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Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable E. W. URQUHART, *Acting Chairman*

No. 1

Complete Proceedings on Bill S-21,
intituled:
"An Act to amend the Criminal Code"

WEDNESDAY, MARCH 11th, 1970

WITNESS:
Mr. W. J. Trainor, Criminal Law Section, Department of Justice.

Complete Proceedings on Bill S-22,
"An Act to incorporate National Farmers Union"

WITNESSES:
Mr. Aubrey E. Golden, Counsel; Mr. Roy R. Atkinson, President; Mr. William Langdon, Director; Mr. Douglas L. Yonge, staff member; Mr. John A. Hinds, Assistant Chief Clerk of Committees, Senate.

REPORTS OF THE COMMITTEE

21778—1

THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	*Flynn	McGrand
Aseltine	Gouin	Méthot
Belisle	Grosart	Petten
Burchill	Haig	Phillips (*Rigaud*)
Choquette	Hayden	Prowse
Connolly (*Ottawa West*)	Hollett	Roebuck
Cook	Lang	Smith
Croll	Langlois	Urquhart
Eudes	MacDonald (*Cape Breton*)	Walker
Everett	*Martin	White
Fergusson		Willis

*Ex officio member

(Quorum 7)

ORDERS OF REFERENCE

Extract from the Minutes of Proceedings of the Senate of March 4th, 1970.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Macdonald (*Cape Breton*), seconded by the Honourable Senator Blois, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code".

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 Macdonald (*Cape Breton*) moved, seconded by the Honourable Senator Blois, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

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

Extract from the Minutes of Proceedings of the Senate of Tuesday, March 10, 1970.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator McDonald, seconded by the Honourable Senator Rattenbury, for the second reading of the Bill S-22, intituled: "An Act to incorporate National Farmers Union".

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 McDonald moved, seconded by the Honourable Senator Urquhart, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

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

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Urquhart:

That Rule 95 be suspended with respect to the Bill S-22, intituled "An Act to incorporate National Farmers Union".

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

ROBERT FORTIER,
Clerk of the Senate.

21778—1½

MINUTES OF PROCEEDINGS

WEDNESDAY, March 11, 1970.

Pursuant to adjournment and notice the Standing Committee on Legal and Constitutional Affairs met this day at 10.00 a.m. to consider:

Bill S-21: "An Act to amend the Criminal Code".

Present: The Honourable Senators: Argue, Aseltine, Bélisle, Flynn, Grosart, Haig, Hollett, Macdonald (*Cape Breton*), and Urquhart. (9)

Present, but not member of the Committee: The Honourable Senator McDonald (*Moosomin*).

In the absence of the Chairman and on Motion of the Honourable Senator Macdonald (*Cape Breton*), the Honourable Senator Urquhart was elected acting chairman.

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

It was agreed that 800 copies in English and 300 copies in French of the Committee proceedings be printed.

The following witness was heard:

Mr. W. J. Trainor, Criminal Law Section, Department of Justice.

After discussion and upon motion, it was Resolved to report the said Bill without amendment.

At 10.15 a.m. the committee proceeded to the consideration of Bill S-22: "An Act to incorporate National Farmers Union".

The following witnesses were heard:

Mr. Aubrey E. Golden, counsel;
Mr. Roy A. Atkinson, President;
Mr. William Langdon, Director;
Mr. Douglas L. Yonge, staff member;
Mr. John A. Hinds, Assistant Chief Clerk of Committees, Senate.

After discussion the Honourable Senator Grosart moved that the Bill be amended as follows:—

Clause 6, line 3: delete "it deems" and substitute "are".

The question being put, the committee divided as follows:—

Yeas 3 Nays 3

The motion was declared passed in the negative.

On motion of the Honourable Senator Hollett, it was Resolved to report the said Bill without amendment.

At 11.45 a.m. the committee adjourned to the call of the Chairman.

ATTEST:

Gérard Lemire,
Clerk of the Committee.

REPORTS OF THE COMMITTEE

WEDNESDAY, March 11, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, intituled: "An Act to amend the Criminal Code", has in obedience to the order of reference of March 4, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

E. W. URQUHART,
Acting Chairman.

WEDNESDAY, March 11, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-22, intituled: "An Act to incorporate National Farmers Union", has in obedience to the order of reference of March 10, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

E. W. URQUHART,
Acting Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
EVIDENCE

Ottawa, Wednesday, March 11, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which were referred Bill S-21, to amend the Criminal Code, and Bill S-22, to incorporate National Farmers Union, met this day at 10 a.m. to give consideration to the bills.

Senator Earl Urquhart (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, thank you for the honour of nominating and electing me as the acting chairman for this meeting of the Standing Senate Committee on Legal and Constitutional Affairs. We have two bills before us today, the first being Bill S-21, an act to amend the Criminal Code. Following the disposition of that bill we will proceed to Bill S-22, an act to incorporate National Farmers Union.

> Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 800 copies in English and 300 copies in French be printed.

The Acting Chairman: Honourable senators, Mr. W. J. Trainor of the Department of Justice is the only witness to appear on Bill S-21. I understand that he is mainly in the capacity of an observer, not to object to the bill but to give us any views we might wish to discuss. If honourable senators desire to ask Mr. Trainor questions we will proceed in that manner.

Senator Flynn: We would like his views.

The Acting Chairman: We also have with us the sponsor of the bill, Senator John M. Macdonald with us, so we have the best legal talent in both provinces, Ontario and Nova Scotia.

Mr. W. J. Trainor, Criminal Law Section, Department of Justice: My position with respect to this bill is simply, as has been stated by your chairman, that I am here this morning as an observer only. I am not here officially in a position to express any views of the department with respect to this bill.

Senator Flynn: Are you suggesting that the department has no views on this at all?

Mr. Trainor: We are not taking a position at the moment.

Senator Flynn: You may have views but you dare not express them yet?

Mr. Trainor: That is correct.

The Acting Chairman: So the department is not objecting to the bill?

Mr. Trainor: My position must be, as I have said, one of neutrality rather than taking a positive position of not objecting.

Senator Flynn: Have we any other witnesses, Mr. Chairman, who are ready to express views on the bill?

The Acting Chairman: We have no other witnesses.

Senator Flynn: I then move that we report the bill.

The Acting Chairman: It is moved by Senator Flynn that the bill be reported without amendment.

Hon. Senators: Agreed.

The Acting Chairman: Honourable senators, we will direct our attention now to Bill S-22, an act to incorporate National Farmers Union. We have four witnesses this morning: Mr. Golden, the Counsel for the National Farmers Union; Mr. Atkinson, the President of the National Farmers Union; Mr. Langdon, a director; and Mr. Young, a staff member of the National Farmers Union.

Senator Flynn: Are there officials from any department?

The Acting Chairman: There are no officials from the department.

Senator Flynn: No expressions of opinion.

Mr. E. Russell Hopkins (Law Clerk and Parliamentary Counsel): I represent no department, but I have a letter from the

Department of Consumer and Corporate Affairs, to which all such matters are referred. As you know, we no longer normally incorporate private corporations. That is done by the Corporations Branch, but in certain cases, of which this is one, we are informed by the Corporations Branch that they cannot incorporate. I have a letter here saying:

> I wish to confirm Mr. Lesage's advice...

Senator Grosart: To whom is the letter addressed?

The Law Clerk: It is addressed to me. I do this in the ordinary course, under direction.

> I wish to confirm Mr. Lesage's advice to Mr. Aubrey Golden, counsel for the incorporators, to the effect the incorporation could not be carried out under the Canada Corporations Act...

If it is to be done at all there must be a private bill.

The Acting Chairman: Is this the only way we can proceed?

The Law Clerk: Yes.

Senator Grosart: Do you know why?

The Law Clerk: Yes, it had to do with the amalgamation provisions. They refer to section 144 of the Canada Corporations Act. Apparently they have been advised by the Department of Justice that when it comes to the amalgamation of companies, some federal and some provincial, they are not competent under the terms of the Canada Corporations Act to so incorporate.

Senator Grosart: Do you have a copy of the act with you?

The Law Clerk: No, I did not bring it.

Senator Aseltine: This is the only way it can be done.

Senator Flynn: Because of clause 2, which says:

> 2. (1) The Manitoba Farmers Union and the Saskatchewan Farmers Union, hereinafter referred to as the "predecessor corporations", are hereby merged and amalgamated with the Union and shall continue hereafter as one and the same corporate entity as and with the name of the Union.

The Law Clerk: That is right and I was satisfied, together with the Corporations Branch, that if this is to be done it will have to be done by private act of Parliament.

Senator Flynn: Have you any comments on this bill?

The Law Clerk: I am satisfied with the bill.

Senator Flynn: With the form?

The Law Clerk: Yes, and I have so signified to the Chairman.

Senator Flynn: If no one has further comments I would like to report the bill.

Senator Grosart: I would like to come back to questions.

The Acting Chairman: There is a memorandum to Senator Phillips, the Acting Chairman, who is away. It says:

> Bill S-22, an act to incorporate National Farmers Union. In my opinion this bill is in proper legal form.

Signed "E. Russell Hopkins, Law Clerk and Parliamentary Counsel."

The Law Clerk: I suggest we call on Mr. Golden.

The Acting Chairman: Honourable senators, is it your wish to hear from Mr. Golden, counsel for the National Farmers Union?

Mr. Aubrey E. Golden, Counsel, National Farmers Union: I have a copy of the act.

Senator Grosart: I would like to have section 144 read into the record.

Mr. Golden: I can read section 144 into the record, and I shall. That is one of the two problems with which Mr. Lesage and I dealt. The other was with regard to the jurisdiction respecting the provincial statutory corporations.

Senator Grosart: I am only concerned with the provisions of the act which make it impossible for this amalgamation to be handled by letters patent.

Mr. Golden: The section with reference to amalgamation is a separate one. Section 144 reads:

> 144. (1) The Secretary of State may by letters patent under his seal of office grant a charter to any number of persons, not being fewer than three, who apply therefor, constituting the applicants and

any other persons who thereafter become members of the corporation thereby created, a body corporate and politic, without share capital, for the purpose of carrying on in more than one province of Canada without pecuniary gain to its members, objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like objects.

(2) Nothing in this Part shall be construed to authorize the corporation to issue any note payable to the bearer thereof or any promissory note intended to be circulated as money or as the note of a bank, or to engage in the business of banking or insurance.

That is the end of the section.

The Law Clerk: Section 128A is the amalgamation section. It was also mentioned by the Corporations Branch.

Mr. Golden: That is a long section, running some three pages.

Senator Flynn: Is the idea that we cannot proceed by letters patent, due to the fact that the incorporation is allowed only when persons and not existing corporations? Would that be the argument?

Mr. Golden: No sir. The real problem arises from the fact that we are amalgamating corporations as well as incorporating individuals. The corporations that are being amalgamated are created by statutes of Manitoba and Saskatchewan. The amalgamation provisions of the present federal act only apply to corporations under its jurisdiction. In this case we have asked that the provincial statutory corporations be amalgamated. The bill is conditional upon the assent of the two legislatures involved. The legislature of Manitoba sits today and we understand the bill will proceed rapidly. The bill is already in progress in Saskatchewan.

Senator Hollett: Have we a record of the provinces giving consent?

Mr. Golden: The bill does not come into force until the consent of the respective provinces is given. As a matter of information, that consent has been petitioned for in both cases. We discussed it with the governments involved before proceeding.

Senator Hollett: Can we give our consent without knowing the provinces have given theirs? Should we act on it at all until they have given their consent?

Senator Haig: To what do they give consent?

The Acting Chairman: It is conditional upon their consent.

The Law Clerk: May I add, to complete the jurisprudence, that we have an important precedent for this type of amalgamation in that of the Canada Permanent and the Toronto General Trust. Canada Permanent was a federal company and Toronto General Trust an Ontario corporation. We amalgamated them by an act of Parliament on the assumption that both jurisdictions gave authority to do so. That is the juridical basis of this legislation.

Senator Hollett: But you did that on the assumption; are we going to do the same thing now?

