

Limited, and in his judgment, at page 649, Mr. Justice Judson says this:

I recognize that there may be a difference between a common law action for damages based on conspiracy and one based on price discrimination. The common law itself imposes liability for harm caused by combinations to injure by unlawful means but the common law never gave any cause of action for price discrimination unaccompanied by conspiracy.

Now then, if you go back and look at what this bill proposes in section 31.1, on page 14, what it says is:

"31.1 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part V . . .

That is the section about conspiracy, restraint of trade, fixing prices and lessening competition, and so on.

. . . or

(b) the failure of any person to comply with an order of the Commission or a court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

It is permitted that:

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part V or convicted of or punished for failure to comply with an order of the Commission or a court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part V . . .

Now, this is a very substantial civil right that has been created, and in common law, where a person who has been harmed might have a cause of action, Mr. Justice Judson says that if there is an element of conspiracy in what was done—the unlawful act—that that would be an enforceable action at common law. It would appear that this particular section of it, so far as it relates to Part V, may legally comply with the requirements of the common law; but we have to look at all the elements. For instance, what a plaintiff in such a case has to establish is conduct contrary to Part V.

Now, it is not that there has been a conviction—the man may never have been tried, or the party who is being sued may have been tried and may have been acquitted; yet under this section, or is it would appear, a person who can prove that what this person did was contrary to Part V, or the conspiracy section, has a good ground for his action. Of course, he has to prove damages to him; not general damages, but damages, and the measure of those damages, that is, the extent to which he was hurt by this conduct.

Now, the question is: Is that too broad? Should a person who has not even been proven guilty of a criminal offence have the same section of the statute which creates that criminal law applied to him in order to give a right of action to a person who hopes to establish that he has been harmed by what was done? Or should the basis for this cause of action be the fact that there was a conviction?

This is a very important issue, the creation of this new right.

**Senator Flynn:** Surely, Mr. Chairman, the first question must be whether it is within the competence of the federal Parliament to do that. Is it necessary for the purposes of this act to create this civil right? I doubt it very much. It belongs, I think, to the provincial legislatures to establish that right if it is not already provided. I have an idea that under the civil code the facts would constitute a fault which would be the basis for an action in damages. It need not be so in common law, but it belongs to the provincial legislatures.

**The Chairman:** I have read the judgment of Mr. Justice Judson and I would be inclined to think the judgment on this point may be *obiter*, that is to say that it may not have been essential to the determination of the case, but it does indicate that at common law, and he has researched that, a person who has been injured by unlawful means would have a civil right of action, but it must be in relation to an offence that involves conspiracy.

**Senator Flynn:** May I point out, Mr. Chairman, that he said that discrimination in prices would not be the basis for an action in common law for damages? Is that it?

**The Chairman:** That is quite true, and the commission, in doing what it is doing—that is to, say making an order—is not making an order in relation to a criminal offence.

**Senator Flynn:** No, I agree with that. But the point is that if it is not in contravention of the act, then that would be impossible also under the civil code.

**The Chairman:** I do not expect that we are going to make a decision on this one way or the other today, but I wanted to get Mr. Hemens' view and the view of his group in relation to the creation of this civil right to sue for damages.

**Mr. Hemens:** There are two aspects of this, Mr. Chairman. Senator Flynn has just raised the question of constitutionality, and we have mentioned it because we think it is an important item. But we do not want to make a big thing of it. The second aspect to which you, I think, have adverted is that there is a provision for a civil action whether or not there has been a conviction on the criminal offence. The problem there lies partly in the fact that if you prosecute for a criminal offence, then you must prove it beyond reasonable doubt. If you take a civil action, there is the balance of probabilities, which means that there are two entirely distinct standards of proof. One wonders, if we are concerned with a criminal offence and the right, as the result of a criminal offence, to damages—and we don't contest that—if the standard of proof should be that for a criminal offence. Therefore, there should be a conviction before there is a civil suit.

**Senator Flynn:** A very logical conclusion, but it shows that we probably should not get mixed up in this field at all. If you require