LIBRARY OF PARLIAMENT

J
103
H7
1974
B3
A1

Canada. Parliament.
Senate. Standing Committee
on Banking, Trade and
Commerce, 1974.
Proceedings.

DATE

NAME – NOM

04-10-13

[redacted]

DATE DUE

NOV 10 2004

GAYLORD

PRINTED IN U.S.A.

J
103
H7
1974
B3
A1

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 1

THURSDAY, APRIL 25, 1974

First Proceedings on Bill C-6,
intituled:

"An Act to amend the National Parks Act"

(Witnesses: See Minutes of Proceedings)

27519—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	*Martin
Desruisseaux	McIlraith
*Flynn	Molson
Gélinas	Smith
Haig	Sullivan
Hayden	van Roggen
Hays	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, April 23, 1974:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Laing, P.C., seconded by the Honourable Senator Cook, for the second reading of the Bill C-6, intituled: "An Act to amend the National Parks Act".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Langlois moved, seconded by the Honourable Senator Martin, P.C., that the Bill be referred to the Standing Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

ROBERT FORTIER
Clerk of the Senate

Minutes of Proceedings

Thursday, April 25, 1974.

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the following:

Bill C-6 "An Act to amend the National Parks Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Cook, Flynn, Gelinas, Molson and Smith. (7)

Present; not of the Committee: The Honourable Senator Cameron. (1)

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

WITNESSES:

Indian and Northern Affairs Department:

Mr. J. I. Nicol,
Director-General,
Directorate—Parks Canada;

Mr. S. F. Kun,
Director,
National Parks Branch.

The Committee then proceeded to the examination of Bill C-6 and after discussion it was *Agreed* that the witnesses bring to the attention of the Minister the concern of the Committee with respect to Clause 2 of the said Bill.

At 10.15 a.m. the Committee adjourned its consideration of the said Bill until Wednesday, May 1, 1974 and proceeded *in camera* to the discussion of other Committee business.

At 10.30 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, April 25, 1974.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-6, to amend the National Parks Act, met this day at 9.30 a.m.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have before us this morning Bill C-6, an act to amend the National Parks Act. As witnesses we have: Mr. Kun, Director, National Parks Branch; and Mr. Nicol, Director General, Parks Canada. Mr. Nicol, you may open the proceedings.

Mr. J. I. Nicol, Director General, Parks Canada, Department of Indian and Northern Affairs: Honourable senators, the bill was before this committee on a previous occasion. The amendments made in the other place are acceptable to my minister. They cover some of those things which some senators were concerned about the last time we were here. These were notably in the form of prior advice of intent in the case of clauses 2, 10 and 11, and a process of independent review of the department's decision and actions, whether taken by itself or in concert with the provincial government.

I think the amendments so made meet the questions that were raised in this committee the last time we were here. The other clauses were not changed. One was added to section 6 of the act. This was not in the original bill. The effect of this is to remove the phrase "lands of Indians." The thought behind this was that "lands" should not be identified separately as "lands of Indians," and the phrase was dropped. That phrase in the section has never been used during the life of the act, which was originally passed in 1930.

The Chairman: In doing that, you have not taken anything away?

Mr. Nicol: No.

The Chairman: You have only broadened the language.

Mr. Nicol: That is correct, sir.

The Chairman: Senator Flynn, you raised a question in the Senate on second reading and indicated that you were going to raise it in committee. Would you care to develop that point now?

Senator Flynn: Yes, Mr. Chairman. It is in connection with the procedure set out in clause 2 of the bill, where a new section 3.1 is added after section 3 of the act.

It provides for the Governor in Council to meet certain requirements before a proclamation can be issued establishing a new park, or enlarging one, if I am not mistaken.

It is provided that notice shall be given in the *Canada Gazette* 90 days before, following which the matter shall be submitted to the Standing Committee on Indian Affairs and Northern Development in the other place.

The standing committee hears the notices and makes a report to the house concurring in the intention to establish the park or disapproving the idea. If it disapproves, the matter rests there, but if there is a positive report the Governor in Council may then proclaim the establishment of the new park.

The Senate is entirely left out of this procedure. I can understand how it occurred. It is certainly not the fault of the department. It is because the amendment was devised in the committee of the other place.

I suggest that if there is a negative report from the standing committee of the other place, the matter should rest there, just as though the decision was not passed. But if there is a positive report, it sems to me that the Senate should be called upon to concur in the recommendation of the committee of the other place and, in fact, of the other place itself.

The Senate has always been a forum for airing grievances. It seems to me that this principle should be respected in giving a voice to the Senate in the case of a positive report from the standing committee of the other place.

I have not drafted an amendment. I would like to hear the views of other honourable senators.

The Chairman: Are you suggesting that there should be an amendment to this section requiring that such a proclamation be approved by the Senate?

Senator Flynn: Yes. My idea is that after subsection (5) of section 3(1) there should be reference to the Senate, that the decision of the house approving the proposed proclamation be referred to the Senate and to a committee of the Senate. The committee would then either concur or disapprove the intended proclamation.

The Chairman: I would like to hear the views of other honourable senators. I should call the attention of the committee to one factor, that another bill—the energy bill—dealt with this principle of procedure by proclamation. The bill in its original form required the approval of the Commons and the Senate. In the Commons the reference to the Senate was struck out, and the bill went through.

That is why, in considering our course of action today, there is the question of whether we should again invite that kind of confrontation or whether there is another and more logical and reasonable way of dealing with this bill to achieve the same result.

Perhaps I should develop that point. My thought is that the bill really creates a system of national parks. It then goes on to provide that if an addition to that list is significant in relation to the park, you can proceed to provide for more parks not by legislation but by proclamation. That proclamation goes through the procedure of advertising, going to a committee of the House of Commons, and coming back to the Commons for approval, without any reference to the Senate.

It occurs to me that if legislation is necessary to create a system of parks, when additional parks are going to be provided of any significant area, at any significant cost, or whatever it might be, it should be done by legislation and not by proclamation.

Senator Beaubien: That would include us.

The Chairman: If an act of Parliament, in which the Senate participates, is necessary to create it and you are dealing significantly with the quantum, then it should be done by legislation. That is my view on the matter. This may be a question of policy, so I would not expect the representatives from the department to venture any comment as to what the minister's view in relation to this would be.

It strikes me that while we should discuss the pros and cons of proclamation in these circumstances, certainly the proclamation method should be limited to insignificant additions by way of expanding the area of an existing park. What I am trying to avoid, if possible, knowing the attitude of the other place now as it exhibited itself in connection with the energy legislation, is a confrontation on this issue, particularly when it strikes me that such a confrontation is not necessary since we can amend the bill now before us. We do not have to amend it in such a way as would make it necessary to consult the Senate, but we can limit the language of the bill to any additions which are not significant.

I do not think I should ask the representatives of the department who are here this morning for their views on that, as I think it is a policy decision. However, when the view of the committee in this connection is ascertained, we can discuss it with the minister. If we do not complete our study of this bill this morning, then we can adjourn it until next week and ask the minister to appear and explain his position.

I now invite comment from the committee.

Senator Molson: Perhaps the Law Clerk can advise us, Mr. Chairman, as to whether or not this manner of dealing with legislation setting out the method by which something will be dealt with in Parliament in detail—the standing committee shall meet without delay and hear witnesses, and they will get up in the morning and go to bed at night, and so forth—is commonly used? I do not recollect seeing legislation that spells out that the House of Commons will do this and that.

The Chairman: You mean this proclamation method?

Senator Molson: Yes. It is usually "Parliament," is it not—not, "The House of Commons shall do this and the House of Commons shall do that"?

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: Perhaps I might comment, Mr. Chairman. It is an extraordinary procedure. It is fairly new.

Senator Molson: It has not been done, has it?

Mr. Hopkins: It has been done, but only recently.

Senator Flynn: It was done, to some extent, in connection with the corporate tax legislation where 60 members of the House of Commons may force a debate on the continuation of that legislation. If there is a resolution adopted saying the legislation should be amended in a certain way, then the Governor in Council is obliged to bring in legislation in accordance with that resolution.

Senator Molson: But then the Senate gets a crack at the legislation.

Senator Flynn: Yes.

Senator Molson: But that is not the case here.

Mr. Hopkins: It is a manifestation of the same thing.

Senator Molson: What surprises me, also, is setting out the method by which the House of Commons will do this. It seems to me that is rather unusual.

Senator Cook: Following on from Senator Molson's comments, what happens if the standing committee does not meet without delay?

Senator Molson: Exactly.

Mr. Hopkins: I think that is covered, because it says if it is not approved, then the publication may not issue.

Senator Flynn: Yes, that would prevent the proclamation from taking place.

Senator Cook: That is not the intent of Parliament; the intent of Parliament is that it should be considered.

Mr. Hopkins: I agree with Senator Molson that it is unusual.

The Chairman: Proposed section 3.1(5), at the bottom of page 2 of the bill, indicates where the proclamation is not to issue, so you are putting all the authority in the Senate if the Senate committee does not approve of the report.

Senator Molson: The House of Commons committee.

The Chairman: That states:

> In the event the House of Commons concurs in a report disapproving of the proposed proclamation or does not concur in a report approving of the proposed proclamation, the Governor in Council shall not issue the proclamation.

It is an extraordinary procedure.

Senator Molson: It is changing the character of legislation.

The Chairman: It is. That is why I feel that rather than run head on into that issue, the limitations on the use of the proclamation should be where there are relatively insignificant additions to be made to an existing park; otherwise, it should be done by legislation.

On that point Mr. Nicol has some comment that he would like to make. He feels there are some things he can say in that connection.

Mr. Nicol: When this bill was before your committee in the last session there was some concern expressed in connection with clause 2, which speaks only of additions to existing national parks, that the provincial and federal governments could jointly create a very significant addition to a national park without the public being aware of that being the case. The same concern was voiced in the committee of the other place. There were a number of suggestions for an independent review, some of which followed along the lines of the independent review which takes place under the Expropriation Act. The members of the committee of the other place came to the conclusion that, along with the additional notices being given prior to proclamation, an independent review could take place in the form set out in the amending bill.

The whole thrust here was to have a review of the addition outside of the provincial and federal governments, and this is the form which they concluded would provide for that independent review. They took cognizance of the points which had been raised by our officials in both committees to the effect that there were very minor additions of two, five or ten acres which had no significance in a park of 1,800 square miles. This, really, was the thought process that went into both committees.

The Chairman: Are there any questions?

Senator Cook: I do not think that alters the position very much, Mr. Chairman. It is a good explanation, but I must say I am very taken, at first thought, with your suggestion. After all, if it is a significant addition, then we should obtain the position of the public on it.

The Chairman: This proclamation method should only be available in the case of an insignificant addition; otherwise, it should require legislation.

Senator Gelinas: We would have to define the words "significant" and "insignificant."

The Chairman: The addition would be to an existing national park, and the natural limitation, I should think, would be the extent or percentage of the geographic area involved. This is where the department might be of some assistance. I am not suggesting that we draft an amendment this morning, but I think we should indicate our thinking. If that, in fact, is the thinking of the committee, then we should ask these officials to go back and explain our position to the minister. We would like to have them express their views.

Senator Gelinas: May I ask the witness a question? We are talking about adding land to the present parks. How about deleting or returning land? Has it ever occurred?

Mr. Nicol: This was deliberately left out of the bill, advisedly. The minister and the government have taken the stand that if there is to be any deletion of any kind it must come before Parliament as a bill, which can then be debated. Clause 2 was designed to facilitate minor, and sometimes major, amendments, or significant additions to the park.

The Chairman: And the language they use, Senator Gélinas, is, "... where the area of the lands described in the proclamation"—that is, the proclamation relating to an addition—"is significant in relation to the park,"—that is, to the park in respect of which the addition is being made. I think the language should just be in the reverse, so as to preserve the importance of the position of Parliament in dealing with this.

Senator Beaubien: Agreed.

Senator Cook: Could I ask a general question, anticipating what arguments might be advanced? We are coming into a new season for the operation of parks. Is there any urgency for this bill to be passed in view of your operation of the parks in this season? Is there anything in the bill which you want immediately?

Mr. Nicol: Yes. The housekeeping items, which have not been the subject of much comment in either committee, are very helpful to us. The other thing is that those parks which are identified in the other clauses in the bill do require the protection of the National Parks Act, and the sooner we get it the better.

The Chairman: They have not had it so far.

Mr. Nicol: They have not had it so far.

The Chairman: And they have been doing all right.

Mr. Nicol: We have not been doing all right, otherwise...

The Chairman: ...you might have been here sooner?

Mr. Nicol: Well, the last time amendments to this act were passed was in 1957, and we have, over that period of time, examined the boundaries of a number of existing parks with a view—and I think the explanation was given to the committee at the previous sessions—to bringing a rational boundary into effect rather than a surveyor's dream of very nice, straight lines; and this is true of a number of parks across Canada. Some of these additions are included in the description. Prince Edward Island, for example, has certain additions listed in the description. They come under one of the clauses, and I do not know whether it is 7 or 8.

The Chairman: I like your language, Mr. Nicol, about establishing the boundaries of the parks in a realistic way rather than following a surveyor's dream of where they should be.

Senator Flynn: Mr. Chairman, your suggestion probably would require an amendment to clause 2; but, on the other hand, by clause 10 we give the Governor in Council the right to proceed under the procedure set out in clause 2 with regard to five new parks there, in British Columbia, New Brunswick, Quebec, Newfoundland and Ontario, and the territory is not defined here. It would have to be decided by the department, with the concurrence, of course, of the province. But then the real procedure of establishing the park would come under the exclusive control of the Commons; we would be left out entirely, as far as these five intended parks are concerned. I agree with you that we should avoid confrontation. I am quite satisfied that they would not accept an amendment which would only deal with the status of the Senate; but we have got to be realistic. We are now giving them exclusive jurisdiction over the establishment of these five new parks.

Senator Cook: Is that quite the effect of clause 10?

Senator Flynn: Yes.

Senator Cook: I do not think it is. Well, you may be right; I am not quite sure. It is a different subsection 2.

Senator Flynn: I am not too sure. Would you say the establishment of these two parks would not require the approval of the standing committee?

Mr. Nicol: There is a significant difference, Senator Flynn, between clauses 2 and 10. Clause 2 has some futurity to it. It is basically that any additions, as they occur in the future, would follow the process as drafted in clause 2.

With regard to clause 10, the five parks mentioned are already subject to a federal-provincial formal agreement. They have had very wide publicity on the definition of the boundaries, and in the case of the one in Ontario the process has been delayed while full consultations concerning the rights of the Indians in that area are taking place. The proclamation will not take place until we have the legal descripition, and all of the lands transferred from the provincial government to the federal government. In the case of (a) the Part III lands have not yet been transferred. In the case of (b) the lands are in the process of transfer now. In the case of (c) the lands have been transferred.

The Chairman: But, Mr. Nicol, in these cases in clause 10, provision is being made in this legislation to do these things.

Mr. Nicol: This legislation will approve these parks.

The Chairman: Yes. And it is up to the department, according to the procedures that are laid down, to proceed with the acquisition, and develop these parks and the definition of boundary lines, et cetera; but the one in clause 2 is dealing with additions to existing parks.

Mr. Nicol: That is right.

The Chairman: And they are using the proclamation method, and I think, if the addition is of any significance, it should be by legislation. That is my feeling.

Mr. Hopkins: But clause 10 stands by itself. It does not have to follow the procedure.

Mr. Nicol: No.

Senator Flynn: This is strange, however, because in clause 2 we say that if you have an existing park you have got to do this, that, and the other thing.

Mr. Hopkins: After it is established.

Senator Flynn: But if you establish a new park under clause 10 you have to do certain things, but not the reference to the standing committee of the other place.

The Chairman: That is right.

Senator Flynn: It would be easier for the department to establish an entirely new park, which may be a very wide area, without the concurrence of the committee of the other place.

The Chairman: But, senator, it is only under clause 10 in a general way. . .

Senator Flynn: I know.

The Chairman: . . . that the locations are dealt with.

Senator Flynn: Yes.

The Chairman: But the selection of the particular area is dependent on what the department does.

Senator Flynn: The counties of Champlain, and St. Maurice in the province of Quebec, I can assure you, are rather a wide area. I know it is an area very close to the minister, but . . .

Senator Molson: Is there any difference between paragraph (a) in clause 10(2) and paragraph (a) of proposed section 3.1:

> (a) clear title to the lands described in the proclamation is vested in Her Majesty in right of Canada;

Is that the same in clauses 2 and 10?

Mr. Nicol: Yes.

The Chairman: No.

Senator Molson: The title does not have to be vested already in the Crown, does it?

Mr. Nicol: Yes. You have clause 2—section 3.1:

> (a) clear title to the lands described in the proclamation is vested in Her Majesty...;

Senator Molson: I see. It is the same in both.

Mr. Nicol: That is right, sir.

Senator Beaubien: So it is the same in both.

The Chairman: Mr. Nicol, do you understand what the problem is insofar as we are concerned? You could wait for the transcript, which should be available very shortly, or we may be able to give you one of the carbon copies, which will be typewritten, to set out the proceedings here today. If you have the opportunity to discuss this and you receive instructions, your minister may wish to come back, and we will sit again on Wednesday next.

Some hon. Senators: Agreed.

The Chairman: If there is any further clarification you need of what concerns us, now is the time to ask for it.

Mr. Nicol: Mr. Chairman, in clauses 10 and 11, Parliament by passing this bill approves these parks. The same device was used in 1957, in the case of Terra Nova National Park. The park was approved by amendment of the act. The legal description of Terra Nova appears in this amendment. The change in the process here in clauses 10 and 11 is that, instead of parks being automatically proclaimed by the passage of this bill, they will be proclaimed when the legal description is available.

Senator Cook: But these clauses do not exclude the Senate because they do not include the House of Commons.

The Chairman: The remarks we made this morning were in relation to clause 2 and not clauses 10 and 11.

Senator Flynn: I would like to know why you accept the principle of referring to the standing committee of the House of Commons the intention to enlarge an existing park, and you do not provide for the same procedure with regard to the creation of new parks. Why this difference? It seems to me that this is not logical.

Senator Cook: But they are already created.

Senator Flynn: But the creation is something much more important than the enlargement of an existing park.

Mr. Nicol: Under clause 10 the boundaries are defined, but the lands are not fully transferred. In clause 11 the full legal description is included in the appendix.

Senator Flynn: Yes, in clause 5, but not in clause 10.

Mr. Nicol: Not in clause 10. The boundaries have been made completely public, but all of the lands have not been transferred as yet.

Senator Molson: There have to be public hearings on that still.

Mr. Nicol: There have to be public hearings on the land called for in clause 10(3).

Senator Smith: I would like to ask Mr. Nicol what the present legal status of Kejimkujik Park is. I was looking for the reference.

Mr. Nicol: Clause 7(2) covers Kejimkujik.

Senator Smith: At what time was legislative authority given for Kejimkujik?

Mr. Nicol: This bill provides for it and also for the legal description.

Senator Smith: Where do I find the approval for Kejimkujik?

Mr. Nicol: This bill approves it.

Senator Smith: Is it because we approve the schedule?

Mr. Nicol: Approval of clause 7(2) and the schedule will effect the establishment of Kejimkujik National Park on a formal basis when the bill is passed.

The Chairman: If there are no further questions, does the committee approve of the course we have discussed?

Hon. Senators: Agreed.

The Chairman: Mr. Nicol, if you are not too clear, even when you get the transcript, all you have to do is get in touch with me or the clerk of the committee or our law clerk and we will provide anything further by way of explanation as to what our position is.

Mr. Nicol: I understand the committee's concern is with clause 2.

The Chairman: That is right.

Senator Flynn: And the difference in procedure.

Mr. Nicol: And the committee is concerned that significant additions to national parks should be in the form of legislation.

The Chairman: That is right.

Mr. Nicol: Rather than the process set out in the present bill. Am I correct?

Hon. Senators: Agreed.

Senator Cook: It should be approved by Parliament as a whole.

The Chairman: Then we will adjourn this morning until Wednesday morning next at 9.30.

Mr. Nicol: I take it that there are no questions on the other clauses?

The Chairman: No.

The hearing is adjourned.

Published under authority of the Senate by the Queen's Printer for Canada

Available from Information Canada, Ottawa, Canada

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 2

WEDNESDAY, MAY 1, 1974

First Proceedings on

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

17833-1

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 2

WEDNESDAY, MAY 1, 1974

First Proceedings on

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

27533–1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	*Martin
Desruisseaux	McIlraith
*Flynn	Molson
Gélinas	Smith
Haig	Sullivan
Hayden	van Roggen
Hays	Walker–(20)

**Ex officio members*

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, April 2, 1974:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Hayden, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act,* in advance of the said bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and–

The question being put on the motion, it was–

Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, May 1, 1974.

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the following:

> "The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden, (*Chairman*), Beaubien, Blois, Buckwold, Connolly, (*Ottawa West*), Cook, Desruisseaux, Flynn, Gélinas, Haig, Laing, Macnaughton and Molson. (13)

Present; not of the Committee: The Honourable Senators Aird, Heath and Manning. (3)

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel; R. J. Cowling, Legal Counsel and J. F. Lewis, Advisor.

WITNESSES:

The Canadian Manufacturers' Association,

Mr. Harry G. Hemens, Q.C.,
Vice-President, Secretary and General Counsel,
Du Pont of Canada Limited, Montreal.
Member, CMA Legislation Committee.

Mr. D. I. W. Bruce, Q.C.,
Vice-President and Secretary,
Westinghouse Canada Limited, Hamilton.
Member, CMA Legislation Committee.

Mr. R. Snelgrove,
Vice-President and Secretary,
Massey-Ferguson Industries Limited, Toronto.
Member, CMA Legislation Committee.

Mr. B. R. McPherson.
President, Gibbard Furniture Shops Limited,
Napanee.
Member, CMA Legislation Committee.

Mr. G. C. Hughes,
Manager, CMA Legislation Department. Toronto.

Mr. D. H. Jupp,
Ottawa Representative CMA.

The Committee proceeded to the consideration of the subject-matter and the examination of the witnesses.

After discussion, the Committee adjourned its consideration of the above matter until Wednesday, May 1, 1974.

At 12.10 p.m. the Committee adjourned until 12.30 p.m. this day.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, May 1, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to examine and consider any bill relating to the Combines Investigation Act in advance of the said bill coming before the Senate, or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, this morning we are commencing our hearings on the reference made by the Senate to this committee with respect to the substance of the proposed combines investigation legislation. Appearing before us this morning are representatives of the Canadian Manufacturers' Association. I am glad to see we have quite a few members of the committee in attendance.

I have read the brief submitted by the Canadian Manufacturers' Association, as I am sure all honourable senators have, and I might say they have done a good job of coverage. The opening statement will be made by Mr. Hemens, and when he takes his place beside me I will have him introduce his "supporting cast."

Would you come to the dais now, Mr. Hemens, and introduce your supporting membership in the order in which they are sitting?

Mr. Harry G. Hemens, Q.C., Member, Legislation Committee, Canadian Manufacturers' Association: Thank you, Mr. Chairman. On my immediate right is Mr. Bruce; next to him is Mr. McPherson; next to him Mr. Snelgrove; then Mr. Hughes; and next to Mr. Hughes is Mr. Jupp.

Mr. Chairman and honourable senators, we thank you for giving us the opportunity to submit our views to this committee today and to answer any questions which honourable senators may care to put to us.

[*Translation*]

Honourable Senators, at the outset of my remarks I would like to thank you for this opportunity to appear before you, but in view of the complexity of this matter, I will, with your permission, continue my remarks in English.

[*Text*]

Honourable senators will find that our submission deals only with those provisions which we suggest require further consideration and amendment. There are, however, many other provisions on which we do not comment. The consumer protection provisions relating to bait and switch selling, referral selling and permit selling are supported by this Association. Furthermore, we recognize that the provisions dealing with foreign judgments, laws and directives are a serious attempt by the government to overcome the extraterritorial application of foreign laws in Canada. We support moves in this direction.

Our submission deals with the many subjects outlined in its table of contents. You will observe that most of our submission deals with the proposed power of the Restrictive Trade Practices Commission to deal with trade practices known as refusal to deal, exclusive dealing, market restriction and tied selling. We have a lengthy appendix on this subject, and our views are given in outline on pages 3, 4 and 5.

I would refer you to sections 31.2 and 31.4 as they would be amended by Bill C-7. These are the sections that give the Restrictive Trade Practices Commission power to deal with refusals to deal and exclusive dealing, market restriction and tied selling.

Let me turn first to refusals to deal. Before the commission can make an order it must find four facts. The first fact is that a person, whom I will call the complainant, was adversely affected in his business or is precluded from carrying on his business because of his inability to obtain supplies of the product. The second fact is that the complainant must be willing and able to meet the supplier's usual trade terms in respect of payment and units of purchase. The third fact is that the product must be in ample supply. The fourth fact is that the reason the complainant cannot obtain supplies is inadequate competition in the market.

It is our contention that these four facts to be found by the commission are not safeguards for industry, but rather thresholds which are very easy to get through. In other words, it will not be hard for the commission to make these findings, and hence obtain jurisdiction.

Let me show you why we reach this conclusion. As to the first fact which must be found, we think that if a complainant can show he would make a profit if he could obtain and sell supplies of the product, then he would have shown he was adversely affected by his inability to obtain supplies. As to the second fact to be found, we think the complainant has only to show he has a good line of credit and would purchase in normal quantities. This would not be difficult in most cases. The third point we think is axiomatic. In any event, except for occasional periods of scarcity, products are usually in reasonably ample supply.

27533–2

The fourth point is often put forward as the most significant. We disagree. It requires proof that the reason for the refusal to supply is an inadequate degree of competition. Professor Donald Thompson, of York University in Toronto, has said that in his opinion the commission will simply establish concentration ratios for each section of Canadian industry. If these ratios are exceeded, then the commission will find inadequate competition. Because of the nature of Canada's market, most industries in Canada are fairly highly concentrated. In fact, the Department of Consumer and Corporate Affairs issued a report in 1971 giving the statistical analysis of concentration in Canada's manufacturing industries. We think the result will be that most industries in Canada will be deemed to be industries in which there is an inadequate degree of competition.

In other words, gentlemen, we believe that these four facts will be very easily found by the commission. This means, of course, that the commission will have jurisdiction.

Let me now deal with the thresholds for exclusive dealing outlined in section 31.4. The commission has only to find that exclusive dealing has been engaged in by a major supplier or is widespread in the market.

Let me say here that one of our main objections to this bill is that a "product" or a "market" is not defined. Although this is the case under the present law, the need for definition becomes critical when this bill proposes to make so many more trade practices subject to adjudication. In other words, it was bad enough before not to have definitions, but now, if the commission is to deal with all these matters, definitions of "product" and "market" are, we submit, essential.

Referring back to exclusive dealing, what we are saying is this. The definition of a major supplier will depend on the definition of the product. Let me give you an example. If the product is branded, for example, Chanel No. 5 perfume, then quite clearly the distributor of Chanel No. 5 is the major supplier, because he will be the only supplier. I should say in passing that there are two interesting sidelights to this example. If Chanel No. 5 is imported directly from France, then an order from the commission cannot touch it; international competitors in the Canadian market cannot be reached by the commission. On the other hand, if Chanel No. 5 is manufactured under licence, then the terms of the licence may be breached by an order if the commission orders the manufacturer to deal with types of distributors not sanctioned by the licence agreement.

When you look at the definition of "market" it is quite clear that a market could be defined as a shopping centre, a city block, a township, a province or the whole of Canada. It is left entirely to the discretion of the commission, so it is not hard for the commission to find either of the first two factors.

In addition, the commission must find one of three other factors. It must find either that the exclusive dealing is likely to impede a firm's entry or expansion in a market; or it must find that the exclusive dealing is likely to impede introduction of a product or the expansion of a product's sale in a market; or it must simply find that the dealing is likely to substantially lessen competition.

Bearing in mind what we have said about the lack of definition of a product and a market, we suggest to you that any one of those three additional factors could also be fairly easily found by the commission.

In the provisions on tied selling and market restriction, you can see a familiar pattern. For both of them the commission must find that the practice has either been engaged in by a major supplier or that it is widespread in a market. I think we have already indicated why this should not be hard to find. As far as tied selling is concerned, the commission must find at least one other additional factor which is exactly the same as those for exclusive dealing. As far as market restriction is concerned, the additional factor which the commission must find is only that the market restriction is likely to substantially lessen competition.

Honourable senators, the gist of all of this is that all these thresholds are in fact very easy to go through, and once through them the commission has a virtually unfettered discretion.

It is true, of course, that for exclusive dealing, tied selling and market restriction there is an exemption for affiliated companies; it is true that for exclusive dealing and market restriction an exemption is provided if it is only used as a temporary measure; and it is true that for tied selling an exemption is provided if there is a technological relationship between the products. But in practice these exemptions will not have a wide application, and that is why we say the commission will have an unfettered jurisdiction. By this we mean, of course, that the commission can decide whether or not the business marketing practice is legitimate or illegitimate without reference to any criteria, defences or guidelines in the act.

In a nutshell, we are saying that this bill may require a supplier to sell his product to customers he does not want, who are able to obtain supplies of his product elsewhere, and hence destroy the supplier's distribution system.

The bill is based on a philosophy of maximizing price competition to the exclusion of all other sorts of competition. It does not recognize the special needs of franchise systems, for example, which rely for their very success on the right to limit the number of franchises granted. Because franchise systems can introduce technical innovations to a number of industries, because they are a means to overcome barriers to industry entry for relatively unskilled persons and because they substantially increase inter-brand competition, it is surely desirable to exempt franchise systems.

The bill does not recognize the desirability of permitting private brands to be exclusive. It does not recognize that it is in the public interest to encourage private branding as an alternative to national brands and to encourage the price reductions and inter-brand competition which accompany private branding.

The bill does not recognize that for many industries suppliers seek in their dealers not only minimum levels of financial responsibility but also high levels of technical competence for presale and postsale customer consultation. This is not just for consumer goods but also for commodities like stainless steel which is sold to industrial buyers. If technical advice is deficient, then the dealer may cause the stainless steel to be used incorrectly and the manufacturer is the one who suffers from the dealer's incompetence.

There are many other factors which we think the Bill does not, but should recognize. Our submission, on pages 25 to 28, gives three

examples of how we think the Restrictive Trade Practices Commission could exercise its discretion.

Let me now give you one of them. Suppose the complainant is not now carrying on business but wishes to do so. He has ample financial resources, adequate knowledge of the trade, premises in which to carry on business and is prepared to order in the quantities usual in the trade. If unable to obtain domestic supplies, he could purchase on the international market. If unable to purchase from the manufacturers, he could obtain supplies at higher prices from wholesalers.

The commission, in our view, could make the following findings:

(a) the relevant market is the domestic and not the international market;

(b) the relevant market is that supplied by the manufacturers and not the wholesalers of the product;

(c) the article is the one in question and not any substitute;

(d) the complainant is precluded from carrying on business even though he is not now in the business and even though he can obtain substitute articles because he has been prevented from entering the business of distributing the particular article in question;

(e) the complainant can meet usual trade terms since his credit is good and he is willing to order in usual quantities even though there is no evidence as to his ability to market or service the article to the satisfaction of the suppliers;

(f) the fact that the industry is highly concentrated is sufficient evidence of an inadequate degree of competition in the market.

Gentlemen, what we are trying to show you is that there are a host of legitimate business factors which enter into a supplier's selection of his customers. We think that the commission should be required, by legislation, by this bill, to consider these matters. This means that sections 31.2 and 31.4 should be modified and we have several suggestions to make in this regard.

The original concept underlying anti-combines legislation was that only conduct which constituted an undue restraint on competition should be prohibited. The minister appears to continue to recognize the validity of this concept because he has continued the concept in the bill in connection with combinations in restraint of trade. We believe the same approach should be built into Sections 31.2 and 31.4 dealing with trade practices. This can be done in any one or more of the following ways:

(a) Only trade practices which *unduly affect competition* should be prohibitable. This is the concept underlying the existing act.

(b) Only trade practices resulting from an otherwise unlawful activity (such as combinations in restraint of trade) should be prohibitable. This is the approach adopted in the United States.

