Bester: Many countries are going through a process of looking back at the past 10 or 20 years, and even further back, and unfortunately they're finding general decreases in competitive dynamism and competitive intensity, with a big focus on digital markets that have been dominated by one or two players. Increasingly, they're based on cost of living issues.

Canada is in good company in struggling with this issue. Many countries are looking to their competition law to reverse that decline, whether through more aggressive enforcement or new laws and legislation. We're not alone.

● (1250)

Ms. Valerie Bradford: Chair, do I have any time left?

The Vice-Chair (Mr. Rick Perkins): You have 30 seconds, give or take.

Ms. Valerie Bradford: You may have addressed this, Professor Iacobucci, in your opening statement. I'm wondering to what extent the amendments brought forward by Bill C-56 address the proposed amendments in Bill C-352.

Mr. Edward Iacobucci: There's overlap, but I'd have to go back and cross-reference. One of the challenges I find with this process is that it has come in iterations.

As to what's in Bill C-56 versus Bill C-59 versus Bill C-19 versus Bill C-352, I'd have to take a moment to respond to you on that. I'll just wait and pass.

Ms. Valerie Bradford: Okay. If you have a chance to review that and can submit it to the clerk later in writing, that would be very helpful.

Mr. Edward Iacobucci: Sure.

Ms. Valerie Bradford: Thank you.

The Vice-Chair (Mr. Rick Perkins): Thank you very much.

Monsieur Garon, you have two and a half minutes.

[*Translation*]

Mr. Jean-Denis Garon: Thank you, Mr. Chair.

Professor Ross, you are one of Canada's leading specialists in industrial organization, in the economics of competition. In this respect, I think Parliament may need your expertise.

In the House of Commons, some of our colleagues are advocating two important policies to improve grocery affordability.

First, they're suggesting that the government set prices for certain grocery goods. This is an NDP proposal.

There is also a proposal to impose a special tax on the “excessive profits” of large grocers, saying that this will improve the situation for consumers.

I'd like your professional opinion on these two proposals.

[*English*]

Prof. Thomas Ross: I'm not someone who's generally in favour of the invasive regulation of particular sectors. There are cases where we might need regulatory oversight, like if we're allocating spectrum, but for most industries, I prefer to let competition policy do the work.

We need more information about the status of challenges in, say, the grocery sector. It's received a lot of attention because prices absolutely went up. There are a lot of reasons for that, and competition—or a lack of it—is only one proposed explanation out of many. Maybe it has a part to play, but we don't know how big a part.

[*Translation*]

Mr. Jean-Denis Garon: Thank you.

I'd like you to talk to us about the “excessive profit” tax on large grocery chains.

[*English*]

Prof. Thomas Ross: I don't like excessive profits taxes. They just discourage investment.

If there is a problem such that grocers are making exorbitant profits, we need to look for a market solution to that. Hopefully, it will attract entry, for example, and that may happen, but I don't like the idea of special taxes for select industries.

The Vice-Chair (Mr. Rick Perkins): Thank you.

MP Masse, you have two and a half minutes.

Mr. Brian Masse: Thank you.

I haven't had a chance to get Professor Iacobucci and Professor Quaid in, so I want to take the opportunity to have them reflect on European law. A good example is the U.K., which just extended their windfall taxes on oil and gas. As Mr. Ross mentioned, that's one strategy out there.

All we have available to us as a tool, and what Mr. Singh had available to him, is a private member's bill, which was eclipsed by other stuff. We can either choose to make some improvements or ignore it altogether and wait for probably another three years to do anything.

Where do we fit in now that we've had Bill C-19, Bill C-56, Bill C-59 and Bill C-352, whatever we choose to do with it, compared to our American and European colleagues, in your opinion, as it pertains to competition protection for Canadians? I'd really appreciate your input and analysis. I know it's pretty hard to do, but just give us a snapshot of where we are.

I understand you're advocating—and so am I—for a larger picture, but this is what we have in front of us, and we have it for a lot of different reasons. It's part of our democratic process until we get a government that wants to do a full review.

● (1255)

Dr. Jennifer Quaid: I'll go first.

I want to stress that I hope I'm not coming across as negative. I saw the opportunity for a deep dive on reform and I am expressing my disappointment, but it doesn't mean that we haven't done important things and that this has been a waste of time. I wouldn't want you to be left with that sense, MP Masse. Also, the combination of the bills together, I understand, is within the reach of what you could do.

My sense is that in some ways we are trying to align the way Canada approaches things with our main comparator jurisdictions—the United States, the EU, Australia and the U.K. However, one thing we always have to keep in mind is that at the end of the day, it's very difficult to compare jurisdictions based only on their rules. We've now done a lot of work trying to change the structural rules where we thought those were a barrier or where the commissioner felt they were a barrier, and I think a lot of those changes are good. We can debate the details at another time.

The bigger question is going to be about enforcement and the overall approach to how it's implemented. The thing we are probably still missing is more resources and perhaps a rethink of the institutional approach, so I'm not sure we're totally on a par with our peer jurisdictions in that regard. However, we are certainly moving to align our rules in a way that is compatible, at least, based on what other jurisdictions are doing. There is never going to be perfect symmetry because we have constitutional, political and other realities that influence how our law is designed.