The Acting Chairman: It is conditional upon the approval of the two legislatures.

Senator Flynn: Where do we find that condition in the bill?

Mr. Golden: Clause 2, subclause (2). There is also machinery contained in the legislation for the inclusion of further corporations when their respective legislatures consent.

Senator Haig: In other words, the provinces of Manitoba and Saskatchewan are going to consent to the operation of this bill?

Senator Aseltine: If they do it becomes law.

Senator Haig: We pass the act first and they consent.

The Acting Chairman: It is conditional upon the two legislatures approving it.

Mr. Golden: Their legislation, I might say, is not conditional but it is predicated upon this act coming into force.

Senator Grosart: Have you any indication from anywhere that the legislatures will comply?

Mr. Golden: Nothing that would bind the legislatures, but the departments involved have indicated to us that they have consulted with the Government and it would be in order for us to proceed with the legislation. We had to petition it because it was private legislation. The original acts were private legislation also. In fact, we were held up a

little by that. We did not want to petition cold, as it were. We requested their opinion and consent first and when we received it, went ahead. We did not get it formally, but they said "please present the bill."

Senator Grosart: So there are no objections from the governments of these provinces?

Mr. Golden: No, none at all.

Senator Grosart: Or the departments?

Mr. Golden: No. If anything, they seemed to be enthusiastic about it.

Senator Grosart: What is the position of the predecessor corporations? Have they themselves voted for this amalgamation?

Mr. Golden: Yes. Each of the predecessor corporations, plus some other organizations which are unincorporated, have agreed to unite to form the National Farmers Union. They have signed agreements which are more or less operational, agreeing to give up their facilities in favour of the national organization and take their members into it. All this has been done, without benefit of counsel, and we are now attempting to put into legal effect something that has been de facto since last August.

Senator Grosart: You say "de facto". Have the members of the corporation voted in favour of this?

Mr. Golden: Yes. There have been conventions in each of the provinces.

Senator Grosart: Could you give detailed information? The reason I ask is that we are setting aside a very important rule, number 95, which requires that bills such as this shall rest for a week, so that anybody who has any objection will have an opportunity. I am not saying this is the position, but I am suggesting, Mr. Chairman, that we should be thoroughly satisfied here that we are not curtailing the rights of anybody who might want to object, by setting aside our own rule. It is a good rule and its purpose is to give everybody an opportunity to know that this matter is coming before this committee at this time and may be reported without the normal lapse of time. I would therefore like to be sure that we have detailed information on each one of these.

Mr. Golden: Yes. I would be pleased to do so.

Senator Aseltine: We have representation here.

Senator Grosart: I would like to have in the record the name of each organization and, if possible, the date on which members endorsed this amalgamation.

Mr. Golden: Mr. Atkinson is here now. He was president of the Saskatchewan Farmers' Union and is president of the new organization. May I ask him to join me. I am sure he would be helpful. It is a question of precise dates?

Senator Grosart: This does not matter. I am perfectly prepared to accept the statement by the witness, naming each one of the predecessor organizations that have assented to this.

Mr. Roy R. Atkinson, President, National Farmers Union: Mr. Chairman, the Farmers Union of British Columbia, by resolution of their annual meeting in 1968, moved to agree to this amalgamation.

The Farmers of Saskatchewan Union, at the convention of December 1968, agreed to this amalgamation.

Also, the Manitoba Farmers Union and the Ontario Farmers Union agreed by resolution at their last convention, September 1969.

The Acting Chairman: What is the date of the Manitoba one?

Mr. Atkinson: December 1968, the same as the Saskatchewan one.

Senator Argue: Some did not agree, but are not mentioned here?

Mr. Atkinson: That is right, but we are not dealing with those corporate bodies.

Senator Hollett: How could you call it a national union, then?

Mr. Atkinson: Because we have membership of it in every province.

Senator Hollett: You have? When you say "we", whom do you mean?

Mr. Atkinson: The National Farmers Union.

Senator Hollett: Why was it called The National Farmers Union?

Mr. Atkinson: Originally The National Union was a federation of provincial farmers unions. Then there was an amendment to the national constitution, which provided for direct membership to the national union.

Those members came out of the Maritime Provinces, which gave us the coverage I described earlier. We discovered from an operational point of view that it was much more advantageous to farmers to amalgamate the various provincial bodies into a national organizations and take membership direct. Hence the decision.

Senator Hollett: In other words, we could look forward to a strike of all the farmers across Canada.

Mr. Atkinson: I hope not.

Senator Hollett: We had better get our own gardens ready.

Senator Argue: What is the position of the Farmers Union of Alberta?

Mr. Atkinson: That union, at a meeting in December, moved to amalgamate in Alberta as a provincial organization, in other words, moved to consolidate what they called the unified farmer organizations in Alberta.

Senator Argue: They are part of this incorporation?

Mr. Atkinson: No, they are not. However, I would want to say that we are chartering locals in Alberta just as fast as we can accommodate them. I myself attended the chartering of five locals two weeks ago, and I have about thirty more in the next four weeks.

Senator Argue: And they are affiliated to the national organization the same as other locals?

Mr. Atkinson: That is correct.

Senator Grosart: Was there any dissent at any of those meetings?

Mr. Atkinson: Not very much, I would think. As a matter of fact, I cannot recall any really strong opposition at all from any of them.

Senator Argue: Except in Alberta. It was turned down?

Mr. Atkinson: In Alberta that was the position.

Senator Grosart: Let the witness answer. Did any of these predecessor organizations actually vote against?

Mr. Atkinson: None of the ones named in the bill.

Senator Grosart: None of those described as predecessor corporations?

Mr. Atkinson: All of those, by resolution, by delegate bodies in annual convention, voted to amalgamate.

Mr. Golden: As I understood the question, it was, did any member of the predecessor provincial corporations vote against the resolution?

Senator Grosart: That is right.

Mr. Golden: I imagine there must have been some.

Mr. Atkinson: In Saskatchewan, none voted in opposition. As I recall, in British Columbia, none. Mr. Langdon may be able to refresh my memory on Ontario. Was there any opposition in Ontario?

Mr. William Langdon (Director, National Farmers Union): I do not think so. There was a discussion as to date. There was not anything that was serious.

Mr. Atkinson: You attended, did you?

Mr. Langdon: I attended at Manitoba.

Mr. Atkinson: And what was the position there?

Mr. Langdon: I do not recall the exact vote. Some delegates attended the Manitoba convention in 1968 who I felt would not approve, because of the type of questions coming forward. When the vote came, I would not want to say if any voted against or did not vote against. If there was any voting against, it was extremely few.

Senator Grosart: I realize that one of our functions here is to protect any such minority. What notice has been given of this?

Mr. Atkinson: To the members?

Senator Grosart: Yes.

Mr. Atkinson: They have all been notified, either by direct notice or written, individually, to our membership, or to the press, through our own paper, that this change is taking place. This information is flowing to them since those conventions, the beginning of 1968.

Senator Grosart: Would you say that every member of predecessor organizations have been notified in writing?

Mr. Atkinson: I would say so, yes, but I would say in writing or through the press, through our own publication.

Senator Grosart: What about the formal notice? Has this been advertised?

Mr. Golden: Yes, on the advice of the legislative counsel, advertising has been taken in the *Gazette*. I realize that the *Gazette* does not probably go to every member, but it was thought that, because of the national character of the organization there was no particular newspaper appropriate, as opposed to any other, and the advertisement did appear in the *Canada Gazette*.

In that connection, I should point out that there might be some confusion as to the difference between amalgamation—the amalgamation which the Senate is being asked to deal with today, and what I call *de facto* amalgamation which took place as a result of these conventions over a year ago.

That getting together, the formation of a national farmers union, the transition between the federation and a direct membership federation, was widely known. It was widely debated and discussed. It was not exactly the object of controversy. The wording was not the object of controversy. But it was done in a highly publicized kind of atmosphere, including this convention and the press reports coming out of this. Prior to that, the local unions which maintained them and in which they participated very actively—it almost took on the aspect of an organizational campaign. If I may be permitted—not being a member but looking at it from the outside—it was a fairly active kind of thing, the campaign for it. That is, on the question of notice. So that the question of notice really relates more to what happened earlier when it was determined to form a national direct-membership organization. I might say that much of what is happening now is more lawyers' business. I was consulted with a view to obtaining the legal perfection what had already been done on the ground, as it were, and this required going back on what had been done previously and also required this legislation in the opinion of the department.

Senator Grosart: But the point is whether any minority dissenting rights might be jeopardized. I am not interested in the *de facto* organization. I am interested in what this Senate does or may do to the rights of somebody who might dissent, because we are in a position where somebody might say "I wanted to belong to a provincial organization but not of necessity to a national organization." Do not our rules require notice by advertisement in certain newspapers?

The Law Clerk: That was a matter for the committee's branch and I always leave it to the committee's branch and they in turn consider each case on its merits. Of course they have specified rules which they follow.

Senator Grosart: What are our rules in this case and have they been followed? I do not want to give the impression I am critical or in any way opposed to this, but I would like to know what the situation is.

The Law Clerk: Perhaps it might be desirable to have Mr. Hinds come in.

Senator Grosart: We should have it on the record that notice has been given as required by the Rules of the Senate. I say this because I would not like to think we were setting aside a rule that was for the protection of somebody.

The Acting Chairman: In the meantime, Mr. Hopkins, have any objections been received?

The Law Clerk: No objections have been received.

Senator Grosart: I appreciate that, but in my view in this kind of situation we should have evidence from the Committees Branch that the requirements so far as notice is concerned have been met.

Senator McDonald: Mr. Atkinson, you mentioned that the membership had been notified by letter or through the newspaper. Do you now have a National Farmers Union newspaper?

Mr. Atkinson: Yes.

Senator McDonald: Then so far as your mailing list is concerned, have you members who are also members of provincial organizations?

Mr. Atkinson: Yes.

Senator McDonald: Does that include all the ex-members of, say, the Saskatchewan Farmers Union?

Mr. Atkinson: Every member who has taken a membership directly in the National Farmers Union or who held a membership in a provincial farmers union and that means every member of the amalgamating groups. I

should also report to you that this question was dealt with by constitutional amendment at the conventions, and our procedure is that all constitutional amendments have to be in the hands of the locals 30 days before the convention, at which times these matters are discussed within the locals. This again is to protect the interests of the members so that they are aware of the changes taking place in the organization and if they are opposed to changes they have an opportunity to express their opinion.

Mr. Golden: I am also on that mailing list and I notice that there was adequate publicity given to this bill and the fact that it was being proceeded with.

Senator McDonald: But the fact that you picked up the mailing lists of the provincial organizations and send the paper to them would mean that every member of the provincial union and every member of the national union would have received this.

The Acting Chairman: Mr. Hinds is here now.

Mr. Grosart: Mr. Hinds, I was asking for verification that the notice required by our rules had been given.

Mr. J. Hinds, Assistant Chief, Committees Branch: Yes, the rule requires advertising once a week for four consecutive weeks in the *Canada Gazette*. That was done starting on December 13, 1969, and continuing for three consecutive weeks thereafter.

Senator Grosart: Why is this situation different from that which requires advertising in certain daily newspapers?

Mr. Hinds: It depends on the type of organization. For an organization of this kind, the *Canada Gazette* only is required.

Senator Grosart: What is the distinction in this case?

Mr. Hinds: Rule 86 says:

> (1) Every application to Parliament for a private bill shall be advertised by notice published in the *Canada Gazette*. Such notice shall clearly and distinctly state the nature and objects of the application, and shall be signed by or on behalf of the applicants, with the address of the party signing the same; and when the application is for an act of incorporation the name of the proposed company shall be stated in the notice.
>
> (2) In addition to the notice in the *Canada Gazette* aforesaid, a similar notice shall be given in a leading news publication with substantial circulation in the area concerned and in the official gazette of the province concerned,
>
> (a) where the application is for an act
>
> (i) to incorporate a company or to amend an act respecting a company whose objects relate to transportation and communications generally, including airlines, pipelines, telecommunications, railways, or canals, or whose objects relate to the construction of any works;
>
> (ii) to obtain any exclusive rights or privileges; or
>
> (iii) to extend the powers of a company or to increase or reduce the capital stock, or to alter bonding or other borrowing powers, or to make any amendments which would in any way affect the rights or interests of the shareholders or bondholders or creditors of the company;

This application is not seeking any exclusive rights or privileges and therefore the *Canada Gazette* would appear to be sufficient.