(c) Specific exemptions should be provided.

e.g. No order against refusal to deal or exclusive dealing should be possible if:

(i) A supplier has adequate distribution in the market and an order would only increase distribution costs or reduce distribution efficiency;

(ii) The complainant is not willing and able to meet all reasonable commercial and statutory standards;

(iii) The complainant uses the supplier as a supplier of last resort;

(iv) The supplier deals only with full line customers and the complainant will not handle a full line;

(v) The complainant can obtain functionally competitive products.

If any of these approaches were adopted, we believe that the issues would be very much narrower than is now contemplated by the Bill and that it would therefore be appropriate for the courts to hear appeals from decisions of the Commission on fact as well as on law.

Mr. Chairman, before I conclude, can I touch on one other matter dealt with in some detail in our submission? On pages 9, 10 and 11, we suggest some amendments to the bill's misleading advertising provisions. Perhaps the most important suggested amendment is that a defence of honest mistake should be available to a charge of misleading advertising. In saying this, we recognize that industry should be very careful and should not be able to hide behind gross negligence of its employees. We believe however, that a fair position has been taken in the United Kingdom Fair Trading Act of 1973. Section 25 of that act provides a defence if the person charged can prove that the offence was due to a mistake or accident or some cause beyond his control and that he took all reasonable precautions to avoid the commission of the offence. We believe this defence should be available in Canada where the mistake was made by a servant, employee or agent of the person charged.

Mr. Chairman, that concludes our presentation. There are many other matters dealt with in our submission and we will be happy to make a serious effort to answer questions from the committee.

The Chairman: Now, Mr. Hemens, in connection with the presentation of your brief, who is going to open the discussion? There is a lot of meat in your brief and the subject is not an easy one to follow. Even the minister has conceded, many times, that there is confusion and complexity. We will appreciate any help that you can provide at this time for the proper understanding of the bill. How are you going to proceed? We have the opening statement.

Mr. Hemens: Mr. Chairman, we had rather thought that you might prefer, after the opening statement, to operate on a question-and-answer basis. As you can see, the brief is fairly complex. Fortunately, a great part of it is contained in the appendix and deals with what, to an extent, is dealt with in the opening statement. As to the other aspects, we will be glad to try to answer questions—unless you would prefer some other method of approaching it.

The Chairman: What is the wish of the committee? Would you care to have the brief read by members of the delegation, with

questions being interjected during the course of their presentation of the brief, or would you prefer just to start asking questions?

Senator Molson: Mr. Chairman, would it be feasible to go through the brief dealing with each heading as we come to it, discuss the general thought in that heading and then move on to the next section? I certainly do not think we should have the brief read, Mr. Chairman.

Hon. Senators: Agreed.

The Chairman: I think that is an excellent idea.

Mr. Hemens, your position, as we go over these headings, will be that either you will have some comment to make yourself or you will call on one of the members of the delegation to amplify the headings. Is that right?

Mr. Hemens: Yes. Thank you, Mr. Chairman.

The Chairman: All right.

The first heading in your brief is "Refusal to Deal–Exclusive Dealing–Market Restriction–Tied Selling". I would like to fire a question, to get things going. As a general question, with respect to these headings which give the authority to the commission to bring a person really to a hearing for the purpose of investigating a complaint in connection with refusal to deal, et cetera, how do you suggest that the provisions in the bill might be retained but the necessary amplification might be made to meet the points you raise in your opening statement?

Mr. Hemens: Mr. Chairman, in our conclusion, starting on page 28 of the brief, we have suggested several possibilities. First of all, one of the proposals is that we retain the basic concept of competition legislation, that only conduct constituting an undue restraint on competition should be prohibited. We suggest to you that would be one way of restricting the unfettered jurisdiction of the commission.

A second proposal is made in the same series of conclusions, that a restrictive trade practice, so-called, should be prohibited, or prohibitable, only if it were attached to an otherwise unlawful activity. That follows the system adopted under the Robinson-Patman Act in the United States. We also suggest the possibility of certain specific defences.

Senator Connolly: Before you continue, you are talking really to item (ii) on page 29 of your brief, that the commission "should be empowered to prohibit any trade practice only if it was the result of an otherwise unlawful activity . . ."

Mr. Hemens: That is right, senator.

Senator Connolly: Would you care to give an example of that?

Mr. Hemens: Well, let us consider refusal to deal. If the refusal to deal were part of a conspiracy among, let us say, the sole manufacturers intended to keep someone out of the market or to force them out of the market, you would have a conspiracy in restraint of trade, and we think the refusal to supply under that circumstance is reasonably prohibitable.

Senator Connolly: For the sake of argument, let us use the example of the manufacturer under licence of Chanel No. 5 perfume, and let us say that that manufacturer under the licence has an arrangement with a certain selective group of outlets to be the exclusive outlets for that product. Let us assume that not only the owners of the outlets but the manufacturing organization agree as among themselves that no other outlets will be available. Is that the type of "otherwise unlawful activity" you are talking about?

Mr. Hemens: No, sir, we do not suggest that.

Senator Connolly: Do you, for example, consider exclusive dealing or exclusive arrangement to market to be an unlawful combination as between the manufacturer and the retailer?

Mr. Hemens: No, sir. There, I think, we get into the problem of the definition of "product". I know little about perfumes, except as they are worn by others, but I suggest to you that there is not only Chanel No. 5 perfume but, for all I know, there may be Chanel No. 1 to Chanel No. 10, plus a whole series of other perfumes. Consequently, we suggest that the manufacturer of Chanel No. 5 should be entitled to set up his normal distribution system. He should not be compelled by the act to take on as distributors or marketers people whom he does not want to take on. Those people can obtain any variety of perfumes they want.

The Chairman: Mr. Hemens, I suppose it is also a fair conclusion that the manufacturer of Chanel No. 5 would not want everybody smelling of Chanel No. 5; it would soon cease to be popular. So you can recognize the need for some control and some restriction. Certainly, the manufacturer should have the right to improve the marketability of his product.

But did I interrupt you, Senator Connolly? What you said brought to mind the fact that we have these matters which are reviewable by the commission, starting with section 31.2, and these are not offences. We have otherwise in the bill what are called "trade practice offences". Now, in the trade practices those are made absolute offences. In other words, that *per se,* if you have done this and it is established that you have done it, you are guilty. But what Mr. Hemens has been talking about is the function of the commission with respect to the trade practices which are not made offences.

As I understood him, it would appear that if some additions are made to these provisions that the commission deals with, they may deal with the list of trade practices that are set out in the bill in the manner provided in the bill, only if what is being done is otherwise unlawful.

Mr. Hemens: That is one of our proposals, yes, sir.

Senator Connolly: Plus this fact, that Mr. Hemens' first point is that if there is this exclusive dealing it does not unduly restrain competition. That is your first point. Your second point is that it should be associated with an otherwise unlawful activity. You have a third point, and you may have others too.

Mr. Hemens: Well, the third one suggests, senator, certain specific defences as being a proper answer to any such complaint.

Senator Connolly: That is right, yes; I am sorry.

The Chairman: Yes. If you look at that one for the moment, Senator Connolly, this part of the bill does provide for a hearing in which the person who is being inquired into may appear and may give evidence; but in order to give relevant evidence I would think that there would have to be some amplification of the provisions of the bill. It would appear that way to me, and I think that is the sum and substance of your point.

Mr. Hemens: That is our proposition, sir.

Senator Connolly: Could I ask just one simple question here, Mr. Chairman, in connection with section 31.2? For example, when the commission embarks upon a hearing, is it Mr. Hemens' submission that the commission should find that a person not only is adversely affected in his business, but that he is unduly adversely affected in his business? Is that the point where the undue restriction or restraint is to be injected by way of amendment? Or do you propose that that should be done in the sections referred to by Senator Hayden dealing with trade practices? At the moment I do not know what that section is; I cannot put my finger on it.

The Chairman: The trade practices which are reviewable by the commission start on page 16, and they start with section 31.2. Now, these are not offences.

Senator Connolly: I see.

Mr. Hemens: Your question, senator, really asks for a drafting answer, I think; and I think we have tried, in general, not to enter into competition with the Department of Justice. I think the answer could well be the addition of a subparagraph which would state that the commission "shall not make an order unless the trade practice complained of constitutes an undue restraint on competition," or, "unless the trade practice complained of is the result of an otherwise unlawful activity," et cetera.

Senator Connolly: I think that is helpful. That helps me a good deal.

The Chairman: Would you carry on to your third point, which may very well not be open to a person who is charged with a matter on which he can adduce evidence at the hearing?

Senator Connolly: Say that again, Mr. Chairman, would you? I am sorry, I did not get the beginning.

The Chairman: What I said was that the third point which is developed by the Association is the suggestion, as they develop it on page 29 in their brief, that they should be able to establish that there is adequate distribution as a matter of evidence, that the form which the distribution takes is a proper and justifiable form, having regard to the nature of the product and the market they are serving, and that those things should be elements which could be raised.

Senator Connolly: As a defence?

The Chairman: By way of defence, yes; by way of answers. This is a hearing, I suppose, and not a trial, to establish that there is adequate distribution, in the circumstances as they relate to the carrying on of this particular business.

Senator Connolly: Well, to summarize what Mr. Hemens' point seems to be, would it be appropriate to say this, Mr. Chairman, that what Mr. Hemens is suggesting is that section 32 should have a further clause in it in which the substance of the points made on page 29 of his brief should be reflected?

The Chairman: I gather that that was his point. Is that right?

Mr. Hemens: Yes.

Mr. R. Snelgrove, Member, Legislation Committee, Canadian Manufactuers' Association: Mr. Chairman, may I add some comments to expand on what Mr. Hemens said about the philosophy that is apparently behind the refusal to deal, in Part IV.1 of Bill C-7, which describes the matters which are reviewable by the Commission?

As Mr. Hemens indicated, the philosophy behind the drafting of these sections is one relating to, affecting price competition, to the exclusion of non-price competition factors.

Senator Connolly: Not supply; it is price?

Mr. Snelgrove: Price competition. The CMA, of course, recognizes that price competition is important, but it is not important to the exclusion of non-price competition, like the service of the product, pre-delivery, and post-delivery service, and many of these items that are set out in paragraph (iii) on page 29 of the brief that the chairman has referred to are directed to trying to offset the thrust of the philosophy in the bill of sole reliance on price competition.

The philosophy of price competition, certainly in many industries, does not reflect the practices of the real world. For many manufacturers of vehicles, automobiles, trucks, farm machinery, industrial construction machinery and many other hard goods, although pricing is important—and it is important to the consumer—the manufacturer, the distributor and the dealer are concerned, as well as the consumer, with how well the product is serviced after sale—Does the manufacturer or retailer stand behind the warranty? What repair facilities are there? What is the dialogue between the retailer and the consumer? What is the effect upon a consumer as it relates to the reputation of the retailer or manufacturer? Things of this nature are important.

For my own industry, the farm machinery industry, we have since 1970 gone through five years of a royal commission on farm machinery, and the royal commissioner had a study on the subject of the farmers' attitude towards farm machinery purchases. I refer to this not because it relates to farm machinery only, but the application of the study relates to many other hard goods. This study, which is available, resulted from an independent survey made

by the royal commission in Western Canada among farmers, and it describes the statistical analysis, sampling, et cetera. In the result, the survey came up with these conclusions–and these are the preferences of farmers in the purchase of farm machinery:

1. "Dealer has a reputation for standing behind farm machinery he sells." Very important. 88 per cent.
2. "Dealer has a reputation for honesty." Very important. 88 per cent.
3. "Dealer has a good repair and service department." 87 per cent. Very important.
4. "Dealer gives me a good deal." 70 per cent.

Then there is a whole list of items but the last one I read, "Dealer gives me a good deal," is the only one relating to price, either the price of a given product or the trade allowance he gets on his trade-in; all the others are non-price items. So, you see, at least in this survey, that the consumer places greater importance on non-price items, and I think this is generally the thrust of the approach that we are taking, that the philosophy of these sections in Part IV.1. of orienting these reviewable offences on the basis of price competition only is unrealistic and does not bear any relationship to the real working out of distribution and, in fact, to consumer preferences.

The Chairman: Well, Mr. Snelgrove, when you look at page 16 of the bill, which is Part IV.1 where you find clause 31.2, you will notice the language:

> Where, on application by the Director, the Commission finds that
> (a) a person is adversely affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

The significance in that, to me, at any event, is what is the meaning to be attached to the words "on usual trade terms".

Mr. Snelgrove: Our conclusion has been that if you read it in full you will see that the language is, "usual trade terms of the supplier or suppliers of such product in respect of payment, units of purchase and otherwise," and to us the emphasis appears to be on the usual trade terms for volume purchases, that is units of purchase. "And otherwise" might confuse the issue, but very probably *ejusdem generis* does enter the picture to confine it still within the area of payment and credit terms.

The Chairman: The language used, "usual trade terms", has its own definition in (b), isn't that right?

Mr. Snelgrove: Yes.

The Chairman: That language does not go far enough to cover the peculiar or particular method by which in certain industries and in relation to certain products business is carried on and products are sold, and what the customer expects. In your view, should there not be a broadening of the definition of "usual trade terms"?

Mr. Snelgrove: Yes, there should.

The Chairman: And if it is broadened along the lines you and Mr. Hemens have talked about, would that not meet the full thrust of your challenge?

Mr. Snelgrove: It could very well, and much of our recommendation along the line you are suggesting is in item (iii) on page 29 of the brief.

The Chairman: You have not any particular phrasing that you would suggest should be added to paragraph (b) of section 31.2?

Mr. Snelgrove: I think the person referred to in paragraph (b) of section 31.2, the wording about the middle of the paragraph on page 29 of the brief–or that the person comply with "other reasonable commercial and the statutory standards which are applicable to other customers of the supplier", or words along that line.

Senator Cook: In other words, the bill does not seem to put any onus on the complainant at all. The complainant could have been three of four times bankrupt. I do not see that the fences are wide enough to say, using your example of the perfume, that the complainant stinks.

The Chairman: What you mean is that the elements of proof required are not broad enough.

Senator Cook: Well, I do not know if the defence would entitle the supplier to say, "We don't want to deal with this person because he is not a reputable person and he is not going to carry out our standards of supply. He will set up for a short time and then, having made a killing, will move on somewhere else." I just wonder if the fences are wide enough to allow you to attack, if you like, the character of the complainant who may not be of particularly good character.

The Chairman: Your point is in addition to what we have been developing with Mr. Snelgrove. There should be some considerable amplification in paragraph (b) of section 31.2 in order to make available a much broader area of elements that must be met by the complainant, and the complainant should be required to meet all these elements. Now the point you made is one that the complainant, of course, would not raise, but there should be a right in the person defending himself to say, "I wouldn't sell to this man for all the tea in China. He has been bankrupt two or three times".

Senator Molson: Mr. Chairman, we have been talking about hard goods, but there is also the question of the display and protection of consumable goods which might provide a very good reason to a supplier not to deal with a particular individual or a particular retailer, for example. It could actually damage Chanel No. 5 if it was displayed in the sunlight or kept carelessly beside the boiler in the store.

Senator Cook: Or next to the salt codfish.

The Chairman: What you are saying, Senator Molson, is that the merchandiser, the manufacturer, the dealer or the distributor should have a right, without being subject to an attack of this kind, to insist

on terms and conditions under which the product may be sold, as to display, for instance, and the nature of the display.

Senator Molson: And the protection of the quality. I think it should be a form of defence if it could be shown that one retailer actually was affecting the reputation, for the sake of argument, by letting the quality go down, whereas another was not. To me, that would be a valid reason for not wishing to supply any particular retailer.

The Chairman: It is obvious from our discussions so far that the words "usual trade terms" and what they are said to mean do not go far enough.

Senator Connolly: Could I put one more question, Mr. Chairman? I apologize for taking so much time, but we are discussing generally the refusal to deal. Originally, when Mr. Snelgrove referred to pricing and other aspects, they really did not enter into the question of refusing to deal. As a result of his comments, however, I have changed my mind completely in that respect. It may be that the witnesses are saying generally that with regard to refusal to deal, the act seems to imply that almost anyone who wishes to enter the business of distributing a given product–whether Chanel No. 5, a motor car, or what-have-you–would be entitled to appear before the commission and advise them that he can obtain such products for resale, but not on the terms which the dealers extend to their chosen customers, and he wishes equal treatment. The submissions made by the witnesses today seem to indicate that that right should not be granted automatically simply on the basis of price, but other factors should be taken into consideration. For example, the refusal to supply does not unduly restrain the trade, and there is no unlawful combination to which complaint might be directed. And these other defences, plus the one to which Senator Molson and Senator Cook made reference, should be available to the person against whom the complaint is made.

The Chairman: Yes, but you see, senator, the bill in the form in which it appears in paragraph (b) does not go far enough in its definition really of "usual trade terms" to permit such instances as those raised by Mr. Snelgrove, Senator Cook and Senator Molson.

Senator Connolly: Am I wrong in my interpretation of the discussion so far?

The Chairman: I do not believe so.

Senator Buckwold: I am interested in the problem of the definition of the word "product", as was ably pointed out in the presentation. In my opinion, this is very important. Just what is meant by "product"? Does it mean a wide spectrum of such a product as a tractor, or is it a specific type of tractor? I only raise this because of our friends from Massey-Ferguson and Westinghouse. Is it a specific type of tractor or a specific name-brand product? This, in my opinion, is a very grey area, when it is said "the product is in ample supply". It is quite possible to buy all the tractors needed, but a specific type of tractor may only be manufactured by Massey-Ferguson, or a specific model of television by Westinghouse.

It seems to me, Mr. Chairman, that we have there a very difficult area with regard to refusing to sell. How can a distributor be prevented from approaching a manufacturer and asking for a certain product? I do not know just how we could get around this, but it seems to me that we are leaving the way open for tremendous–

The Chairman: But, Senator Buckwold, according to the illustration you have given you are able to establish in evidence before a hearing that there is adequate distribution in relation to a certain type of product. Should a person not wish to buy any other type manufactured by any other concern, but that product manufactured by Massey-Ferguson and he is ready to meet the usual trading terms, why should the law not provice that he is entitled to buy it and sell it to the public?

Senator Buckwold: It does not work out quite that simply in the market-place. Customers will very often require just that particular specific product in spite of the fact that there may be adequate supplies through the distributor. I just go on to say that I feel that the definition of "product" should be specific as to the broad product, an automobile or a specific type of product or brand-name. For example, General Motors may have a Chevrolet distributor in a given area, and it could be said that there is adequate distribution, but eventually the time arrives when there should be a second distributor. In due course, General Motors make up their minds that there is room for a second distributor of their product, Chevrolet. Before that time, however, someone says it is true that there is adequate distribution and supply, but there should be another distributor in this particular area. How will the commission be able to determine that?

The point I raise, Mr. Chairman, is that a person may wish to buy a Chevrolet car, or whatever other article it may be, rather than just the "product".

The Chairman: Yes, but the wording of the clause is "a product". There could not be anything broader than that.

Senator Buckwold: Do you interpret that to mean that so long as there is a car available a specific product would not be provided for?

Mr. Hemens: Our contention is that "a product" can be very broadly or extremely narrowly interpreted, which is one of the major problems of the proposed legislation.

Allow me to cite an example with which I am familiar. We manufacture a product which is generally known as cellophane and because "Cellophane" is a trademark, we are the only manufacturers of it. It is essentially a packaging material, however, and competes with such products as kraft paper, various types of film, such as polyester and nylon film, corrugated boxes, et cetera. Should the commission–as, in our belief, this bill would permit them,–rule that cellophane is the product, we might be required to make it available to all who wish to distribute it. If, on the other hand, the product is not cellophane, but a packaging material, the problem would not arise.

The Restrictive Trade Practices Commission have a report, for example, in connection with lead pencils. Is a lead pencil a product or a writing instrument? If it is a writing instrument, it competes with pens, typewriters, chalk and various other products. However, if the definition were restricted to "lead pencils," there would be an entirely different problem.

The Chairman: How would you suggest the definition of "a product" should be worded?

Mr. Hemens: We believe it should be broad and include functional competitive products.

The Chairman: Would that provide for a situation in which, for instance, a complaint were made to the director by a person, not because he could not buy an engine, but because he could not buy a particular make of engine to distribute?

Mr. Hemens: Exactly.

The Chairman: Do you consider that the insertion of the word "functional" would provide for such a situation?

Mr. Hemens: It would help, senator, but to provide a definition of "product" we will have to spend some time endeavouring to develop it appropriately. We admit it is not an easy term to define.

Senator Flynn: Your last example, "writing instruments," would include lead pencils and typewriters.

Mr. Hemens: But more people today write with typewriters than with lead pencils, senator.

Senator Flynn: I agree with you, but if someone wished to have a typewriter you would say, "Here is a lead pencil," which I do not believe would be appreciated.

Senator Buckwold: In my opinion, if we took the original interpretation of "a product" as meaningful in this context, it would almost mean that the act is inoperative. Generally speaking, somewhere in "a product" a person may find a suitable article. It may be a product tremendously inferior to that which the public would be prepared to accept. This is true of many very good products which are in popular demand and of which there is an imitation which is low in popular appeal because of its performance. That is why I say that the definition of "a product," if it is in the broadest terms of a product, would make the act meaningless. There is no way, unless it is a complete monopoly, that we need the act in that case.

Mr. Snelgrove: Except if the commission, in its wisdom, makes an order against a particular supplier to supply a person.

Senator Buckwold: I agree, but I am trying to bring the product into a more meaningful definition.

Senator Molson: What would you do about explosives, Mr. Hemens? That is a fairly wide field of product range. It is also in your field.

Mr. Hemens: It is also a very difficult problem situation. Let me try to deal with it this way: In Canada, at the moment, there are essentially four manufacturers of explosives, two of which are not a particularly great force in the market.

One of the things which in our view is required in respect of a distributor of explosives is fairly high technological competence. If someone comes into the field–let us say, someone entirely new–demands that we constitute him a distributor of our explosives, goes to the commission, and is able to satisfy these very simple thresholds, we could be faced with a very serious problem.

Firstly, there is the federal Explosives Act. There is no requirement in the bill that he bind himself to comply with it. It is required by other legislation.

We would require that he be technologically capable, and yet we cannot establish that here. He can put up his money, he is prepared to buy on unusual terms, the product is in ample supply, and clearly it can be argued that there is an inadequate degree of competition. There is no responsibility for technological ability.

The Chairman: At this point, it is perhaps a good time to refer to an article which appeared in the *Financial Times of Canada*, arising out of the minister's appearance before the Commons committee, the discussion that went on and the questions answered. The article says:

> Observers learned these points from answers from Mr. Gray:
>
> Brand names do not necessarily mean products. So a television manufacturer would not be prosecuted for refusing to supply a dealer who could buy TV sets of another make.

Where is that in the bill?

Mr. Hemens: It is not in the bill.

The Chairman: The article goes on to say:

> Usual trade terms can include inventories and provision of skilled service. For example, a new entrant could not claim he had been denied supplies if he had not satisfied the supplier's standards for servicing.

Where is that in the bill?

Senator Flynn: I suggest, Mr. Chairman, that the minister may be thinking that he will establish a policy of enforcement of the bill.

The Chairman: But you know, senator, how much reliance we place on pious utterances of that kind. That is the way I look at it.

Senator Flynn: It would be very bad, in any event, because another government could . . .

The Chairman: They are going to make their own interpretation, and with the director of the Combines Investigation presenting the evidence, you can feel certain that it will be presented in the light of what the statute says and not the policy of the administration. The article continues:

> Practices of real estate agents could be examined by the trade practices commission if they are not regulated by provincial legislation. In all cases, provincial legislation takes precedence over Bill C-7. This also applies to fee-setting by doctors or lawyers. Most provinces, under health schemes, have the final say over medical fees. Such control is not held over lawyers' fees.

That is not entirely correct, because judges set a scale of fees on a solicitor-client basis, and there is a taxing officer in Ontario–and I suspect in other provinces–to tax lawyers' bills according to certain standards of services rendered.

It is improper to say that a lawyer can charge a certain fee. If the client insists on having it taxed, the lawyer receives what the taxing officer says he is entitled to receive for the services rendered.

You have stockbrokers' commissions, for example, set by the Toronto Stock Exchange under the authority of the Ontario Securities Commission. They are exempt from the bill as they are regulated by existing provincial regulations under the Ontario Securities Act.

The area which we are discussing with Mr. Hemens is not a new one. Senator Buckwold, when speaking about a product hit the point right on the head with regard to the meaning of trade terms. Meanings that are now being suggested for purposes of administration do not appear in the bill, so it looks as though we have an area to which we have to give some attention.

I am not committing myself to any particular opinion. I am merely pointing out our course of action and the approach we shall have to take in order to deal seriously with this matter.

Mr. Hemens, I notice that you say there should be an appeal to the courts.

Senator Flynn: Mr. Chairman, before we leave that point, do we solve the problem of a diminishing product if we insert the principle that the trade practice must constitute an undue restraint on competition?

Mr. Hemens: In my view, we do it only in part. If you provided, for example, a specific defence which would permit you to establish that there were, in fact, competing products available, that would help the situation.

Senator Flynn: There are three suggestions that would avoid the necessity of defining a product.

Mr. Hemens: It would go a long way toward it.

Mr. D. I. W. Bruce, Q.C., Member, Legislation Committee, Canadian Manufacturers' Association: I do not want to suggest at this point that the suggestions are exhausted. It is either by an exemption or defence, as we see it, that you can narrow this product problem.

Mr. Hemens: There has been a suggestion that the only complainants in respect of this bill are those representing big business. We feel that these refusal-to-deal problems are going to affect more adversely relatively small businesses, and Mr. McPherson, of Gibbard Furniture, is prepared to elaborate a little on that.

Mr. B. R. McPherson, Member Executive Council, Canadian Manufacturers' Association: With reference to our particular industry, the furniture manufacturing industry, and in our distribution, the question of price is not nearly the factor it was years ago. When you get into the production of furniture, where styling and design is very much a factor, a problem is again created with regard to the question of what is a product. A piece of furniture is an item, but it is also a design. In the merchandising and distributing of furniture, in particular furniture of a higher quality or better design, it is of the utmost importance that such designs are sold in certain stores. We create designs for certain markets. If the industry is restricted from selling to the dealers for whom a design is created, they are going to be in serious trouble. These are small companies. Our industry is a very large one: it employs somewhere in the neighbourhood of 50,000 people; it is a $1 billion industry; it is made up of many, many hundreds of factories. So, it is a complex industry. I think our industry exemplifies just what small companies are in this country. We would very definitely be affected by this refusal-to-deal provision.

I might also mention, along the line of what Mr. Snelgrove has said, that any surveys taken recently of our industry indicate a consumer preference for quality, first of all, followed by design and then price. In these particular surveys, dealer dependability was not one of the questions asked. Had it been, I would certainly think it would have been up at the top. In other words, the customer today–and this is borne out by surveys–is more concerned with assurance of the product, either through dealer dependability or the product itself. Consumers take a long look at their buy today, and price is way down on the totem pole.

This refusal-to-deal provision, we think, would very definitely limit our ability to market new designs and innovations of any type in the industry, because they have to be marketed on an exclusive or semi-exclusive basis. In other words, the manufacturer has to enter into a partnership with a dealer or a group of dealers in order to market a new design; otherwise, there is no way to get a new design off the ground. A dealer will certainly not enter into some kind of partnership if he does not know whether or not he is going to be forced to share that design with someone else whose store image is not in line with his. So, this would affect the sale of any such products. Under this proposed legislation, design would come down to the lowest common denominator. In other words, quality and design would be very much disturbed under this proposed legislation.

Senator Buckwold: This goes back to the definition of the product. I do not think the minister feels that any such case would be subject to an adverse ruling by the commission.

Mr. Hemens: With the greatest respect, senator, once you get before the commission, what the minister feels is completely irrelevant and immaterial.

Senator Buckwold: That is why I say the product definition becomes important. Again, that goes back to the other point.

There are two other matters I wanted to raise and on which I invite your comments. First of all, what about those instances where the manufacturer insists on price maintenance? If a dealer is habitually undercutting the market as against an established price, it is not unheard of for the manufacturer to refuse to deal with that dealer. That is the first point on which I should like to have your comments.

The second point is with respect to package buying. In other words, if a dealer wants to carry an exclusive item that is in real demand, he must also buy other lines that are manufactured by that manufacturer which may not be that much in demand. I know of many cases of this kind where, in fact, the dealer is not allowed just to buy the exclusive line, but rather he must buy a range. Could you comment on that insofar as this proposed legislation is concerned?

Mr. Hemens: Perhaps I could comment first, senator, followed by Mr. McPherson. On your first question, retail price maintenance is illegal. Refusal to deal, tied in with that illegality, in our opinion, might be prohibitable.

As to the second point you raised, I think you chose a very difficult concept, with respect. There are many other aspects of that concept. For example, in an industry which I know reasonably well, that being textile fibres, we, as a major manufacturer, are forced to manufacture, in order to supply our customers properly, a full line, including short runs of special materials. Those short runs of special materials are costly, and we can supply them effectively only to someone who will buy our ordinary material. What you are suggesting, senator, has already happened in our industry. For example, a distributor will purchase the long-run material on an import basis and come to us for the short-run materials, which, as I say, are much more costly. Under those circumstances, why should we be forced to supply that distributor when he is not supporting the major part of our industry? I can assure you that, that has happened in our industry.

Mr. McPherson: We are not confronted with the same problem in our particular industry, either at the dealer level or the retail level. Generally, we sell products in a given price range. The manufacturer, depending on the equipment he has in his factory, manufactures low end furniture, high quality furniture or medium quality furniture. I do not think we really get into what you are referring to, senator.

Just before I go on, Mr. Hemens referred to small companies and the fact that the minister has said that this legislation is in favour of small companies and the consumer, and that most of the criticism to date has been from large companies. I think he said that the source of the criticism should be looked at with a degree of skepticism. In my view, the reason that small companies have not come here to complain, strange as it may seem, is because they are just not aware of this legislation. I say that most forcefully, because in the last three weeks I have spoken to a number of companies, both dealers and manufacturers, in our trade, and I would not say that there is one per cent that are aware of this legislation. When a dealer asks me what this legislation is all about and I tell him that the design or designs that he carries exclusively on his street may be available to so-and-so down the street, he just about has a conniption.

Senator Macnaughton: Mr. Chairman, could I interject a question at this point?

The Chairman: Yes.

Senator Macnaughton: How many years has your particular firm been in business?

Mr. McPherson: It was established in 1835, but there was a period in the late 1930s when the firm changed hands.

Senator Macnaughton: How many employees have you?

Mr. McPherson: We have 107. If you are asking questions about our particular firm, we could be typical of others, not only in our own industry but in other industries. We happen to be in the situation where we are a limited supplier; we cannot produce enough at this time. I think there is good reason to believe that we may be in that position for some time. It is also possibly interesting to note why. We are known as a high quality firm; our designs seem to be attractive to today's clientele. I think this again is an indication that people do want something better, an upgrading. However, we feel we are the type of company that should be encouraged to expand and export. Under this legislation, if we had to sell other than to dealers that we feel can sell our product—and we do not pick them but it is the dealers that come around, they can choose to turn us down—I think our future would be very, very questionable.

Senator Macnaughton: Are you one of the chief employers of labour in your area?

Mr. McPherson: Yes. That is pretty well the situation in the furniture industry; it is mostly in small towns throughout the country.

Mr. Bruce: I was going to try to respond to Senator Buckwold's second question. I think this question of tied sales is important. At one end of the spectrum, I do not think I would disagree that if you want bananas you ought not to have to buy peanuts too. The question is, if you want one grade of bananas, perhaps you ought to be prepared to buy both grades. In our industry this would show up in the white goods business. While the act provides for a technological link, you cannot really argue that a refrigerator and a range are technologically the same, yet these products have been traditionally sold together; they are made in the same factory, using the same people, skills and so on. We think that in the long run it would be more costly and not as satisfactory if a purchaser could come in and say, "I am just going to take your range, but I am going somewhere else for my refrigerator, and somewhere else for my dishwasher." It would create turmoil. Of course, the minister advocates turmoil in the markets. The theory is that this is a good thing, because it goes back to this price competition. That is why I think on the question of tied sales some kind of defence or exemption is the answer. Obviously, one should not be able to fob off shoddy goods, because you happen to have one desirable line. I think that is wrong.

