do suggest that there should be a right of appeal from the decision of the commission.

I am wondering whether in that connection you have considered the fact that in the Federal Court Act, section 28, there is a provision for review of decisions of a federal board, commission or other tribunal. What have you to say as to the adequacy of that? The appeal is to the Federal Court of Appeal.

Mr. Hemens: Well, under section 28 of the Federal Court Act there are only three grounds for appeal. The first is under section 28(1)(a), which is failure to observe principles of natural justice, or action beyond jurisdiction, or failure to exercise jurisdiction. We submit, and we have pointed out, that we are not going to run into that situation very frequently, because of the wide discretion. Then there is paragraph (b).

The Chairman: Let us rush to paragraph (c).

Mr. Hemens: Section 28(1)(c) of the Federal Court Act states:

> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

With this very wide discretion I think we are going to have trouble in establishing any sort of caprice. I suggest that you are going to have great trouble in establishing perversity with, again, the wide discretion. And what is the material which is before them? Well, if you look at the act you find that there is no standard of proof required: "Where, on application by the Director, the Commission finds that . . ."

The Chairman: Now you are answering me on the basis of the bill, but you are not satisfied with the factors that the commission must find in order to have authority to make an order. So I am asking you about section 28, if the things which you have objected to are improved in the way you have suggested.

Mr. Hemens: Well, let me elaborate on that. If the things which we have suggested were to be included in the act, we wonder why there would be any objection to a normal appeal, because a court of appeal would be in a position to determine a finding as to product, if "product" were properly defined; a finding as to market, if "market" were defined; and not leave it to this sort of breadth—and it is not breadth, really, it is the opposite, narrowness—of this right of appeal.

The Chairman: So your position, shortly, is this: that a right of appeal appended to this bill without making the changes you have discussed would be a meaningless sort of thing, and a right of appeal, even with the changes that you have suggested, would not be as helpful as an appeal to the courts.

Mr. Hemens: Exactly, sir.

The Chairman: So you think there should be an appeal to the courts, in any event.

Mr. Hemens: Yes, sir.

The Chairman: Whether the bill stays the way it is or whether the changes you have recommended, or any of them, are made.

Mr. Hemens: Yes, sir, but less strongly if the bill stays the way it is, because in my personal view it would become rather difficult for an ordinary court of appeal to determine an appeal of a finding which is essentially a discretionary finding.

The Chairman: You mean you cannot apply a judgment to a discretionary order?

Mr. Hemens: It is difficult to appeal against a normal, reasonable use of discretion. If the discretion is broad, then it becomes very difficult.

Mr. Bruce: If it remains the way it is, then to be satisfactory it would probably have to be in the nature of a trial *de novo* so you could get to the merits.

The Chairman: I was just coming around to that, because in the Criminal Code we still have provisions for a trial *de novo* where a man has been summarily tried before a magistrate or provincial judge. The trial *de novo* means that the whole case is gone into again on the theory that there has not been a full or adequate disclosure or discovery at the trial. That has been justified all the time on the basis that speed seems to be such an essential element in the disposition of summary trials before magistrates. We went into all this when, of all things, this committee was the one which produced the new Criminal Code back in about 1954 or 1955. I still think we did a fair job, but there was an attack on the trial *de novo* method then. But I take it that what you think here is that there should be a trial *de novo*. In other words, there should be the opportunity to hear all the evidence again and any new evidence that might develop.

Mr. Bruce: Certainly, if it is going to remain as general as it is now. I think that was Mr. Hemens' point.

The Chairman: Well, if all of the evidence is not developed at the trial, then in a hearing there is no limitation on the hearing as long as you stay within the scope of the jurisdiction of the commission and the statutes. Why should they review all that evidence again? They will have to study it.

Mr. Bruce: Simply because section 28 of the Federal Court Act—the so-called appeal that is now provided for—would never get at the merits.

The Chairman: But Mr. Hemens and myself have gone further now. He had said that he wanted a right of appeal to the courts in any event, but not as strongly if all the suggested amendments are made; and what was bothering me was the use of the words "not as strongly".

Senator Flynn: Mr. Chairman, I understood Mr. Hemens to say quite the contrary. I understood him to say that in the event that the amendments were not made, then in his opinion the appeal would be practically useless because the discretion of the court would be pitted against the discretion of the commission.