Senator Grosart: Probably the distinction is also that there are no shareholders or bondholders.

The Law Clerk: And no construction. They have in mind nothing that is for the advantage of Canada which might extend the jurisdiction of the provinces.

Senator Grosart: Is there any transfer of funds involved in this?

Mr. Atkinson: There will be a transfer of assets from provincial unions to the national union and also there will be the assuming of liabilities.

Senator Grosart: How much will be involved, roughly?

Mr. Golden: It does not look like a plus figure at the moment.

Mr. Atkinson: I would think somewhere in the order of $250,000.

Senator Grosart: You are speaking now of your predecessor organization.

The Law Clerk: It comes under subsection (4) of section 2.

Senator Grosart: I was asking about the total amount.

Senator Hollett: Is the word "farmer" defined anywhere in this?

Mr. Golden: No, it is not.

Senator Hollett: Of course I know what a farmer is, but I know a number of people who call themselves farmers and who have never turned a sod in their lives.

Mr. Golden: The Income Tax Act defines that quite clearly.

Senator Belisle: In this Federation, every provincial organization will be able to join?

The Law Clerk: There is an enabling provision to that effect which is section 2, subsection (3).

Senator Grosart: How will this organization relate to existing national farmers' organizations?

Mr. Atkinson: It will be separate and apart. At least, it will be an independent corporate entitity, if you will.

Senator Grosart: How will it be distinguished from the Canadian Federation of Agriculture?

Mr. Atkinson: The Canadian Federation of Agriculture is a federation of organizations, whereas this organization will be an organization of farmers. In other words, it will be a single organization whereas the Federation represents many organizations.

Senator Grosart: That is why you call it a union?

Mr. Atkinson: Yes. The old national federation was a federation of unions and the experience we had in that field led us to the conclusion that it was important to give farmers a forum through which they could work which was national in nature.

Senator Grosart: How will the will of the members be expressed in relation to executive action?

Mr. Atkinson: The process is as follows: members will meet and make decisions through their locals which will be referred to regional conferences or national conventions in which the members' will will be resolved. The decisions which come out of those conventions will then be the guidelines through which the organization will operate. These will be the parameters of the policy of the board of directors.

Senator Grosart: Would this not be the same as the Federation of Agriculture?

Mr. Atkinson: It would be somewhat different. The Canadian Federation of Agriculture is divided into groups who make decisions at the organizational level.

Senator Grosart: But endorsed by their members in the same way as yours?

Mr. Atkinson: Endorsed by their members to the organizational plateau. Once they move past the organizational plateau it is a meeting of resolutions from the various organizations across the country. Then there is an organizational trade-off in terms of decisions made.

Senator Grosart: Is yours not the same? You say you have local regions.

Mr. Atkinson: It is different in this sense, that their process is through a delegation of delegates to various levels. Ours is direct from the farm community to the decision-making body, which is a national convention.

Mr. Golden: There is a basic structural difference. I am not very familiar with the actual underground workings of the two organizations, but the Canadian Federation of Agriculture is a body made up not only of actual farm organizations, but of other organizations in the farming field. It is a broader type of organization. When Mr. Atkinson referred to a trade-off he really meant different interests can appear at the Canadian Federation of Agriculture, whereas in the Farmers Union there would be no room, for instance, for elevator companies.

Senator McDonald: Is the Canadian Federation of Agriculture not a federation of wholesale and retail concerns and not of producers?

Mr. Atkinson: I would call it a conglomerate in which the wholesale and retail handling concerns and farmers meet and trade off policy decisions.

Senator Argue: Would you not consider that the Canadian Federation of Agriculture is an organization of business groups, albeit farmers' business groups, but wheat pool, co-op creameries, co-op implements, and so on? I may be wrong, but my impression at any rate is that it is an organization of farmers' business groups.

Mr. Atkinson: We term them agri-business groups. It is farm and business.

Senator Argue: It is not individual farmers in individual organizations.

Mr. Atkinson: I could best describe it by saying that farmers do not take a direct membership in the Canadian Federation of Agriculture, but in other organizations who first of all federate into federated bodies at the provincial level. Then the provincial super-body federates with the Canadian Federation of Agriculture. It is a much different process than that in which we are involved.

Senator Grosart: Would your members be members of the local and, only by virtue of their membership in the local, members of the union?

Mr. Golden: By virtue of the fact that they are members in the national they are members of the local. The local is the administrative organization at the community level through which farmers discuss mutual problems.

Senator Grosart: Where do they pay their fees?

Mr. Golden: To the national.

Senator Grosart: They send their money to Winnipeg?

Mr. Golden: That is correct.

Mr. Atkinson: The national pays back to the district a percentage of the national fee. Districts then make a determination—the district is made up of locals—they determine as to what amount is paid back to the local.

Senator Grosart: What is your anticipated annual revenue?

Mr. Atkinson: We have projected for the first year's operation a minimum budget of $750,000, with a maximum of about $1,200,000.

Senator Grosart: What would the membership fee be?

Mr. Atkinson: $25.

Senator Grosart: How many members do you anticipate in your first year?

Mr. Atkinson: I would suppose about 30,000. That is a minimum.

Senator Grosart: What percentage of the active farmers of Canada are in it?

Mr. Atkinson: This again becomes a question of definition, because the definition of "farmer" in Canada also includes people who live in the country and have a bit of a hobby in market farm produce, and there are some rural residents who have off-farm jobs.

Senator Hollett: Do you not think the definition should be in the bill?

The Law Clerk: No, senator. It is provided in the bill that the union may make regulations concerning qualifications of eligibility for membership or elected office. So they will make the provisions.

Senator Hollett: That is all right—as long as it has been mentioned.

Senator Grosart: That in itself is a very dangerous thing. Senator Hollett's point is a good one. This means that you can decide who is eligible—and that you yourself could be eligible for membership—which is not a good thing in an organization calling itself a national farmers union. It would be valuable to have a provision—and I recommend this to you for your by-laws—to indicate some free access of eligibility to your organization. It would be good public relations, if I might say so.

Mr. Golden: I may say that any definition in the bill would restrict it, because at the point it is at now, anyone, even those persons mentioned who have merely a garden in the back of the house, are technically eligible for membership of this organization. I would not think it is in Mr. Atkinson's objective to rule out such dues-paying members, any more than is absolutely necessary. There is an economic force at work there and it is a matter of organization. I do not know what kind of definition the farmers would put in. I am afraid of the income tax definition, it might be too restrictive.

Senator Grosart: It is a problem in any organization set up as a union to define the eligibility of persons, because there have been cases where this has shut out people, not only from membership in it but from jobs.

Mr. Golden: I may say this as an aside on this topic. We hit a problem because of my rather egotistical assumption that my French was good enough to do a translation of "National Farmers Union". I did that myself and came up with the word "fermière" instead of "cultivateur". And the word "fermière" implies a less established sort of farmer, more than the tenant farmer kind of indication. And we from the history of Canada think of "cultivateur", which indicates a farmer of some more means, with more established assets. That may be a definition by accident.

Senator Argue: I have a question on clause 4. It provides for the establishment of the head office in Winnipeg—which was no doubt a decision of the National Farmers Union. I am curious as to why Winnipeg was chosen. I am curious as to why Ottawa was not chosen as a spot for the head office of the National Farmers Union, since I take it that a good deal of the work of the union is in fact in keeping in touch with members of Parliament, including Senators, and with the federal Government, etc. When are you going to move to Ottawa?

Mr. Atkinson: Do you need a little company, Senator Argue?

Senator Argue: It is lonesome around here, with all these lawyers.

Mr. Atkinson: I suppose there were many reasons why the head office was in Winnipeg. It is sort of the centre of the country. There is access to an international airport. Communications are accessible. I suppose that is a major thing. It could well be that there is going to be a lot of commodity activity out of Winnipeg.

Senator Haig: It is a good centre to work in, too.

Senator Argue: This might have to do with policy and might not really be germane to the legal questions of this bill, but I would be interested as to whether or not you might be considering setting up some kind of office in the City of Ottawa, as I believe your procedessor organization had at once time in a very limited way. From my experience, it would be a very valuable thing.

Mr. Atkinson: I would think that is an obvious outgrowth of the organization, to have contact in Ottawa.

Senator Argue: I think that if you are going to have lobbying here, and these are lobbying situations in Ottawa, it would be pretty difficult to carry out an effective one from Winnipeg, or one as effective as you might carry on if some of the officers of the National Farmers Union were here on a fairly regular basis.

Mr. Atkinson: There was a feeling expressed by many of our people that it was probably just as well to sort of stay outside of Ottawa because when you get into Ottawa you get so close to the machinery that you have a different perspective on things than you have if you are sitting outside and looking in.

Senator Belisle: The decision on Winnipeg was not arrived at with any thought of future separatism?

Mr. Atkinson: No. As a matter of fact, Senator Grosart, if we were thinking in those terms, we probably would not be in an organization called the National Farmers Union.

Some hon. Senators: Hear, hear.

Senator Grosart: I would like to ask the witness if he would object to an amendment in clause 6. I suggest the deletion of the words "it deems" in line 3 and the substitution therefore of the word "are", so that instead of reading that the union may from time to time make such rules and regulations not contrary to law as it deems necessary to carry out its work, it would read that they may make such as "are necessary".

The reason I suggest this amendment is that at the moment I am trying to get the draftsmen of other bills giving certain powers to the Governor in Council, to make the same change.

We used to have the wording in acts that "the Governor in Council has the authority to make regulations necessary for the implementation of the provisions of this act." In recent years somebody changed this to read, "as the minister deems necessary," which takes the whole act, on the aspect of the regulations, out of the courts entirely. I do not think this Parliament should pass a bill saying that you may do anything that the executive thinks necessary. I think it should be "that are necessary," because if someone objects to what you are doing the reply can be made that it says "what is deemed necessary".

The Acting Chairman: It makes it mandatory.

Senator Grosart: It brings any action of the executive under the provisions of the act and not under the judgment of the executive.

Mr. Golden: Mr. Hopkins and I have worked out some of the wording, and I would want to consult with him about this. I have no objection to the principle of the wording. However, I would suggest that there is a growing body of administrative law that says in effect that there are areas of administrative discretion in an organization. This has mostly to do with administrative tribunals,

however, and this is not an administrative tribunal. If that were to be applied to this organization, there would have to be a change. As it now stands, if the organization were acting in bad faith or denying the legitimate interest of a substantial group of persons in an arbitrary way, they would be able to have it reviewed by the Courts. If the words are changed as you have suggested, then it would mean taking the administrative law and applying it to this body or the Board of Directors, which would mean it would be subject to review in the courts so far as every by-law was concerned on the issue as to whether or not it complied with the act.

Senator Grosart: And what is wrong with that?

Mr. Golden: There is nothing wrong with it, but the tendency in administrative law is to create an area of administrative competence.

Senator Grosart: And administrative irresponsibility is a very bad trend.

Mr. Golden: I only cite this because this appears to be Government policy—to create areas of administrative responsibility. Therefore, to change the language in this way would go against the general trend and could create endless litigation. The results would be not any different. If the courts were to determine that somebody had been arbitrarily dealt with under an abuse of that clause, they could still interfere, but if it was not an abuse and was simply a question of interpreting the statute, and with one issue being raised after the other, having regard to the multitude of by-laws, there is liable to be an endless review. I have had some very hard-nosed debates with people in both the federal and provincial governments about this tendency. I am acting for an organization that has this option facing it at the moment.