Mr. Snelgrove: I would like to expand on one remark concerning the effect on the smaller businessmen, particularly at the retail level, as it relates to the refusal-to-deal section. If our interpretations are right—and we think they are—as to the impact of the refusal-to-deal section, the adverse impact on the retailer who is an established franchisee, who has made a substantial investment in his premises, his service shop, employees, inventory and so on, if he has to compete with anyone who merely has a price to pay to the supplier

for the same goods, without performing any other commercial requirements of a supplier, such as the after-sales service function to satisfy the consumer, then it would be chaotic for the existing local retail entrepreneur, because he would be forced to compete with somebody who did not have to adhere to the same reasonable standards of retailing a product. The small retailer would suffer, and suffer immeasurably. As Mr. Bruce indicated, this apparently is the situation that is designed by the concentration of price competition.

Senator Cook: I do not quite understand why you say no order should be possible against only one company. If I complain that I cannot get goods from a company, what is the implication of that statement that no order should be possible against only one company?

Mr. Hemens: Let us take Mr. Bruce's industry as an example. There are a number of suppliers in that industry. Let us assume this particular situation. Should the commission be permitted to order Westinghouse, as distinct from C.G.E. or the various other producers of television sets, to supply this particular complainant, or should not the order, if it is to be made at all, be made to the totality of suppliers, and let them come to some arrangement as to who should be the supplier or how this distributor is going to be dealt with?

Senator Cook: Take a practical case. I complain that I cannot buy Mr. Bruce's refrigerators. Say the commission agrees that there is merit to my case and an order is going to be made. What is the form of the order?

Mr. Hemens: Let me take that in two parts. First of all, we suggest to you that the commission should not be able to say that you can get Westinghouse refrigerators, but simply that you can get refrigerators. You see, you are defining a product very narrowly as a Westinghouse refrigerator. That is too narrow.

Mr. Bruce: I think the premise of the senator's question is really this. I do not think that particular problem would arise except in the case of an individual who, say, wanted to be a refrigerator dealer; he did not have any particular thrust towards one brand or another; he scouted the market and found that for various reasons he could not get refrigerators from any of them. Let us assume this is not the result of a conspiracy, but it is just that each individual had some reason for not wanting to supply. At that point the unfairness is that the commission becomes the agent that makes the business decision as to who out of all this industry is going to supply this character, whom none of them wants to supply.

The Chairman: Mr. Bruce, have you thought of the effects of the language in section 31.2 following paragraph (d), saying what the commission may do when the director makes a complaint? It says:

> the Commission may, after affording to the supplier or suppliers of such product in the market a reasonable opportunity to be heard,

do certain things. Does that not seem to suggest that even though the director files a complaint in respect of a product, which may be a refrigerator, and perhaps a Westinghouse, when it comes to the stage of the commission dealing with it the commission has to look at the whole range of suppliers?

Mr. Hemens: Paragraph (f) says the commission may:

> order that one or more suppliers of the product accept the person as a customer.

We complain that in that case it can be directed to one.

The Chairman: Yes, the order can be directed to one, and this is the fault you find, the possibility that the commission can make the order in respect of one supplier only.

Mr. Bruce: Yes. Suppose you happen to be the one who gets "caught." Let us say this is in the metropolitan Toronto area. Suppose there are now 20 dealers whom you had considered adequate; you are sure that they can make a good living and therefore would be good dealers. To have this twenty-first one thrust at you is the unfairness.

Senator Cook: And yet the complainant may be only interested in that particular refrigerator.

The Chairman: Senator Cook, in looking at this clause, all you would have to do is strike out the words "one or more" so that the authority of the commission would be to order the suppliers of the product. That would meet your objection, Mr. Bruce?

Mr. Bruce: Well, it might. I would not be sure.

The Chairman: I can only look at your objection as it is in your brief.

Senator Connolly: Should we not ask ourselves, on that specific point, if an order were made that suppliers of the product provide the article in question; and then is that an order that can be carried out?

Surely, something else has to be done somewhere along the line? If you are going to make an order, for example, that is going to cover Westinghouse, General Electric, and all the other manufacturers of television sets, and if it affects them all but does not affect any specifically, then I think you take the teeth out of the thing and make it impossible for the order to be carried out.

The Chairman: Senator Connolly, one thought that occurs to me is, if you had such an order by the commission, addressed to all the suppliers of that product, they would have to get together, as you are indicating, in order to agree on how they were going to ration the supply. Would the director then decide that that was a conspiracy?

Mr. Bruce: It seems to me that this points up the dilemma you are in when you try to transfer a business decision to a government agency.

Senator Cook: Also, is there not the dilemma that the commission makes an order against people who do not appear, say, Westinghouse, and argue the case, and the commission do not agree with them. Now General Electric and everybody else has to suffer.

Mr. Bruce: That is right. I would like to point out something, if I may, but I do not know how reluctant you are to learn lessons from the United States.

Senator Cook: I think we are prepared to learn from anybody.

Mr. Bruce: I think it is generally recognized that in the anti-trust field the United States is as tough as you will find anywhere, but the one area that Robinson, Patman and everyone else has left alone is the right of the individual trader to choose his customers. Whether that is by good management or good luck I do not know, but it obviously creates quite a problem for a government to make what is essentially a business decision.

Mr. Hemens: Let me add only this to it. We are talking about a television set situation. The order, however it is directed, can be directed only against Canadian manufacturers; it cannot be directed against the competitors of Canadian manufacturers–and somehow I think that has to be wrong.

Mr. McPherson: May I add that again, in our particular industry . . .

Senator Connolly: Your own industry, the furniture industry?

Mr. McPherson: . . . the furniture industry, there is an increasing trend, especially in stores. There are two areas which surveys look to for future expansion in sales in the industry: one is the warehouse type of operation, such as Leon's; and the other is the specialty store which is the direct opposite, the store which is trading on design and better service, better quality and so on. The specialty store requires exclusive merchandise or semi-exclusive merchandise, as opposed to the department store. It is a dealer who shops for it; it is not the manufacturer who goes out and sells; it is the dealer who shops the markets. If he cannot get this merchandise in Canada, say, because it would not be able to get in under the legislation, then he would go and get it from the United States; he would get it from outside our borders. So we would anticipate a really tremendous increase in imports in the type of furniture which is in increasing demand. I have just referred to a warehouse type of operation like Leon's. Last year they brought in 20 per cent of their furniture from the United States and at their annual meeting the other day they predicted that 40 per cent would be coming in in 1974. This would be merchandise that they would take full mark-up on, because it would be exclusive. That would be at the expense of the rest of the merchandise, which would be Canadian, and that is where they would drop the price.

Senator Laing: What is the tariff on furniture?

Mr. McPherson: 15 per cent.

Senator Heath: Mr. Chairman, I wonder if this is a disturbing illustration of part of the bill. I wonder also if this is an example–you can tell me if I am following you correctly–of where this may do absolutely the opposite to what the intention of the bill is, apparently. In the case of a small manufacturer who has a limited capacity to produce and has an excellent product, if he is forced to make his distribution through a large group which has a wide vertical organization, and if this particular organization wants to buy up the small manufacturer's organization, this could, I think, from what you are saying, mean that the large distributor would take over the small man's production, pack it away in a warehouse and subsequently really drive him off the market, because he would not then be able to distribute his specialized, albeit expensive, rather haphazard but particularly in demand type of product where it is available.

This has happened already, and it seems to me that this bill we are dealing with now is going to make this even more difficult for a small manufacturer with an excellent product to market independently and improve and expand. Am I wrong in this?

Mr. Bruce: I think you have touched a very dramatic example and I would be cautious to say that things happen exactly like that. That is the kind of concern that we have, I think, that this emphasis on price competition encourages people who are only interested in making money, in putting bucks away and using their particular financial ability to do that.

Senator Heath: It is rather disturbing.

Mr. McPherson: A few years ago, price was the main area of competition. It was not unusual a few years ago for a dealer to think that if he sold a product it did not matter whether it was good or whether it was bad; the main idea was to make the sale. He was not thinking particularly of the customer and he might even put it over the customer. That was a few years ago, whereas today that type of dealer has no future. He is struggling today and any survey would show that the articles that are shown in the discount stores are fighting for survival. The people are going more towards places where they can get assurance and they are not price conscious. This is where we really question what is the greater percentage. Is the act going to favour the greater percentage of the consumer, or is it going to act in disfavour of the consumer? It certainly seems he is going to suffer.

Senator Laing: What percentage of the furniture sales are credit sales?

Mr. McPherson: I am afraid that is a question I could not answer.

Senator Laing: Would it be over 90 per cent?

Mr. McPherson: I would not think so. I would just be taking a guess, but I would not think it is that high.

Senator Macnaughton: Mr. Chairman, am I right in assuming that "a product" would cover such general commodities as copper, steel and aluminum, which could very easily be in short supply and with respect to which one company might be an integrated company involving the whole process, from the mineral right up? Is there not some idea behind this legislation that with respect to Canadian producers of commodities which are needed, the manufacturer should not be in a position to say, "We will favour this one as opposed to that one"?

Mr. Hemens: This applies, senator, only if the product is in ample supply under section 31.2(c).

The Chairman: That is one of the elements.

It seems to me that we have run over the items which you have raised in your brief in relation to Part IV.1 of this bill dealing with matters which are reviewable by the commission, except that you

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.

The Chairman: The other part of his answer was that assuming that all the amendments they have suggested are made, then does he still want a right of appeal to the courts? And he said, "Yes, but not as strongly". The words "not as strongly" are what bothered me.

Mr. Hemens: I am sorry; I must have communicated poorly. I think an appeal to the courts is even more justified and even more practicable if we have the proposed amendments.

The Chairman: Very well.

Senator Connolly: Mr. Chairman, I notice that the witnesses have been speaking about an appeal going to the Federal Court, as provided in section 28. Do the witnesses have any views as to whether that is the appropriate court? In some of the other material and submissions before us it was suggested that such an appeal should go to the provincial courts.

Mr. Bruce: I believe we have so submitted, too, largely on the basis that the Federal Court judges have very little expertise or experience in criminal law.

Senator Connolly: Yes, that was the point made in the other submissions.

Mr. Snelgrove: Particularly as it relates to the prohibitive offences.

Mr. Bruce: I am told that it is not in the brief, but we certainly discussed it.

Senator Connolly: So the question of what court the appeal should be to has not been discussed in your brief.

The Chairman: That is a matter that we will have to come to if we get that far along the road.

At this stage, I think maybe we have shaken everything we can out of these particular elements of the act dealing with the jurisdiction of the commission to review matters.

Senator Connolly: Could I ask another question, Mr. Chairman? It seemed to me that the latter part of the discussion we had this morning utlimately came back to the problem of the definition of "product", as Senator Buckwold has raised it here, and what we have before us is the proposal to amend the Unfair Competition Act. I am not familiar enough with the mother act to know the answer to this question, but is there a possibility that some of the things that we have been considering as appropriate for change in this bill might be covered by a power to regulate that might be in the mother act? Can any of the staff tell us whether there is a power to make regulations? Usually there is.

Senator Cook: It is unique, if there is not.

Senator Connolly: I wonder, too, whether those regulations could cover some of the problems that we have discussed.

The Chairman: Well, Senator Connolly, you know the short answer, I think, of quite a number of the members of the committee–and I think I know their views–is that the committee as a whole is violently opposed to legislation by regulation.

Some Hon. Senators: Hear, hear.

Senator Flynn: That would be the case, indeed.

The Chairman: This would be substantial, if these amendments were made, and I do not know how you could amend provisions in this bill, legislatively, in their scope and effect, by passing some regulation.

Senator Connolly: I am not suggesting that you should. I just wonder whether the power to regulate is there, and whether it might be one device that might be proposed to deal with this; because if it is, we will have to handle it.

The Chairman: By the way, I might draw your attention to the fact that the right to make regulations in the bill is limited. That is section 48.

> The Governor in Council may make such regulations, not inconsistent with this Act, as to him seem necessary for carrying out this Act and for the efficient administration thereof.

So that the regulation method would not appear to be a method that could be used to bring about the changes which this delegation has recommended.

Senator Beaubien: Mr. Chairman, if the regulations could amend, as it were, the act, they could be amended again.

The Chairman: Oh yes.

Senator Connolly: You are not quoting from the bill, Mr. Chairman; you are quoting from the mother act–is that right?

The Chairman: Yes.

Senator Connolly: And you were quoting section 48.

The Chairman: Yes. Now then, I would suggest that we might move on.

There is another matter that I would like to get Mr. Hemen's view on, and the view of his delegation. That is on what this bill does in the way of creating a civil right to sue for damages by any person who can claim that he has been hurt; and that what has been done by the person he is suing is contrary to the provisions of Part V. Those are the conspiracy sections of the act and the bill.

Establishing a civil right to sue, is something new, and it is interesting that there has been some case law as to what is the common law. I am just reading from one of these cases, and it is one decided in the Supreme Court of Canada in 1962, the *Direct Lumber Company Limited against Western Plywood Company*

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

for a civil action the standard of evidence required in a criminal action, then it is not fair.

Mr. Hemens: I do not think a court could operate on that basis, and that is why I say that I think you have to have a criminal conviction first.

Senator Buckwold: I think it is necessary to have some kind of right of claim for damages that may be caused as the result of restrictive practices carried on, and by which a man may be ruined. I would agree that you should have a decision somewhere along the line because a refusal to sell may break a man, and I think he should be entitled to compensation.

Mr. Hemens: I agree that if I injure you as a result of a crime that I have committed, you ought to be entitled to a remedy, but I think you have to convict me of that crime.

Senator Buckwold: I agree on that, but I was rather commenting on Senator Flynn's idea that we perhaps should not be involved in this whole matter. I think somewhere we have to be, and perhaps it should be in the area of the conviction on the criminal offence. But it could get down to the situation where refusing to sell to somebody and putting him out of business would be a criminal act.

The Chairman: Well, I can tell you now that under the bill it is not. Of course, if a group of people got together, then that might be something else.

Senator Buckwold: But if you refuse to sell to a man and he goes out of business–if you say to him, "I don't want you any more. Goodbye! " and he goes out of business and loses all his investment and later you are ordered to sell to him, and it is still not a criminal act as interpreted by our chairman, then I say that the man who suffers should have the right of action for damages.

Mr. Hemens: Well, failure to comply with an order of the commission, I suggest, could become a criminal offence.

Senator Buckwold: But we are not talking about the order here; we are talking about the refusal to sell to the man.

Senator Cook: There is no offence without a conviction.

Mr. Snelgrove: That is a reviewable offence.

The Chairman: The criminal offence is the failure to comply with the order. It is not what the commission dealt with that was criminal in its nature.

Senator Cook: It is the conviction that makes the criminal.

The Chairman: The failure to comply with the order.

Senator Flynn: The failure to comply with the order would probably be the basis for the civil action under common law if the damages are consequential upon the refusal to obey the order. It would be contrary to public order not to obey an order of the commission. I think there could be a civil action, anyway, but you would have to go that far and you do not need a provision in this bill to say that you will have a civil remedy.

Senator Buckwold: Well, I am not a member of the legal fraternity, so, then, under this bill what right of damages–and perhaps the chairman would clarify this for us–has a claimant who has suffered from a restrictive trade decision? I will give you an instance: A man is a distributor for, say, Westinghouse and he makes his living out of this. Suddenly, Westinghouse decides that it does not want him and he is cut off. Later they are ordered to sell to him again, but for two years he is out of business. Is there any claim for the losses suffered by the plaintiff during that time?

The Chairman: Well, what I am telling you is that the bill provides that a person who has suffered damage as a result of any failure on the part of a person to comply with an order of the commission may sue, but he has to prove his damages.

Senator Buckwold: Then in that case, if they complied with the order, there would be no claim for damages, even if damages were suffered for a period of time.

Mr. Bruce: It depends on the reasons for the cutting off. In common law there might be an action for damages.

Senator Flynn: But we would be no better off if the action were taken and it was contested on the question of constitutionality. The court could find that it was beyond the competence of Parliament. You could drag it out for years and you would only find yourself involved in a lot of legal costs.

The Chairman: Well, we have had Mr. Hemens' viewpoint that if any person suffered damage by reason of a criminal act under Part V of this bill, he should be compensated or should have the right to seek compensation from the person who has caused that damage. Mind you, that is a particular right to a particular person. He has to prove the damages in relation to himself.

Senator Flynn: Returning for a moment, however, to the question of constitutionality, I believe legislation in some provinces for the protection of consumers provides such a remedy. It would certainly be within the competence of a provincial legislature to provide that in any case of intervention, even by the federal law, there would be a civil remedy.

The Chairman: Yes, and then you have this conflict. There may be a civil action in relation to the same subject matter in the province and also under this act.

Senator Cook: If a supplier were cut off because of an honest business judgment he would have no right of damages, even though it was later ordered that he be re-instated. If the order of the Commission were carried out, the supplier might sue. However, if he were cut off through malice he would not have any right, irrespective of that.

The Chairman: Except that in common law he would not have a civil right for damages caused by regional price maintenance.

Senator Cook: Oh, no.

The Chairman: It appears in the common law that the element of the unlawful act must include conspiracy.

Senator Cook: I am referring to breach of an implied contract.

Senator Flynn: Could we not ask counsel for advice, Mr. Chairman?

The Chairman: Yes, but, as you know, the manner in which we operate is to debate matters here, after which we may hold a conference. "After which" does not mean later today, but after we have heard all representations, and the minister, if he wishes to do so, has attended. Some departmental officers may wish to attend to consider the bill clause by clause. We are simply attempting to establish all the possibilities inherent in the granting of this civil right and the conditions attaching thereto. We know now the attitude of this delegation.

Are there any other particular points, Mr. Hemens, to which you would like to call our attention at this time—for instance, trade practices such as misleading advertising, which are made criminal offences?

Mr. Hemens: In respect of misleading advertising, we have made proposals commencing at page 9 of our brief. You may also recall that in respect of a proposed defence of honest mistake we made a statement in our opening remarks.

This may be a personal reaction, but on page 10 of the brief reference is made to the problem raised by the term "general impression", which is found in section 36(5). As it stands at the moment, I consider it to be ambiguous, reading as follows:

> In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account . . .

What is meant by "the general impression"? Does it mean the impression of the general public, or is it the general impression of a complainant? We are not sure. For instance, if I happened to be the complainant and the literal meaning is quite clear but I have the general impression that there has been a misleading statement, is that evidence, or is the court required somehow or other to arrive, by way of a survey, at the impression of the general public?

Senator Cook: It would have to bring into play the concept of a reasonable man.

Mr. Hemens: In my opinion, it is closer to the concept of a credulous man. I have always been opposed to that concept, which I believe means an idiot.

Mr. Bruce: This is the answer of the present minister to Mr. Basford, "credulous man".

Mr. Hemens: It needs at least clarification and if it means the impression of the general public, we suggest that it should be clear that customer surveys by professionals should be considered to be relevant evidence, in which case, of course, there should be a right of cross-examination.

Mr. Bruce: As a general statement, I think it should be clear to the committee that we do not condone failure to meet the highest standards of advertising. It is just that the bill perhaps does not give due recognition to the fact that the problems of control, particularly in larger organizations, sometimes are tenuous and that honest mistakes should not be dealt with severely as long as there is good faith and an attempt to rectify them.

Mr. Hemens: Together with reasonable precautions to avoid them.

Mr. Bruce: Yes, but it is very difficult to argue against the need for the clean-up of many advertising practices we see today.

The Chairman: Is there anything else, Mr. Hemens?

Mr. Hemens: I do not believe we have any other major issues, but we would be glad to answer any further questions.

Mr. Bruce: I would like to mention one legal point, which is mentioned in our brief. It is our concern about the introduction of an interim injunction into the criminal law. One can understand why a bureaucrat would like it, but introducing into the criminal law the principle that something can be enjoined because it is thought it may happen in the future is almost an instrument of a police state. That is perhaps dramatizing it too much, but it is somewhat akin to seeing a person walking on the street and deciding in advance that he may commit a crime, and saying therefore, that he should be taken into custody. The injunction, at least in the common law, of course, has always been an extraordinary remedy in an attempt to hold a situation. It has never, however, been a feature of criminal law and this attempt by bureaucrats to introduce such power is worrisome. In my opinion, the interim injunction is an example of that and ought to be carefully considered, although I am sure that Mr. Gray can argue very strongly for it.

The Chairman: May I revert to the section containing the phrase "general impression"? It is most unusual in its wording, which is as follows:

> In any prosecution for a violation of this section—

That is advertising.

> —the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

There are words in common use today which, when used, are not intended to convey the literal meaning. They have an acceptable meaning in conversation and reading but they would be 100 per cent removed from any literal interpretation of the words.

Why should it not be a case of, "Here is what was said"? Is there a representation of what was said, and what is that representation?

When we say "a general impression", a general impression by whom? How do you present evidence of that? Are you satisfied that the judge sitting on the bench is capable of determining what the general impression would be of those who read that?

It seems to me a fantastic way of doing it.

Senator Molson: Would this cover the kind of advertising that deals with "Whiter, lighter, stronger," and that kind of thing, where the general impression is not the same as the literal meaning?

The Chairman: It could, but you may consider both the general impression of the judge and the literal meaning.

Senator Molson: But the literal meaning in some of those ads is zero.

Mr. Hemens: Is it the general impression of one person or is it the impression of the general public?

The Chairman: Surely, it is not limited to the impression of one person?

Senator Cook: How do you test that?

The Chairman: They would not use the word "general."

Senator Cook: They could not test the general impression of one person.

The Chairman: If you paraded to the stand 20 people who said, "Our general impression of those words is such-and-such", the Crown would then call 30 people to say the opposite, and on the balance of numbers the general impression might be determined.

Senator Flynn: You would have to call a lot of witnesses who had read the advertising, and they would say, "This led me to buy the thing. I thought it would be like this or that." I know we would enter into a long debate.

Senator Molson: The survey method suggested by Mr. Bruce is generally accepted, if it is a properly planned survey.

Mr. Hemens: If you conclude, senator—and it might not be fair to conclude—that this is a replacement for a credulous man, you may come to the conclusion that it is my general impression.

Senator Desruisseaux: I was thinking possibly beyond the scope of this, about what would be the repercussion—if for instance, Westinghouse or CGE advertise in the U.S.A. and that advertising is called here misleading advertising—on your advertising in Canada, in the magazines, over radio and on television.

Mr. Bruce: In our particular case, I would not think very much. Certainly, we are not a big advertiser. I do not know of a case where such a conflict has arisen. We attempt to keep our advertising different from that in the United States. We do not see the thing in the same way as they do in the United States. Westinghouse advertising tends to be institutional rather than related directly to the product.

Senator Desruisseaux: That may be the case with some companies, but not with others.

Mr. Bruce: If we found that happening, certainly we would hold consultations. It would be important that we did not get into any trouble in Canada because of what they were saying in the United States.

The Chairman: I am looking at the headings which appear in your table of contents. They appear to be clear in connection with the point that you are attempting to make. Would you like to add anything more to those headings, other than those with which we have dealt so far?

Mr. Bruce: I feel that we have covered the important matters.

Mr. Hemens: In all fairness, we should add one thing which came to our attention latterly. It is on page 11 of the brief, under the heading "Solicitor-Client Privilege."

We have talked with the Department of Justice. The statement is made here:

> . . . the Department of Justice has recently taken the position that the defence of privilege attaching to communications between solicitor and client is not available under this section.

We now believe that impression to be incorrect. However, our view remains that solicitor-client privilege exists.

The Chairman: It is your view that the statement to the effect that the Department of Justice has taken a position is not correct?

Mr. Hemens: We think it is not correct.

Senator Cook: It is only fair to say that whatever position they take, it is for the courts to decide.

Senator Connolly: Are you telling us that you thought originally that the Department of Justice would not recognize the solicitor-client privilege, and you now think you are wrong in that?

Mr. Hemens: We received information which we think was incorrect.

Senator Macnaughton: But you are not sure.

Mr. Hemens: We spoke to the deputy minister, who stated that they do and will recognize the solicitor-client privilege.

The Chairman: Where I have found they do is where the statute says they must.

We shall meet at 3.30 this afternoon. The minister will appear to deal with the point raised in our discussion of the National Parks Bill.

Mr. Hemens: Mr. Chairman, may I thank the committee very much.

The Chairman: Thank you for attending the committee meeting.

The committee adjourned.

Published under authority of the Senate by the Queen's Printer for Canada

Available from Information Canada, Ottawa, Canada

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 3

WEDNESDAY, MAY 1, 1974

Second and Final Proceedings on Bill C-6, intituled:

"An Act to amend the National Parks Act"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

77835—1

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 3

WEDNESDAY, MAY 1, 1974

Second and Final Proceedings on Bill C-6, intituled:

"An Act to amend the National Parks Act"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

27535—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	*Martin
Desruisseaux	McIlraith
*Flynn	Molson
Gélinas	Smith
Haig	Sullivan
Hayden	van Roggen
Hays	Walker—(20)

**Ex officio members*

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, April 23, 1974:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Laing, P.C., seconded by the Honourable Senator Cook, for the second reading of the Bill C-6, intituled: "An Act to amend the National Parks Act".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Langlois moved, seconded by the Honourable Senator Martin, P.C., that the Bill be referred to the Standing Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative.

Robert Fortier,

Clerk of the Senate.

Minutes of Proceedings

Wednesday, May 1, 1974.

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 3.30 p.m. to further consider the following:

Bill C-6 "An Act to amend the National Parks Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Blois, Buckwold, Cook, Desruisseaux, Gélinas, Haig, Laing, Macnaughton, Martin and Smith. (12)

Present; not of the Committee: The Honourable Senators Benidickson, Lapointe, Greene and Goldenberg. (4)

In attendance: E. R. Hopkins, Law Clerk and Parliamentary Counsel.

Witnesses:

Department of Indian Affairs and Northern Development:

The Honourable Jean Chrétien,
Minister;

Mr. S. F. Kun,
Director,
National Parks Branch.

After discussion and upon motion by the Honourable Senator Gélinas it was *Resolved* that the said Bill be reported without amendment, but that recommendations as outlined in the discussion be included as a part of the Report.

At 4.05 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Thursday, May 2, 1974.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-6, intituled: "An Act to amend the National Parks Act", has, in obedience to the order of reference of Tuesday, April 23, 1974, examined the said Bill and now reports the same without amendment.

In addition, your Committee desires to state that, despite the urgency of this legislation in the present circumstances, it should at once indicate its opposition to the principle of clause 2 of Bill C-6, and that it should serve notice that the clause will not be taken as a precedent in so far as the Senate is concerned and that such provisions, which fail to recognize sound parliamentary principles, should not be included in future. Moreover, the inconsistency between clause 2 and clause 10 of the Bill should also be noted. Obviously the establishment of new parks and the significant enlargement of existing parks should be dealt with on the same basis.

However, the Committee considers that the availability of the beneficial provisions of the Bill should not, at this time, be delayed because of the defects noted above.

Respectfully submitted.

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, May 1, 1974.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-6, to amend the National Parks Act, met this day at 3.30 p.m. to give further consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, it will be recalled that we met a week ago to consider this bill. In view of certain questions that were raised, we outlined the position of the committee so that the minister could have that information available. We decided to adjourn the meeting until today, to give the minister an opportunity to appear. He is with us today.

It will be recalled that a question was raised in connection with clause 2 of the bill, dealing with additions to parks which are created and set out in the schedule to the bill. It was the feeling of the committee that the provision, and all the lengthy procedures involved in that clause, were completely unnecessary.

We wanted to hear the minister's view on that. If we wish simply to provide that an insignificant area can be added to an existing park by proclamation by the Governor in Council, rather than by legislation, that is fine; but the provision of a new park would have to be by legislation. The minister already knows the alternative courses that were discussed.

Senator Laing, as sponsor of the bill, have you anything to discuss before we hear the minister on the point which brings him here?

Senator Laing: I am sorry that I was not present last week, but there was a reason for it. I am a resident of Vancouver and the transportation service was such that I would have had to walk in order to get here. However, I read our proceedings. The point raised in connection with clause 2 seems to revolve around the idea that there is an old-fashioned concept in the Senate that Parliament is resident in this entire building and not just at one end of it. I think that point is well taken.

I did not deal with that when speaking of the bill in the house, because I overlooked it. Precedents could be established here, in respect of future legislation, that could put us in conflict with the other place.

The Chairman: As I see it, there is only one way in which we can avoid establishing a precedent in dealing with this bill, if there is any emergency. The report could contain a recital of all the circumstances, indicating why the bill is approved notwithstanding this defect, and indicating that it is not a precedent but that there are special circumstances. That is one course.

Another is to strike out clause 2—the bill could live without it—or we could limit clause 2 by striking out everything in the bill except that which provides that the Governor in Council, by proclamation, can add an insignificant area in relation to an existing park. Those are the various courses of action.

As the minister is available, he should have the opportunity of explaining the situation, and what he would appreciate our doing, if we could do it.

Hon. Jean Chrétien, Minister of Indian Affairs and Northern Development: Thank you, Mr. Chairman and senators. I read the proceedings of your committee meeting of last week. I listened to my predecessor, Senator Laing, and I cannot disagree with the committee. I argued against the clause in committee, because there was another fundamental problem.

This procedure should not be used for one moment. When we want to establish a national park, or add substantial lands to a park, we have to make a deal with the provincial government.

A policy was established by my predecessor that when land is purchased for a national park, the cost is shared with the provincial government.

It is a provincial decision to transfer crown provincial land, or to transfer to the federal government, land they have acquired. The procedure provided in clause 2 will enable a member of the committee of the house to discuss the validity of the judgment of the provincial government—and that is not proper.

As I say, I have argued against that clause in committee. For example, I am currently in negotiation with the premier of a province who, in the wisdom of his government, is contemplating turning over a large piece of land as an addition to an existing national park.

The land in question is provincial crown land. The premier and government of the province are leaning in the direction of setting aside the land for the purpose of a national park. They feel that is the best possible use for the land.

If the premier decided to turn over many square miles of that land to the federal government for perpetual conservation under the National Parks Act, do you think it would be proper for a member of the committee in the other place, or of the Senate committee, to tell the premier of a province, "You are not being wise"? The act exists. Land for park purposes is controlled by that act, it is up to the provincial government to transfer to us provincial land. Of course, the minister can help by being aggressive, and so on.

For example, both my predecessor and I have been very much involved in the creation of new national parks. In the last five years we have managed to establish 10 new national parks. They are not all included in the bill, for reasons that I will explain later.

When we have persuaded a provincial government to transfer land to the Crown, it would not be proper for any committee of the house to discuss the wisdom of the premier, whatever the colour of his party.

I have argued against that clause, but through no fault of mine, we are in a minority position in the House of Commons.

Senator Flynn: That is not your fault.

Hon. Mr. Chrétien: No. The clause was introduced by a member of your party simply to try to score political points, to create the impression that he was concerned for the people.

If a provincial government is wrong, it is up to the voters of that province to tell the government that it is wrong; but it is not for any senator or member of the house to tell the government so, if a proper Constitution exists in this country.

I have argued that the clause was not a good one, but we were defeated in committee. I said that I could live with it. It serves no good purpose and it is an embarrassment.

I am glad that the Senate committee has recognized that point. We could delete the clause, but we are in a bind. There could be an election any day. We are in a minority position. If an election is called next week, the bill would not become law and the work of my predecessor in connection with national parks in British Columbia would not be written into the law because of a small technicality.

I know that you will have another crack at it, probably next year or the year after, because I am still negotiating for new national parks.

We are negotiating the creation of the Pukaskwa National Park in Ontario. The land has not yet been transferred to us because the Government of Ontario has not been able to resolve all the difficulties involved. They are, however, committed to the idea of transferring the land to us. An agreement will soon be reached, which means that next year or the year after we will return with another bill creating other areas as national parks, and you will be able to have another crack at this clause. If the Senate does not pass the bill as it stands now, it will simply be an embarrassment. The committee's objection to clause 2 is a valid one, but it is not a fundamental clause. I would urge honourable senators to look at the validity of such a course.

This legislation will enable the federal government to set up the first three national parks ever in the North and the first two national parks ever in the province of Quebec. I must say, it was not an easy task to get these parks in Quebec. My predecessors over the last 50 years have been trying to do so. It is due to hard work that we managed to get them this time, so I am very keen on having this legislation finalized by the federal government. Once this legislation is passed, it will allow us to proceed with the establishment of Forillon National Park and La Mauricie National Park.