The Vice-Chair (Mr. Rick Perkins): Thank you, Mr. Masse.

We have a few minutes left. We have one item of business at the end, but I know that MP Badawey is chomping at the bit to ask a few questions, with the indulgence of everyone.

As it's an open round, you're the only one who hasn't had a chance, so go ahead.

Mr. Vance Badawey (Niagara Centre, Lib.): Thank you, Mr. Chair.

I want to concentrate my questions on performers and performance with respect to what was mentioned earlier about the all-of-government approach. Simply put, it really drills down on the provincial trade barriers and supply management. Performance adjudication would be a part of that, as well as parallel behaviours. Again, that's drilling down on how performers are undermining the act.

When we look at mergers and acquisitions and their impact on consumers and labour, the fewer performers that are part of supply management, the more impact there is on consumers and labour. Of course, ultimately there are remedies to encourage more competition and lessen labour impacts.

I'm going to drill down on the grocery sector. When we look at it, we recognize that prices increased minimally over the years until there were fewer performers. That was based on the incentivization by manufacturers and wholesalers to shrink the distribution market. I'll give you an example, and I'll be blunt. When you look at manufacturers like the Cargills of the world, Kraft and all the big names, they imposed minimums on many retailers and mom-and-pop businesses. That left maybe two or three distributors—the GFSs and Syscos of the world—and therefore the inability to have more performers. What have we seen in the last 10 years? Prices have spiked.

To the Conservatives and all those who are giving an analysis on why grocery prices are going up, I've been in the grocery business for the better part of my life, over 40 years. I can say that this is what I saw on the ground while I was trying to meet payroll, while I was trying to meet supplier demands, while I was trying to ensure that my suppliers got taken care of when bills came due.

That said, Mr. Bester, I would like your opinion on how that has rolled out over the years and how it can fit into this legislation to ensure that consumers are being looked after with fewer labour impacts.

Mr. Keldon Bester: You make a phenomenally important point that's been missed from the discussion over the past couple of years. It's that the issues with food system consolidation and concentration are not just at the retail level, but at the distribution and wholesale levels, with all processors and input providers. You mentioned Cargill, both at the level of providing inputs to primary producers and also as a dominant processor in the beef space in Canada.

What I'm encouraged by is the market study power from Bill C-352, brought in through Bill C-56. We need to go further up that chain and understand beyond what the consumer sees. We have had—and I use the term “concentration begetting concentration”—a process over many years that would be very difficult to unwind. However, the first step is a stronger approach to competition and understanding that consolidation is costing us today not just at the grocery store shelf, but all the way up the chain.

● (1300)

Mr. Vance Badawey: Mr. Bester, when we look at those drivers and the mom-and-pop operations we see in communities, or that we used to see in communities, whether it's a corner store, hardware store, grocery store or furniture store, the lack of buying power that some of the smaller operations have creates an inability to have the margin grow, to have more employees, to be competitive and to stay alive and be around, quite frankly.

That's what we're seeing in communities now. The bigger players, like Walmart, have the buying power to make the margin because of the volumes they're purchasing at any given time for any given product. Second to that, they're still making the margin they expect, whereas the smaller operations, the ones that people used to have the choice to shop at, are not. Their margins shrink. They have to second-guess whether they'll be around tomorrow.

Again, how do you see that being looked after in any legislation we're contemplating right now?

Mr. Keldon Bester: It's a very difficult topic. It's a very difficult task. I often say that consolidation is a one-way street. It makes the challenge, once the market is concentrated, that much higher. I've written about it in the past. I'd be happy to share that.

It's about the concept of fair competition and moving away from competition based on the exercise of power—you referenced the buying power—and instead to the offering of a superior product. I don't have an easy answer, but fair competition is at the heart of it.

The Vice-Chair (Mr. Rick Perkins): You can have one more.

Mr. Vance Badawey: Thank you. This is my last point.

Frankly, what this drills down to is the ability for us to balance the playing field and ensure that the impact on these businesses, as well as the people they're supporting, is such that they don't drop by the wayside over time and we don't have basically one option for the consumer. Partly, it's the consumer who will drive that agenda, but ensuring that they have the choice is something this legislation has to look at in the future. Then we won't necessarily see the mergers and acquisitions from the top end, but from the bottom end, which is sometimes hidden, as the “performance” to the “performers”. That is exactly what some of the bigger players are imposing on the consumer, ultimately. It's about buying power and the minimums that have to be established. Those who can't meet the buying power minimum fall by the wayside. Then there are fewer options for the consumer and there are impacts on the labour market.

The Vice-Chair (Mr. Rick Perkins): Thank you, MP Badawey.

I want to thank the expert panel of witnesses. I had one question, but I've pushed it long enough. Maybe I can talk to you off-line about it before we go.

If the committee wants to begin clause-by-clause on this bill next week, we need to set a deadline for submitting amendments. From talking with the clerk, we can make it noon on Thursday so we can start, if that's okay with the committee.

● (1305)

Mr. Ryan Turnbull: That's fine with me.

The Vice-Chair (Mr. Rick Perkins): Great.

Thank you very much, everyone. This was a fascinating meeting with a great panel. I really appreciate that. I'm sure we'll be seeing more of you in the future.

The meeting is adjourned.