Senator Grosart: I cannot agree with you at all on this. You say you do not want to be faced with endless litigation, but surely the whole purpose of litigation is to protect rights that might otherwise be in jeopardy. To me that is an extraordinary statement to use—"endless litigation."

Mr. Golden: It is the standard language.

Senator Grosart: It is not standard at all. It is used here and in some of the newer acts, but there are many, many statutes that do not use this language. I speak strongly on this because I feel strongly about it. You could have a situation arising where a minister or the executive of any body could say "the act says we can do this if we deem it to be necessary, and this is in accordance with the provisions of the act." Surely a court should decide whether they are *intra vires* of their own act.

Senator Hollett: Why not say this: The union may, from time to time, make such by-laws, rules and regulations, not contrary to law, as may be necessary.

The Law Clerk: I would like to make this observation because it is my duty as I conceive it, to limit myself to a legal basis and not to go into the realms of policy, and in my view either form of wording would do the trick.

Senator Grosart: What trick?

The Law Clerk: Either wording would be legal.

Senator Grosart: It would be legal of course, but anything that is passed by Parliament is legal.

The Law Clerk: Yes, but this whole question will shortly be reviewed by the Senate, and probably by this committee if the motion concerning statutory instruments standing in the name of Mr. Martin carries. For a number of years now we have had very few private bills. This is the standard form for these private bills but it is a matter for the committee to say whether there is to be a change in that language, and, as I say, the whole subject will shortly be under a general review. However, whether we should make such a decision here and now is not for me to say.

Senator Grosart: I am going to move that clause 6(1) be amended and that the words "it deems" in line three be deleted and the word "are" substituted therefore. I realize that this is not the proper form of amendment, but if the chairman will take the revised clause 6(1) as read, then that is my motion.

I would urge this on all honourable senators. This is a good place to make a start. The fact that this whole question will come before the Senate and probably before this committee is not really relevant to my point, because that discussion will refer only to ministerial power and authority under orders in council. I cannot for one minute accept the proposition

that even if that is desirable in a public statute it is therefore desirable in a private bill.

I think the principle of accountability to the terms of the statute by the courts is essential. I cannot fully agree with Mr. Golden's contention, although I know what he is speaking of, that the courts have the authority to go beyond the wording of the statute. The executive could quite properly come into court and say, "The statute says that if we deem it necessary we have the power to do such and such a thing." The court might decide whether it is the right or wrong thing to do, but I suggest, the court would not say, "You don't have the power to do it." They might say, "You have exercised your power in a wrong way". What I am saying is that you should not have the power to go beyond what is necessary to implement the provisions of the statute.

Senator Hollett: Would not the words "not contrary to law" take care of the situation?

Senator Grosart: No, not at all. There must be some reason for its being there. It seems rather redundant to me, because I cannot see where any act of Parliament can give power to something that is contrary to law. I am concerned about something that might be quite legal under the terms of this act. Let us take an example. Let us assume you decided to raise your fees without consulting your members...

Mr. Atkinson: We cannot do it. Our by-laws outline the procedure under which these may be raised. It is a voluntary organization and therefore a member who chooses to do so can opt out.

Senator Grosart: That is a very poor answer. You are talking like a capitalist who says "If you don't want to buy my goods at the price I am asking, you don't have to buy them at all." The point I am making is that the individual may want to stay in to make sure that you stay within the law.

Mr. Atkinson: But he has the right to do that because in order to adjust the fees the membership must do so at an annual convention. That is a democratic decision that is made.

Senator Grosart: Well, I may have taken a bad example in that one, but obviously there are things that the executive might do, and they could say "We deem these things to be necessary" and if somebody at an annual general meeting were to say, "I do not think that that is necessary" then they could say, "I am sorry, but just read the act. It says 'we deem it necessary'", and that would be the end of it.

Mr. Golden: The problem really in the context of this legislation is considerably narrower than that. I realize your concern, and I am very deeply aware of it and I have been debating it for some time. In this case it has to do with the by-law-making power out of which flow the rules and regulations related to the by-laws. Now certain by-laws may be enacted for a specific purpose and the area of judicial concern creates a difference. The courts have said on many occasions, and here I am summarizing the language of many different decisions, that they do not want to sit as a court of appeal from every body who makes decisions and some of them have considerably more power than we find here. After all, you can resign from the National Farmers Union, but you cannot resign from a body such as the Commodities Board in Ontario. Many cases have come from these commodity boards where they have been given the power to determine what is in the best interests of the marketing of a particular commodity. If they decide it is in the best interests for marketing to send one of their members to Palm Beach, then that is an area that the court will not interfere with. If, however, they had done it in bad faith in denial of natural justice, a matter which deprives persons of the right to operate under the Constitution and to deal with their executive in the normal way, the courts will interfere. They do not want statutory power to be used in an arbitrary and unfair way, but to enter into the realm of policies of the organization.

It is not a manadatory corporation. The membership is not mandatory but falls in line with the area of private associations. In that area the courts will be extremely reluctant to interfere. They would be equally reluctant under the other language, so I am not taking any great stand on it, except to point out that the one area invites the courts to deal with policy and the other does not. The policy area is what the courts are invited to deal with, but they do not wish to do so.

Senator Grosart: I do not care how reluctant the courts are. If somebody says this body is *ultra vires* the act the court has no option. That is what they are there for. If a citizen appears before the court and says this organization to which I pay dues is acting

outside the provisions of the act, the court will hear that person.

The second comment I have with reference to your remarks is that you are, of course, dealing with administrative law, where the statute has delegated authority, which is a different thing from this. You are saying you have delegated authority, *ipso facto* you are given the policy powers because for various reasons it is not possible to exercise the policy-making powers by statute.

Mr. Golden: There is none of that.

Mr. Grosart: There is none of that here at all; this is an entirely different situation. My amendment will require any action of the officers of the union to keep its by-laws, rules and regulations within the provisions of the act, not within what they think are the provisions of the act. This is all my amendment would do.

Senator Bélisle: Mr. Chairman, I am very much in sympathy with what Senator Grosart says. I know it makes good hay, if I could use the word, but I feel, as Mr. Hopkins said, that we are going to be more careful with our legal phraseology. I do not feel that we should start with the farmers in this instance. So, unfortunately, I will not support my honourable colleague, Senator Grosart. I feel that we have been using this kind of phraseology, or this legal terminology, and we should let one more go.

Senator Grosart: That is the worst possible argument in the world, Mr. Chairman, that we have been doing the wrong thing and therefore should keep on doing it. We are a committee of the Senate charged with the responsibility of examining a specific piece of legislation. Our responsibility is to make this legislation as good as it can be, particularly in the interests of the members of this organization upon whom by statute we are imposing obligations. This is a very good place to start.

Senator Hollett: In clause 6, subclause (1) it is stated:

> The Union may from time to time, make such by-laws, rules and regulations,...

Who is the Union? How are you going to get the Union to do it?

Mr. Golden: In the first instance the directors will have the power.

Senator Hollett: Under what?

The Law Clerk: Clause 6, subclause (2).

Mr. Golden: Clause 6, subclause (2) provides that the incorporating directors in the first instance would have the power to enact the first set of by-laws. The persons named in the first sections of the act, specifically listed, would be the first directors.

Senator Hollett: Why?

The Law Clerk: All the people named in the bill are stated to be the first directors.

Mr. Golden: I may say that they are in fact the directors now.

Senator Hollett: I am thinking about the new by-laws which may have to be made and the union is going to do it. It is going to take a long time for the union to get a little by-law passed if they have to go all across Canada for the consent of every branch. I do not see why the directors of the union could not make the by-laws.

Mr. Golden: The directors shall make the first set of by-laws. The general power in clause 6 is a continuing power of the union to make by-laws. The first by-laws will set out the procedure, probably by convention and decision.

Senator Grosart: This greatly reinforces my argument, because now we are in a position where non-elected directors will make the substantive by-laws. They have not been elected, and I suggest it is reasonable to say that the act requires them to stay within the provisions of the act in making those by-laws.

Mr. Golden: In fact these persons are all directors by election of the unincorporated association.

Senator Grosart: Yes, but they are not of the subject of the bill.

Mr. Golden: Yes, but in so far as it was humanly possible to elect them prior to the bill being passed...

Senator Grosart: I do not object to saying that they are not elected officers. Therefore there is nothing unreasonable in requiring them to stay within the provisions of the act.

Senator Haig: Clause 7, paragraph (d). Why did you not put in there the funds to be invested in trustee securities?

Senator Grosart: Mr. Chairman, I wonder if we should not stay with the amendment?

The Acting Chairman: Yes; we are into another clause of the bill. We were on clause 6 and Mr. Grosart's amendment relates to that. Are there any other senators who wish to comment on clause 6 and the amendment proposed by Senator Grosart?

Senator Argue: I can be and am sympathetic with the general line taken by Senator Grosart, but it seems to me that this committee should be very careful at this stage not to single out one farm organization, or one organization for one kind of treatment and one kind of law if all the other organizations being incorporated have this looser phrase within their act. My question may have been answered, but I did not hear it: To what extent is the type of wordage in the bill before the amendment common and to what extent is legislation with words like the amendment? In other words, what is the practice? Is it nearly all one way or nearly all some other way?

The Law Clerk: We are in the invidious position that we rarely deal with such bills. It is only for the last five years, since the amendments to the Canada Corporations Act. Prior to that we dealt with them in the regular course. This was the language commonly used.

Senator Grosart: With due respect I suggest that this is not by any means a usual phrase in private bills—it is certainly not universal.

The Law Clerk: Well, that is a question of fact, senator.

Senator Grosart: I say that, with respect.

Senator Argue: I am not looking to see whether there was one exception or not, but I want to know in general where the majority lies, or the vast majority lies.

The Law Clerk: I would say that many of them read this way.

Senator Belisle: This is the observation I gathered a while ago.

The Law Clerk: I do not take issue with Senator Grosart at all, because it could be changed.

Senator Argue: It may be that it should be changed.

The Law Clerk: It may be that it should be changed. That is not an area in which I feel I should intervene.

Senator Argue: This may be a very stupid question. I am a layman. Under this new system, providing a law for incorporation, what kind of words are used? Has your corporations branch seen this? They produce laws setting up corporations, but in another area. What words did they use?

The Law Clerk: I can tell you this, this is as far as I can go, that this bill in its full text was submitted to the corporations branch, and they suggested certain changes, and they did not suggest that one. But that does not prove very much.

Senator Grosart: It proves nothing.

Senator McDonald: On this point, it was mentioned earlier that Senator Martin has a motion now before the Senate dealing with statutory instruments. It seems to me, that despite the argument put forward by Senator Grosart that this may restrict ministerial power, probably the intent and purpose of the review of statutory instruments is for that purpose. It seems to me that the committee which studies the proposals will be lending its attention to private bills and their working with respect to delegated powers. I think we might act wisely by leaving it in this bill, until such time as this committee has had the opportunity to review delegated powers, whether they are ministerial powers or are in private legislation. Because if we are going to change the wording in this bill and make it more restrictive, then perhaps we should change the wording in all the acts.

Senator Grosart: That is what King John said at Runnymede—"We have always done it this way, why are you insisting on a change?"

Senator McDonald: I am not saying this is of necessity the right way, but when I see that there is a general review pending, I think it would be wise to wait until that general review has been done.

Senator Grosart: There is no general review pending on this at all.

The Acting Chairman: Are you ready for the question?

Senator Argue: I think this is really important. If the farmers union do not think it is important, then I am prepared to drop it right now.

The Acting Chairman: You make your point.

Senator Argue: If they feel they do not want to accept the suggested amendment, I would ask for a little further clarification. The National Farmers Union, as I see it, is a controversial organization. It has some very firm views on many things. A lot of people do not agree with the farmers union itself, and there are some things where some are for the farmers union and some are against it. On the question of feeding the Metis, some people think it great, others think that they have no business trying to do something like that. So it is controversial.

I think that as far as the resources are concerned, it is relatively poor organization, in the sense that the resources are limited. I would be highly surprised if the farmers union had funds to fight a series of court cases based on what we are asking this morning, if there should be an appeal from that. I do not know if it is possible. The legal counsel is here for the farmers union.