For those reasons I feel quite strongly that we should proceed with this bill, notwithstanding this technicality with which you are unhappy. I, too, am unhappy with it. I do not think there is any real need for it. However, if the committee amends the bill, it means it will have to go back to the House of Commons, and if there is an election within the next few weeks, the legislation in respect of those parks will not be finalized in this Parliament.

I would urge you, therefore, to pass this bill as it now stands. When the legislation in respect of the other parks comes down in a year or two, the Senate can have another crack at scrapping that clause.

The Chairman: Mr. Minister, in the light of what you have just said, it would appear that there is unanimity of thought as between yourself and members of this committee that clause 2 of the bill should be deleted. Having said that, the question then becomes one of what course the committee should take.

On the other side of the coin, you have impressed upon us, Mr. Minister, that there is some urgency, in the sense you have described it, in building up a national parks system. The acquisition of national parks and the loss of impetus and momentum in the work that has been done are things, I suppose, which you have to look at. But we have to look at our position too. If we agree that clause 2 should not be in the bill, then we cannot report the bill without amendment, unless we adopt a practice, which we have done in the past, whereby in our report we include a recital of all the facts to indicate that the circumstances were such that we decided to report the bill without amendment, even though there was a clause or there were clauses in it which we felt were wrong and should not be in the bill. That is face-saving, but it is also a little more than that. It gets away from the suggestion that we are establishing a precedent in so far as the position of the Senate is concerned.

My position last time, as you will recall, was that clause 2 of the bill serves no purpose. That is still my position. I thought we could whittle it down somewhat by limiting the power of the Governor in Council, by proclamation, to the addition of "insignificant areas" to existing parks. But any amendment, whatever the scope of it, will have the same effect.

The question we have to decide, honourable senators, is whether or not we are impressed by what the minister has told us, to the extent that we should pass this bill without amendment to allow him to carry out his work. We have to decide whether we are prepared to set forth our position in the recital to our report indicating our reluctance to pass the bill without amendment but, in view of the circumstances and without any limitation on our right to deal otherwise with any new bill that may come before us on this subject, our willingness to pass the bill.

Those are the two courses we can take. I do not think there is any discussion on the merits at this time. Everyone seems to agree that clause 2 has no purpose in the bill.

Senator Gélinas: Mr. Chairman, I think the formula you have just described certainly settles everything as far as I am concerned. I would be prepared to move that the bill be passed—

Senator Flynn: Before we entertain a motion, I should like to put a few points. First of all, Mr. Chairman, I should like to mention that I taught law to the minister and possibly I infused in him the fighting spirit he has shown here this afternoon.

The second point I want to make is that I do not want useless confrontations with the House of Commons, no more than the minister would want such a confrontation. However, I would like the minister to clarify a few matters for me.

When this legislation came before us in the last Parliament, this committee, in conference with the minister and

his officials, amended the bill to allow for the publication in the *Canada Gazette* of a notice of intention to issue a proclamation, so that those interested one way or the other could express their views before a proclamation would be issued. By doing that we allowed for all interests in the establishment of a national park to be taken into consideration. The publication of such a notice in the *Canada Gazette*, I think the minister will agree, was a good procedure.

Hon. Mr. Chrétien: Yes, I think it was an excellent way of letting the people know what was going on. I have no objection to informing people of the establishment of a national park.

Senator Flynn: The minister agrees that the clause referring the problem to a standing committee of the other place serves no purpose. I think it is a matter of policy for the federal government to obtain title to the land from the province concerned, but that is not necessarily the case in all circumstances. Under clause 2 of the bill it is also provided that:

> (3) The Governor in Council may authorize the Minister to purcahse, expropriate or otherwise acquire any lands or interests therein for the purposes of a park.

In some cases, therefore, your department, Mr. Minister, with the authorization of the Governor in Council, may expropriate land for the establishment or enlargement of a park.

Hon. Mr. Chrétien: Yes, we do that when we want to acquire a small amount of property to add to an existing park. However, when we want to add a significant addition to a park, we consult with the provincial government concerned. We have always followed that course.

Senator Flynn: But it is a matter of policy to have the province concerned provide title to the land?

Hon. Mr. Chrétien: Yes. The amendment which your committee put forward, to provide for publication in the *Canada Gazette* of a notice of intention to issue a proclamation, was not in the old act. If one of my successors decides to acquire a large area of land without the approval of the provincial government concerned, he will not be able to do so until publication of a notice to issue a proclamation to that effect is published in the *Canada Gazette*. So the provincial government concerned will be alerted at that time and can take appropriate steps.

Senator Flynn: That brings me to my last point, Mr. Chairman, which is in connection with clause 10 of the bill. Clause 10. (1) reads as follows:

> Subject to subsection (2), the Governor in Council may, by proclamation, set aside as a National Park of Canada, under a name designated therein, any lands

And the lands are set out in clause 10.(1)(a) through to (e). When a proclamation is issued under that clause, if this bill carries, the procedure outlined in clause 2 will not apply.

The Chairman: That is right.

Hon. Mr. Chrétien: Those parks are already in operation. They are not in the act.

Senator Flynn: They are not in the act?

Hon. Mr. Chrétien: They were not in the old act. I can give you an example of one national park that has been in operation for 20 years, that being Terra Nova National Park in Newfoundland.

Senator Flynn: But a description of the boundaries is not to be found in the schedule.

Hon. Mr. Chrétien: Yes, it is.

Senator Flynn: No, certainly not.

Hon. Mr. Chrétien: Read clause 8, senator. It deals with the new description of Terra Nova National Park.

Senator Flynn: Terra Nova, yes, but I am speaking of the parks mentioned in clause 10 of the bill. For example, in the counties of Champlain and St. Maurice, the boundaries of those parks have not yet been finally determined—not by any act of Parliament, in any event.

Hon. Mr. Chrétien: We know where.

Senator Flynn: We know where.

The Chairman: Clause 10 is not a general empowering clause. Subclause (2) says:

> The Governor in Council may issue a proclamation under subsection (1) . . .

Subsection (1) is the one which indicates the lands, and it is in relation to those specific land he may do that.

Senator Flynn: I agree. If you will give a chance to complete my argument, Mr. Chairman, what I want to say is this. Under the present wording of clause 2, for the enlargement of any park, there has to be published a notice in the *Canada Gazette*. Under clause 10, for the establishment of these new parks, which have not already been established by law—they may have been established in fact but not by law—there is no requirement to publish a notice in the *Canada Gazette*.

The Chairman: It does provide that.

Senator Goldenberg: Subclause (2)(c).

Hon. Mr. Chrétien: Line 40:

> (c) notice of intention to issue a proclamation under subsection (1), together with a description of the lands proposed to be described in the proclamation, . . .

Senator Flynn: I agree with that. The point I wanted to make was that only this notice has to be given, and there is no reference to the standing committee.

Hon. Mr. Chrétien: No, not for those parks.

Senator Flynn: Where is the justification for this?

Hon. Mr. Chrétien: I argued with the members of the committee of the other place, and I could convince them at least that there was no purpose at this time, when the land has been turned over to the federal government and there are employees working there and roads being constructed, in coming after the work has started to question the judgment of a provincial government.

Senator Flynn: The same argument should have been accepted under clause 2.

Hon. Mr. Chrétien: Yes. They accepted it on clause 10 and did not accept it on clause 2. I made exactly the same

argument. I do not know what their feeling was, but my feeling is the same about the two clauses.

Senator Flynn: That is the only point I wanted to put on the record. It seems illogical. If we pass the bill as it is, it is a compromise. I agree with the chairman that we should recite our objection, and this one too, if the committee is agreeable, that there is a difference of procedure provided in clauses 2 and 10.

Hon. Mr. Chrétien: I have been consistent myself on both clause 2 and clause 10. I know that you are consistent on both clause 2 and clause 10. The only people who have not been consistent are the members of Parliament of your party.

Senator Flynn: I do not think they have a majority at the present time. Does the minister suggest that at that time the other opposition parties sided with us?

Hon. Mr. Chrétien: The NDP sided with you, and they did not show any more judgment than the members of your party.

Senator Flynn: This is one case where you did not have to prostitute yourself, as you have done in other cases.

Hon. Mr. Chrétien: I stuck to my guns and I am living with that clause.

Senator Molson: I agree with Senator Flynn that confrontations with the other place are highly undesirable. I am completely sympathetic with the minister. He knows my party affiliations as well as I do, and I can say that I have been very favourably impressed by the minister in his department, and I would like to congratulate him on what he has done in that department. In fact, I am surprised when he tells us that his party has not a majority. I should think that with him in it, it should have. However, the point that we are dealing with in this bill, which happens to be his responsibility, once again brings up a matter that is another slight step in the elimination of the upper chamber of this Parliament under the Canadian constitutional system. I do not know whether we have had it now three or four times. We had it on the tax review bill. We were told, "Don't send back the wire tapping bill!" Now we have it on this bill. Next month we will have it on something else. As much as I am sympathetic with getting this bill into effect, I cannot agree with that process by which this part of Parliament is constantly being cut down in its responsibilities. To that extent I must vote against the motion that is before the committee.

Hon. Mr. Chrétien: If there is an offender, it is not me. The first time I introduced the bill I came to the Senate. I think you should consider that in your voting.

Senator Molson: I agree with you.

Senator Flynn: We are not arguing against the Minister.

The Chairman: The motion is that we report the bill without amendment, but that we include the recitals.

Senator Flynn: And our objections.

The Chairman: And our objections, and why we have reported the bill without amendment.

Senator Greene: Before the motion is put, being a stranger to this committee, and having no right to vote on the motion, I am wondering whether your suggestion could be strengthened and a recommendation put in the report that at the next revision of the act serious consideration be given to the fundamental amendment of or the deletion of clause 2. Would that strong recommendation embarrass the minister in getting his bill through? Since the bill is being passed, I should not think it would, and it might give more teeth to the provisos with which we pass the bill. If I may help Senator Molson—and this might impress Senator Flynn—the right honourable member for Prince Albert in the other place might say that this bill is emasculating the upper house. I think that is his choice of words in a situation such as this.

Senator Cook: I want to speak one way and vote the other. If ever a bill needed the benefit of sober, second thought, this is such a bill. I agree entirely with Senator Molson. On the other hand, I suppose that at the next session we could bring in an amending bill. I am persuaded by what the minister says, and I do not want to do anything at all that might have very serious repercussions, if we amend the bill now. I must confess, however, that I speak one way and I will vote the other.

Senator Desruisseaux: I hope the same thing does not happen that happened once before when the minister changed ministries. It was forgotten then.

Senator Flynn: The problem is, the Senate having taken a stand, when the revision of the act comes before us the house will be warned, if the bill is initiated there, that we will not be able to accept anything but a solution to this problem.

The Chairman: That is right.

Hon. Mr. Chrétien: I can tell you that if I am the minister when there is another bill introduced, clause 2 will not be in it.

Senator Flynn: I have no objection to your remaining the minister as long as we have the same government, but I hope we change the government.

Hon. Mr. Chrétien: Hope is very far from reality in these circumstances.

Senator Flynn: In both cases.

The Chairman: I put the motion that we report the bill without amendment, with the recitals that we have discussed here today incorporated in the report.

Hon. Senators: Agreed.

The Chairman: The motion to report the bill in the form we have discussed, without amendment, is carried.

I will be presenting a report tomorrow. I have to draft it. May I show it to as many of the senators as I am able, to approve of the form?

Hon. Senators: Agreed.

The committee adjourned.

Published under authority of the Senate by the Queen's Printer for Canada

Available from Information Canada, Ottawa, Canada.

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 4

THURSDAY, MAY 2, 1974

Complete Proceedings on Bill C-14, intituled:

"An Act to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act".

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 4

THURSDAY, MAY 2, 1974

Complete Proceedings on Bill C-14, intituled:

"An Act to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act".

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

27537—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	*Martin
Desruisseaux	McIlraith
*Flynn	Molson
Gélinas	Smith
Haig	Sullivan
Hayden	van Roggen
Hays	Walker—(20)

**Ex officio members*

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, April 25, 1974:

"Pusuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Molgat, seconded by the Honourable Senator Inman, for the second reading of the Bill C-14, intituled: "An Act to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Molgat moved, seconded by the Honourable Senator Langlois, that the Bill be referred to the Standing Senate Committee on banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, May 2, 1974.

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the following:

Bill C-14 "An Act to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act".

Present: The Honourable Senator Hayden (*Chairman*), Buckwold, Cook, Desruisseaux, Gélinas, Hays, Laing, Molson and Smith. (9)

Present; not of the Committee: The Honourable Senator Benidickson. (1)

In attendance: E. R. Hopkins, Law Clerk and Parliamentary Counsel.

WITNESSES:

Department of Finance:

Government Finance-Loans,
Investments and Guarantees.

Mr. Richard C. Monk,
Assistant Director;

Mr. F. C. Passy,
Chief,
Guaranteed Loans Administration.

After discussion, and upon motion of the Honourable Senator Smith it was ***Resolved*** to report the said Bill without amendment.

At 10.10 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Thursday, May 2, 1974.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-14, intituled: "An Act to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act", has, in obedience to the order of reference of Thursday, April 25, 1974, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,

Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, May 2, 1974.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-14, to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators we have before us Bill C-14 and we have as witnesses Mr. Richard C. Monk, Assistant Director, Government Finance — Loans, Investments and Guarantees; and Mr. F. C. Passy, Chief, Guaranteed Loans Administration both of the Department of Finance.

Quite a full explanation of this bill has already been given in the Senate, and I think that, unless anyone has other ideas, we should open our proceedings with a statement, in a summary way, from the witnesses who are here as to the purpose and operation of this bill. Mr. Monk, will you lead off?

Mr. Richard C. Monk, Assistant Director, Government Finance—Loans, Investments and Guarantees, Department of Finance: Thank you, Mr. Chairman. As you know, these three acts come to an end on June 30, 1974, if not previously renewed. As a result of that deadline, the department undertook a review of the legislation, consulting various other government departments and private groups, and having regard to correspondence and so on that they had received over the years, to decide what changes would be required to bring them up to date.

In the course of that review we focused on the major issues which had come to our attention—things like the adequacy of the loan limit, the purposes for which loans are made available, the eligible lenders and so on. As a result of that review we put up the proposals which are reflected in the bill and which, to a very large extent, I think, meet the kind of suggestions made in the criticisms of the acts by the various people we consulted.

Senator Laing: These are not direct loans?

Mr. Monk: No, they are guaranteed loans. This is a program under which the banks do the lending.

Senator Laing: What is the amount guaranteed? Is it 90 per cent?

Mr. Monk: Yes. The Minister of Finance will pay 10 per cent of the losses incurred on loans.

Senator Laing: Why do we now have the Alberta Treasury branches mentioned in this?

Mr. Monk: The last time this matter was debated—and I think it was in 1970—a number of members from Alberta drew our attention to the fact that the Alberta Treasury branches were important lenders in that province and that they should be included. Subsequently we had representations from the Province of Alberta itself. I guess it is fairly well known that people from that region consider that this is a fairly important lending institution and has a large number of branches throughout the province. It has sizeable loans and there seems to be every reason, on that basis, for including it as a reputable lender and helping to expand the scope.

Senator Laing: Do you have any figures on the totals of loans made under the tree acts?

Mr. Monk: The total loans made for all times?

Senator Laing: Yes, the total loans guaranteed under the bill.

Mr. Monk: Perhaps Mr. Passy has that information.

Mr. F. C. Passy, Chief, Guaranteed Loans Administration, Government Finance—Loans, Investment and Guarantees, Department of Finance: The total outstanding figure?

Senator Laing: Yes.

Mr. Passy: I can give the totals outstanding as at the end of December 1972. I am sorry I do not have more recent figures. Under the small businesses loans program there was a total of $75 million outstanding as of December 31, 1972; under the farm improvement loans program there was $375 million outstanding at the same date. So far as the fisheries improvement loans program is concerned, I do not appear to have an outstanding figure for that. I am sorry.

Senator Laing: To what extent have we been required to come up with the gaurantee?

Mr. Passy: What percentage?

Senator Laing: Yes.

Mr. Passy: The loss ratio on all these programs is very small—less than one-fifth of 1 per cent of the loans made.

Senator Desruisseaux: And how is that distributed over the various types of loans?

Mr. Passy: In the case of the farm program I think it is less than one-tenth of 1 per cent; for small businesses it is less than one-fifth of 1 per cent; and under the fisheries program it is less than one-fifth of 1 per cent.

Senator Cook: How long is the period of the loans?

Mr. Passy: It depends on the purpose for which the loan is made, but the maximum term is 10 years for a loan under the farm program, except for the purchase of land when it is 15 years.

Senator Cook: Taking the 10-year ones, ut the end of the period is there any rollover?

Mr. Passy: There is provision in all the acts for the extension of the term if the situation warrants it, with the approval of the minister. That is to say that the lender must apply to the Guaranteed Loans Administration who, on behalf of the minister, will authorize an extension beyond the 10 years. This is not common, but it certainly happens.

Senator Cook: That is the question I was going to ask. It is not common?

Mr. Passy: No, most of the terms of the loans are of the order of three, four or five years and, therefore, the bank has the authority within the legislation to extend that term up to 10 years. So most of the three-, four- or five-year, or additional term loans can be satisfied within the bank's power to extend up to 10 years. It would only be relatively few that would require the minister's approval to extend the maximum period in the act.

The Chairman: With the right in the banks to extend a three-, four- or five-year loan up to 10 years, does the guarantee of the government supporting this loan go along with the action by the bank in extending it?

Mr. Passy: So long as it is within the 10-year period. If the bank were to extend it beyond 10 years without the approval of the minister, then I suppose that theoretically the guarantee would stop at the 10 years.

The Chairman: But the bank does not need any approval from the minister to extend a loan period from whatever the initial period was to a total period of 10 years?

Mr. Passy: That is correct.

Senator Smith: With reference to the fisheries improvement loans, as I understand the situation from what you have said before, the maximum authority the banks had to issue a loan under the guarantee system was for a period up to 10 years.

Mr. Passy: That is right.

Senator Smith: And it is up to their judgment to decide what the shorter period shall be—and we can understand that.

Mr. Passy: Yes.

Senator Smith: And if, in general, the circumstances seem to indicate that a longer term would be productive of benefit to the industry, then that term can be extended. How much above 10 years, with the minister's approval, can it be extended?

Mr. Passy: There is no limit. It would depend on circumstances. A normal case we get is for extension for a further two years or so. This is usually sufficient.

Senator Smith: Then with the exception of the purchase of land under the farm improvement loans program, is there some extraordinary character about a fisheries improvement loan that would be equal to the restrictions or the availability of a longer term in the fisheries improvement? A fishing boat, for example, beyond 10 years would not be, in my view, an example of good business management. So what else is there that fishermen would be involved in?

Mr. Passy: Well, the situation, if my memory serves me correctly, where this sort of thing arises is where a farmer, fisherman or small businessman runs into specific difficulties during the term of his loan, and for this reason will be unable to complete his previous agreement. At that point he would, presumably, go into the bank and say, "Look, I cannot meet my agreement. I would like a revision of my terms". In that situation the bank has the aurhority to revise the terms, and if the term, for example, had originally been ten years, then it may only be a matter of revising his terms for more frequent, lower payments within the same total term. Various permutations and combinations could be arrived at between the borrower and the bank manager before the minister would be involved. It is only where these requirements of revision would exceed the maximum laid down in the act that the minister would be involved.

Senator Smith: I understand, in general, from what you have said, that this is pretty close to normal banking practice, then.

Senator Laing: Does this guarantee the lowest possible business rate current?

Mr. Passy: The lowest possible interest rate?

Senator Laing: Interest rate, yes.

Mr. Passy: The interest rate under these programs is set down by a formula which relates the maximum rate that may be charged to the yield on certain Government of Canada bonds. The guarantee is valid so long as the rate in the loan agreement made between the bank and the borrower does not exceed the formula rate.

Senator Laing: In other words, the rate would be as favourable as the best business rate, or even better?

Mr. Passy: Better, yes.

Mr. Monk: It is much better at the moment.

Senator Laing: Have you any idea as to the regional distribution of the loans?

Mr. Passy: Yes. We have a regional distribution. I will have to give them by program again.

Senator Laing: Yes; just generally will do.

Mr. Passy: I do not have these in percentages. Is this what you would like?

Senator Laing: Yes.

Mr. Passy: Perhaps I could say that the bast bulk of the farm loans are, of course, made in Alberta and Saskatchewan, and there are some 70 per cent of the loans that are made in Alberta and Saskatchewan under the farm program. These are the main farming areas, of course. As regards the other provinces, the other 30 per cent is distributed fairly evenly among them.

Senator Buckwold: May I ask what percentage of that 70 per cent is Saskatchewan rather than Alberta?

Senator Hays: Most of it.

Mr. Passy: Yes. Getting on to 40 per cent in Saskatchewan.

Senator Buckwold: Of all the loans, 40 percent is Saskatchewan.

Mr. Passy: Under the small business loans program—these figures that I am using here are for last year—about 40-odd per cent, perhaps 42 per cent of the loans under the small business program last year were made in Quebec. Ontario and British Columbia get the lion's share of the balance, amounting to about just over one-quarter of the loans in each case going to British Columbia and Ontario. The balance is split fairly evely among Saskatchewan, Manitoba and Alberta, with relatively small quantities of small business loans going to the Maritimes, or the Atlantic provinces.

Senator Molson: And fisheries?

Mr. Passy: I expect the distribution is primarily to those provinces bordering the sea. British Columbia gets about two-fifths of the loans, Nova Scotia gets just over one-fifth, as does Prince Edward Island. Of course the prairie provinces get relatively few. Alberta had two last year, I notice. Ontario and Quebec get about 2 per cent of the loans.

Senator Laing: Thank you.

Senator Molson: Mr. Chairman, might I ask if the definition of "lender" includes anything else besides banks and the Province of Alberta Treasury Branch, now that they have added that? I do not have the original act here. Are there any caisses populaires?

Mr. Passy: These are already eligible.

Senator Molson: Yes, but I say, what else besides the banks and the Province of Alberta Treasury Branch are approved lenders?

Mr. Passy: Well, credit unions, loan, trust and insurance companies, and other co-operative type lenders are eligible to apply for designation by the Minister of Finance under the program. Under the farm program, 131 credit unions have been designated by the minister. Under the small business program, 27 credit unions have been designated. Under the fisheries program, two credit unions have been designated. Only one trust company has been desinated. It has applied under the farms program, and it was designated.

Senator Molson: And no insurance companies?

Mr. Passy: None has applied. They are eligible to apply, but none has done so.

Senator Hays: Mr. Chairman, could Mr. Passy explain that formula? Supposing government bonds are yielding 7¾ or 8 per cent, just for purposes of discussion, what kind of formula would it be? What would the interest rate be, roughly?

Mr. Passy: In the case of the farm program for land purchase purposes, it is maturing in one to ten years, and—

Mr. Monk: For land it is five to ten; for all other purposes it is one to ten.

Mr. Passy: Yes. Over a six-month averaging period, before October 1 or April 1. These are the two change dates when the rate is changed, plus one per cent.

Senator Hays: Plus one per cent? That is over the cost of the government yield?

Mr. Passy: One per cent of the government yield on the Government of Canada bonds, yes.

Senator Hays: May I ask another question? If a farmer borrows, say, $50,000, and a proportion of that is eligible under this bill and the banker says, "Well, the rate under the small business loans program is a certain amount," does he have to loan that portion at the interest rate that is applicable under this bill?

Mr. Monk: Well, he does not have to make a loan at all, of course.

Senator Hays: Assuming he has made a loan of $50,000. Then the farmer says to him, "Okay. Now you're charging me 11 per cent," say, "or 10½ per cent." It is a short-term loan, and he says, "Well, you know, I'm familiar with some of the government legislation. Ten thousand dollars of this is eligible under this guarantee and the rate is one per cent over," and so the banker has already agreed to make the loan to him at 7 per cent. He does not have to loan this money, as I understand it.

Mr. Monk: Well, if the contract has already been made, refinancing is not permitted. If it is a question of refinancing a loan that has already been paid at 10 or 11 per cent, that is not permitted under the legislation.

Senator Hays: Well, here he is talking to the banker, the banker has already agreed to give him $50,000, and he says, "I'll give you $50,000 at 11 per cent," and he says, "$10,000 or $15,000 of this is eligible under the small business loans program." It used to be that he would go in to see a banker, and the banker would say, "You will get $5,000 of it at 4½ per cent, and you will get $10,000 at 6¼," and so on. The Bank of Nova Scotia used to do that, but they do not do that any more. I am wondering if, the more substantial the loan, the less likely he is to get the benefit of the guarantee and the lower interest rates.

Mr. Monk: As I said, if a borrower said to the banker, "Look, I would like part of this under the Small Businesses Loans Act," or if he is a farmer, under the Farm Improvement Loans Act, and so on, the bank is not compelled to loan him anything under these three programs. It may choose to do so because it feels that this is a good way of keeping that man as a client; but, on the other hand, if it feels that the person asking for the loan is capable of carrying a higher rate of interest, it might well and it has the right to insist, if the borrower wants the loan, that he pay the usual commercial rate.

Senator Cook: You could give him the $10,000 at the guaranteed rate and just the ordinary rate on the other $40,000, and leave it at that.

Mr. Passy: I do not think the legislation would permit him to take just a portion of the loan of $50,000, as you are suggesting, and say that $10,000 of it would be under this program. It seems to me the legislation requires that the loan may be made for a certain purpose. If there is one purpose in this $50,000—for example, $10,000 of it for the purchase of a tractor—then he could make a loan under this program for that purpose in order to purchase the tractor. But I do not think, if the $50,000 was all being spent on one project, that he could take $10,000 of that and put it under here.

Senator Hays: You could define it any way you want; you could take bulls and heifers or you could take chickens and turkeys.

Senator Cook: Well, you would have to have two loans.

Senator Hays: Yes.

Senator Cook: One for $10,000 and one for $40,000.

Senator Buckwold: I am interested in the actual physical actions that take place when farmers go in to make loans. Does the government in any way subsidize this program, other than by a banker's guarantee?

Mr. Monk: No, I do not think you could say it subsidizes the program. It offers a preferential rate, of course, using its credit power, and in that sense it gives assistance.

Senator Buckwold: The farmer goes to a bank or credit union—and I would suppose most of them go to banks—and applies for a loan, and the bank, if it accepts his application, lends him the money at about 1 per cent higher than the average government bond yield. Why would banks do that when we are in a tight money period at the moment? Why are they going to lend to him at 8½ per cent when they are paying more than that for deposits? Are you concerned that the source of supply of loans during this period of high interest rates which we have now may dry up, and that farmers may be turned down because of their lack of ability to borrow at the higher rates?

Mr. Monk: Yes, there is some concern on that point. Back in 1968, for instance, when we did not have this kind of formula, as I recall, the lending rate which the banks were permitted to charge became fairly far out of line with the commercial rates, and lending under the Farm Improvement Loans Act in 1968 dropped rather drastically down to $40 million. Subsequently, we got on to this formula, and after that, and until very recently, the rate which banks were entitled to charge was not very far out of line from the bank prime rate. As a matter of fact, it was less in most of the periods since 1970.

Senator Buckwold: But right now it is not. Do you feel that if a farmer went into a bank or any financial institution—it is not limited just to banks—to borrow money under this program, he would be greeted with open arms?

Mr. Passy: Well, up until the end of last year. Of course, last year was the best year that has ever happened under these programs.

Senator Buckwold: Of course, the situation was a little bit different last year.

Mr. Passy: Last year's experience would seem to imply that the banks are lending. But it is true that this year the rates have begun to pull apart again, and, certainly, early returns this year indicate some lowering of the rate of lending.

Senator Buckwold: A spectacular change has taken place within the last few weeks, and if we are into a period of relatively high interest rates, which looks to be the situation for a period of time, then is any action going to be taken by the government to assure farmers that these loans will be available to them, because the source, in my opinion, at the moment may dry up unless you pay the price for the money.

I would like a comment on that. As a Saskatchewan senator I am concerned on this right now, because 40 per cent of your loans come from our area and the farmers there are constantly speaking of the difficulty they have in getting money, despite the fact that the legislative program looks great.

The Chairman: Senator Buckwold, the point you are making may get to be a question of policy. If there is something afoot or in the air at the present time to meet this situation, these witnesses might or might not be able to tell us.

Senator Buckwold: Then can I change the line of questioning a little? Do the officials administering the Farm Improvement Loans Act watch this very carefully? Do they, in fact, act to make funds available, or are they just going to let the source dry up?

Mr. Monk: We do watch it very carefully, sir. The minister, of course, is aware every quarter, when he relates to the public on what the lending activity has been and on what the situation is, because he constantly gets letters. It would, of course, be up to him to decide whether action should be taken, if the situation seems to be deteriorating rapidly.

You may recall that last July, after a long period in which the rates under these acts had been frozen and some concern arose within the department that the banks were becoming reluctant to lend, the president of the Canadian Bankers Association made a speech in Halifax in which he indicated that this was becoming a matter of concern to the banks. The minister then took action—the government took action to unfreeze the rate, which put it back on the formula.

As you say, of course, interest rates have risen so rapidly recently that this is again becoming a cause of concern.

Senator Buckwold: I think you have the point that I am trying to make, which is that I am concerned that there will be a very severe restriction in the availability of loan capital from financial institutions to farmers, unless something is done to improve the rate to the lender—not the borrower—in order to make the funds available. That is why my first question was whether any subsidy was available with the government moving in, in fact subsidizing the rate, to keep it low for those who need it. Your answer is no. I hope some day there will be.

Senator Desruisseaux: Has there been any request for a review of the rates lately?

Mr. Monk: The banks themselves, during our general review of the program, suggest that we should use a different formula. In effect, they want whatever formula you might produce which would give them a higher rate. On the one hand, you have, I suppose, to offer a rate to the types of people who use these programs, which seems reasonable. It seems preferential. It is preferential, in fact. At the same time, one must be careful to provide the banks with something which will attract them into it. Most of the time, I think since 1968, we have been successful in doing that. I think we may be faced with a rather special situation now as a result of the very rapidly rising rates during the last six months.

Senator Desruisseaux: What is the percentage of loans that have been rejected over the past two or three years?

Mr. Monk: I think I am correct in saying that we do not have any statistics from the banks. You would need to have information from all of the chartered banks on this question. It would require a considerable amount of effort

on their part, you know, to sort it out and turn it in. We do not get that kind of information.

Senator Molson: Supplementary to that, have you had any complaints from members of the public, or farming or small business communities, that the banks are not providing them with funds?

Mr. Monk: Yes, I think Mr. Passy, who is more deeply involved in the administration, would be able to answer that in more detail, but there have been some complaints.

Mr. Passy: Perhaps I could add that we do get complaints from potential borrowers who claim they have been turned down. We do look at these and investigate them with the bank concerned. I would have to say that in the vast majority of cases we find that the reason for the rejection is not directly related to the interest rate. It is often due to the fact that the project is not a viable one, or it relates to the credit history of the borrower. He is very reluctant to write to us and say, "I didn't get the loan because I wasn't a good risk." So we find in a good number of cases that it is not due to the interest rate, although sometimes there is difficulty.

Senator Cook: That may tend to make the manager a bit more selective, but it is not the reason for turning down the loan.

Mr. Passy: No.

Senator Hays: I do not think that as a farmer, I have ever received—or at any rate it was very seldom—this preferred rate, and maybe the rate is not important. Maybe it is a question of the availability of money. I cannot see why banks should have to subsidize farmers, but that is actually what is happening. The banks are subsidizing these people and, having regard to what Senator Buckwold has said, it seems to me that we should look at the policy of the department. It is really the availability of the loan. If they guaranteed the loan, then I do not think we should ask the banks to subsidize. I think that when we guarantee a loan it must be a viable loan, and the farmer has to pay these rates. But if it has to be subsidized, why should the banks subsidized it?

Senator Cook: In other words the farmer should be viable.

Senator Hays: That is right.

Senator Molson: But we must keep in mind that they get a guarantee by the government.

