Under the Unfair Competition Act presently existing, and under the old Trademark and Design Act, the law substantially was this: that in order to register a trademark it had to have a distinctive character. Among the bars to normal registration was that the word was descriptive of the character or quality of the goods to which it was applied, or was geographic in origin, or consisted of the name of a person. So you had a lot of words which in the first instance were refused registration because they did nothing more than to describe the characteristics and the quality of the goods. For instance, you could not take a refrigerator and call it a "cold air" refrigerator, because, after all, that is all that a refrigerator is. And also you could not take a stove and call it a "warm heat" stove, because that is what it is.

Under the old law—and also under the presently existing Unfair Competition Act—there was a procedure whereby you could establish that, through long and continued use, your trade mark had become so known all across Canada that the average purchaser would disregard that descriptive meaning and would immediately say "Well, this represents the goods of so and so." For example, the trade mark "Ford" is only the name of a man called Ford. Normally, "Ford" refers to an individual by the name of Ford but today and for many years past, everybody in speaking of a Ford knows that it means an automobile manufactured by the Ford Motor Company down at Windsor, or in Detroit in the United States. So it has always been felt that those highly publicized names, surnames, should be registrable and that descriptive words should also be registrable on the same basis because they had lost their primary significance and acquired a secondary trademark significance, describing or denoting the person who was responsible for the goods being on the market.

By Mr. Macdonnell:

Q. Yet you have said that the word "Perfection" was refused?—A. Yes. It was refused on the basis that it was nothing more than a mere laudatory epithet. It was like saying "best" soap, or "super fine" soap. Those were words which the court held that everybody should be free to use. It did not matter how long you used them.

By Mr. Crestohl:

Q. Do you think that the word "Hotpoint" would be a case in point?—A. That was decided in England not to be in the same class as "perfection", but in the first class I spoke of, namely, descriptive, and therefore a word which could acquire a secondary meaning.

Q. That is right.—A. Some three or four years ago the word "Superweave" was submitted for registration as applied to the sale of textiles and the registrar quite properly, under the statute, refused registration. The applicants then went to the Exchequer Court under the procedure outlined in section 29 of the Unfair Competition Act, and brought proof that the trade mark had acquired a distinctive secondary meaning by the long and widespread user which I have mentioned. The Exchequer Court then ordered its registration. Thereupon the department appealed to the Supreme Court of Canada and that court held that the word mark "Super weave" was nothing more than one of those laudatory epithets such as "super fine", "perfection" and so on, and that no amount of user could ever make it a distinctive trade mark in the sense of becoming adapted to distinguish. The committee feels that that situation ought not to be permitted. If a trademark in the commercial life of this country does in fact distinguish a trader's goods, no matter what the character of the words are and even if the word is descriptive in fact, then we ought to get away from this artificial rule of its not being adapted to distinguish.