We should be very careful not to single out at this moment one corporation, one organization, for one kind of treatment, and let everybody else have some other kind of treatment, particularly if there is any danger whatsoever, that people who are opposed to the objectives of the farmers union could, by some means, use this kind of wording to see that a number of court cases were brought forward...

Senator Grosart: Mr. Chairman, that is surely...

Senator Argue: I would like to finish my statement. I would like to know from the farmers union whether or not they feel there is a danger in this amendment. If they are quite happy with the amendment, I am quite happy to accept it, in this situation. But if they feel there is danger that might flow from using them as a starting point for some other language, then I think we should vote against the amendment.

The Acting Chairman: Mr. Golden, what do you say?

Mr. Golden: First of all, the bill was drafted without any specific concern with this particular clause. This was actually taken from a precedent. I was trying to locate it in my file but I could not do so. There were a number of precedents on various aspects of this bill which were used and put together in lawyer-like fashion, as we do not always do things originally. This was not one of the things dreamed up originally in my office, and also it was not brought in specifically.

I also want to say—and I am quite certain that I am speaking for the organization—that we do not want to appear in any way as wishing to hold an arbitrary kind of power or appear to wish to do anything unfair to persons which would result in a court action.

I think we are aware, from Senator Grosart's remarks, that the purpose of the amendment would be to open the by-law, to make the door more open than it is now. It is already open to some extent, but this would open it to the court to review it. I would indicate the kind of legal debate that is going on in court circles on this question. I am not always exactly in agreement, but I am an active participant. I think my position would be that it would tend to create legislation that might be used to hamper organizations.

I do not suggest that it is the intention. If this is widely reported, it might give people some ideas. I do not know.

Certainly, I do not think it is.

If it is the common practice of the Senate, that is the way it came before the Senate, because I drew it from the common practice. I would assure you, on the technical point that I have to make, that we do not want to ask for arbitrary power, but we would also not wish to open the door in such a way that we could be made a kind of legal whipping post.

Senator Argue: So you are for it and against it?

Mr. Golden: On behalf of the organization, I can say we would prefer the bill to go on as originally drafted on that clause, but I do not think I should express any views on the policy question.

Senator Argue: No. The Senate will deal with the policy question.

Senator Aseltine: Is it your opinion that if the amendment were passed, that it would be possible for persons not in sympathy with the union, and outside the union, to have asked the union by legal means, by trying to make it show cause, other than is necessary.

Mr. Golden: I think it would provide a kind of legal argument. It is not easy to define. These things are not final, because they are always open to review. If a board that is elected is elected democratically, as it will be,

and if that action is subject to democratic review, that is, I think, the appropriate vehicle for policy determination.

As I said before, the courts may be very reluctant to get into policy questions; but they can always be asked to do so; and by the time the Supreme Court of Canada has said it is reluctant to entertain this question, two years and a great deal of money will have gone down the drain.

Senator Haig: Are you not going to deal with this question?

The Acting Chairman: Yes.

Senator Grosart: For the record, if I may make one statement, and I am not concerned with policy, the purpose of my amendment is really to require that the actions of the executive be within the provisions of the act.

The Acting Chairman: It is moved by Senator Grosart that the words "it deems" in line 3 of clause 6 be struck out and the word "are" substituted therefor. That is the motion. All those in favour of the moton please signify by saying "Aye" or raising the right hand.

Vote counted: 3 for, 3 against.

The Law Clerk: The Chairman has a vote, but not a casting vote. In this case, if he votes, it would appear to be in effect the deciding vote.

Senator Grosart: But the Chairman did not vote and therefore it is a tie.

The Law Clerk: And where there is a tie, the matter is resolved in the negative.

Senator Grosart: That is right.

The Acting Chairman: Well, the motion is lost then. I thought I could vote only in case of a tie.

Senator Hollett: You did not say how you would vote.

The Acting Chairman: I did not have to.

The Law Clerk: A tie vote is lost.

Senator Hollett: It does not have to be lost. He could vote for it.

Senator Haig: In clause 7 (d) dealing with investment powers, why do you not put in a restriction that monies may only be invested in trust certificates?

Mr. Golden: There is a provision in clause 8 covering investment of funds which are in the nature of trust contributions to the union. These are things in the nature of donations being held under similar trust powers.

Senator Haig: But under clause 7 (a) if you have any funds left over after your fees are paid at certain times of the year you can invest it in anything you want to.

Mr. Golden: It is not intended that the function of this organization shall be to retain large sums and these sums would be considered to be in the nature of operating funds.

Senator Haig: But at certain times of the year you might have large sums of money on hand and you could invest them in 90-day certificates of banks or trust companies or you can put them into long-term mortgages if you like. I think in a situation where there are no dividends to be paid, you should have some restriction.

Mr. Golden: There are certain provisions covering certain types of funds that might be appropriately kept under that kind of provision, but in the nature of an organization like this there is a lot of money on hand, as it were. At least we hope there will be a lot of money on hand. But whatever operating funds there might be available would not be invested at all. It would simply be kept in a bank account—which I suppose is a form of investment—or put into some short-term investment whereby they would be readily available. The kind of fund going into long-term securities or what is commonly referred to as trustee investment would be money that it was intended to keep for a while and would be invested as retained capital. It is not anticipated that this organization will have any of that. If it could be provided for in an amendment, I would prefer to see it as a separate fund established under the act to be used for that purpose. If it is the wish of the Senate that certain funds be invested in trustee investments, that portion would have to be invested in a separate fund, otherwise it could be interpreted that money given to an organizer in an area to set up the organization there—it might be argued that the money was not a trustee investment.

Senator Macdonald: Surely if it is their money we can let them do what they want with it.

The Law Clerk: Again, this is by no means a conclusive observation at all but this stand-

ard form has in practice been required only in the case of trust property.

Senator Haig: But in clause 8 you have restrictions on investment.

Mr. Golden: But these are funds given to us as endowments and donations and that kind of thing. Sometimes people might say "I would like to will you something from my estate" and this would take care of that situation. But all those funds not received as dues or fees could be invested in trust investments.

Senator Hollett: Put it in the wheat pool.

Mr. Golden: I suppose we could transfer surplus funds into clause 8 funds. However, the history of the organization is such that no such funds have been available.

Senator Haig: The history of some organizations that I belong to has been that at certain times of the year when the members have paid their fees they have surplus funds which they invested in bank certificates or as a trust investment. Is your organization going to have surplus funds on hand at any given time of the year?

Mr. Atkinson: That is rather difficult to know.

Senator Haig: When does your membership pay their fees?

Mr. Atkinson: It is a continuous thing. It circulates throughout the whole year.

Senator Haig: In other words, you could have a member paying his fees from July 1st of one year to July 1st of the following year.

Mr. Atkinson: That is right.

Senator Belisle: Am I in order in suggesting that the bill be reported as it is but, if it is at all possible, within the terms of reference to report it to the Senate that we have accepted the bill as it is after defeating a motion for amendment and to make it clear that the executive, to use the legal terminology should be very careful, because we are not going to go for this any more.

The Chairman: Shall we report the bill without amendment?

Hon. Senators: Agreed.

The committee adjourned.

Queen's Printer for Canada, Ottawa, 1970

Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 2

WEDNESDAY, MARCH 18th, 1970

First Proceedings on Bill C-126,

intituled:

"An Act respecting the expropriation of land".

WITNESS:

Dept. of Justice: Mr. C. R. O. Munro, Assistant Deputy Attorney General.

Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 2

WEDNESDAY, MARCH 18th, 1970

First Proceedings on Bill C-136,

intituled:

"An Act respecting the expropriation of land".

WITNESS:

Dept. of Justice: Mr. C. R. O. Munro, Assistant Deputy Attorney General.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman.*

Argue	Flynn (*ex officio*)	McGrand
Aseltine	Gouin	Methot
Belisle	Grosart	Petten
Burchill	Haig	Phillips (*Rigaud*)
Choquette	Hayden	Prowse
Connolly, J. J. (*Ottawa West*)	Hollett	Roebuck
Cook	Lang	Smith
Croll	Langlois	Urquhart
Eudes	Martin (*ex officio*)	Walker
Everett	Macdonald, J. M. (*Cape Breton*)	White
Fergusson		Willis

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of Proceedings of the Senate of March 4th, 1970.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Urquhart, seconded by the Honourable Senator Bourque, for the second reading of the Bill C-136, intituled: "An Act respecting the expropriation of land"

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 Urquhart moved, seconded by the Honourable Senator Gouin, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

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

ROBERT FORTIER,
Clerk of the Senate.

21780–1½

MINUTES OF PROCEEDINGS

Wednesday, March 18, 1970.
(2)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2.00 p.m. to consider:

Bill C-136, intituled "An Act respecting the expropriation of land".

Present: The Honourable Senators: Choquette, Cook, Fergusson, Flynn, Gouin, Haig, Hayden, Hollett, McGrand, Phillips (*Rigaud*), Smith and Urquhart. (12)

On motion of the Honourable Senator Haig, the Honourable Senator Phillips (*Rigaud*) was elected acting chairman.

Present, but not of the Committee: the Honourable Senator McDonald.

Ordered:—That 800 copies in English and 300 copies in French of the proceedings of the Committee be printed.

Witness heard in explanation of the Bill:
DEPARTMENT OF JUSTICE:

Mr. C. R. O. Munro, Assistant Deputy Attorney General.

It was RESOLVED by the Committee that all clauses of the Bill, with the exception of those clauses in respect of which amendments were proposed by the Honourable Senators Hayden, Choquette and Flynn, be approved, and that the amendments proposed by the aforesaid Senators be approved in principle, subject to re-drafting by the Department of Justice, and that the Minister appear before the Committee in relation to the proposed amendments.

The Committee adjourned at 3.05 p.m. to the call of the Chairman.

ATTEST:

Gérard Lemire,
Clerk of the Committee.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Wednesday, March 18, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-136, respecting the Expropriation of Land, met this day at 2 p.m. to give consideration to the bill.

Senator Lazarus Phillips (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, the business before us is Bill C-136, an Act respecting the Expropriation of Land, which has been sent to this Committee for consideration.

Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 800 copies in English and 300 copies in French be printed.

The Acting Chairman: We have with us this afternoon Mr. C. R. Munro, Assistant Deputy Attorney General of the Department of Justice, who will explain the bill to us from the point of view of the Justice Department. He will answer any questions that honourable senators may wish to put before him.

Before calling upon Mr. Munro, I will like to make some observations which are maybe slightly unusual. We received an indication from Senators Hayden and Choquette of an intention to submit to this committee and its deliberations some amendments to this bill. There may be others present here today who may also want to submit amendments. Mr. Hopkins has prepared a first draft of such proposed amendments and with the consent and concurrence of Senator Hayden and Senator Choquette, this first draft was transmitted to the Department of Justice, because of the highly technical nature of the bill that we are considering. It was sent for the purpose of enabling the Justice Department to be made aware of the intention to submit the amendment. We are advised by Mr. Munro for the Justice Department and for his minister that if it is the sense of this committee to approve of the proposed amendments, the Justice Department would desire to be given the authority from this committee or would desire to draft the amendments in the form that would harmonize with the remainder of the bill, with a view also to determining whether there would be further consequential amendments that would be necessary.

There is the further suggestion that if, as and when such amendments are so approved by us in principle and such redrafting is made the Minister of Justice may indicate a desire to appear before us in order to discuss the proposed amendments. Since the subject matter is somewhat unusual in terms of procedure I thought I should explain it to you. If this meets with your approval, we will call upon Mr. Munro to deal with the bill at large. We will go through all of the sections and then await the consideration of any amendments that may be presented, but such amendments, if, as and when approved by this committee in principle, are to be dealt with in the manner which I have indicated.

Senator Hayden: Might I suggest that there seems to be, in all the discussions we have had on the bill, a pretty unanimous view favouring the bill and most of the clauses. There were just a few objections. I was wondering whether it would be in order to deal with those,—because the rest of the bill could be disposed of very quickly, I think.