Senator Hays: Yes, but take the case of somebody building a house, he also gets a guarantee, so what is the difference?

Senator Cook: The guarantee does not help if you are lending at a loss.

Senator Hays: We criticize the banks, but if the bank does not loan the money we cannot very well blame the manager. He has only so much money and he is lending some at 8¼ and he is lending more at 10¼, and he could lend it all at the higher rate in times of short money. Yet this manager looks bad by being compassionate to a group of peope in a certain given area. So I think we should look at policy.

Senator Desruisseaux: Mr. Chairman, two or three years ago, as I understand it, there was quite a campaign carried on by the banks for these loans directed towards the public, and I wonder what the results were. In other words, there was a publicity campaign inviting the public to avail themselves of this type of loan.

Mr. Passy: I was not aware of any such campaign.

Mr. Monk: I recall that one of the banks in Quebec made a special effort to make more of these loans.

Mr. Passy: It seems to me that a couple of years ago the banks did go to a two-rate structure in relation to small businesses, and there was quite a bit of publicity about this, but I do not think it was related to these programs.

Senator Cook: As a matter of interest, are there overlapping provincial programs along these lines?

Mr. Passy: Yes, particularly in the farm program area and most of the Atlantic Provinces have fisheries loan boards who are lending money for very similar purposes to those permitted under this act, but at 3 or 3½ per cent interest. So, clearly, they take the lion's share of the demand in those provinces. In relation to small businesses, most provinces have developed corporations of one kind or another that do provide financing, and in the case of the farm program I think I am correct in saying that Quebec is the only province that has a similar program, and therefore there is very little traffic under our farm program in Quebec.

Senator Cook: On the question of the availability of loans, it seems to me that either the project itself is not viable or the applicant is a pretty poor credit risk. Otherwise he would get money under either the federal scheme or from the provincial government.

Mr. Passy: I would suggest that that is generally true, but certainly the rate might well then come into play. If the purpose were eligible and the borrower's project completely viable, then it is possible that the rate would become an important determinant for the bank.

The Chairman: Are there any further questions?

Are you ready to report the bill?

Senator Smith: I move that we report the bill without amendment.

The Chairman: Without amendment?

Hon. Senators: Agreed.

The committee adjourned.

Published under authority of the Senate by the Queen's Printer for Canada

Available from Information Canada, Ottawa, Canada

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 5

TUESDAY, MAY 7, 1974

Complete Proceedings on Bill C-4, intituled
"An Act to amend the Export and Import Permits Act"

REPORT OF THE COMMITTEE

(Witnesses—See Minutes of Proceedings)

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 5

TUESDAY, MAY 7, 1974

Complete Proceedings on Bill C-4, intituled:

"An Act to amend the Export and Import Permits Act"

REPORT OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

27539—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	*Martin
Desruisseaux	McIlraith
*Flynn	Molson
Gélinas	Smith
Haig	Sullivan
Hayden	van Roggen
Hays	Walker—(20)

**Ex officio members*

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 6, 1974:

"A Message was brought from the House of Commons by their Clerk with a Bill C-4, intituled: "An Act to amend the Export and Import Permits Act", to which they desire the concurrence of the Senate.

The Bill was read the first time.

With leave of the Senate,

The Honourable Senator McElman moved, seconded by the Honourable Senator Carter, that the Bill be read the second time now.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator McElman moved, seconded by the Honourable Senator Carter, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, May 7, 1974.

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10:00 a.m. to consider the following:

Bill C-4 "An Act to amend the Export and Import Permits Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Blois, Buckwold, Cook, Desruisseaux, Martin and Smith. (8)

Present; not of the Committee: The Honourable Senators Benidickson, McElman and McIlraith. (3)

In attendance: E. R. Hopkins, Law Clerk and Parliamentary Counsel.

WITNESSES:

Department of Industry, Trade and Commerce:

Mr. J. J. McKennirey, Director General, Office of Special Import Policy;

Mr. H. D. Evans, Chief, Export and Import Permits Division.

After discussion and upon motion of the Honourable Senator Cook it was *Resolved* to report the said Bill without amendment.

At 11:25 a.m. the Committee adjourned until 9:30 a.m., Wednesday, May 8, 1974.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Tuesday, May 7, 1974.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-4, intituled: "An Act to amend the Export and Import Permits Act", has, in obedience to the order of reference of Monday, May 6, 1974, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, May 7, 1974.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-4, to amend the Export and Import Permits Act, met this day at 10 a.m. to give consideration to the bill.

Senator Salter A. Hayden (Chairman) in the Chair.

The Chairman: Honourable senators, in considering Bill C-4 this morning we have with us two officials from the Department of Industry, Trade and Commerce: Mr. J. J. McKennirey, General Director, Office of Special Import Policy; and Mr. H. D. Evans, Chief, Export and Import Permits Division.

I understand that Mr. McKennirey will make an opening statement.

Mr. J. J. McKennirey, Director General, Office of Special Import Policy, Department of Industry, Trade and Commerce: Honourable senators, I believe you are familiar with the contents of the bill. Essentially, under the Export and Import Permits Act you can do three things: First, put items on what is called an Export Control List; second, put them on an Import Control List; and third, establish what is called an Area Control List.

The purpose of this bill is to add to the reasons for which items can be put on the export control list. There are two additional reasons. One is that if the government is trying to encourage the upgrading of resources in this country, and is making various kinds of efforts to do so, these efforts should not be rendered ineffective by reason of unrestricted exportation of the raw materials in question.

This is enabling legislation which is intended by the government merely to be a means of last resort in its efforts to encourage the upgrading of resources.

The second reason for proposing export controls is to cover the situation in which there is in this country a large supply of a kind of material for which the price is depressed so that it is not possible to achieve a reasonable return at that particular time. It is proposed that in such circumstances the government should have the power to introduce export controls to avoid further disrupting the market, in order to maintain the price at a more reasonable level.

The government does not visualize too many circumstances in which Canada would have sufficient impact on the international market to be able to make use of this particular means to improve the price of materials. But, in any case, it is enabling legislation which the government would like to have in place.

The third proposed amendment to the bill is one to support action taken under the Farm Products Marketing Agencies Act with respect to supply management for eggs and turkeys. Under the Farm Products Marketing Agencies Act, supply management programs are permitted to stabilize supply conditions in order to avoid oscillations in price and make it possible for producers to have a more reasonable return. However, attempts by supply management to stabilize the price within the country can be upset if there is an availability of low-priced imports. Therefore, to support the supply management activity, it is proposed to enable the government to impose import controls. That is the object of that amendment.

The final object of the bill is to repeal section 27 of the act, which sets out an expiry date. The act has now become, essentially, ongoing legislation. It is used to support seven other acts which do not have an expiry date. Five of those acts have to do with maintaining prices in the agricultural and fisheries sector. The others are the Textile and Clothing Board Act and the Anti-dumping Act.

At times import controls are necessary in order to implement these acts. Therefore, this act is really aiding and abetting ongoing legislation.

In addition, Canada has a series of international commitments with respect to the exportation of strategic goods, which are also of an ongoing nature. These are controlling export of strategic goods to the countries named in the Area Control List, which are obligations to members of NATO. The government also has international obligations of an on-going nature in the field of commodity agreements, for example, cocoa. All of these obligations have no expiry dates. Essentially, that is the basic reason why the government feels that the business of having an expiry date serves no useful purpose, and is really inconsistent with all the legislation which is being complemented by this act.

The year that this act comes up for renewal causes a lot of administrative difficulty for industry, who have to re-apply for export permits. In many cases, export permits are given to, for example, 400 logging firms on the West Coast on an annual basis. Export permits of a six-month duration are provided to firms who supply aircraft parts around the world so they can supply these parts on an emergency basis in order that aircraft will

not be grounded too long. We have import permits of a certain duration of time to cover people who are importing shirts. In the year that this act is renewed all of this work has to be done at least twice.

Another problem with regard to this business of the act expiring regularly arises when industry enters into long-term contracts with state trading nations, for example, China. The state trading nation wants to be sure that an export permit will be granted for the product they are buying. The product has a long-lead time, that is, its delivery is two or three years down the road, and of course, the act is expiring in the meantime; so technically, it is impossible to assure them that an export permit will be granted for the object in question, and this has been the cause of quite a bit of negotiating back and forth. It is a sort of bureaucratic obstruction to trying to sell to these state trading countries, and it would be much easier if the act was not subject to an expiry date.

Mr. Chairman, that sums up the four amendments. If there are any questions, we will be prepared to deal with them.

Senator Beaubien: Mr. McKennirey, supposing the act expired, and the government had a contract with China to export certain things to them, you would not need an export licence then, would you, if the act had expired?

Mr. McKennirey: That is right. You would not.

Senator Beaubien: Well, how does the argument stand up, then, that you need to continue this act because you could not guarantee an export licence? You would not want one.

Mr. McKennirey: In the case of the countries we have had this difficulty with—China was one of them—the problem is that they know the act expires, and they want some sort of guarantee that there will be no further necessity for an export permit.

Senator Beaubien: Well, the best way to give them that guarantee is to let the act expire, is it not?

Mr. McKennirey: Well, the other point that is drawn to my attention by Mr. Evans here is that, in the matter of dealing with China, they are on the Area Control List, and we have a continuing commitment to the NATO countries that we will not sell strategic goods to Area Control List countries without agreeing to international supervision as to what we sell.

Senator Beaubien: Mr. McKennirey, I am just trying to get this straight in my mind. Let us talk about potash. In Saskatchewan there was a tremendous over-supply of potash, and the province started limiting production, and that sort of thing. Has the federal government any way of controlling potash now?

Mr. McKennirey: No.

Senator Beaubien: Therefore, if this were passed, the federal government could make any regulations it wanted to make without any further reference to Parliament with regard to potash. It could put the price up, or keep it from being exported, or do anything it wanted.

Mr. McKennirey: What it could do, sir, is, it could make potash subject to export controls. It would have to do so, of course, by Order in Council, and the government would have to approve the Order in Council.

Senator Beaubien: I know about the Order in Council, but I am talking about Parliament. The government would not have to go back to Parliament. It could do anything it wanted.

Mr. McKennirey: It could make it subject to export control, and that export control would be subject to conditions set by the minister. That is right.

Senator Beaubien: It could set the price, and the quantity produced, and everything else.

Mr. Chairman, it seems to me that we are talking about discretionary powers, and in fact, everything can be controlled under this thing. It does not matter what line you are in, the government can control it. If you are going to export or import, the government can set the price, it can limit the amount, and so on, without any reference to Parliament. All they have to do is put through an Order in Council. I am not saying they are going to do something that is wrong, but I am saying that if you are importing or exporting you are completely at the mercy of the government.

Mr. McKennirey: Mr. Chairman, I think there is one point that is worth noting here, and that is the circumstances under which this amendment for surplus and depressed prices might be applicable.

Senator Beaubien: Depressed prices?

Mr. McKennirey: Yes, sir.

Senator Beaubien: There are not too many of those about nowadays.

Mr. McKennirey: That is right, but the wording of the amendment is, "in circumstances of surplus supply and depressed prices," for a particular material in the international market.

Quite candidly, we have been unable to pick, at this moment, even one item that we think this sort of thing could apply to. It could be that in the future one could come up. It was true that, in the case of potash, when prices were very low, the government felt that it was ineffectual, inasmuch as the Saskatchewan government took over the job of setting up some sort of export control mechanism. At the moment, however, there is no particular raw material that we can think of where these particular residual powers would be necessary, though again it could be that in the future one could come up. By virtue of the fact that you are talking about materials in conditions of surplus supply and depressed prices, where the amount of material that would be available for sale from Canadian sources would have an influence on world prices, those circumstances would be very rare.

In the case of agricultural products, they are already covered under the Wheat Board. The Wheat Board has

that particular power. So I think, in a sense, it tends to limit the generality of the application of the amendment.

Senator Beaubien: Who would decide if there is a surplus and depressed prices? And is there any appeal?

Mr. McKennirey: It is hard to say. It is a theoretical question, but all of the suppliers may find it to their benefit to be able to co-operate in order to limit the supply in a legal way so that the world supply would be reduced and improve the price they would get. It would be to the advantage of the producers in the country to—

Senator Beaubien: What about the Combines Act?

Mr. McKennirey: That is the point. This is one situation which alleviates the responsibility of the suppliers, if there is more than one supplier.

Senator Benidickson: Mr. Chairman, I have been making some inquiries about this bill, frantically, this morning. I find it got third reading in the House of Commons at about 3.15 yesterday. In the first instance, no members of the index staff or the library could even tell me anything about the third reading stage. Three-quarters of an hour after the start of normal office hours this morning, somebody did ascertain from the Journals branch of the other place that it did get third reading over there.

I did not hear Senator McElman's remarks in introducing the bill yesterday, but we waived our rules to go ahead immediately with second reading, which is not abnormal, but by getting up early this morning I did get an opportunity to read what would be the equivalent of our "blues."

We have just heard that they cannot think of a single product the necessity to control the export of which would demand any urgency in the passage of this bill. Therefore I cannot help but think that the urgency element must exist in clause 2. Clause 2 relates to control of importing. Now, when you start to control importing—

Senator Cook: Eggs.

Senator Benidickson: I want to find out what that urgency is.

Senator Beaubien: They are too cheap.

Senator Benidickson: When you start to control importing there must be some emergency there, and I would like to know what it is, because legislation at the moment covers an agricultural product that can be put on the Import Control List, if the product comes under the Agricultural Stabilization Act, relates to the Agricultural Co-operative Marketing Act, to the Agricultural Products Board Act or to the Canadian Dairy Commission Act. What is it that government does not have right now to do some controlling of imports? Usually, when we propose to control some imports that means some benefit to a Canadian producer of whatever the product is, but, on the other hand, it doubtless involves increased cost to the purchaser of that product in Canada. What are these products? What action is likely to be taken? Unless this is examined, we won't know anything about it because it authorizes executive action on the part of the cabinet without too much notice to the country as a whole. Now you have, I think, mentioned turkeys and eggs. Is this going to give authority besides, if sufficient pressure is applied to control the import of, for example, cucumbers, tomatoes, strawberries, potatoes and all kinds of other things? Will that be the effect? Could it conceivably give that authority to the cabinet? That is in addition to and outside of the measures that may be available under our dumping laws or the authority vested in the Tariff Board or in the Minister of Finance by publicly announced changes in import duties in the budget. What are we in for here and why are we moving so fast? I might add, before you reply, that I think that since basically government intention is involved, this committee should have before it a member of the government because it is the Cabinet that will have the authority to act under this legislation.

The Chairman: Well, let us have a chance to answer your question first.

Mr. McKennirey: Under the Farm Products Marketing Agencies Act, which is referred to in this amendment, the only two products that can be subject to supply management are turkeys and eggs.

Senator Beaubien: That is at the present time?

Mr. McKennirey: Yes. And if there are other products to be added, the Farm Products Marketing Agencies Act would have to be amended.

Senator Benidickson: That is, the act itself must be amended, or would it be a case of issuing an Order in Council?

Mr. McKennirey: The Act itself would have to be amended. It is only permitted for poultry and eggs.

Senator Benidickson: So that answers my question. In no way could I conceive that the executive would have the right to do something that would raise prices for consumers in the field of tomatoes, cucumbers or what might be termed hot-house grown foods products in Canada.

Mr. McKennirey: No, sir. The second point I want to make is that under the Farm Products Marketing Agencies Act, with respect to poultry and eggs, supply management is permitted. As I explained, and in order to make supply management effective, some sort of control is necessary from time to time for imports. Otherwise the whole object of supply management would be defeated. That was the purpose of this particular amendment, to provide the necessary support for the turkey and eggs supply management programs.

Senator Benidickson: What was the date of the previous amendment?

Mr. McKennirey: The Farm Products Marketing Agencies Act was passed in 1972. Now under the Farm Products Marketing Agencies Act, if a supply management agency introduces supply management, it does not necessarily follow that import controls would be imposed for them. If the supply management agency feels that cir-

cumstances have arisen where import controls would be necessary for the sake of the program, they can then make representations to the government, and the government will then evaluate the situation in terms of its own guidelines and proceed with an Order in Council if that is deemed necessary. There is an urgent situation before the government right at the moment with respect to both turkeys and eggs. There is a large inventory of turkeys in the United States and they are selling at well below the supply management price in this country for turkeys. Also there is a large inventory of eggs with a large number of them coming into the country, and so the government is anxious to do something with regard to both turkeys and eggs right at the moment.

You asked also, senator, as to whether there would be another means to achieve the same end. Under the Agricultural Stabilization Act, which is already provided for in the Export and Import Permits Act, if the government put in a stabilization program, for example, for eggs and turkeys, such a program would involve either deficiency price payments or some kind of price support mechanism that would mean an outlay of government funds. Then the government could, under the Agricultural Stabilization Act, if it engaged in price support activity for those products, invoke the Export and Import Permits Act as written to support that paricular stabilization activity.

Senator Benidickson: I think I understand that that stabilization act that you referred to involves government expenditures to support the prices of certain products.

Mr. McKennirey: Whereas the Farm Products Marketing Agencies Act does not.

Senator Benidickson: It involves no government subsidy or support?

Senator McElman: When Senator Beaubien listed the things that the government could or could not do under this act, the witness nodded assent, I believe. Included in that list Senator Beaubien said that the government could set prices under this act. But surely the government cannot set prices under this act, can it?

Mr. McKennirey: It cannot set prices, as I understand it, but—and here I am going back to an earlier question about surplus materials and depressed prices—the government could establish as one of the conditions for an export permit that the price would not be below a certain figure. For example, with respect to surplus supply and depressed prices the government could make it as one of its conditions for granting an export permit that the item being exported is not being exported below a certain price.

With respect to import controls which exist now on shirts under the Textile and Clothing Board Act, which is another act which is complemented through the agency of this act, the government sets import controls on shirts below a certain price per dozen, and they can only come in in a certain quantity.

Going back to the question of poultry and eggs, the government would not be imposing a complete embargo on poultry and eggs coming into the country if they were below a certain price. Normally it would, because of its obligations to its trading partners, allow the quantities in that came in during the years previous.

Senator McElman: Mr. Chairman, as I understand it, this act was passed initially to meet agreements that had been made after the last war between various western countries. Is it not true that all western industrial countries and Japan have today on their statute books similar types of legislation?

Mr. McKennirey: Yes, sir, they do.

Senator McElman: If we did not have this legislation, then we could not meet the contractual obligations which we have with many countries.

Mr. McKennirey: Yes, sir. One very important example is that of our relations with the United States. When that country supplies material to Canada their sellers do not require export permits. Normally in the United States exports must have permits in respect to other parts of the world, but these would create a great deal of red tape and bureaucracy in the trade between Canada and the United States. The Americans have, therefore, as a result of representations made by their exporters waived the necessity to produce export permits for all the goods that flow into Canada. Canada, in return, agrees with the United States that anything that enters from the United States and is shipped out of Canada without a change as to form, value or substance, will require an export permit. If it is incorporated into a different product, that is something different. This is done to ensure that Canada does not become a back door for exports out of the United States to somewhere the United States does not wish them to go, and which would normally be covered by its export legislation.

This is a very convenient arrangement for the Canadian cross-border trade and is implemented under the Export and Import Permits Act. Of course, if we did not have that act we would not be able to implement this. It is a very important contributing factor to cross-border trade and also to the supply to Canadian manufacturers, for example, of components and materials of one kind or another on a daily basis.

Senator Cook: You are referring to the act as it existed before this amending legislation.

Mr. McKennirey: Yes, sir.

Senator McIlraith: Reverting to clause 2, with reference to agricultural products, under the agricultural products price stabilization legislation the principle is that the producer obtains the full price warranted by the market, but the taxpayer takes up the difference.

Mr. McKennirey: Yes, sir.

Senator McIlraith: This amending legislation would cause the consumer to pay the difference in price. Take your example of eggs; it was indicated in the newspapers last week that the authority of this legislation

would be exercised in respect to eggs. That means that they will become more expensive in the chain stores to the consumer.

Mr. McKennirey: Not necessarily, sir.

Senator McIlraith: Well, just a minute; the imports are cheaper now than the Canadian produced eggs. If this legislation were exercised to exclude those eggs, would the consumer not have to buy Canadian produced eggs at the higher price?

The Chairman: I did not understand there was to be an exclusion, but a limitation on the amount which might enter.

Senator McIlraith: Allow me to use the word "restriction", then. There is approximately 10 cents per dozen differential to the consumer now. If we restrict the lower-priced product from being available in the chain stores, is it not reasonable to assume that the consumer would pay the higher price and that difference in cost would be transferred by the use of this mechanism directly to the consumer? The previous legislation which is still in force caused the differential in price to be spread among the taxpayers at large. Is that not in essence the result of this clause with respect to eggs and turkeys?

Mr. McKennirey: To take it in its theoretical context, the egg and turkey producers, as I understand it, came to the government over a period of years. In poor years they would ask for support. Then at other times there would be shortages and the price would vacillate up and down.

Senator McIlraith: Yes, I understand that.

Mr. McKennirey: The government advised the producers to put their own house in order and establish supply management in order to obviate a situation in which there would be over-abundance, followed by scarcity. At times the producers would be seeking assistance and at other times the consumer would be paying very high prices because of shortages. For these reasons the government advised the producers to establish supply management procedures. Supply management, of course, would be supervised by the government, and all the rest of it, so that it would not introduce monopolistic practices in order to extort. The representatives of the consumers decided that, on balance, the consumer would be better off with that kind of orderly production and marketing in Canada than with the swings back and forth which existed previously. This procedure was introduced with the feeling that the consumer would, in the long run, be better off, because the business would settle down and become efficient in supply and other aspects. There was no intention on the part of the government to insulate the Canadian markets from North American markets completely, or from long-term industrial or international price trends. Consequently it was felt that it was better for the consumer and the producer.

It is true that supply management eliminates the need for subsidies of various types under the Agricultural Stabilization Act. However, the business of supply management can only work if it is prevented from being upset from time to time by the availability of low-cost imports from the United States. There is a curious aspect to that which I might point out to the committee. Even if the amount of imports entering from the United States is very insignificant, and there is historical support for this; the price in the United States will pull the price down in Canada just by the threat that their product might enter. Often the cross-border trade has not been of great significance. But this fact has resulted from the comparison made between the prices in the two countries.

Senator McIlraith: I was not referring to the justification for the legislation, but to what it would enable government to do. The fact is that action taken under this legislation, if it does have an effect on prices, will raise them to the consumer. Is that not correct, bearing in mind your very last comment, that the consumer will have to pay the increased price directly?

The Chairman: Yes; those who eat the eggs or eat the turkeys.

Senator McIlraith: The consumer.

Mr. McKennirey: If I may, senator, there is a little better construction to be put on that. It does not raise the price; it stops the price from going below a certain floor.

Senator McIlraith: Exactly, so that the consumer is prevented from obtaining the benefit of the lower prices.

Mr. McKennirey: I should add one more caveat: The arrangement with our trading partners would be that the volume which entered the previous year, regardless of what it was, would be imported at the lower price.

Senator McIlraith: There is no such restriction in the legislation. It is not necessary to limit it to the volume that entered last year.

Mr. McKennirey: That is quite true, sir.

Senator McIlraith: So that it is reasonable to assume that any difference by way of maintaining the price upwards for the producer is paid directly on the product by the consumer. That is really what this legislation involves.

The Chairman: Let us use the happy phrasing: If any difference occurs, the incidence will fall on the consumer.

Senator McIlraith: You see, as I understand it, and if I can believe the newspapers so far as the price of eggs is concerned, this proposal would mean a difference of 10 cents a dozen to the consumer in the grocery store. There is also a larger question involved that is strictly germane to this amending bill, but which is not; perhaps, being argued this morning. That is, to what extent is it in the interests of Canada to raise the cost of food to our consumers while we are experiencing inflation and ever-increasing demands for higher wages? This question is of considerable interest in the light of the larger policy.

The Chairman: There are balancing factors, of course.

Senator McIlraith: Of course there are, but it still remains a nice question. If this legislation is to be effective and have any influence at all it will also raise the cost of food to consumers, and in a period of inflation the cost of food to consumers has relevance.

The Chairman: Let us say, in the short run.

Senator McIlraith: Sometimes it would affect pensioners, which is in the longer run.

The Chairman: No, the point is how long will the Canadian supply of eggs continue in the face of lower-cost imports? How long can the producers of eggs stand up under that?

Senator McIlraith: I do not know. We have imported butter from New Zealand, and we have experienced the meat and turkey situation for many years. I remember appearing before this committee many years ago when it was considering the very same kind of legislation. I had a very hard time, and I wish I had possessed Mr. McKennirey's eloquence on that occasion to obtain a limitation for as long as three years on the legislation. I quite agree that it should be of that duration at this point.

I would like to refer for a moment, if I may, however, to clause 1, which provides for the addition of paragraph (a.I) immediately after section 3(a) of the act. I would like clarification of a point which bothers me. As I understood your earlier evidence, Mr. McKennirey, you said you could not think of one item where you would have any reason to suspect there might be a need to use this clause at the present time. I think that was your evidence.

Mr. McKennirey: Yes, sir.

Senator McIlraith: If that is so, why is the government coming to Parliament to ask for the granting of this extraordinary power? I do not follow that governmental system.

Mr. McKennirey: I think the answer is to be found in the potash situation that arose a few years ago. The government felt somewhat at a disadvantage, because we had a situation where it was felt that if the export of potash could be restricted for a period of time, it might improve the word price of potash. The government had no legislation to restrict it. As a result, the Saskatchewan government jumped into the breach and did it. The question is now before the courts in Saskatchewan as to whether or not that action is illegal. In any event, the consensus was that we should really have this kind of enabling legislation in case that situation should arise again.

Senator McIlraith: Thank you very much.

Senator Cook: There are some fishery products which are sometimes exported in an unprocessed state, which could be benefited by being processed in Canada.

The Chairman: That is right.

Senator Benidickson: I am back to clause 2 of the bill and to the interest of the consumer, and how such consumer might be affected by the enactment of clause 2, and by such action as the executive might take.

Within recent days we were supplied with the 1973 annual report on operations under the Export and Imports Permits Act. There are two sections to the report, one dealing with export controls and the other with import controls.

A few moments ago somebody said something about the necessity of having import controls on an excessive importation of shirts, and the like, from certain low-wage countries, shall we say.

In this report it says that the Governor in Council can act in the interests of Canadian producers of this kind of textile product, but the Governor in Council, before acting, must have an inquiry made by the Textile and Clothing Board.

Again, with respect to other kinds of import controls, such action would only follow an inquiry under the Anti-dumping Act. There is no such protection for the consumer contemplated in this proposed amendment to the act. I am wondering whether or not something is already mandatory in the way of a prior inquiry before action is taken that might result in higher food costs to the consumer.

Are the witnesses able to say whether I am right or wrong in thinking that a couple of months ago the food Prices Review Board, presided over by Mrs. Plumptre, did come to the conclusion that egg prices were then too high. Can the witnesses tell us anything about that report?

Mr. McKennirey: There are two questions involved. The first is with respect to supply management activities under the Farm Products Marketing Agencies Act. Supply management at the moment is only permitted in the case of turkeys and eggs. As I understand it, there are, under the Farm Products Marketing Agencies Act, a set of controls and checks on the operation of the supply management agencies to ensure that the consumers' interest is protected. Reference is made to the interest of consumers in the act. I do not pretend to know anything more about it than that, except that there is, as I understand it, an elaborate set of checks on what happens to the consumer.

Senator Benidickson: Something equivalent to the Textile and Clothing Board—prior inquiry, and so on?

Mr. McKennirey: Yes, for the consumer. With respect to the second question, the Food Prices Review Board report on egg prices alleged that the Ontario Egg Board may have tried to restrict or discourage imports. The Minister of Agriculture has directed the National Farm Products Marketing Council to investigate the Food Prices Review Board's report, and that investigation is still underway. We do not have a report on it.

Senator McIlraith: The expression "depressed prices" is used. Is there a definition of "depressed prices" in any of the relevant legislation?

Mr. McKennirey: No, sir. The assumption is that the term "depressed prices" applies where the price results in less than sufficient revenue to cover the cost of production. I think that is the test. That was visualized, but it has not been set out anywhere.

Senator McIlraith: Cannot the Governor in Council decide whether or not a price is depressed without any criteria? I am thinking of commodities like potash.

The Chairman: This is a condition under which this power may be exercised.

Senator McIlraith: On what basis are they "depressed"? Is it based on the earlier price of the same product?

The Chairman: I would not think so, necessarily. I would think that if there were a bankrupt or insolvency condition, that would indicate depressed prices.

Senator McIlraith: If new technology in another part of the world in processing a product—we are dealing with processed products—were to set the price down rather sharply, would that become a "depressed price" as envisaged in this legislation, because we had not applied that new technology?

The Chairman: The hens still have to lay the eggs.

Senator McIlraith: There are no hens in this one. I am referring to (a.2) of clause 1. It is extraordinarily loose and wide.

Mr. McKennirey: The circumstances that are visualized are those where the supply from Canada would have an influence on world prices. There would be no point in Canada's refusing to supply the market if world prices were going to be independently in any event and if other people could supply. It would only be a situation where the Canadian contribution to the international market was so large that by itself it could manipulate the price.

Senator Beaubien: That would be at the discretion of the minister. He decides everything.

Mr. McKennirey: The other point is that if the supplies of the product in question were to fetch only "depressed prices", then clearly it would not be in the interests of suppliers to sell at such prices. Therefore the effort of the government to help support the price in order that an economic return could be achieved would be in the interest of the suppliers of this country. Again, it would be buyers in other countries who would be paying the price. I would imagine such action would be at the instigation of the suppliers of this country asking the government to help them influence world prices in this respect.

Senator Desruisseaux: I wonder if I understood that correctly. Since this is a question of an order of the Governor in Council, have the parties, whoever they are, the right to appeal an order or to present their case before such an order is made? How is it done?

Mr. McKennirey: Strictly speaking, senator, the answer to your question is that there is no right of appeal under the act itself with respect to import and export permits. However, this would be done through an Order in Council, which has to be gazetted and registered in Parliament, thus giving Parliament the opportunity to voice any objection it might have.

Senator Desruisseaux: Some exporters might be seriously hurt by a decision of the government not to allow the export of a certain commodity. A Canadian company involved in the producing or extracting of resources could be seriously hurt by such an order, and yet there is no right of appeal whatsoever, as I understand it, nor is there any opportunity afforded to put one's case before the government.

The Chairman: You are correct, Senator Desruisseaux, there is no right of appeal. However, as I understand the evidence, the suppliers are the people who would initiate action in so far as the government is concerned. It is the suppliers who would be protesting against the situation and the depression in prices by reason of the importation.

Senator Cook: Not all. The high cost producer might, but the low cost producer might be quite agreeable.

The Chairman: A low cost producer might be agreeable, yes, but I would expect that any consideration of the question would weigh all factors in determining the major interests.

Senator Cook: I could not agree more, Mr. Chairman. I simply say that it does not necessarily follow that all producers are going to request action on the part of the Governor in Council.

The Chairman: No, not all producers, but, perhaps, the more substantial producers may ask.

Senator McElman: Mr. Chairman, may I go back for a moment to the inclusion of the Farm Products Marketing Agencies Act. A very short time ago the egg producing industry in Canada was in a dreadful state. We had the so-called "egg war" between provinces. As a result all of the provincial governments, along with the federal government, decided as a matter of policy, that this legislation was an instrument to bring some order back into that industry, thereby enabling Canadians to produce with some assurance of a return on their investment. Without the inclusion of this, the whole of the policy decision by the federal government and all the provincial governments could, and perhaps would, be subverted. The very purpose is to support a policy agreed upon by all of the provincial governments and the federal government.

Is that not the case, Mr. McKennirey?

Mr. McKennirey: I am not familiar with the total development of the Farm Products Marketing Agencies Act, senator, but, generally speaking, that is my understanding of it.

Senator McElman: So that before any other agricultural product could be included under this legislation, there would have to be an amendment to the Farm Products Marketing Agencies Act?

Mr. McKennirey: Yes, the Farm Products Marketing Agencies Act would have to be amended.

Senator McElman: So that all we have, in effect, with this amending legislation, is the policy decision of the provincial governments and the federal government to bring some normalcy to the egg and poultry industry in Canada.

The Chairman: Well, the government could not go further without amending legislation.

Senator McElman: But the effect of this, Mr. Chairman, is simply to support the policy decision of the federal and provincial governments to bring some normalcy to egg and poultry production and marketing within Canada.

The Chairman: What I am saying, Senator McElman, is that the area of application cannot be enlarged without amending legislation.

Senator McElman: I appreciate that.

Senator Cook: That is in connection with eggs and poultry, Mr. Chairman. If the Government of Canada wants to encourage further processing of materials or production in Canada at the present time, it can only do so by holding out a tariff or by giving tax relief, and this and that. However, under clause 1, they could do it by decree. They could simply decree that one cannot export raw materials. That is a big jump, really.

The Chairman: Senator Beaubien.

Senator Beaubien: I do not have a specific question, Mr. Chairman, but I would like to say a few words.

The Chairman: Go ahead.

Senator Beaubien: Mr. Chairman, we are dealing here with temporary legislation which was to expire on July 31, 1974. The effect of clause 3 of this bill, which is to repeal section 27 of the act, will place this legislation permanently on the statute books. This amending bill will give the government tremendous discretionary powers. I think what the committee has to do is to look at the whole of the Export and Import Permits Act, section by section, because what this bill does is to put that act permanently on the statute books. It was temporary legislation to expire on July 31, 1974. Therefore, I think the committee should go into the Export and Import Permits Act very carefully. If we pass this bill, we will be putting that act on the statute books forever.

The Chairman: Well, we will be putting it on the statute books until Parliament decides otherwise.

Senator Beaubien: Yes, but still we are putting what was to be temporary legislation on to the statute books more or less permanently. We are not dealing simply with some amendments; what we are doing, in effect, is passing again, but in another form, the entire Export and Import Permits Act.

The Chairman: Looking at clause 1, which deals with efforts to retain further processing of natural resources in Canada, as I understand it, many of the provincial governments are already doing that very thing. They are doing it in various shapes and forms, but they are doing it. This would put the overall authority in the Governor in Council to make a determination, in certain circumstances, that it is in the interests of Canada that a particular natural resource should be further processed within Canada.

Senator Beaubien: That may be a very good thing, Mr. Chairman, but this bill does not simply deal with two or three minor amendments to the Export and Import Permits Act.

Senator Cook: Clause 1 is not a minor amendment.

Senator Beaubien: No, it gives tremendous discretionary power to the Governor in Council.

Senator Benidickson: It creates beyond provincial laws a completely new federal authority.

The Chairman: Senator Beaubien, I think Mr. McKennirey may be able to deal with one of the points which you have developed.

Mr. McKennirey: The one point I want to mention, senator, is that we now have seven acts which do not have expiry dates and which are supported by the Export and Import Permits Act. Those acts, to some extent, would be emasculated by the failure of this act to be in force. Those acts include the Anti-dumping Act and the Textile and Clothing Board Act. So that, in effect, to drop this bill, or to allow the Export and Import Permits Act to expire, would be to incapacitate those other acts of Parliament supported by it and which are without an expiry date.

We have made some investigation as to whether or not there was any other legislation under which Canada could maintain its commitments to various countries for the exportation of strategic arms in the event that this act expired, senator, and the only other legislation we could use would be the War Measures Act. This would involve such things as cross-border trade with the United States and the commodity agreements we have mentioned.

Senator McIlraith: This came out of the War Measures Act when certain sections were cancelled. The first act was to be for one year's duration and was limited to strategic materials. The committee then had to decide whether the power to control, first, the export of strategic materials should be granted for one year. It was granted only on the condition that it was limited to one year, but later that was changed to three years, if I remember correcly. I, myself, had to carry some of those battles. It is on that point that we are asking for it permanently. I am not opposed to that.

Mr. McKennirey: Perhaps I might refer to a point mentioned by the chairman earlier. We have made inquiries into what sort of legislation exists in all western industrial countries and Japan. They have all now equipped themselves with enabling legislation, because under current conditions of international commerce there are certain circumstances and conditions that can be

dealt with by national governments only with this kind of apparatus.

The Chairman: Could I interject for a moment. It seems to me that under GATT some years ago, when we were dealing with anti-dumping legislation, we changed our whole approach to anti-dumping. Prior to that time, under anti-dumping all you had to prove was that the goods came in at a lower price than the price in the home market. In the anti-dumping legislation—which was an agreement in this respect, and a form of bill was presented to Parliament and passed—the whole approach to anti-dumping was changed. Now the fact that there is that difference in price does not necessarily mean that the dumping provisions of the law shall come into force. A man who thinks he is hurt has to go to the Anti-dumping Tribunal. At that time, although I did not say anything much about it, I wondered how long it would be before the governments of all the countries concerned sought some way of getting back into their hands some control of this situation, which they had given up in the revision of the anti-dumping legislation. This is only my own view, but this would appear to me to be a method for doing that, so that the parliaments or governments of particular countries will have this power, which is necessary if they are to afford adequate protection to their own industries and producers.

Senator Cook: I notice that under the bill the Governor in Council may establish Export Control Lists and Import Control Lists, and also make other orders in council. Is a report of what takes place made to Parliament.

Mr. McKennirey: Yes, sir.

Senator McIlraith: They have to be tabled.

Mr. McKennirey: All orders in council are tabled. There is an annual report as well.

Senator Smith: In what year was the Export and Import Permits Act made effective?

Mr. McKennirey: I think in 1947.

Senator Smith: I had an idea it was in the post-war period. It is not a contemporary act. When someone talks about going back and digging up the whole act and making it a permanent act, I would point out that it has been permanent for the last 25 years at least.

Senator McIlraith: I think the first one was in 1947.

Senator Smith: The need for such an act is evident from the number of years it has been operating.

The Chairman: It appears in the chapter of the statutes which I have, which has the Export and Import Permits Act, 1953-54. There must have been an earlier one.

Senator McIlraith: Some of them are earlier.

Mr. McKennirey: The act was revised as to title and, to some extent, as to substance since, I think, 1941 and 1942 when it was first enacted.

Senator McIlraith: There was an order in council under the War Measures Act.

The Chairman: This was the act passed in 1953-54. This is the act that is now in force.

Senator McIlraith: It seems to me that there were two separate acts and they were combined.

Mr. McKennirey: That is right.

The Chairman: Any other questions?

Senator Cook: I would be prepared to move, if we have finished, that we report the bill without amendment.

Senator Beaubien: Mr. Chairman, before that is done, let me say this. This bill is in effect passing the Export and Import Permits Act, which otherwise expires. We are passing the whole act itself, not a bill to amend. I think the least we can do is to take the Export and Import Permits Act and go over it section by section now. I do not say we should not pass this bill. However, I think it gives the minister a tremendous amount of discretion, which I think is completely wrong. At least we should look at the whole thing and see how these things fit into the amended bill. We are passing the whole act; otherwise it expires.

The Chairman: When you talk about discretion, let me point out that I have been a sort of a heretic in the field of ministerial discretion over the years, because I have held to the theory that it is wonderful that a minister with whom you may have to deal on some problem or other has discretion. If he has no discretion there is nothing he can do. Having discretion does not frighten me very much.

Senator Beaubien: Mr. Chairman, you have fought strongly against discretion in an awful lot of cases.

The Chairman: In particular cases, yes.

Senator Beaubien: I think we should look at the whole act. The government can put things on an export control list, an import control list, an area control list. I do not doubt they will do a reasonable job, or try to do a reasonable job, but the whole thing gives a tremendous discretion. That is why the act was to expire this July. But because it gives tremendous discretion Parliament felt they should look at it again. I think we should look at the whole act, not just two amendments to it. I have not read the act, but I think our committee should sit down and go over it section by section.

The Chairman: I have read the act, and I have not got as worked up about it as you have, Senator Beaubien.

Senator Beaubien: But we are now passing it; we are passing the whole act. The act expires, so if we do not take any action there is no act. We are re-enacting the whole thing, and I therefore think we should look at the whole thing.

The Chairman: What do you suggest? Do you suggest that we should go through the act section by section?

Senator Beaubien: Yes.

The Chairman: Right here and now?

Senator Beaubien: I think it would be better if we had all our committee here to go into it, but if you feel this is the time then I think it should be done.

The Chairman: If the committee wants to see what is in the act, right here and now is the time to do it.

Senator Cook: In a very general way.

The Chairman: Oh yes.

Senator Cook: It has been on the statute books since the 'forties, so looking in a very general way at what the sections are ought to be sufficient. Otherwise I agree with Senator Beaubien.

The Chairman: Would you care to take a run at it, Mr. McKennirey?

Senator McElman: Before Mr. McKennirey does that, let me ask this. Is it not a fact that what is here is not ministerial discretion, but Governor in Council discretion?

The Chairman: That is right.

Senator McElman: That is something quite different. How do you govern unless you have a law with which to govern and bring government policy into effect? This is no different from a hundred other pieces of legislation that give similar authority to government to put policy into effect and make policy effective.

The Chairman: Senator Beaubien was saying that I have sometimes taken a position in relation to discretion. There are several different ways in which authority has been given in legislation by Parliament. Sometimes it is ministerial, sometimes it is Governor in Council. My objection to some of the authority that has at times been given in particular bills to the Governor in Council has been on the basis that they have really been authorizing him to legislate rather than take an administrative decision under a statute.

Senator Cook: We have always been very opposed to the ministers' having discretion when he is a party to the dispute.

The Chairman: Yes.

Senator Cook: In other words, if it is a question of income tax and you are fighting the minister, then he has discretion to put you in the pokey. That is one we objected to.

The Chairman: I remember that one.

Senator McElman: Surely there is a difference in this act. It is not ministerial discretion. If government cannot govern on policy, then you just wipe out government and say, "Let Parliament govern the country."

The Chairman: Since this question has been raised, I think it would save a lot of time if we looked at the act. We may end up by having a look at the act anyway, so why not take the witness over it to get some idea of it? The act has existed for a long time and its provisions are well known and there has been, I think, in general, capable administration under the act.

Senator Beaubien: Mr. Chairman, if this bill is passed with these amendments, it will give the government unbelievable powers with respect to export control and area control.

Senator McIlraith: Area control is limited by other criteria in the legislation, I believe.

Mr. McKennirey: Yes.

The Chairman: Instead of everybody making statements as to what can or cannot be done under the existing act, let us hear the witness. He can tell us in a summary way the scope and effect of the statute.

Mr. McKennirey: Mr. Chairman, I suggest that we take a look at each one of the three control mechanisms in the bill, the Export Control, the Import Control and the Area Control Lists, to see what the reasons are for using them and what is being proposed in the new bill.

With respect to the export control list, which is referred to in section 3 of the act, there are three reasons now whereby, by Order in Council, something can be put under export control. The first reason is to assure that arms, ammunition, and munitions of war will not be made available to any destination where their use might be detrimental to the security of Canada. That is the first reason why you can put something on the export control list.

Senator Buckwold: You say that the export of ammunition is limited if it is detrimental to the security of Canada. Would this then mean that we would have no way of limiting the export of arms to a country if such export did not affect the security of Canada, although it might affect the security of some other area of the world?

The Chairman: If it affected some other area of the world it might indirectly affect the security of Canada.

Senator Buckwold: Is it as broad as that? I wonder if the witness can answer that.

Mr. H. D. Evans, Chief, Export and Import Permits Division, Department of Industry, Trade and Commerce: If the act were to expire as at July 31 there would be no way now to control military equipment going to such countries as South Africa or Rhodesia or to the Middle East, for example.

Senator Buckwold: Do you then use such a broad interpretation as indicated by the chairman, namely, that the security of any limited area of the world would be construed as the security of Canada?

Mr. Evans: Basically, the answer to that is yes, sir. If you put it the other way around, you can say that it might not be in the best interests of Canada to let the arms go there.

Senator Buckwold: I thought the word was "security".

Mr. Evans: Security is involved there, yes.

Mr. McKennirey: Perhaps it would help if we discussed the actual mechanisms by which it works. All of the arms, ammunition and so on are listed on an export control list under an open-permit arrangement. Do you want me to explain that?

Senator Buckwold: No, I don't need that. It just occurred to me that a court could upset that.

The Chairman: I don't think so.

Senator Buckwold: You don't believe so, if there was a revolution in Taiwan or some place like that which had absolutely no relationship to the security of Canada, *per se*?

The Chairman: If we did ship we might be taking sides or we would be supporting both sides. Are you suggesting there would be no repercussion to Canada in that circumstance?

Senator Buckwold: I am saying that there might be occasions when we would have arms embargoes even when in the wildest stretch of imagination there would be no effect on the security of Canada. I am wondering if it is strong enough in the act as it is now.

Mr. Evans: Yes.

Senator Buckwold: Thank you.

Mr. McKennirey: The second purpose for which things can now be put on the Export Control List is to implement intergovernmental arrangements or commitments. The interpretation which the Department of Justice has put on this is that when we make arrangements with other countries with respect to the flow of commodities, in order to implement such arrangements we can put an item on an export control list.

The third reason which now exists in the act is to ensure that there is an adequate supply and distribution of such articles in Canada for defence or other needs. That is, anything that is in short supply and that we don't want to go out of the country, we can put under export control.

Senator Desruisseaux: Energy resources as well?

Mr. McKennirey: The control of exportation of products in the energy field is done under the National Energy Board Act. Short supply does cover things like beef last summer, and scrap iron and steel at the moment.

Those are the three reasons which now exist for export controls under the act. They would continue and there would be two more added under the bill as proposed.

The Chairman: But they would disappear if the bill were to die.

Mr. McKennirey: If the act expires they will disappear, yes.

Senator McElman: Is it true that "copper coin" has just been put on the list?

Mr. McKennirey: Yes. Otherwise it would become in short supply. The same is true of silver.

Senator Cook: Is it in short supply as a coin or as a metal?

Mr. McKennirey: As a coin.

Senator Benidickson: On page 3 of your report under the Act for 1973 it is stated that nine items were removed in their entirety from the export control list. What kinds of items were they?

Mr. Evans: They were items in the area of strategic equipment, senator. Periodically, we have a list review as technology becomes more advanced, because there is little point in restricting lower-grade technology items.

Senator Benidickson: All right. On page 4 you then go on to say that seven new items were added. Are they again items in this strategic equipment class?

Mr. Evans: Yes, sir.

Senator Benidickson: Thank you.

Mr. McKennirey: Now we move, Mr. Chairman, to the import control list. Under section 5 of the act there are currently five reasons for which things can be put on the import control list. One, again, has to do with intergovernmental arrangements with respect to things like commodity agreements or things in short supply. It could be coffee, cocoa and sugar. We only have cocoa on it now. The words in the act are:

> (a) to ensure, in accordance with the needs of Canada, the best possible supply and distribution of an article that is scarce in world markets or is subject to governmental controls in the countries of origin or to allocation by intergovernmental arrangement;

And the next one is:

> (b) to implement any action taken under the Agricultural Stabilization Act, the Fisheries Prices Support Act, the Agricultural Products Cooperative Marketing Act, the Agricultural Products Board Act or the Canadian Dairy Commission Act, to support the price of the article or that has the effect of supporting the price of the article;

That is what we have been talking about this morning. In order to make these acts effective, one of the things you have to do is control access at the border from time to time.

Finally, you have 5(c) "to implement an intergovernmental arrangement or commitment". Again that has to do with arrangements made between countries with respect to the international supply management of a particular commodity.

The fourth reason is that if, under the Anti-dumping Act, it is found that injury has been done and that one of the remedies should be import controls, you can put them on the Import Control List under this act.

Senator Benidickson: But Cabinet then can act only after an inquiry.

Mr. McKennirey: Only after an inquiry, yes, sir.

The Textile and Clothing Board Act is the final one. If the Textile and Clothing Board reports to the minister and makes a representation that import controls be imposed, and if the minister accepts it, then the minister can, through Order in Council, put it on an Import Control List. So that is what exists today and what is being proposed for the Farm Products Marketing Agencies Act, which joins those other agricultural and fisheries acts, but only from the standpoint of supply management.

Senator Benidickson: Referring again to the 1973 report, and so that we can see how you operate under this act, we do have references to a couple of items that we all, as laymen, have some knowledge of. It refers to the removing from the Import Control List of coffee and sugar. Could you tell us simply what was the reason for putting them on that list, and what was the reason for taking them off the list in 1973?

Mr. Evans: Originally coffee and sugar were put on there to implement the international coffee agreement and the international sugar agreement. Our commitment to those international agreements—

Senator Benidickson: Were they separate agreements?

Mr. Evans: Yes, they were two separate agreements.

Senator Benidickson: We are in the coffee agreement as buyers. Was it a conference that involved both buyers and producers of coffee?

Mr. Evans: As I understand it, yes, sir.

Senator Benidickson: Something like the Wheat Agreement?

Mr. Evans: Yes. Both of those agreements broke down in the last 12 months however. Consequently, there is no international agreement as to the requirements to have coffee or sugar on the Import Control List; therefore, by order in council, they were removed.

The Chairman: Would you go on with the next group?

Mr. McKennirey: Finally, there is the Area Control List. I think you can explain that better than I can, Mr. Evans.

Mr. Evans: There is a list of countries known as the Area Control List. I will read out the names of the countries and that will probably explain the reason for the list better. The countries are: Albania, Bulgaria, Czechoslovakia, East Germany and East Berlin, Hungary, Mongolia, North Korea, North Vietnam, The People's Republic of China, Poland, Romania, The Union of Soviet Socialist Republics, and Rhodesia.

Before I said the "and", you will have noticed that the countries that preceded that word are what we refer to nowadays as the Sino-bloc and, Soviet-bloc countries.

Senator Benidickson: You did not mention South Africa, did you?

Mr. Evans: No, I did not, sir.

The Chairman: Go ahead, please.

Mr. Evans: The reason for establishing these as a group of countries is to ensure that the government knows, generally speaking, what type of goods are going to these countries; and rather than saying that an individual permit is required for, say, knitting needles going to a factory in Poland, we have established what is known as a general export permit, which allows, generally speaking, non-strategic goods to go to these countries. Really, what we are looking for, and have to keep very close watch on, is to ensure that no strategic goods go to those countries without their having been properly examined, and to ensure that, basically, it does not upset the balance of power. This is where we come into our international agreement that will not encourage or permit the export of highly strategic goods to these countries.

Because of our commitment to the United Nations to uphold the embargo on trade with Rhodesia, we placed Rhodesia on the list, which means that permits are required, and generally speaking, unless there is something of a humanitarian nature involved, we are not issuing permits for goods going to Rhodesia. It is the same thing, conversely, but that will come up later.

Senator Cook: Do we get many applications to issue permits for exports to Rhodesia?

Mr. Evans: No, sir. I would say in the last year only about four or five. Generally, in fact, they have all been to a particular mission hospital and they have been related to such things as hospital equipment.

The Chairman: Those are the control areas, and that is the scope of the bill. You can see how important it is that the bill should continue to exist, and how denuded of power the government would be if, suddenly, this statute were allowed to expire.

We have a motion before the chair to report the bill without amendment. Are you ready for the question? Those in favour? Contrary? I declare the motion carried.

That is all our business for this morning.

Senator Benidickson: For the record I would like it to be known that while I have contributed by asking questions I am not a voting member of the committee.

The Chairman: We have the list here.

Senator Benidickson: Those reading the *proceedings*, however, may not appreciate the distinction.

The Chairman: Senator McElman is not a member of the committee either, so that puts you in good company.

The committee adjourned.

Published under authority of the Senate by the Queen's Printer for Canada

Available from Information Canada, Ottawa, Canada.

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 6

WEDNESDAY, MAY 8, 1974

Second Proceedings on

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

27591—1

SECOND SESSION—TWENTY-NINTH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 6

WEDNESDAY, MAY 8, 1974

Second Proceedings on

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

27591—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	*Martin
Desruisseaux	McIlraith
*Flynn	Molson
Gélinas	Smith
Haig	Sullivan
Hayden	van Roggen
Hays	Walker—(20)

**Ex officio members*

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, April 2, 1974:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Hayden, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, May 8, 1974.

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider the following:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Blois, Buckwold, Cook, Desruisseaux, Flynn, Laing, Lang, Macnaughton and Molson. (11)

In attendance: E. R. Hopkins, Law Clerk and Parliamentary Counsel; R. J. Cowling, Legal Counsel; C. A. Poissant and J. F. Lewis, Advisors.

WITNESSES:

Canadian Chamber of Commerce:

Mr. A. F. Joplin,
Vice President,
Operation and Maintenance,
C.P. Rail, Montreal.

Chairman, Corporate Affairs Committee;

Mr. Ronald F. Booth,
Secretary and Legal Counsel,
R.C.A. Ltd., Montreal.

Chief Spokesman;

Mr. W. G. Morris,
Partner,
Morris, Trevick and Associates,
Barristers and Solicitors,
Montreal.

Member, Corporate Affairs Committee;

Mr. R. W. Becket, Q.C.,
Vice President and General Counsel,
Canadian International Paper Company,
Montreal.

Member, Corporate Affairs Committee;

Mr. B. F. Roussin,
Chief, Patent Agent,
Canadian Industries Limited,
Montreal.

Co-Chairman of Committee on Intellectual and Industrial Property;

Mr. W. F. Corning, Manager,
Research Department,
Canadian Chamber of Commerce.

The Canadian Real Estate Association:

Mr. Brian R. B. Magee, President,
Chairman of the Board,
A. E. LePage Ltd.,
Toronto, Ontario;

Mr. Albert Fish,
Immediate Past President,
Chairman, Competition Policy Committee,

Vice President,
Bowes & Cocks Ltd.,
Guelph, Ontario;

Mr. B. S. Onyschuk, Legal Counsel,

Partner,
Thomson, Rogers,
Toronto, Ontario;

Mr. J. T. Blair Jackson,
Executive Vice President,

Canadian Real Estate Association,
Toronto, Ontario;

Mr. Georges H. Couillard,
Vice-President,

President,
Sogim Ltée,
Quebec City, Quebec.

The Committee proceeded to the consideration of the subject-matter and the examination of the witnesses.

At 11:50 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, May 8, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to further examine and consider any bill relating to the Combines Investigation Act in advance of the said bill coming before the Senate, or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we continue this morning our study of the substance of Bill C-7. The first delegation appearing before us is that of the Canadian Chamber of Commerce. We will be hearing from the Canadian Real Estate Association later this morning.

Mr. A. F. Joplin, chairman of the Corporate Affairs Committee of the Chamber of Commerce, will make the opening statement.

Mr. A. F. Joplin, Chairman, Corporate Affairs Committee, Canadian Chamber of Commerce: Mr. Chairman and honourable senators, as the official delegation of the Canadian Chamber of Commerce, we very much appreciate the opportunity to appear before you today, to discuss the Chamber's submission on Bill C-7, an act to amend the Combines Investigation Act. I understand that you all have copies of our submission.

It is my pleasure now, sir, to introduce the members of our delegation, but before doing so I wish to apologize on behalf of Mr. Paul Ouimet, Q.C., the Second Vice-President of the Chamber, who would ordinarily have been here with you but is unfortunately unable to attend.

I am Fred Joplin, chairman of the Chamber's Corporate Affairs Committee, and my business affiliation is that of Vice-President, Operation and Maintenance, C.P. Rail, in Montreal.

Our chief spokesman today is Mr. Ronald F. Booth, a member of the Chamber's Corporate Affairs Committee, who is Secretary and Legal Counsel of R.C.A. Limited, in Montreal.

Working with Mr. Booth on the Corporate Affairs Committee is Mr. William G. Morris, who is a partner of Morris, Trevick and Associates, barristers and solicitors, Montreal.

Mr. Roussin, the Chief Patent Agent of Canadian Industries Limited, Montreal, is the co-chairman of the Committee on Intellectual and Industrial Property.

Mr. R. W. Becket, Q.C., is Vice-President and General Counsel of the Canadian International Paper Company.

We also have with us Mr. Bill Corning, the Manager of the Research Department of the Canadian Chamber of Commerce, to complete our delegation.

With your approval, honourable senators, I would now like Mr. Booth to lead off our discussion.

Mr. Ronald F. Booth, Member, Corporate Affairs Committee, Canadian Chamber of Commerce: Honourable senators, it is not my intention to go into the brief in any great detail. I understand copies have been made available to you ahead of time. So what I would like to do is simply touch on some of the highlights in the various areas of concern which the chamber has. Then, Mr. Chairman, I hope that that will leave some time for questions. There are members of our delegation who are prepared to deal in greater detail with any particular items which may attract your attention.

May I say at the outset, honourable senators, that the Chamber is in complete agreement with the inclusion for the first time in the bill of the service industries. We think it is a progressive step to provide for a civil jurisdiction in the act, but we feel that it would require more careful examination before it is proceeded with in the manner presented.

Concerning the Restrictive Trade Practices Commission itself, in our brief we have made a number of recommendations. First of all, we recommend that the commission be larger in numbers, and Bill C-29 would seem to indicate that the government agrees with this concept. They are proposing an increase to a full-time commission of seven, with provision for five temporary appointees. We recommend that the quorum be increased from the present number of two. The concept seems to be that the commission will have various disciplines available to it to deal with the complicated matters to be considered by the commission, and it is somewhat puzzling to us to understand how, if the quorum is only two, those various disciplines could be properly represented at any given hearing. We consider it essential that there be a right of appeal from the decisions of the commission, not only on questions of law but on the facts as well.

Finally, one of the most critical of our concerns, so far as the commission is concerned, is its very large discretion to deal with trade practices. It has, under section 31.2, the power to make orders, as you know, which could require businesses to take on new customers. The "refusal to deal" section has had a great deal of publicity. The commission can prohibit suppliers from engaging in what has been until now an accepted and established legal means of doing business. Here we are getting into the area of the commission's being able to prohibit what the bill defines as exclusive dealing, market restriction, tied selling and so on. There is no requirement in the bill which would compel the commission to consider legitimate business reasons for entering into relations of this kind. One only has to consider the franchise practice which is quite common in North America and elsewhere in the world, for that matter. If two people independently decide to enter into a contract in the form of a franchise agreement to sell fried chicken, and the franchisor or decides there should be certain standards of quality and product, and certain standards of quality in the surroundings, the cleanliness

of the premises and so on, and then the second party feels that he is tied to that franchisor to purchase supplies and so on, it is difficult to see why the commission should have jurisdiction and should be able to interfere with that relationship. There are all kinds of other fried chicken outlets available, and the public is not being harmed. Those people have entered into a contract, and the Chamber feels that the commission should not be able to interfere in that.

The "refusal to deal" provisions, in our view, are likely to interfere with the traditional methods of distributing products in Canada. The Prairies and the Maritimes, in particular, are areas where there have been established distributorship arrangements which have been in existence for many years between manufacturers and distributors. An essential part of these relationships is the ability of the distributor to provide services to products that need servicing. In my own industry, Consumer electronic products, such as television sets, it is essential that the distributor have a certain amount of product knowledge and be able to answer questions about the product. But the commission, without considering questions like this, and if they simply decide that someone is qualified financially to meet the usual trade terms, or on other rather vague grounds, can then interfere with this relationship and order that supplier to take on additional methods of distribution.

This is not going to hurt the supplier; it is going to hurt the distributors. I realize that this is a difficult question, but I think at the same time that there is an unwarranted assumption that there is some prejudice being created towards the consumer by the evil that that clause is supposed to alleviate.

The Chamber has no objection to the commission's being able to act in cases of abuse by business, or where there is some significant or material effect on competition. That is completely legitimate and nobody would argue with it. But we do not think that the commission should be set up in the form of an administrative tribunal to tinker with business methods that have been tried and tested and which have presumably been considered to be legal for a number of years. It is a bit of a motherhood statement, I suppose, but really what we are talking about here is the free enterprise system, and the question is whether that should be interfered with by government tribunals.

I think there are good reasons for regulated industries, obviously, in businesses such as railways—and Mr. Joplin may want to add a word on that—pipelines, banks and so on. But I am suggesting that in effect this commission will have the power to make all Canadian business akin to regulated industries to a certain extent.

Our basic suggestion in summarizing that point is that section 31.2 needs careful redrafting.

The question of interim injunctions is something we are in strong opposition to. Section 29.1 enables injunctions to be obtained in certain circumstances. Now, if you take the most ridiculous case that I can think of having regard to the language there as I read it, the court can issue an injunction prohibiting a person who is about to do or likely to do something which is an offence under Part V, the criminal part of the bill. The injunction prohibits him from doing something which he may not yet have done, and that injunction remains in force until he is prosecuted for the crime under section 30(2). It seems ludicrous because here you have an injunction telling somebody he must not do something he has not been prosecuted for and may not even have done yet. I admit that that is an extreme interpretation, but nevertheless the language is in there. One might as well legislate that injunctions can be obtained to prohibit people from committing murder, which would seem to me to be a much more serious crime than some of those business offences referred to in the act.

Finally, and still in the area of injunctions, there is provision in the bill for *ex parte* injunctions at a time when the courts in most of the provinces are moving away from granting *ex parte* injunctions. Particularly in labour matters the courts are most reluctant to grant those injunctions, and here we have the government requesting legislation to enable the obtaining of those injunctions.

On the question of the inclusion of industrial and intellectual property, patents, trademarks, copyright and so on, our submission is that attention should be given to excluding, to a degree which Mr. Roussin can go into in detail, those areas of intellectual property. The are, by their very nature, monopolistic. They are government recognized limited monopolies, and again and again it seems to be at cross-purposes in putting into this act a provision for free competition.

Finally, on the question of bid rigging, in section 32.2, the Minister of Consumer and Corporate Affairs has proposed an amendment before the House of Commons Committee, but we still think that this does not go far enough.

The section as we all understand, or as I assume we understand, was intended to deal basically with the cases of contractors getting together and submitting bids to municipalities and others. However, it is a case of overreach, over-kill, because the language is sufficiently broad to prevent what are known as team agreements in high-technology industry. These are the areas with which I am most familiar and which in many instances, such as the aerospace industry and satellite communications, involve joining together to combine areas of expertise in which one company is more qualified than the other and submitting a joint bid. It is an essential part of that arrangement that they agree that only one party will be the prime contractor and lead bidder. They exchange information of a highly technical and confidential nature and it is essential that they enter the arrangement simply to gain a competitive advantage and then form a consortium, or team if you like, of their own. In my opinion that type of activity would be caught by the criminal offence of bid-rigging. Other examples come to mind, such as the submission of joint bids in the petroleum industry in order to spread the risk of exploration and development of our natural resources. Others are cases of small contractors joining together legitimately to submit bids on major construction projects in competition, perhaps, with large contractors who would be able to carry the project on their own.

In our opinion all these cases are caught by the legislation and the simple inclusion of the word "collusion" before the definition which the minister proposes I do not think satisfies the question. Business needs to know that it is free to go ahead with these types of activities assuming, of course, that they are not truly anti-competitive.

Basically those are the points which I wished to make, Mr. Chairman. I would prefer to leave time for questions, if there are any.

The Chairman: There are bound to be questions, Mr. Booth. With respect to your references to services, you

realize the very broad meaning to be attached under this legislation to "services". It includes professional services, such as commissions on selling real estate. The manner in which it is drawn is broadly without the exceptions that one might expect. For instance, in Ontario lawyers are governed or regulated by the Law Society of Upper Canada. Solicitor-and-client fees may at the instance of a client be taxed before a taxing officer, who is really a statutory official and whose decisions may be appealed. However, in reading this bill it would appear that if the lawyers were to settle on a tariff or scale of fees it might be one of the offences under Part V of the bill. In addition, in Toronto there is the County of York Law Association, which is now a statutory body. One of its functions, which is not particularly provided for in this statute, is to settle a tariff by investigation, research and study. It determines from time to time the scale of fees for acting for a purchaser or a vendor. That might under the wording of this bill be an offence, bearing in mind that "services" are included in the legislation. I understand that a different situation prevails in the province of Quebec, where your incorporated body governs the different professions. Superior to that, however, there exists a general statutory authority which rules on the question of fees. I am sure that if we examined the legislation in other provinces we would find additional differences.

Considering all these differences, does it not appear to you that the broad inclusion of "services" in this legislation without any exemptions would be more than confusing? It fails to appreciate the reality of life—that is, that there is much in the way of statutory background to all professions, yet they are included in the bill. May we take it, therefore, that the Chamber of Commerce would favour some very particular description of the "services" it is intended should be subject to the legislation and that there should be substantial exemptions?