The Acting Chairman: I certainly react with considerable favour to that observation, if it meets with the approval of honourable senators.

Hon. Senators: Agreed.

The Acting Chairman: If in effect we could get to the hard core of the proposed amendments, the assumption could be that, if no other amendments are suggested, this committee approves of the remainder of the bill. Does that meet with your approval?

Senator Haig: What clauses is it intended should be amended?

The Acting Chairman: May I call upon Senator Hayden to be good enough to deal with the proposed amendments. We have not got too many copies available here. However, every senator now has an opportunity at least to see a copy. Would Senator Hayden be good enough to proceed?

Senator Hayden: I had raised in the Senate the question that I did not think, in any proceedings under this bill, once it becomes law, it should be possible to bring into issue the merits of the expropriation authority, the general policy which led to the decision to expropriate.

I thought that was a matter for the minister. He has his responsibility to his fellow ministers and to Parliament and this issue should not be left to be decided in what I would call administrative proceedings such as would take place with a hearing officer, to have him reviewing the merits of the policy.

I had indicated that in Ontario the former Chief Justice McRuer, in his very elaborate report, had dealt with this question of expropriation. The Ontario act in this regard, which was enacted a couple of years ago, recognizes that principle which was enunciated by Chief Justice McRuer, that is, the authority, the policy behind the decision to expropriate, should not be reviewable by any administrative tribunal.

Whether the Ontario statute accomplishes that will be something which the courts will have to decide over the years but at least they have in Ontario specifically limited the subject matter of the hearing, where they make it the "taking of the land". The Ontario act in section 7(5) reads:

> The hearing shall be by means of an inquiry conducted by the inquiry officer who shall inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

That language was designed to keep the question of policy being considered by an administrative tribunal such as this inquiry has provided. I spoke about this in the Senate. This bill which we have before us really touches on this in three places, as you will see in the amendments.

I discussed my ideas with Mr. Hopkins, our Law Clerk, and he produced this first draft. In essence, he proposes to add, in three places in the bill, the language of the Ontario act. In that way, we are hoping to limit the authority of the administrative officer to an inquiry that centres around the taking of the land, but not the policy that lay behind the decision to take the land.

I present these amendments but, in line with what you, Mr. Chairman, have suggested, I think it is perfectly in order that the Justice Department should have a look at them in the context of the whole bill, rather than that we should just put them in here today as amendments, without necessarily establishing the correlation to the rest of the bill. So I would be perfectly satisfied if the committee saw fit to approve in principle of what we are seeking to accomplish and then move on from there and ask Mr. Munro to go ahead and study it. If he can make a better job of it or if there is some correlation required, the pride of authorship would not be upset, I feel, in Mr. Hopkins, and would not be upset in me.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: No.

The Acting Chairman: May I suggest that in addition to the expression "the taking of the land or any part thereof" there be added "or any interest therein", in view of the fact that the present bill does cover the interest of tenants now.

Senator Hayden: That is right.

The Acting Chairman: That is just a thought of an extra point which may be needed, and there may be others. Mr. Munro, could we get your reaction to these three proposed amendments, before calling upon the senators to express their views.

Mr. C. R. Munro, Assistant Deputy Attorney General, Department of Justice: Mr. Chairman and honourable senators, I can try to explain the reasoning behind the bill in its present form. It is that not only the basic objectives of the Government is a matter of policy but also the selection of the actual site, the decision as to what piece of land to take, is also a matter of Government policy. Since it is a matter of policy, it must be the responsibility of the Minister of Public Works, under the statute, who after all is answerable for whatever policy decisions he makes in this respect.

While it is something for the minister to decide, we recognize that of course the minister and also his departmental officials may not be aware of all the relevant facts which would have a bearing on whether site A or site B should be taken. It was with that in mind that we provided this rather elaborate procedure, to give an opportunity to anyone who has any particular objection to any particular site to come along and state his objection at a public hearing, be represented by counsel and so on. In this way, the minister, before he proceeds with his intention to expropriate, will have had before him all the relevant factors.

The hearing officer has no responsibility on the question of policy. He has no responsibility to anybody at all. If he makes a recommendation as to what site should be taken, he makes it untrammelled by any considerations that the minister might have to take into account.

It was thought also that if the hearing officer were to make a recommendation it would in a very real sense fetter the minister in the decision that he has to make. For example, suppose the inquiry officer makes a public statement and publicly reports what his recommendation is, that he does not think that the

minister is right, he does not think that the minister should take this piece of property, now, as a practical matter, what effect is this going to have on the minister's decision in the matter?

We felt that for any hearing officer to make a public statement, about what he thought of the Government's policy, would fetter the minister in the exercise of his responsibility to make the decision in the final analysis.

Senator Hayden: Mr. Munro, if you stop there, do I understand that you are including in the question of policy decision not only the decision to take the land but to make the particular land that is selected part of the policy decision?

Mr. Munro: That is right, the actual selection.

Senator Hayden: Then you are precluding a possible objection–and there is no limitation on the objections here in the bill–the possibility of saying, yes, we agree the policy is a good policy but surely we can raise the issue that you are not taking the best piece of land.

Mr. Munro: Yes, that objection could be raised to the policy decision.

Senator Hayden: That could not be raised if you make it part of the policy–not the way I want it to be drawn.

Mr. Munro: Perhaps I did not explain myself. I am saying that the decision as to which piece of land must be taken is a policy decision that must be the responsibility of the minister. I am also saying that it is open to any person at all to object to the expropriation on any grounds at all. They can make their objection and the objection is brought to the attention of the minister. If he does not, then he proceeds.

Senator Flynn: It can hardly be on anything else but the choice of the site, because I don't think the minister would entertain an objection, for instance, by the expropriated party saying that the Government should not proceed with certain projects.

Mr. Munro: He would not entertain it for very long, I am sure.

Senator Hayden: Mr. Chairman, it is all very well to have discussions at large as to what the minister may do and how he may react, but we have to look at the bill, and any person who is affected by an expropriation or notice of expropriation may make an objection, and that objection sets forth the nature and the grounds of the objection. I want to be sure that you cannot bring in issue the merits of the policy decision itself. I don't think for that purpose that the particular selection is necessarily part of the policy decision. I think the policy decision is the decision to expropriate for a certain purpose. That is why in the Ontario act they use the language "the taking of the land". That is the policy decision.

Senator Flynn: You mean that would be the decision to undertake a certain project?

Senator Hayden: Yes, and to expropriate land therefor.

Senator Flynn: Yes, there is a big difference there, because, as Mr. Munro just said, the minister would not be inclined to listen to any argument along that line.

Senator Hayden: I should have the right, and certainly there is such right under the Ontario statute, to question the particular location and to say that the Government is doing me an irreparable damage in taking my piece of property when in fact right near by, for example, there is some other property that would serve all of the purposes required; so I should be able to suggest that they look at that property. Now, that is not a policy decision.

Senator Flynn: Sometimes the two can be mixed up.

Senator Hayden: Yes, they can get mixed up.

Senator Flynn: For example, I had a letter recently from some people at Meach Lake. They complained about the decision of the National Capital Commission to expropriate all private property over there. Apparently the plan is to make a park out there. There you have the two mixed together: the policy–whether it is a good idea to make a park there in the first place; and whether they should expropriate all of the property.

Senator Hayden: The policy decision is really to make the park.

Senator Flynn: Yes, but at the same time you could say that you need only half of the land and that you could exclude this or that particular cottage. That means that very often the two will be mixed, the principle and the species.

Senator Hayden: If you apply the test to this and assume you include in the policy decision both decisions, the decision to expropriate and the decision to expropriate the particular property, what is there left for the person whose land is expropriated other than to say that you are not offering enough money? Are you going to limit him to that?

Mr. Munro: I think we are not quite at "idem", sir. Clause 7 of the bill refers to persons objecting to the intended expropriation. They can object to the intended expropriation on any ground. There are no words limiting the nature and the grounds. They have

to state the nature and the grounds of their objection to the intended expropriation.

Senator Hayden: If you stop there, you can say this is what the person can do, but under that wording and interpretation he could raise the issue of the policy decision.

Mr. Munro: Yes.

Senator Hayden: There is no place where you have excluded that?

Mr. Munro: Does it make any difference at all, really, though? In Ontario there are circumstances which make it necessary that the bill be different. Under the Ontario bill the hearing officer makes a recommendation. Of course, if you were going to make a recommendation on the basic policy issue that would perhaps be unthinkable under our bill. It is therefore necessary to restrict the issue upon which the hearing officer makes his recommandation. But under our bill there is no recommendation by the hearing officer at all. He listens to the nature and grounds of the objections and he reports on them to the minister. That is all. But he does not make any recommendations.

Senator Hayden: But the point is that, if the bill does not have this restriction in it, the door is not being shut on the possibility of raising an issue in policy. You go along and at some stage you may get into court and, if your bill is drawn in language that would permit the questioning of policy, then that could be an issue in the court. I don't want that possibility to exist.

Senator Flynn: You don't want what possibility to exist?

Senator Hayden: I don't want it to be possible to raise the policy behind the taking of land as an issue.

Senator Flynn: I don't know. This is a very delicate matter. For instance, if you look at it from the point of view of a municipal corporation, you always have the right to say you cannot expropriate for that very purpose because it is without your jurisdiction. If the federal Government, for example, were to expropriate in order to build an elementary school, you could say that that is without their jurisdiction. I think you should be entitled to raise that objection. That is just an example. I would not expect that to happen. But I submit that in principle you could raise an objection of that kind.

The Law Clerk: A jurisdictional problem is different from a policy problem, senator.

Senator Flynn: I know, but, if I understood the witness, he said that everything is included. There is no limit to the objections that can be raised.

Senator Hayden: That is what it would appear to be.

Mr. Munro: The words are "objects to the intended expropriation". You would have to find that the objection was in fact an objection to the intended expropriation.

Senator Flynn: It could be an objection in law and it could be an objection in fact.

Mr. Munro: If I might mention that once the notice of confirmation is registered, then the matters prior to the registration of the notice of confirmation, which of course takes place after the hearing, cannot be called in question.

The Acting Chairman: May I draw your attention, Mr. Munro, to paragraph 7, where the party in interest has the right to indicate the nature of his objection? Do you not think it would be desirable to follow through on Senator Hayden's suggested amendment for two reasons: from one point of view it restricts the grounds upon which the objection can be taken; and, from the other point of view, it does give a guide as to what the objecting party has the right to object to by merely being called upon to establish the lack of fairness, the lack of soundness or the lack of reasonableness. As you have it now, the parties in interest do not know on what basis to guide themselves.

As Senator Hayden says, the nature of his objection might go to the very policy matter, whereas the proposed amendments say on a negative basis the objection cannot go to the policy matter but can only go to the fairness, reasonableness or soundness of the proposed objective.

It would appear to me that it would be in the interest of the minister to introduce into the statute such a guide, because the way you have it now any objecting party can march from here to Timbuktu in the form or the nature of his objection, you see.

Senator Flynn: I was not here at the beginning of the discussion, but I would be inclined to take the opposite view.

The Acting Chairman: I see.

Senator Flynn: I would give the expropriated party all the latitude possible, because I think that is what we are trying to correct. Generally speaking, there has always been abuse by the expropriating party. I say generally speaking, but I don't say it has always resulted in injustices for the expropriated party. However, what we are trying to do now is to be entirely fair to the expropriated party and we are putting the

burden on the expropriating party to prove that he has the right, that this decision, whether it be a matter of policy or of choice, this question of fact, is sound. At least let us give him the chance to reconsider the decision. I think that is what the witness is suggesting.

The Acting Chairman: To cover your point, Senator Flynn, there is nothing to indicate in the present statute that the minister must make out a case of fairness, soundness or reasonableness.

Senator Flynn: I am not defending the wording of the bill.

The Acting Chairman: You are going further than Senator Hayden in saying that the objection should include even the objects.

Senator Flynn: Yes.

The Acting Chairman: Any further questions?