Mr. Booth: Yes, I think that is a fair statement, Mr. Chairman. The Chamber really has not addressed itself to the question of making suggestions as to changes in language in any detail. That is the draftsman's job and we have confined ourselves mostly to consideration of concepts.

I recognize the problems that you mention in the area of services. In my opinion, they are very real and potential conflicts with the provinces. Perhaps a type of exemption for regulated services to provide for professions and other groups would be appropriate.

The Chairman: The language of the bill as drawn does not indicate that this would be a good defence.

Mr. Booth: No, I do not believe it would be, although it seems to me that Bill C-256 of 1971, the original competition legislation, contemplated exemption for provincially-regulated professions.

The Chairman: But we are discussing Bill C-7.

Mr. Booth: I understand. Yes, I agree, Mr. Chairman, that it is a real problem area. I feel rather reluctant, as a lawyer myself, to comment on exemptions for the legal profession.

The Chairman: But you know that if a lawyer in Ontario renders a bill to a client who is not happy about it, that client can insist on having it taxed?

Mr. Booth: Yes.

The Chairman: That is ample protection to the public, surely, since there is even a right of appeal from the taxing officer's decision. He does not follow any particular scale of fees in making some of his assessments; he may be guided more by expert evidence as to the quantity and quality of the service and what it is worth. So there seems to be a large area for real difficulty in the case of an over-active administration endeavouring to establish precedents.

Mr. Booth: Yes, I agree.

The Chairman: Are there any other questions with respect to this point that members of the committee would like to put?

I was concerned, Mr. Booth, about your almost "blessing" on the functions of the Restrictive Trade Practices Commission. If this so-called anti-inflationary bill ever becomes law, it would become the Trade Practices Commission. Although a change of name does not matter very much, what do you think of combining investigative services, administrative services and quasi-judicial functions in the same body?

Mr. Booth: In my opinion, it is an extremely dangerous practice. One becomes judge, jury, prosecutor and policeman, all in one. It certainly seems to be the trend of government today to create more and more of these administrative tribunals. While again we have not commented on that in any great detail, our thrust has been to discuss the wide subject, I suppose, more from the point of view of—I hate to say "giving up", but recognizing the reality of the ever-increasing number and powers of these boards. We would like to see this one limited specifically by the legislation to what are its powers and duties.

The Chairman: There is no right of appeal under the bill in respect of decisions on trade practices that may be made by the commission. I do not think section 28 of the Federal Court Act is broad enough.

Mr. Booth: I agree completely.

The Chairman: Do you agree there should be the right to appeal?

Mr. Booth: Absolutely—on matters of fact as well as on matters of law.

The Chairman: You realize, so far as this Trade Practices Commission is concerned, that someone from that commission will be chairing the inquiry that may be conducted and will make rulings on the admissibility of evidence. This is in the nature of an inquest, and anything goes. If you try to get a ruling on relevancy before that inquiry, it is impossible to get it. I can tell you that from experience. The answer is, "We have not yet heard all the evidence. Later evidence might establish relevancy, so we should not rule it out this early." Secondly, it is not a court, anyway; they are not, strictly speaking, bound by any rules of evidence, and there are legal decisions to that effect.

Mr. Booth: If I might add to that, Mr. Chairman, section 46.1 makes it a criminal offence to fail to comply to an order of the commission, which order may have been made on that kind of suspect evidence, and, in addition, creates a civil right to seek damages.

The Chairman: I think we have to look at both sides. If the commission makes an order, the person against whom

the order is made has the right to appear before the commission to present evidence and cross-examine witnesses.

So, broadly speaking, in that proceeding, the person affected has the right to present his side of the case, but he does not have any right of appeal. The action of the commission is not a criminal proceeding. It is only if you fail to obey the order that it becomes an offence.

We have not discussed the civil right to damages. You deal with that in your brief.

Mr. Joplin: Mr. Becket, I think, will be dealing with that.

Mr. R. W. Becket, Q.C., Member, Corporate Affairs Committee, Canadian Chamber of Commerce: We will be covering that, Mr. Chairman. Would you like me to speak now on that point? We are concerned with that.

The Chairman: Yes.

Mr. Becket: The Chamber is very concerned on the question of civil rights damages. It is concerned from two points of view. We think that the introduction of civil areas for the first time in the Combines Investigation Act is the right move, but we think it has been done in such a way that we are going to run into conflict. Fortunately, we do not have treble damages here, as they do across the border, but one of the dangers is this likelihood of damage. You have a civil action running right there, under the new provision.

I am not quite clear if I have your full question, Mr. Chairman. Perhaps I am not handling it correctly.

The Chairman: Your position, as I read it in your brief, is that you support the idea of creating civil right damages in an action that may be taken by a person who can establish that he has been hurt and suffered damage by the conduct of some person, which is against any of the provisions in Part V of the bill. Those are what I call the criminal law provisions.

You realize too that this is a civil action for damages, and therefore the proof is less than that required in a criminal trial.

Conceivably, a number of people may be tried and acquitted under the provisions of Part V, and yet they would be subject, if there is enough evidence to support it, to an action for damages for injury done to them by conduct contrary to Part V; and the element of proof to establish that conduct is less than the element of proof to establish violation of Part V.

Mr. Becket: That is true. We have not gone into this in depth. Certainly if you have a case where there has been a prosecution under the Criminal Code and there has been an acquittal or dismissal, the opportunity for success in a civil action would be fairly limited.

The Chairman: Why?

Mr. Becket: True, there may be slight differences of opinion in the amount of proof, but I would think those differences are minimal.

The Chairman: There is a big difference between proof beyond a reasonable doubt and the balance of probabilities.

Mr. Booth: Mr. Chairman, on page 4 of our brief we have made the submission that the right to sue for civil damages should arise only if there has been a conviction for an offence, which I think would address your point. It would only be after one had been found guilty beyond a reasonable doubt that a civil action could be brought.

The Chairman: So you support the principle of creating this civil right for damages, but you would limit its application to cases where a person has been convicted under Part V?

Mr. Becket: That is right.

Senator Flynn: That would not cover the case we discussed last week, namely, refusal to deal if, after a month or so, there were an order of the commission to do so. If he complies, there is no civil action, although there has been a delay of several months. It seems entirely unbalanced.

The Chairman: I have been talking about the criminal proceedings. The civil right arises also if you do not obey an order of the commission.

Senator Flynn: Yes. It is a criminal offence if you disobey an order of the commission.

The Chairman: To equate that, a civil right to damages, where it is disobeying an order of the commission, should be limited to a case where there has been a conviction.

Senator Flynn: Yes; but, on the other hand, I think it unfair in a case where there is a definite criminal offence which is the basis of a civil action. On the other hand, if a person obeys the order after several months of investigation by the commission, the damage may have been done and there would be no recourse.

The Chairman: Yes, I follow that. What do you suggest, then?

Senator Flynn: My view is that to restrict the civil action on the basis of a conviction would not be entirely fair in all cases.

The Chairman: How would you distinguish it?

Senator Flynn: I do not know. It seems to me that if there is evidence establishing the fact that one has acted in contravention of the general principles of the act, then a civil action could be based on that evidence. If one acted in contravention of the general principles of the act by refusing to deal, even though a subsequent order of the commission is complied with, then that should be the basis of a civil action. The act has to be fair and logical to everyone concerned.

The Chairman: If there is a hearing before the commission in relation to some trade practice over which the commission would have jurisdiction under this proposed legislation, and the commission makes an order to terminate that practice, are you suggesting that if the practice is stopped there should be no right of action?

Senator Flynn: No, Mr. Chairman. On the contrary, what I am saying is that if the evidence upon which the commission issues an order shows that someone suffered damages, then that individual should have some recourse. In other words, if an individual refuses to sell to so-and-so for three months and the commission then issues an order stating that the sale should be made, which order is complied with, the would-be purchaser could still have suffered damages as a result of the refusal to sell and there would be no basis for any recourse.

The Chairman: No, that is covered under section 31.1(1)(b), which reads as follows:

> Any person who has suffered loss or damage as a result of . . .
>
> (b) the failure of any person to comply with an order of the Commission or a court under this Act,—

So that the civil right of action would only arise if an order made by the commission has not been obeyed.

Senator Flynn: That is my point. I think there should be a recourse to cover the whole field.

The Chairman: If I understand you correctly, Senator Flynn, what you are saying is that the damages may have a cumulative effect.

Senator Flynn: Yes, the damages could have accumulated prior to the order being made.

The Chairman: What you are saying, then, is that any such effect should be part of the composition of the claim for damages.

Senator Flynn: Yes.

The Chairman: So you would broaden that aspect of it?

Senator Flynn: Well, I would have some reservations about inserting it in this legislation. It seems to me it may belong to another legislative body to provide for such recourse. For example, I am not sure whether or not the refusal to deal would constitute a fault under the Civil Code, notwithstanding the fact that there is no criminal conviction.

The Chairman: We had quite a lengthy discussion on this point with the Canadian Manufacturers' Association.

Senator Flynn: My purpose in bringing it up today, Mr. Chairman, is simply to refresh our memories on it.

The Chairman: The suggestion by the Canadian Manufacturers' Association was that there should be substantial amendments to some of the provisions in Part IV, which deals with the rights of the commission.

Senator Flynn: My only point, Mr. Chairman, is that if we accepted the view expressed by this brief, thereby restricting the recourse to cases where there have been criminal convictions, we would be creating unfair situations.

Mr. Booth: In support of our submission, Mr. Chairman, the law has not abandoned this field completely. There are rights of action presently existing under the Civil Code and under the common law. If the conduct engaged in by the parties gives rise to a cause of action, so be it. However, the intent of this clause, as we read it, is to insert an additional penalty or, to look at it another way, an additional inducement for people not to engage in such trade practices. In other words, what this says is that not only is one liable to a fine or imprisonment but, in addition, one is liable to new causes of action for damages. What we are saying is that those penalties should only arise if there is a criminal conviction.

Senator Flynn: Well, if that is done, it would certainly restrict the existing rights of action. I think that would be the effect, because it would establish that the only basis for a cause of action would be in circumstances where there has been a criminal conviction. All others would not be faults and, therefore, could not be the bases of any civil action.

Mr. Booth: But the other causes of action would lie under the Civil Code or the common law, not under the federal legislation.

Senator Flynn: But you would have to establish that the practice is forbidden by an act of Parliament. Refusal to deal would be forbidden under this legislation, but according to your submission there would be no recourse if an order of the commission to deal is obeyed. In effect, that would sanction the initial refusal.

The Chairman: I am not sure that I would say "Amen" to your legal pronouncement on that point, senator. What you are suggesting is that whatever might be the length of time—

Senator Flynn: In my example, Mr. Chairman, it would be easy to establish damages. I would simply have to establish that there was a refusal to sell followed by an order of the commission. That would be easy. I could then establish my damages for the period during which I was unable to purchase. There may or may not be damages as a result of the refusal to sell.

Senator Buckwold: Mr. Chairman, I wonder if we could get into a different area.

The Chairman: Yes.

Senator Buckwold: We have heard for the first time the problem of double ticketing raised with this committee insofar as section 36.2 is concerned. I think a difficulty in that respect has been pointed out which requires a good deal of explanation. Perhaps one of the witnesses might elaborate somewhat on just what is meant by "double ticketing".

Mr. Booth: I think the fear expressed in our submission in that respect, senator, is that the section might be interpreted as preventing the re-evaluation of inventory. In a sense, I think we all recognize that it is an emotional issue. If you go into a store and see two prices, you naturally cannot understand why you should not pay the lower price. What this section says is that it is only if it is public knowledge. So that what it does not prohibit—and I am not, by any means, suggesting that it should—is the situation where perhaps the stock in the back room is at one price and the stock out on the shelves is at a higher price. It seems to us that if the public does not know that there are two prices in existence, then it is okay.

Senator Buckwold: I gather, then, that you interpret this as being in relation to goods sold at the retail level only, as against other levels.

Mr. Booth: No. That is our concern; that is precisely the point. We are concerned that it goes byond the retail level, and that it would back up into catalogue sales; it would perhaps back up into price lists that manufacturers have sent out and have not been able to change; it does not recognize the fact that inventories not only go up but may go down in value, they may become obsolete.

Senator Buckwold: This is my concern, that the marketplace is far broader than just having some goods ticketed on a shelf. It goes right down the line. You could have goods on a manufacturer's shelf that also have some markings on them indicating a price—a tag, a slip, or any number of things.

Mr. Booth: That is exactly our concern.

Senator Buckwold: In the wholesale field you have merchandise, or even in a retail store or a warehouse. What is a price tag? Is it a price in a list or is it the price on a tin of beans? I congratulate the Chamber on drawing this to our attention. The marketplace does not operate quite that way. It would be almost impossible to sell every product at its original price in a fluctuating market. How do you know when goods came in and when they went out? It seems to me that as a committee we should have some observations to make in this regard.

The Chairman: You appear to be addressing yourself to retail sales.

Senator Buckwold: I don't know. It would appear this would mean goods on a shelf at the retail level, but it is not exactly clear. It could be goods anywhere. It could be a stockpile of ore in a mine. It could be anywhere. Does this mean that the original price is frozen?

Mr. Joplin: It is our conclusion that under the present wording of the bill there is no place where it stops. This point is well taken. Is it on a retail shelf? Is it in a store? Is it still back in the warehouse? Is it on the manufacturer's workbench? Or does it go even beyond that to the primary manufacturer? Where does the legislation really stop as to what is double-ticketing? The definition is not very clear. We recognize that if a person picks something off the shelf there is an implicit contract between the price on there and when he takes it to the counter. That is one kind of situation, but what about inventory?

Senator Buckwold: All that would happen is that there would be no such thing as double-ticketing any more. The tickets would be such that they could be removed. That is happening now. A shirt could be marked at $4.95; the same line goes up to $5.95; they take the ticket off and they put on a new ticket. They used to stroke it out but they are getting smarter now. Is that double-ticketing, or is double-ticketing only if you somehow stroke out one price and add another one? I think we need clarification on this point.

The Chairman: The common form of double-ticketing as reported in the newspapers from time to time in connection with certain supermarket operations is that you find two tickets with different prices on the same product.

Senator Buckwold: If that is what they mean I am all in favour of this.

The Chairman: If we are limited to that.

Senator Buckwold: Yes. I say it is so vaguely worded that it could be interpreted to mean any change in price upwards of any item for sale at any level of its distribution process in which the price has changed on the product generally, but not necessarily on that particular shipment. This is what worries me.

The Chairman: That is something we will have to look at.

Mr. Joplin: Consider the case of a sale. Goods are ordinarily on display at $10, but for some reason on the sale day the merchant puts the goods down to $9. When the sale is over he wants to restore his price to $10. That could be a case of double-ticketing right back to inventory.

Senator Buckwold: That in itself does not really worry me. I am really worried about the whole process of raising a price on a product. Does it always have to be the exact price that the product cost the individual in that particular shipment? I do not know.

The Chairman: Common sense seems to suggest that it could not justify that interpretation.

Senator Buckwold: It could be interpreted that way.

The Chairman: The section may be badly drawn.

Mr. Booth: I think that is the problem. If you look at the broad definition of supply, under section 36.2(1)(d) it is an offence where there is a price

> contained in or on anything that is sold, sent, delivered, transmitted or made available on behalf of the supplier to members of the public.

The public again is broadly defined. If a company in the mining business has a price list out and because its costs are obviously increasing it decides it has to increase its prices, if the public in the form of its customers is already in possession of their old price list, how does it raise its prices?

Senator Buckwold: I think we have to clarify this. Does this prohibit an inventory profit?

The Chairman: I should point out that paragraph (d), to which Mr. Booth referred, is one in respect of which the minister has proposed an amendment, and has recommended that it be deleted.

Mr. Booth: All I can say is that the chamber made a submission to the minister. I am happy about it. I do not know whether that is as a result of our submission.

The Chairman: I will not say this happened merely because you are here today. It may well have happened because of the representations you made.

Mr. Becket: The minister was at pains to point out in discussion that double-ticketing is not prohibited. You just must sell at the lower price of two tickets. The first three lines of the section say:

> No person shall supply a product at a price that exceeds the lowest of two . . . clearly expressed.

This does not clarify the problem we were concerned with, that you get misinterpretation because it is badly drafted. It is improved by the deletion, but it is important to note that it is not a prohibition of double-ticketing.

The Chairman: What is the next point?

Mr. Joplin: There are some points we would like to talk about in connection with intellectual property.

Mr. B. F. Roussin, Co-Chairman of Committee on Intellectual and Industrial Property, Canadian Chamber of Commerce: We feel that where there is a reference to industrial property the wording is such as to embrace the normal exercise of rights derived under industrial property.

According to section 38(1) no person who has the exclusive rights and privileges conferred by a patent shall, directly or indirectly, by agreement attempt to influence upward the price at which any other person engaged in business supplies a product within Canada.

If you take the case of a patentee who is not engaged in the production and sale of a product covered by the patent, but who licenses the patent to another party, he obviously will want a royalty as a consideration for the right he is granting to the other party. Automatically, this

will enhance the selling price upward because the licensee in selling the product will have to keep in consideration the 2 or 3 per cent of his selling price that he has to remit back to the patentee.

This is probably not the intent of section 38(1), but a strict interpretation of the wording would cover such a situation.

Another example is in section 29(1), where we find the use of the words "commit or facilitate the commission of". Well, this is a very broad wording, "facilitate the commission of". It is left to individuals to interpret this and some people may well regard again the normal exercise of patent rights or trademark rights as facilitating the commission of an offence.

Another danger in section 29(1) is that it extends the possibility for contravention of the section. To give you another example, let us say that a company has been prohibited by an order of the commission from continuing its exclusive dealing in a trademark product, but that it continues to so deal. In such a situation it would be held liable, obviously, for an offence under section 46(1), but because the product happens to have a trademark it could be held that the company has used the trademark to facilitate the commission of an offence under section 46(1). So that would be a double offence.

That is one of the reasons why in our submission we recommend the deletion of the words "facilitate the commission of" in section 29(1). But our general submission is that there ought to be a provision in the act to the effect that the normal or proper or due—and you can use whatever adjective you see fit—the normal exercise of rights derived under "industrial property" or of "privileges conferred", shall not be regarded as contravening the provisions of the act, and this could well fit into section 4 which is the section exempting various acts done by people.

This is basically what our submission is all about.

Senator Laing: Mr. Chairman, I would like to know what has happened to us in Canada that it is deemed that this sort of legislation is necessary either to protect a distributor or, in the long run, to protect the consumer. I was in business for 27 years before coming into this profession. It was a different age. We were taught that the objective of industry was to produce goods of higher and higher quality and greater and greater volume at lower and lower prices. That does not seem to be the objective of industry today.

I cannot understand what has happened to the competitive system in Canada that it would require or would engender a demand for this kind of legislation.

When I was a member of the Canadian Manufacturers' Association we met occasionally and talked to one another. We found that the idea that a company had of the lowest possible price was a price for everyone. I don't think we did too badly by the consumer in those days, and I can give you an example. Up to 1952 we sold a particular product at $38 a ton which today is selling for $145 a ton.

What worries me is what has happened in the meantime in industry to engender this kind of demand among the public or among some people to require that industry, at every move, must have someone looking over its shoulder.

I had thought that no one in business would like this kind of legislation, but about ten days ago I happened to be speaking to a businessman from Western Canada about this very legislation, suggesting to him that it should be unnecessary in Canada. His reply surprised me. This competent and prosperous businessman told me, "Dont't you believe it. It is very necessary."

What kind of practice has been going on which would make a businessman tell me that? It must be something that was not going on prior to 1951, when I had some knowledge of business and competition in Canada.

I believe that consumer prices are going to suffer out of this kind of legislation, because for any product sold the mark-up is based upon the volume. If a manufacturer gives his product to four people to distribute instead of just to one in a community which could be served by one distributor, then in the end the consumer is going to pay more money.

Again, I ask: What has happened to industry in the time since I left business until now, to require this kind of constant snooping over the shoulder to see that justice is done to everyone? I don't think justice can be done to everyone in this sense of business. I don't think it is possible.

I worry when a competent businessman tells me that this legislation is necessary. I think of the great businesses on this continent and the fact that the Canadian experience has followed the experience of the U.S., where great individuals with great dreams created great articles. I think of Ford, Firestone and people like them. We have seen that same kind of pioneering influence Canada. Unfortunately, it seems to be heavily qualified today.

The Chairman: Senator Laing, on the opening day of our hearings I made use of the expression that it appeared from the bill, and from the speeches which the minister had made before the bill was tabled, that the government was attempting to stake out as a special preserve the marketplace where it would exercise all the control—presumably on behalf of consumers.

I understand and appreciate what you are saying when you ask what has happened, and what are the materials that the government has that indicate that this is necessary. Is it, for example, because a supermarket did some double ticketing in a few instances? You could not support legislation of this kind on the basis of that. You would simply deal with that problem in itself.

Senator Laing: Yes, those are only details.

The Chairman: Yes.

Senator Laing: They are merely details in the greater concept of getting to the consumer an article of as high quality as possible at as reasonable a price as possible.

The Chairman: If a person manufactures a television set and has a brand name on it and then sets a price on it, what is wrong with his dealing only on that basis?

Senator Laing: There is nothing wrong with that. Other people can make television sets as well.

The Chairman: That is right, and other people can have other brand names. But if I manufacture a particular brand of television set and someone comes to me and wants me to sell to him, and, looking him over, I decide that he is not the proper kind of person for me to get the kind of distribution that I want, what is wrong with that?

Senator Laing: What I put to these gentlemen in business is this: Why is it that this competent businessman in West-

ern Canada tells me this is a good bill? Whether he has a special grievance or not, I do not know, or whether he is a special case, I do not know; but what is going on in business today that would make him tell me that? That worries me. He is the only one who has told me, incidentally.

Mr. Joplin: Could I just check you on a couple of points, senator? I disagree with you that business in this country has lost its nerve or its direction or its dedication to the customer. That is not so. In fact, the Chamber represents what we consider to be ethical businessmen, and our position is that we do not subscribe in any way to any of the unethical conduct that is carried on. There have been some sharp practices, and I think everyone recognizes that there have been people who have indulged in such practices. I guess, in part, there is a kind of Gresham's law in sharp practice, just as there is with regard to money. Gresham's law says that counterfeit money drives out good money. We are very concerned with that aspect, senator. One thing that we do try to preserve is the good name of business, and we can preserve it if we eliminate the unethical practices. We think that is the proper thing to do.

We agree with you entirely that dabbling in business, becoming involved in it, ignoring the marketplace, trying to construct some falsity in the marketplace, is wrong. We do not agree with that principle in any legislation. We think dabbling in the marketplace is wrong. We think the marketplace should really look after itself. Where the marketplace will not look after itself, as I say, and where there have been sharp practices, and where people need protection, we agree that maybe there is something to that, and this is probably what your businessman is saying, namely, that there have been bad practices in the marketplace; but you do not have to have an envelope so big that everyting you do is subject to a gang of guys going around poking their noses into your business. We do not think that is the right kind of bill to have at all, and we have tried to express here to you our feelings that you do not need to create such a big, wide envelope, such a big, wide bucket, that almost everything you do can have the effect of somebody nosing into it.

The Chairman: Did you have something more to add, Senator Laing?

Senator Laing: No.

Senator Lang: While we are on this theme, I wonder if I might refer to the Economic Council of Canada Report of July, 1969, which is the philosophical base for this legislation. In one sub-chapter there, entitled, "The New Industrial State," there is a summation of Galbraith's arguments in his book by that name, and I would like to quote some of it and ask for your comments as to its validity:

> He finds that the giant corporation has achieved such dominance of American industry that it can control its environment and immunize itself from the discipline of all exogenous control mechanisms—especially the competitive market. Through separation of ownership from management, it has emancipated itself from the control of stockholders. By reinvestment of profits (internal financing), it has eliminated the influence of the financier and the capital market. By brainwashing its clientele, it has insulated itself from consumer sovereignty. By possession of market power, it has come to dominate both suppliers and customers. By judicious identification with and manipulation of the state, it has achieved autonomy. Whatever it cannot do for itself to assure survival and growth, a compliant government does on its behalf—assuring the maintenance of full employment, eliminating the risk of and subsidizing the investment in research and development, and assuring the supply of scientific and technical skills required by the modern technostructure. In return for this privileged autonomy, the industrial giant performs society's planning function. And this, according to Galbraith, is not only inevitable (because technological imperatives dictate it); it is also good.

Mr. Joplin: I suppose that if you had read that when it was written, you might even think that what General Motors said was good for the world was what General Morors produced. Yet, if you were to look now at what has happened in the marketplace as far as General Motors is concerned you would find that certainly they are still doing very well—I am not going to apologize for General Motors—but certainly the changes in the buying habits of the public as far as General Motors' particularly large type of automobile is concerned, and certainly the pronouncements that have been made by the automobile manufacturers who live in the kind of world suggested by Mr. Galbraith, indicate that Mr. Galbraith would not be right when he wrote that.

I think one has to recognize that the marketplace does function differently in Canada, and that Canada is a different place from the United States—a much different place. We do not need to go to the United States and borrow their legislation. Our ways of doing business are very different from theirs.

The Chairman: Well, what is wrong with one of the references there? What is wrong with business influencing, or attempting to lead the potential purchaser in the direction of its products?

Mr. Joplin: Nothing.

The Chairman: Is that not part of selling?

Mr. Joplin: Yes, sir.

The Chairman: If they do it illegally, we do have a Criminal Code.

Mr. Joplin: Yes, sir.

The Chairman: And the question here is, as Senator Laing put it: Why do we need all these so-called safeguards? Do you think business practices in Canada, from your experience, and selling practices, are such that the consumer will continue to be hurt by operations in the marketplace unless all these provisions in this bill become law?

Mr. Joplin: I do not think the consumer is being hurt in the marketplace to any large extent right now.

The Chairman: He is not?

Mr. Joplin: He is not, no. I think he is getting his money's worth. The are, as I said, cases that can be pointed to as horrible examples, and the government seems to be bent upon providing this kind of protection. What we are saying is that if they are going to provide this type of protection—and we accept it as a foregone conclusion, they have gone this far with it, and have created a department whose job is fundamentally directed that way—if they have gone this far with it, they probably intend to go

further. If they go further, we want at least to try to preserve as much of the freedom of the marketplace as possibly, which has protected the customer and brought us to our present state of affluence in the world. We want to protect as much of that as we possibly can.

Mr. Booth: I wonder if I might add one example? I was interested to note the phrase, "a compliant government" in that quotation. I do not think that we in Canada can afford the luxury of legislation of this type. I know of an instance of a company in the United States that was served with a subpoena in an anti-trust matter. It did not involve this company; the company was called for purely evidential purposes and, in effect, the company was a witness. That subpoena required 7,200 man-hours of research to respond to it. Those man-hours were man-hours of professionals—lawyers, accountants, and so on—and there is absolutely no way that the costs of that sort of thing do not become a cost of doing business; there is no way that it does not get added on to the selling price of a product. For us to invite legislation that requires that sort of thing, I think, is ridiculous.

Senator Macnaughton: I wonder if I could ask Mr. Roussin, through you, Mr. Chairman, if he would apply the same arguments to intellectual and industrial property. There has been a tremendous growth and development of government regulation in that field.

Mr. Roussin: In the United States?

Senator Macnaughton: No, in Canada. I am concerned now with licensing and with people coming in and using patents and things like that. In other words, this forced licensing. For example, you have a patent on a certain item which has taken 20 years to develop, and now you have put it on the market, you are doing reasonably well and you are trying to get some of the costs of production back. And then, bingo, somebody wants to use it and pays you, perhaps, 1 per cent.

Mr. Roussin: This is automatic licensing, as recommended by the Economic Council.

Senator Macnaughton: Doesn't it imply the same trend?

The Chairman: Isn't the situation something like this? Under the Patent Act, for instance, you have certain exclusive rights. If this happens to relate to a product, then as long as you supply the market demand you have the right to deal in that yourself. When this bill becomes law, if it does become law, if I, as the holder and developer of a patent, supplying the market adequately, refuse to deal with somebody else who wants to get into this area, then there is a conflict in legislation. This can mean embarrassment and it may even mean litigation, and yet both pieces of legislation are federal legislation. In my view, this is an area that requires some very careful thought—the extent to which you are going to legislate additionally in relation to brand-name products, for instance. If some person demands a licence, and I refuse it, then I may have litigation, but at the same time under this bill I may have the commission making an order, and if I do not comply with that order I may be prosecuted.

Senator Macnaughton: That is my point.

Mr. Roussin: This is the very reason for our submission.

Senator Molson: Mr. Chairman, we have just dealt with some of the philosophy of this legislation, and it seems to me that the Chamber of Commerce can quite rightly be designated as having the largest constituency of anybody to appear before us here, in that it represents the boards and chambers of all sorts of municipalities across the country.

I assume they have looked at all aspects, or have had representations made or have had discussions on all aspects of this bill. But, so far, nobody has mentioned one aspect which in a small way may affect the feelings of a great number of people in the community, and that is the area of sports. I do not know if anybody is going to come here and discuss anything to do with this, but it seems to me that with a body like the Chamber of Commerce, representing so many communities, they ought to have a view, even if it is only on, let us say, amateur sport which now is going to be subject to government control, in common with many of these other interferences with free enterprise. I wonder if the Chamber of Commerce has a view on the necessity for the government to step into that field in the way provided for in the bill.

Senator Macnaughton: One could almost say schizophrenic control.

The Chairman: But there does seem to be some conflict in language as between talking about amateur sports and talking about the rights of a player to move where his best advantage lies, and I would assume that the words "best advantage" would mean the best deal he can make. There seems to me to be a contradiction in terms.

Senator Molson: Has the Chamber of Commerce any view on this?

Mr. Joplin: In our discussions we took it generally from the point of view that we were talking about professional sports and we did not consider the question of amateur sports. We considered that professional sport was, in fact, a service, and we looked at it from the point of view that here was a man rendering a service in a professional way, and in a similar way to other professional men, and so we simply left it on that basis. We did not go beyond that or consider it in relation to the effect it might have on the community.

Senator Molson: There are comparatively few professional athletes but there are hundreds of thousands of amateur athletes, and the smaller communities would have the greatest difficulty in making their views known, and they are the ones most affected by amateur ahtletics. So I thought that perhaps the Chamber would have a view on that particular phase.

I take it they have not, Mr. Chairman. There is a deathly silence.

Mr. Joplin: As I said, Mr. Chairman, we had not discussed amateur sports.

The Chairman: Well, have you any personal view you would like to express, or are you speaking today only on behalf of the Chamber of Commerce?

Mr. Joplin: I think I will confine myself to trying to reflect the ideas of our 2,700 corporate members and subsidiaries, rather than expressing my personal views.

The Chairman: But from your brief we might assume that you favour what is said in the bill in relation to sports and services because in your opening sentence on page 2 you say:

> The Chamber also agrees that sports and service are both properly included within the scope of the legislation.

I must take it then that since amateur sport is covered in the bill, you are giving your blessing to the inclusion of amateur sport.

Mr. Joplin: Well, Mr. Chairman, I guess that if you are going to nail me on that particular point, then you are right. In our discussions we did not go into the impact on amateur sports, and in this case I would say the wording of our submission to you is not quite correct, and here I think we have to stand corrected, and I thank you for drawing it to our attention.

Mr. Booth: Perhaps, Mr. Chairman, it is a case of misery loving company. If we are in the soup, then everybody else might as well be in it too.

The Chairman: May we take it then that this is an inadvertent inclusion giving such a general and overall approval, and that you had not thought of amateur sport in relation to this?

Mr. Joplin: We had not thought of amateur sport in relation to the bill.

Mr. Becket: I wonder if I could add a word here, Mr. Chairman. In this bill we are dealing with business and the restriction and supervision of business practices, and I do not think it occurred to those of us who examined it that amateur athletics, as such, were business and would come within the scope of this act. In a sense, perhaps I am speaking personally. But with regard to professional sport, yes, it is a business, a service industry. Amateur sports, as I understand it, and the senator may correct me, is not, at least *per se*, a business and, in my opinion, amateur sports should not come within the purview of the bill.