Senator Hayden: May I just add, because I do not think you were here when I mentioned this, that if you have a question of policy considered, whether it is only going to be the subject matter of a report, the report reflects the views of the reporting officer. To have an administrative official reporting in a report on the merits of the policy is foreign to any concept that I have.

Mr. Munro: If I may make one or two points; the proposed amendment would give the hearing officer the duty to report on whether the taking of the land or any part of it is fair, sound and reasonably necessary. In short, the hearing officer has to form an opinion.

The Acting Chairman: I do not think so, Mr. Munro, with profound respect. He has to report on what the interested party stated on fairness, soundness and reasonableness. The reporting officer is not a judicial officer concluding; he is merely reporting on what took place, as I read the bill. And certainly, as I understand Senator Hayden, the purpose is that the objecting party must state why he does not regard it as being fair, sound and reasonable, and having listened to the evidence, he reports what has been said either by transcription of the evidence or by summary, but the hearing officer does not act judicially in concluding.

Mr. Munro: Probably I am mistaken, but that is not the way I read the amendment. But that is what is intended.

The Acting Chairman: That is all the more reason for getting together here, and having at least a meeting of minds before redrafting is important.

Mr. Munro: The object of the amendment is merely to restrict the nature of the objection that may be made and nothing more.

Senator Hayden: That is it.

The Acting Chairman: So, you see, it is limitative in part as gainst the broadness of the bill but it is a guide in part as well as to what the objecting party has the right to say and to do.

Senator Flynn: But would you suggest, Mr. Chairman, that the political objections which I submitted could not be raised before the hearing officer? Supposing it could be without the competence of the Government to expropriate for that very purpose.

Senator Hayden: I do not think the hearing officer in this bill has any authority to make any decision of that kind.

Senator Flynn: I think you mentioned that he has no decision to make but that he only has a report to make and he could report on my objection, but I am just asking whether I would have to go to Court if I have an objection in law like the one I have just suggested.

Senator Hayden: But your only objection in law would be jurisdiction.

Senator Flynn: Yes, it is the most obvious. I do not want to be limited in this.

The Acting Chairman: I think your point is covered, senator, by the proposed amendment of Senator Hayden when he says "at the time and place so fixed provide an opportunity to each person appearing who served an objection upon the Minister, and such of those persons as he deems necessary in order to report to the Minister on the nature and grounds of the objections"—that is general—"and on whether the taking of the land or any part thereof is fair, sound and reasonable."

Senator Flynn: On the nature and ground?

The Acting Chairman: Yes.

Senator Flynn: What does Mr. Hopkins think?

The Law Clerk: It is a matter of policy and I am a simple draftsman.

Senator Flynn: I am not asking about the interpretation and I am not asking you to agree with my viewpoint.

The Law Clerk: I would say the amendment is pretty clear and speaks for itself.

Senator Choquette: *Res ipsa loquitur.*

The Law Clerk: And it would exclude any report on the policy of the Minister in deciding to expropriate.

The Acting Chairman: Honourable senators, as I see it we have reached the point that there is a consensus here and we can assure Mr. Munro that it is not intended that the hearing officer should act in a judicial capacity or make any recommendations, but rather that the objecting party can act and state his case within the framework of the proposed amendments.

Mr. Munro: To restrict the nature and grounds of the objections which may be made.

The Acting Chairman: In the form which we have suggested to you, if the honourable senators will approve.

Now, honourable senators, may we therefore state that it is the consensus of this committee that it would favourably consider three amendments suggested by Senator Hayden, as it appears before us, and that we are asking Mr. Munro to be good enough to draft in a form that will be satisfactory to the Justice Department the amendments that would give effect to the foregoing as explained here, and any consequential amendments in the statute that may be necessary. Is that agreeable, honourable senators?

Hon. Senators: Agreed.

The Acting Chairman: Is that agreeable, Senator Hayden?

Senator Hayden: Yes.

The Acting Chairman: Now if we may move on to some further amendments that Senator Choquette has in mind.

Senator Choquette: Honourable senators will recall that when I spoke on this bill in the Senate chamber, I intimated that I would propose in committee a few amendments, and I would like to state briefly before reading to you how I have worded these proposed amendments, that I have three amendments which I intend to propose, and the first one is that the Minister should not be allowed to and cannot delay making an offer without a Court order. If we refer to the wording of the act itself, it says–"When the Minister decides it is not practicable". This is so indefinite, and he wouldn't even have to give his reasons for finding that it is not practicable, so that in order to conform to the Ontario Legislation I would suggest that he cannot delay making an offer without a Court order, so that therefore a section 14(2) should mention a change which I will read briefly after I have dealt with the other two points.

My second proposed amendment is that if there is a Court application made, the costs payable should be paid by the Crown notwithstanding section 36, therefore a section 14(4) would be added to it, and the third proposed amendment is that the interest as a penalty paid should be a basic rate and not 5 per cent.

Now, dealing with this last proposed amendment, I would refer honourable senators to the bill itself at page 33 which defines "basic rate" in section 33(1) as follows:

> In this section
> (a) "basic rate" means a rate determined in the manner prescribed by any order made from time to time by the Governor in Council for the purposes of this section, being not less than the average yield, determined in the manner prescribed by such order, from Government of Canada treasury bills;

I have gone to the trouble of ascertaining what is usually the basic rate and I think at the present time it is 7-½ per cent. I think I am correct in saying that. So that rather than have a rate of 5 per cent, as stated in the bill, it would be the basic rate and we could always refer to the basic rate definition in the act.

Coming back to my first proposed amendment, I think honourable senators have received a copy of my draft amendments, and I would refer to the bottom of page 1, which would be section 14(1)(c) to be added after paragraph (b), and it is underlined:

> within the period extended by the Court under subsection (2), and if the Court does not extend time under subsection (2) forthwith upon the adjudication made by the Court under subsection (2),

We have to read (b) before that.

> within ninety days after the registration . . .

I am now reading section 14(1)(b):

> within ninety days after the registration of the notice, or, if at any time before the expiration of those ninety days an application has been made under section 16, within the later of
>
> (i) ninety days after the registration of the notice, or
>
> (ii) thirty days after the day the application is finally disposed of; or

. . . and this is my amendment, which would be (c) as underlined at the bottom of page 1.

Then my second amendment, if a court application is made, the costs paid by the Crown, notwithstanding section 36, should be on a solicitor and client basis. That is to be found on page 2:

> (4) Notwithstanding section 36, the costs of all parties to an application by the Minister under

subsection (2) shall be paid by the Crown on a solicitor and client basis.

Those who practise law will know that there is some difference between costs payable on a party and party basis and those payable on a solicitor and client basis.

Senator Hayden: On that point, all our experience and rules in connection with costs is that we have two tariffs: we have a solicitor and client tariff; and we have a party and party tariff. Normally, in a proceeding of this kind it would be on a party and party basis. The solicitor and client basis is at a higher rate. The question is whether it is the client who has the right to select a solicitor, and if he uses his judgment, no matter what the costs may be, should the other person have to pay that amount or should it be strictly and impersonally on a party and party basis?

Senator Choquette: I think a solicitor and client basis would be the logical step to be taken. This is a bill favouring the individual Canadian, and there are many steps that a solicitor would take, forced by certain clauses of the act and the wording of the act, and his client would have to pay him for those steps. I think, in all fairness to this litigant, his costs should be paid on a solicitor and client basis for that reason. This is a suggestion I am throwing into the discussion, and it could be argued pro or con.

The Acting Chairman: Senator Choquette, would you be good enough to draw honourable senators' attention to section 36 of the act as we have it, which deals with the subject matter of costs, where the decision is apparently left to the court?

Senator Choquette: Yes.

Senator Flynn: In section 36(1), but in section 36(2) it is on the basis of solicitor and client.

Senator Hayden: That is where a party whose land has been taken gains an additional amount over and above what the minister paid. This is in the nature of a penalty.

Senator Flynn: That is all right. That is a privilege we give to the minister, to apply for delay to make the offer. I think it should fall in the same class as the case where the amount he has offered is not judged sufficient.

Senator Hayden: Mr. Chairman, I have stated my position, but I would not object to putting in "solicitor and client basis"

Senator Choquette: Those are my amendments, Mr. Chairman.

The Acting Chairman: Those are two, but you have not referred to the third.

Senator Choquette: The third one is at the bottom of the second page:

> Page 34: Strike out subclause (4) of clause 33 and substitute therefor the following:
>
> "(4) When an offer is not made until after the expiration of the applicable period described in paragraph (b) of subsection (1) . . .

The Acting Chairman: Is it "applicable"?

Senator Choquette: Yes, it is "applicable". I have made the correction in my copy, but it is not in the others, apparently. This is using the wording of the act itself.

> "When an offer is not made until after the expiration of the applicable period described in paragraph (b) of subsection (1) of section 14 for the making of an offer of compensation by the Minister, interest, in addition to any interest payable under subsection (2) or (3), shall be payable by the Crown at the basic rate on the compensation, from the expiration of that period to the day upon which an offer is made by the Minister."

The Acting Chairman: Honourable senators, you have the three proposed amendments of Senator Choquette. Following the procedure heretofor followed with respect to Senator Hayden's thoughts, do we now have the consensus of honourable senators that we should support the amendments as suggested by Senator Choquette under the three headings mentioned? Is that the view of honourable senators?

Senator Hayden: In principle.

The Acting Chairman: In principle, and it flows from that, as I understand it, that we will now be asking, with your approval, the Justice Department to prepare . . .

Mr. Munro: I have some remarks to make on this, Mr. Chairman.

The Acting Chairman: I am sorry, I apologize, and we will withdraw the assumption that there has been a consensus until we have heard from the department.

Senator Hayden: The jury has not been polled!

Mr. Munro: As I understand it the proposed amendment is entirely different from the provision in the Ontario statute. I do not know whether everyone has a copy of that provision. The similar provision in the Ontario statute is designed to protect the expropriating authority, whereas this proposed amendment is designed to protect the expropriated owner. I am not satisfied myself that it is really necessary, but the Ontario provision, which is section 25, in effect does

two things. It authorizes the expropriating authority to make the offer of compensation after the expiration of three months without having to pay additional interest. That is unlike the bill as it now stands. Under this bill, once the three month period goes by–that is, the 90 days–penalty interest is payable, but the Ontario statute authorizes the offer after the expiration ot three months without the payment of any additional interest.

Senator Choquette: How soon after?

Mr. Munro: That is left to the court to decide. One of the objects of going to the court is to have an extension of the period during which you can make the offer without paying penalty interest.

The second thing is that it enables the expropriating authority to obtain possession after the three month period but without having made the offer, which is again something we cannot do under this bill except by way of order in council in very special circumstances. But, under the equivalent provision of the Ontario statute the expropriating authority can get possession after the expiration of the three month period, and without first making an offer.

The proposed amendment in this bill would merely require the Crown to make the offer within 90 days of the notice of confirmation, unless the time is extended; unless a court authorizes the Crown to make it later. Despite the fact that the Crown does not have its appraisal reports ready–and it may be a very complicated expropriation–unless the court extends the time then the Crown must make the offer right then.

It is to be remembered, I think, that under the Ontario statute the offer that is made is only an offer of the market value of the land. The business disturbance is left for a year after the expropriation. Under this bill the minister must make an offer of the total compensation, including that for business disturbance and everything else, within 90 days.

Senator Hayden: That is the better way.

Mr. Munro: Yes. So, within that period the minister must have his appraisals ready, and everything must be done in order to make it at that time. In many cases it will not be practical, and in those cases the statute provides for a penalty interest. It is not an economic return on the owner's money. It is a penalty of 5 per cent if the offer is not made within the 90 days.

If the Crown were forced to make an offer notwithstanding the fact that it did not have its appraisals all ready within the 90 days, and notwithstanding the fact that that is impractical, then probably a much lower offer than was realistic would be made. So, the owner would not get all his money–he certainly would not get 100 per cent.

The contrary could theoretically happen, and that is that too much would be paid to the owner, in which case we can sue to get it back.