The Chairman: Section 32.3(1)(a) provides that:

> Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional or amateur sport or to impose unreasonable terms or conditions on those persons who so participate, . . .

Now, he is guilty of a indictable offence. There is no question that the section which I have read does extend to include amateur sports.

Mr. Becket: You are quite right, sir.

The Chairman: The refinements that you are making now have no place in any possible defence to the provisions of the bill if you have conspired, combined, agreed or arranged with any other person. If I coaxed an amateur hockey player to the town in which I live from the town where he plays, might I be conspiring?

Mr. Becket: Yes, Mr. Chairman, under this wording it would appear so, even though you are not doing it for a business purpose. However, when we made our general statement in connection with including this, we may not have examined those provisions as closely as we should. In my opinion, we viewed the business or professional aspect of the sport, and that only, and decided that to that extent it has a place in the legislation. But you have nailed it right down.

The Chairman: Further, in section 32.3(2), in connection with the court determining whether or not an agreement or arrangement violates what I have read, it is provided that:

> . . . the court before which such a violation is alleged shall have regard to
>
> (a) whether the sport in relation to which the violation is alleged is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and
>
> (b) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.

In other words, by the threat of court action you would try to assure yourself that you would level out capacities of various teams in the same league. Is it your view that such a provision has a proper place in this bill, having regard to the purpose to which it directs itself?

Mr. Becket: To answer your question personally, no, it is not my view; and I am afraid our committee has overlooked that area. At least, that is my feeling.

The Chairman: Are there any other questions by members of the committee? Have you any other matters that you would like to raise on which we have not questioned you?

Mr. Becket: I have no specific matters, sir. I would just like to emphasize once again two points. One is with respect to the delineation of services. You made reference, as one example, to the Bar Association. I would like to emphasize the comments of Mr. Booth in particular regarding this point, that there is not by any means sufficient delineation in these proposed amendments and there should be. If services are to be included, there is a great deal of further drafting to be done.

My other point reverts to the basis of our main position, which is the preservation of free enterprise. The Chamber takes a very serious view of the encroachments into this area which are in steady progress and are bringing much of our business community under an arm of socialism. Some of these amendments are almost extreme examples of this, and the Chamber is against that. I am sure I am speaking for the Chamber.

The Chairman: Is there anything else you wish to add?

The Canadian Chamber of Commerce delegation withdrew.

We now have as witnesses a delegation from The Canadian Real Estate Association. Who will make the opening statement?

Mr. Brian R. B. Magee, President, The Canadian Real Estate Association: I will, Mr. Chairman.

The Chairman: Mr. Magee, will you identify, for the purposes of the record, the order in which your colleagues are sitting?

Mr. Magee: Honourable senators, I am appearing before you as a representative of The Canadian Real Estate Association. I will make a few introductory remarks. Then I will ask Mr. Albert Fish, the Immediate Past President of The Canadian Real Estate Association and Vice-President of Bowes & Cocks Limited, who has been the chairman of

our Competition Policy Committee, the legislation relevant to which now comes forward under the Combines Investigation Act as Bill C-7, to continue.

On Mr. Fish's right is Mr. B.S. Onyschuk, our Legal Counsel, partner in the firm of Thomson, Rogers in Toronto. On Mr. Onyschuk's right is Mr. J. T. Blair Jackson, Executive Vice-President of The Canadian Real Estate Association. Mr. Georges H. Couillard, Vice-President of the association and President of Sogim Ltée, in Quebec City, is also present, further over on the right. My name is Magee and I happen to be President of this association.

I was very interested in the submission of the Canadian Chamber of Commerce a few minutes ago because, as past-president of the Toronto Board of Trade, which is the biggest member of the Chamber of Commerce, I must say that certain of the views that we put forward may differ somewhat from theirs.

Mr. Fish will make the presentation and basically he would like to bring to your attention certain sections of this proposed legislation which will affect our industry, our business or our semi-profession to a large degree. They will possibly change the whole *modus operandi* we have had heretofore, which seems to have served the consumer and the Canadian public fairly advantageously over the years.

With those few remarks perhaps there will be some questions which we may be able to field later on, Mr. Chairman. I will now turn the discussion over to Mr. Fish.

Mr. Albert Fish, Immediate Past President, The Canadian Real Estate Association; and Chairman, Competition Policy Committee: Thank you.

Honourable senators, our brief has been submitted and I believe all members of the committee have copies. We certainly appreciate this opportunity to appear before you today to answer any questions you may have in connection with our brief. We also appreciate, Mr. Chairman, the fact that you changed our date of appearance so that we could come on May 8 rather than the first of the month, as we had other commitments to meet in another part of Canada.

We are concerned with the implications of this proposed legislation and have been since the Economic Council of Canada introduced its interim report in 1969. When Bill C-256 was introduced in 1971 we were very active and vocal in our concern with and opposition to the original competition legislation. Since that time, we have given it considerable consideration and have spent a lot of time following the progress of this bill through the house.

We have had very good relations, I might add, with the Department of Consumer and Corporate Affairs, through three different ministers, and we have had excellent cooperation from their staff. We have discussed the philosophy of the bill with them. As a matter of fact, we have come to feel a personal acquaintance with them because we have spent quite a bit of time there.

To get down to some of the issues in this legislation, this affects approximately 33,000 real estate people in Canada under about 83 real estate boards. I would like to turn to page 3 and read some of the general comments in that section. It is our submission that if this bill is enacted it could seriously curtail the industry's ability to effectively serve the public; result in a reduction of competence and responsibility to the public; impede the opportunity of free choice of individuals to cooperate and share their efforts towards owning a living in the vocation of their choosing; distort the free market concept that is the essence of real estate and property ownership; and create and maintain a dangerous precedent in the concept of the state regulating the private affairs and legitimate business operations of Canadian citizens.

Generallly the members of this association are prepared to accept and endorse any proposition that will contribute to an improved position of the public and the consumer in the market place, and the reasonable protection of his purchasing activities.

However, we do not feel that this bill fulfils that requirement. If you will read through the bill you will notice that we are placing emphasis on an explanation and discussion of the Multiple Listing Service, known as MLS.

In our attempt to defend the MLS system from the implications of this bill, we firmly and strongly believe that MLS is a service designed and developed in the public interest.

Our boards are non-profit organizations similar to a cooperative. In fact, before the name was changed to Multiple Listing Service, it was called a cooperative listing service.

So in this bill we have put strong emphasis on the Multiple Listing Service operated by many of the real estate boards across Canada.

The act, if applied to our industry, will have very serious repercussions, and I would like to make few points on what we think it will do to our associations and industry.

Firstly, it will prohibit the operation of the MLS system. It could make real estate boards and real estate associations illegal, and, in any event, many of their key functions would become illegal; it will prohibit standard commission rates by real estate boards, it could prohibit entrance requirements, educational standards and codes of ethics of real estate boards and provincial associations; and it could prohibit disciplining procedures of real estate boards and provincial associations.

All these activities will be prohibited under the criminal law as opposed to civil law, and it will put all real estate workers in jeopardy of being criminals and subject to criminal indictment, prosecution or conviction.

I should like to draw the attention of the committee to page 16, and to comment that in this section we have dealt with the Criminal Code consequences as they relate to business practices. As far as our industry is concerned, putting us under the Criminal Code for these activities is abhorrent to us, as I am sure it is to other service industries.

As an example, most professions in the services field, as well as our industry, have established tariffs and fixed commission schedules for many decades. This has been done to eliminate predatory practices on the one hand and price gouging on the other. These schedules and tariffs have reflected the interest of the public and have been accepted by them as being reasonable rates of remuneration. These activities are now made criminal offences under the act.

Surely the only issue is whether or not the tariffs are reasonable. At the very most, this should be a subject matter of regulation by some body and is not an activity which is criminal in nature.

Surely the other activities of service associations, such as codes of ethics, education requirements, entrance and explusion requirements, developed as a means of self-regulation and policing of the industry, should not become "criminal offences" overnight.

If there is any justification for regulation by the federal government of various business activities in the service industries, surely it should be a matter of civil regulation and not criminal law.

It is our opinion, Mr. Chairman and gentlemen, that the restructuring of all organized real estate boards and associations will be required if this legislation is enacted as presently written.

On page 23 we have made . . .

The Chairman: You are talking about provincial regulations. Is there not a provincial legislative requirement that people who wish to become real estate agents must qualify by examination? I am referring to Ontario.

Mr. Fish: In Ontario there is, yes.

The Chairman: When you say most provinces, what other provinces?

Mr. Fish: All of them have some form of educational requirement to a varying degree. Every province has an examination requirement.

The Chairman: That is administered by the provincial government?

Mr. Fish: Many of them are administered by the real estate organizations themselves. They prepare the courses and in many cases mark the results for the provincial government.

The Chairman: But they are doing that on behalf of the provincial government.

Mr. Fish: Yes.

The Chairman: Is there an overriding provincial statute that makes that requirement?

Mr. Fish: Yes, there is.

The Chairman: What about the commission: is there a general authority of any kind in, say, the provincial statutes of Ontario which gives authority to real estate boards to arrive at rates of fees?

Mr. Fish: No. The only reference in the Real Estate and Business Brokers' Act of Ontario is that if anyone goes to court to dispute, say, a commission, the court will normally award the commission as established in that general area.

The Chairman: Generally speaking, in your experience, is the offer from the intending purchaser to the vendor, or does the vendor make an offer which the purchaser accepts? Which way do you do it?

Mr. Fish: Generally the purchaser makes an offer and it is for the vendor to accept or reject.

The Chairman: On the offer form there is a commission slip at the bottom. It is perforated so that it may be torn off.

Mr. Fish: Some have a perforation. It can also be blocked out.

The Chairman: Of course, the person who obligates himself to pay the commission does not have to sign it, or he can amend the form.

Mr. Fish: That is correct.

The Chairman: The agent does not have to accept it.

Mr. Fish: That is correct.

The Chairman: So it is a matter of bargaining—or let me put it this way: it could be a matter of bargaining.

Mr. Fish: It could be a matter of bargaining. Probably we should have our Legal Counsel comment, but, so far as I am concerned, there would normally be a listing procedure before that offer came into effect. The listing procedure would have a certain commission rate set on it, and that would normally be the commission the vendor would pay.

The Chairman: Is there an agreement or understanding among all real estate people as to the rate of commission that would be charged?

Mr. Fish: I would have to say that most by-laws or regulations of real estate boards at the present time contain in them some reference to what we call minimum or standard fees or commissions. There are some boards which do not, but generally speaking there are standard minimum commissions. The rates are set as minimum commissions.

The Chairman: Is there any sanction if a particular individual or firm does not follow that rate and charges a lower rate of commission?

Mr. Fish: I would think that there probably has been the odd sanction in such circumstances, Mr. Chairman, but generally speaking they are not strictly adhered to. In a case where someone does not follow the standard rate, he is not normally sanctioned by the Board. They are not generally thrown out of the Board because they do charge a lower rate of commission. Generally speaking, I would say that the rates of commission are generally kept to this minimum rate.

The Chairman: When you say they are "generally kept," what do you mean by that?

Mr. Fish: Well, if someone did go below the rate on a certain transaction it does not necessarily follow that he would have any problems with the real estate board in his area.

Senator Beaubien: Are there separate rates set for different areas? In other words, do the commission rates vary across the country?

Mr. Fish: Yes. the Commission rates are set by the local real estate board. The Canadian Real Estate Association does not set the rates. I do not know what the commission rate is in Quebec City, but it may be 5 per cent for exclusive and 6 per cent for MLS. In my area it is 5 per cent for an exclusive listing and 5.5 per cent for an MLS listing. Out West, it may be 6 per cent for an exclusive listing and 7 per cent for an MLS listing, or in some areas it may be 5½ and 6½ per cent. The rates are set by the local real estate boards.

Senator Beaubien: Is there one real estate board governing Toronto?

Mr. Fish: Yes. I do not know how far it extends. There is a separate board in Mississauga and a separate board in Brampton. For the large centre of Toronto itself, it is one board.

Senator Beaubien: And what is the rate under that board?

Mr. Magee: It is 5 per cent for an exclusive listing and 6 per cent for a multiple listing.

Senator Beaubien: And what was the rate 10 years ago?

Mr. Magee: It was 3½ per cent and 4 per cent. Mind you, we are now just talking about housing. When you get into leasing there are different scales of commissions. There is also a different scale for commissions of a lower order as far as builders' houses are concerned. In other words, if a builder has more than five houses to sell, the rate of commission can go down as low as 2 per cent. The standard rate would be for resales as opposed to new homes.

Mr. Fish: There are varying rates for the different types of transactions.

The Chairman: Is your association a federally-incorporated association?

Mr. Fish: Yes.

The Chairman: And is there a provincial statute in Ontario, say, of general application to all those engaged in the business of real estate?

Mr. Fish: Yes, we have the Provincial Real Estate and Business Brokers Act in Ontario, and there is a similar act in every other province of Canada.

The Chairman: And to what extent does that give authority to local boards in the matter of establishing the rates of commission?

Mr. Fish: It does not give any such authority.

Mr. B. S. Onyschuk, Legal Counsel, The Canadian Real Estate Association: Perhaps I could elaborate on that, Mr. Chairman. The Real Estate and Business Brokers Act of the province of Ontario is primarily an act with two directives or directions in it, one being to establish the licensing requirements which the province requires of anybody selling real estate in the province of Ontario, and the second being to prohibit or, under certain penalty, to direct and regulate the type of activities generally, vis-à-vis the public, which the province has indicated are either good or bad. For instance, there are certain practices which real estate agents licensed by the province of Ontario shall not enter into in dealing with the public.

Those are the only two areas, to my knowledge, in which the provincial government has put any form of regulation into the real estate industry.

The provincial associations, of which there are 10 across Canada, and The Canadian Real Estate Association were established quite apart and distinct from any provincial acts. They have been established since 1902 and were established as an attempt within the industry of self-policing, of improving educational requirements and of self-disciplining the industry. So that the boards which engage in this self-disciplinary, self-regulatory work within a city or area, as well as the provincial associations, are quite outside the purview of the provincial legislation.

The Chairman: Even though the local boards would be incorporated?

Mr. Onyschuk: Yes, Mr. Chairman.

The Chairman: If they are provincially incorporated, what authority do they take or are they given under their Letters Patent?

Mr. Fish: Under the Letters Patent they are a voluntary association, in effect, without share capital. Anyone who wishes to belong to the Association can belong and anyone who wishes to leave can leave. The fact is, however, that over the period of the last 70 odd years, most of the real estate practitioners within the individual municipalities have joined their local real estate boards because of the standards of ethics, the educational requirements, and the image that these boards have with the public. The same applies throughout the country. To that extent, the average statistic is that 85 per cent nationally of the practitioners of real estate belong to the local real estate boards and through those boards to the provincial associations and through the provincial associations to the Canadian Real Estate Association.

The Chairman: But the Letters Patent for the local boards gives them the authority to discipline.

Mr. Onyschuk: Yes, they do.

The Chairman: And also to regulate the basis for admission?

Mr. Onyschuk: Yes.

The Chairman: And do you admit people who are not licensed as real estate brokers under the provincial acts?

Mr. Onyschuk: Yes, there is a form of membership known as affiliated membership which is available to individuals who are not licensed as brokers. I think the type of individuals who belong as affiliated members are set out in Appendix "A" to the brief. These consist of organizations and companies which, although not licensed as real estate practitioners, do have real estate activities or business dealings with real estate companies in one form or another. These would include government departments and agencies, a number of provincial and municipal agencies and departments, large retailers, land developers, life insurance companies, and even some banks. They are not full members in the sense that they do not take as keen an interest in the day-to-day affairs of the Association as do the full members.

The Chairman: Do they have a right to vote?

Mr. Georges H. Couillard, Vice-President, The Canadian Real Estate Association: They do have the right to vote in the Canadian Real Estate Association. The by-laws of the local boards are structured differently, so in some areas they might have the right to vote and in other areas they would not have that right.

The Chairman: Among the powers or objects in your charter, is there the right to settle the basis of commission?

Mr. Onyschuk: Yes, Mr. Chairman.

Senator Cook: Perhaps we could be given some examples of the things which members of the association are not allowed to do. We have been told that the act of incorporation permits them to do certain things.

Mr. Onyschuk: It is not the act of incorporation; it is the Provincial Real Estate Brokers Act. It deals with a

number of areas vis-à-vis the public, the vendor. It says, for instance, that you shall not . . .

Senator Beaubien: Gouge too much.

Mr. Onyschuk: Yes, it does say that to a certain extent. Basically it deals with certain unethical practices. I am at a loss to put it exactly. Perhaps Mr. Fish could help.

Mr. Fish: Buying for their own account.

Mr. Onyschuk: Yes, buying for their own account is one. Accepting a listing on a piece of property which is covered on another listing is another.

Senator Cook: Buying on your own account without disclosure.

Mr. Fish: Without disclosure, yes. There are practices such as not listing a property for sale at a certain price to the vendor and then whatever you can get over that is yours, but you have to list it at a set commission schedule.

Mr. Onyschuk: Misleading advertising.

Mr. Fish: Misleading advertising is another. Quite a number of things are in that general area.

Mr. J. T. Blair Jackson, Executive Vice-President, The Canadian Real Estate Association: Perhaps I could elaborate on that. In Appendix "B" attached to our brief, commencing at page 29 we have outlined some standards of business practice that have been adopted by the Canadian Real Estate Association and by all member boards and members.

The Chairman: They are standards of business practice laid down by whom?

Mr. Jackson: Laid down by the Canadian Real Estate Association, adopted by the local real estate boards, and therefore a requirement of membership of the local real estate boards.

The Chairman: Is this the right to create standards of business practice? Is there any authority in the provincial statute?

Mr. Fish: No, this is self-regulating.

Mr. Jackson: It is self-motivating, self-regulating, and self-initiating I suppose. While Ontario does provide some requirements or prohibitions within their act, they are probably one of the better provinces in that area; some of the provincial acts still have not come up to establishing the kind of ethical standards that we feel the public deserve and have the right to expect from our industry.

The Chairman: When you say "we" who do you mean?

Mr. Jackson: We are talking about the real estate industry.

The Chairman: But what body are you talking about when you say "we"?

Mr. Jackson: I am talking about the Canadian Real Estate Association, which is in fact an amalgam of the real estate industry.

The Chairman: That association is a federally incorporated non-profit company, is it not?

Mr. Jackson: That is correct, of which our members are those who are members of local real estate boards, and the voting procedure goes through that way.

The Chairman: But your local boards are provincially incorporated?

Mr. Jackson: Correct.

The Chairman: The local boards are the ones who lay down the standards of business practice?

Mr. Jackson: They adopt the standards that have been promulgated by the Canadian association, and it is in fact a condition of their membership in the Canadian Real Estate Association that they agree to abide by and adopt them.

The Chairman: I take it a local board is a member of the association?

Mr. Jackson: Correct.

The Chairman: Is there any requirement that membership and continued membership involves the requirement that you must subscribe to the regulations laid down by the association?

Mr. Jackson: Not regulations, but the code of ethics and standards of business practice.

Mr. Onyschuk: I think it is important to indicate here that the code of ethics and standards of business practice were developed by the boards. In fact, the Canadian Real Estate Association is the child of the individual real estate boards, who first banded together at a time in their development as provincial associations and then in time as the Canadian Real Estate Association. I wish to point out here that it is not a question of the Canadian Real Estate Association dictating the terms to any of the boards. It is quite the opposite. In fact, there are conventions held each year, and the only voting members are members of real estate boards who, through that conference and through meetings within the year, establish, evolve and change these standards of business practice.

The Chairman: Am I right in saying that there is a tariff of commissions?

Mr. Onyschuk: Yes, there is.

The Chairman: At what level is that tariff established?

Mr. Onyschuk: At the local level.

The Chairman: At the local level?

Mr. Onyschuk: Exclusively at the local level.

The Chairman: The local board would be a member of the association.

Mr. Onyschuk: Yes, it would.

The Chairman: Is there any co-relation there as a result of which the local board establishes such a tariff, or does it initiate it itself?

Mr. Onyschuk: The local board initiates it exlcusively itself, and changes and amends it itself. For example, one board immediately outside of Toronto has dropped its commission rates for that municipality very recently because of the inflationary spiral in the marketplace. That is something they do; they have exclusive prerogative over it.

Mr. Magee: I think I should add on that score that both provincial associations and the Canadian association can advise a local board to reduce a requirement that is considered to be too stringent or too expensive for the buying public. For instance, in years gone by certain boards imposed restrictions that before somebody could be a member of the board they had to have an office opened in that city for a year or two years. Other boards imposed initiation fees out of all reason, of $1,000 or $2,000 a member.

The Chairman: I was not interested in that angle. I was interested in what, if anything, in the way of advice or direction can or does flow from the association to the local board in the way of commissions?

Mr. Magee: We are getting back to the competitive free enterprise system. To give a proper service to a client a certain minimum fee has to be charged and a minimum commission has to be derived when a sale is made. The law of economics alone will dictate that that commission is somewhere around 5 per cent. It must be borne in mind that that is on completed sales. A real estate salesman is not paid until he actually sells something. There is a great deal of running around that goes on. In our firm as many as 100 houses have been shown to one family before they have made up their mind—and then they have probably gone and bought directly from the vendor!

With respect to the saleman's lot, we hear a great deal of comment, some of it irresponsible, in the press to the effect that if a salesman sells a $50,000 house in a week he will make $2,500. I wish they all did, but unfortunately they do not. The average real estate salesman's earnings are, in certain categories, at the poverty level across Canada. You will find cases where probably the average real estate salesman is not taking home a gross of much more than $6,000 to $7,000 a year.

The Chairman: My question is directed simply to trying to find some basis of authority for the determination of the scale of fees, rather than the suggestion that might be made that you have conspired together or agreed together to maintain prices.

Mr. Magee: No, we have not agreed, and none of the boards have agreed at all on the schecule of fees.

Mr. Jackson: I am afraid I may have given a somewhat erroneous impression. The condition of membership by boards in the Canadian Real Estate Association are quite simple. Our prime objective was to try to raise the standards of competency and ethical practice. The agreement to adopt and abide by a code of ethics and standards of business practice is, in fact, the only requirement that we place on the boards as a condition of membership, except for payment of dues, showing up at meetings and maintaining certain basic classifications of membership, so that there is again a standardization. That is, so that salesmen as well as brokers can be a part of that organization. Otherwise you would have a distorted picture nationally.

When it gets into areas such as by-laws, we are not consulted nor do we always have knowledge of the individual by-laws.

Commission schedules could be changed and we would not again be consulted in advance nor would we necessarily be advised ultimately. Every few years we have out of curiosity, more than anything else, tried to collect what is the prevailing rate by real estate boards, and we have not always been successful in getting a total picture there because they don't think it is any of our business and it really does not have any bearing on our operations.

The commission rate, in fact, at one time in Vancouver used to vary between what occurred in the West End and what occurred in North Vancouver, although it was the same board. You can read all sorts of things into that, but the fact is that within the same board there were different commission rates for the different areas. This was so because they happened to be the prevailing rates for one reason or another.

The Chairman: Actually, under the Combines Investigation Act and under this bill there would not appear to be anything you could call a conspiracy that is beneficial or an agreement to fix prices that is beneficial. So when you say, with respect to the man who has to pay the commission, that the charge for the service rendered is reasonable, it would not appear to be a defence at all. It might be in mitigation of the fine or other penalty.

Mr. Jackson: He does not have to pay the commission. He does not have to engage the services of the real estate broker in the first place. That is entirely optional. If he decides to engage the services of a real estate salesman or a real estate broker, then he will know what the cost of that service will be, as things are at the moment. Everything could be subject to negotiation, or argument, at some later point, but then the public would never know.

The Chairman: Oh, yes, but the answer to that might be that, when you go to an industrial concern or a merchandising firm, you don't have to go there; you might go somewhere else. But the one you go to may be in a group of firms that have agreed on a common price. So to say that you do not have to go there does not seem to be a complete answer. I am trying to find out if there is some statutory basis which gives you some authority or whether there is any supervision by the provincial authority.

Mr. Jackson: I think the simple answer is that there is no statutory basis.

Mr. Fish: I have just one or two points to make, Mr. Chairman. I would like to point out that it is our legal counsel's opinion that under section 31(4)(1) under exclusive dealings, we feel that this definition could encompass an exclusive listing agreement for the sale of real property, and we think that there should be an amendment to that section so that it would not include an exclusive agreement for the sale or lease or rental of real property.

The Chairman: As I understand your method of dealing, there are a great number of real estate agents in a community. You can pick whichever one you want to deal with, but if you want him to take on and perform that service you have to make a contract and give him the exclusive right for a period of time.

Mr. Fish: That is correct.

The Chairman: The exclusive right means that if the owner goes out and sells the property himself during that time he still has to pay the commission. Isn't that right?

Mr. Fish: Yes, except that it would appear that that section, in the way it is drafted, is broad enough that it would include that type of contract between an agent and the owner of the property under that exclusive dealing section, 31(4)(1), and I do not think it is the intention that

that type of exclusive listing should be caught. We would like to see, for clarification purposes, that it be excluded.

The Chairman: I understand that and we have made a note of it, but that is only one of your points. The main point would appear to be your apparently standard basis of charge for your services and how you establish that, and whether that could be said to be an agreement to maintain prices, or whatever there may be under Part V.

Mr. Fish: There are other things involved. For instance, there is the operation of a real estate board itself, where we have ethics arbitration procedures, education requirements for membership, and where the MLS system is available to members of the real estate board only.

It is our opinion that the act is broad enough that a lot of these activities could be caught under the criminal section.

The Chairman: We will have a good look at that. Those are two points. Is there a third?

Mr. Fish: The only other point that I should like to make is with respect to misleading advertising. On page 15 there are the words "sales above advertised price". We feel that in the real estate business it is possible to list a property today for $40,000 and advertise it tomorrow for $40,000, but then, two on three days later, the owner may wish to increase that price to $42,000. It has also occurred on numerous occasions that someone would offer more than the list price for a property. For these reasons it is not always possible for us to act within that advertised price.

The Chairman: You are acting as an agent and not as the vendor.

Mr. Fish: That is right.

The Chairman: And is there any further comment?

Mr. Onyschuk: In summation, Mr. Chairman, the real concern of the association and its membership is that the act, because it brings in services in a holus-bolus fashion, does not specifically look at any one particular service industry to determine what will be the effect of the act on that industry. Offences in relation to trade as set out in sections 32 to 38 are broad, and any attempt at restricting competition, as those words are used, or at trying to or actually restricting the entry of a person into a market, or at trying to in any way restrict the competitive behaviour of that person in the market, is illegal.

There are two ways of looking at it, as is obvious. There is the beneficial point of view, which is the way the professions have developed, and I mean the standard professions which are accepted today. However, those professions and the standards which they have developed are affected in the competitive behaviour of the people within the particular professions. To the extent that the Law Society can restrict entry into that market of the number of lawyers and that they are governed by provincial enactment, that presumably would be legal and not covered by the bill. To the extent that that same activity is not legitimized in the real estate industry by any provincial enactment, that would be a criminal offence.

The Chairman: What do you regard as being the effect of a licensing requirement?

Mr. Onyschuk: The licensing requirement in itself would be some defence. However, to the extent that there are ethical requirements established, or a higher standard of education than in certain provinces, where there are fairly low standards of education, that would be illegal. Certainly to have any sort of a code of ethics applied is not a licensing requirement in any province, and if the board applies that to people entering, or seeking to enter, the profession, that would be a restraint of trade under the section. Because this industry is not covered in all of the areas that the professions are covered in, there are areas where we are not merely greatly concerned, but, where there would be actual contraventIons of the criminal sections in the act unless some sort of exemption is given. If it is for a regulated industry and a provincial jurisdiction, or an industry which seeks to regulate itself, and has some body supervising it, that would be fine; but at the moment there are not these provisions for it.

One of the fundamental areas in addition to this, Mr. Chairman, that the industry is very concerned about, is the Multiple Listing Service. That service, in order to operate, must operate on fixed, established commissions. It must operate under certain given rules and regulations. It must operate with certain commission splits and with certain rules as to how a person shall work within that system. We believe that that system is in the best interests of the public; but the question of the best interests of the public is something that presumably would have to be litigated, and it depends on how a person looks at it, and whether he looks at the system with a jaundiced eye, or with a beneficial eye.

The Chairman: But there may not be scope in this bill for you to litigate that issue.

Mr. Onyschuk: That is right. As the bill is drafted at the moment, there is no defence of doing this in the public interest. That is not a defence. So long as there is a conspiracy, combination or agreement as to certain things, it is illegal. The defence of public interest is not a defence under the bill.

The Chairman: Is there anything else?

Mr. Magee: I have just one thing, Mr. Chairman, and then we will thank you for hearing us.

It is interesting to note that under this multiple listing system, in 1963, there were 39,000 transactions. In 1973 that volume had grown to 107,000 sales out of 195,000 listings, which is better than a two-thirds record. The total volume of transactions was $3.4 billion worth of sales, and over 400,000 Canadian citizens took part in the multiple listing system, so it is an accepted way of marketing, and a fair way, for the consumer.

The Chairman: There are applications of the multiple listing system that are very much in the interest of the person who is seeking to dispose of property.

Mr. Magee: Yes. I think it is only one very small frog in a very big pond, but we take the same attitude as the Canadian Chamber of Commerce, namely, that we are trying to act responsibly in the public interest, and we certainly object to having certain government agencies looking over our shoulder.

The Chairman: It is enough that you have the income tax people in there.

Mr. Magee: Well, they are there as well, of course.

The Chairman: Any other points?

Mr. Magee: No. Thank you very much, Mr. Chairman.

The Chairman: Due to external events over which this committee has no control, it is not possible at this time to indicate when we will meet again, so we will simply adjourn sine die.

MR. E. RUSSELL HOPKINS, LAW CLERK AND PARLIAMENTARY COUNCIL: At the call of the Chair.

The Chairman: All right. At the call of the Chair.

The committee adjourned.

Published under authority of the Senate by the Queen's Printer for Canada

Available from Information Canada, Ottawa, Canada.

Second Session—Twenty-Ninth Parliament

1974

THE SENATE OF CANADA

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

INDEX

OF PROCEEDINGS

(Issues Nos. 1 to 6 inclusive)

27715—1

Prepared

by the

Reference Branch,

LIBRARY OF PARLIAMENT.

INDEX

Witnesses

—Becket, R. W., Q.C., Member, Corporate Affairs Committee, Canadian Chamber of Commerce

—Booth, Ronald F., Member, Corporate Affairs Committee, Canadian Chamber of Commerce

—Bruce, D. I. W., Q. C., Legislation Committee, Canadian Manufacturers's Association

—Chrétien, Hon. Jean, Minister of Indian Affairs and Northern Development

—Couillard, Georges H., Vice-President, Canadian Real Estate Association

—Evans, H. D., Export and Import Permits Division, Industry, Trade and Commerce Dept.

—Fish, Albert, Immediate Past President, Canadian Real Estate Association; Chairman, Competition Policy Committee

—Hemens, Harry G., Q.C., Member, Legislation Committee, Canadian Manufacturers' Association

—Jackson, J. T. Blair, Executive Vice-President, Canadian Real Estate Association

—Joplin, A. F., Chairman, Corporate Affairs Committee, Canadian Chamber of Commerce

—McKennirey, J. J., Director General, Office of Special Import Policy, Industry, Trade and Commerce Dept.

—McPherson, B. R., Member, Executive Council, Canadian Manufacturers' Association

—Magee, Brian R. B., President, Canadian Real Estate Association

—Monk, Richard C., Assistant Director, Government Finance—Loans, Investments and Guarantees, Finance Dept.

—Nicol, J. I., Director General, Parks Canada, Indian and Northern Affairs Dept.

—Onyschuk, B. S., Legal Counsel, Canadian Real Estate Association

—Passy, F. C., Chief, Guaranteed Loans Administration, Government Finance—Loans, Investments and Guarantees, Finance Dept.

—Roussin, B. F., Co-Chairman Committee on Intellectual and Industrial Property, Canadian Chamber of Commerce

—Snelgrove, R., Member, Legislation Committee, Canadian Manufacturers' Association

For pagination *see* Index by alphabetical order

Published under authority of the Senate by the Queen's Printer for Canada

Available from Information Canada, Ottawa, Canada