Senator Hayden: On this point, Mr. Munro, my experience–and I have been through a lot of these cases in the years I have been practising–has been that by the time the Crown decides to expropriate they have done all their studies.

Mr. Munro: That may be so, but under this legislation we have some very short time periods.

Senator Hayden: But even before they make the decision to expropriate they have done their studies.

Mr. Munro: In some cases that is so, and hopefully that will be done more and more.

Senator Hayden: I have found them so well informed that I had to go out and get well informed myself right away.

Mr. Munro: The reaction from the public servants who are going to have to administer this is that it is almost impossible to get the appraisals ready to make the offer within 90 days. They are concerned about all the interest we are going to have to pay after the 90-day period. As to the rate of interest . . .

The Acting Chairman: Do not worry too much about that. The National Revenue Department will get the interest back.

Senator Hayden: Is it only the wealthy landowners who are going to be expropriated?

Mr. Munro: There are disadvantages to making the Crown pay the compensation within the 90 days, and I do not think that it is really necessary because there is the carrot that the minister is not going to have to pay penalty interest if he pays within 90 days, but as soon as the 90 days are up he is going to start paying the additional penalty interest.

As to the rate of interest, I point out that it is a penalty. It is not intended to be an economical return. At this stage of the game when this penalty interest is payable the owner has his land. When he has his land taken away from him–that is, when he has to give up possession–then the bill provides for an economic return on his money. But, at this stage of the game it is merely a penalty, and that is all.

Senator Hayden: Yes, I know, but the moment proceedings of this nature are instituted the owner's use of the land is very substantially restricted, as a matter of fact. What can he do with it? If he has a store there he can operate for a little while, but he is not going out to buy more merchandise.

Mr. Munro: There are all kinds of people, sir, down here on Sparks Street who are doing precisely that. They have been there for years.

Senator Hayden: What conclusion am I to draw from that?

Mr. Munro: The point is that in fact people do use their property. They are allowed to remain on their property, sometimes for years, after an expropriation.

Senator Hayden: I know, but that is a matter of agreement. We are not discussing that.

Mr. Munro: But even when there is no agreement . . .

Senator Hayden: I would not load a store up with inventory if I expected to be pushed out tomorrow, unless I had some understanding.

Mr. Munro: In any event, sir, it seems to me that it should not be a requirement that the compensation be paid at the end of the 90-day period.

The Acting Chairman: Thank you, Mr. Munro, and I apologize for not having called upon you before asking for the views of members of the Committee.

Honourable senators, do I understand that the amendments suggested by Senator Choquette meet with your approval in principle, and we should ask the Department of Justice to prepare the necessary amendments, and the consequential amendments, if necessary?

Hon. Senators: Agreed.

The Chairman: Would you be good enough to do that, Mr. Munro?

Mr. Munro: Yes, sir.

The Acting Chairman: Honourable senators, as I understand the situation, it will be necessary for us to adjourn this hearing . . .

Senator Flynn: Mr. Chairman, may I mention that I did give a warning in the house that I was not entirely satisfied with subclause (1) of clause 36. I would like the committee to express a view on that. I suggest that the rule be that in all cases judicial costs be paid by the expropriating authority, unless the opposition or the contestation be juged to be entirely futile. I do not like this discretion here, because when you read subclause (1) you will come to the conclusion, I think, that we are going to continue with the present practice, that when the expropriated party fails to get more than the offer made by the expropriating authority he has to bear the costs. In my opinion this is not fair, because it may be a matter of opinion or of a few thousand dollars. If you have the expropriated party bear the costs you are in fact penalizing him and decreasing the compensation to which he is entitled. I suggest therefore that this subclause (1) should be redrafted in that way, that unless the contestation of the expropriated party is futile, in all cases the costs should be borne by the expropriating authority.

The Acting Chairman: Would you accept the word frivolous?

Senator Flynn: Yes.

The Acting Chairman: Because futility might go to the question of the amount.

Senator Flynn: Yes.

Senator Choquette: There is a danger also, Mr. Chairman, that the presiding judge, using his discretion, might be guided by our courts in civil matters. I pointed this out when I spoke to the question. We all know that in an automobile accident, for instance, where the defendant decides that a certain amount would be fair compensation and deposits it in court and the case is disposed of, if the court allots an amount less than that which has been deposited the defendant is saddled with the costs. I say this in support of the suggestion made by the honourable Leader of the Opposition that there would be a danger of the presiding judge, when asked to use his discretionary power, basing his decision on those principles that are well known throughout the country.

Senator Flynn: Principles which should not apply in a case such as that.

The Acting Chairman: Mr. Munro, would you express your views in this regard?

Senator Cook: Would "frivolous" include fraudulent?

The Acting Chairman: I would think so, yes.

Mr. Munro: The object of the provisions of the bill as presently drafted is to require a person to act reasonably in bringing proceedings against the Crown. As a practical matter, the way it works out, in my experience at any rate, is that there are exceedingly few cases, an extremely small percentage, in which the court does not award at least a little more than the Crown's offer, the Crown paying the costs under the legislation as it now stands. Therefore the prospects of a party ever having to pay costs under clause 36, subclause (1) as it stands now are almost negligible.

Senator Flynn: I will not subscribe to that, because this act will appear to the court to be more generous than the system which now prevails. Therefore they may want to apply this more strictly than has been the case in the past.

Senator Hayden: Mr. Munro, you say the attitude of the courts would be such that they would treat the owner very nicely in any event. Then you should have no objection to putting that in the bill.

Mr. Munro: I would be prepared to do that.

The Acting Chairman: Honourable senators, is it the consensus in this particular instance that we support the suggestion of the honourable Leader of the Opposition with respect to the proposed amendment to clause 36?

Hon. Senators: Agreed.

The Acting Chairman: We ask Mr. Munro and the Department of Justice to proceed in the same form as in relation to the previous suggestions. Do we now have a consensus that, whith the exception of the proposed amendments, this committee does not formally approve at this stage because we are adjourning, but we indicate approval of the bill in its present form other than the provisos and proposed amendments?

Senator Hayden: I so move.

Senator Choquette: I second.

Hon. Senators: Agreed.

The Acting Chairman: I have a memo that with the proposed amendments as they will be coming forward it is the feeling that we should ask the honourable Minister of Justice, who most likely, and I would say more or less definitely, will wish to appear before us. Do we then fix a date or wait for the Department of Justice?

Senator Hollett: After Easter.

Senator Flynn: Whenever the minister is ready.

The Acting Chairman: We will fix a date whenever convenient after Easter for consideration of these amendments.

Senator Hayden: Or as soon as they are ready.

Senator Urquhart: We will be guided by Mr. Munro as to when they will be ready.

The committee adjourned.

Queen's Printer for Canada, Ottawa, 1970

Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 3

TUESDAY, MAY 12, 1970

Second and Final Proceedings on Bill C-136,

intituled:

"An Act respecting the expropriation of land".

WITNESSES:

The Honourable John N. Turner, P.C., Minister of Justice and Attorney General of Canada.

REPORT OF THE COMMITTEE

21782—1

THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman.*

Argue
Aseltine
Belisle
Burchill
Choquette
Connolly, J. J. (*Ottawa West*)
Cook
Croll
Eudes
Everett
Fergusson
Flynn (*ex officio*)
Gouin
Grosart
Haig
Hayden
Hollett
Lang
Langlois
Martin (*ex officio*)
Macdonald, J. M. (*Cape Breton*)
McGrand
Methot
Petten
Phillips (*Rigaud*)
Prowse
Roebuck
Smith
Urquhart
Walker
White
Willis

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of Proceedings of the Senate of March 4th, 1970.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Urquhart, seconded by the Honourable Senator Bourque, for the second reading of the Bill C-136, intituled: "An Act respecting the expropriation of land".

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 Urquhart moved, seconded by the Honourable Senator Gouin, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

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

ROBERT FORTIER,
Clerk of the Senate.

21782—1½

MINUTES OF PROCEEDINGS

TUESDAY, May 12, 1970.
(3)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 4:30 p.m.

Present: The Honourable Senators Aseltine, Choquette, Connolly (*Ottawa West*), Croll, Eudes, Flynn, Gouin, Grosart, Hayden, Hollett, Lang, Macdonald, McGrand, Phillips (*Rigaud*) (*Acting Chairman*) and Urquhart—(15).

In attendance: Mr. Russell E. Hopkins, Parliamentary Counsel and Law Clerk and Mr. Pierre Godbout, Assistant Law Clerk and Parliamentary Counsel, and Director of Committees.

Consideration of Bill C-136, intituled "An Act respecting the expropriation of land" was considered further.

The following witness was heard:

Department of Justice:

The Honourable John N. Turner, P.C., Minister and Attorney General of Canada.

On motion duly put it was *Resolved* to report the said Bill with the following amendment:

Page 36: Strike out subclause (2) of clause 36 and substitute therefor the following:

"(2) Where the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under section 29 in respect of an expropriated interest does not exceed the total amount of any offer made under section 14 and any subsequent offer made to such party in respect thereof before the commencement of the trial of the proceedings, the Court shall, unless it finds the amount of the compensation claimed by such party in the proceedings to have been unreasonable, direct that the whole of such party's costs of and incident to the proceedings be paid by the Crown, and where the amount of the compensation so adjudged to be payable to such party exceeds that total amount, the Court shall direct that the whole of such party's costs of and incident to the proceedings, determined by the Court on a solicitor and client basis, be paid by the Crown".

At 5:00 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Patrick J. Savoie,
Clerk of the Committee.

REPORT OF THE COMMITTEE

TUESDAY, May 12th, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-136, intituled: "An Act respecting the expropriation of land", has in obedience to the order of reference of March 4th, 1970, examined the said Bill and now reports the same with the following amendment:

"Page 36: Strike out subclause (2) of clause 36 and substitute therefor the following:

"(2) Where the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under section 29 in respect of an expropriated interest does not exceed the total amount of any offer made under section 14 and any subsequent offer made to such party in respect thereof before the commencement of the trial of the proceedings, the Court shall, unless it finds the amount of the compensation claimed by such party in the proceedings to have been unreasonable, direct that the whole of such party's costs of and incident to the proceedings be paid by the Crown, and where the amount of the compensation so adjudged to be payable to such party exceeds that total amount, the Court shall direct that the whole of such party's costs of and incident to the proceedings, determined by the Court on a solicitor and client basis, be paid by the Crown." "

Respectfully submitted.

LAZARUS PHILLIPS,
Acting Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Tuesday, May 12, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-136, respecting the Expropriation of Land, met this day at 4.30 p.m. to give further consideration to the bill.

Senator Lazarus Phillips (Acting Chairman) in the Chair.

The Acting Chairman: Honourable senators, we have a quorum. On your behalf, I welcome the Minister of Justice, who is good enough to grace us with his presence here, and also Mr. Munro, the Assistant Deputy Minister of Justice, and Mr. Hayes, the minister's executive assistant.

Honourable senators will remember that we dealt with the subject matter of Bill C-136 in this committee. During the course of our deliberations there was provisional approval of the bill as it had passed the other place, but there were three amendments suggested, one by Senator Hayden, one by Senator Choquette, and one by Senator Flynn. It was suggested that before proceeding with these proposed amendments it would be well to get the view of the Minister of Justice and his department generally with respect to them.

I have been advised by Senator Choquette that he is not pressing the amendment which he had discussed in the conference which previously held. We are now down to two amendments, one by Senator Hayden and one by Senator Flynn. With your approval, Mr. Minister, before the calling upon you I will ask Senator Hayden if he is still of the same view.

Senator Hayden: I was concerned about the position of the minister, but the minister does not feel the same concern, and therefore I am not pressing the proposed amendment.

Senator Croll: Mr. Chairman, it so happens that I was busy elsewhere. Would you tell me what Senator Choquette's and Senator Hayden's amendments, that they have so generously dropped, were?

The Acting Chairman: I think it would be best, Senator Choquette, if you would summarize your amendment.

Senator Choquette: I really have lost track of the amendment which I proposed.

The Acting Chairman: I think the basic points were with respect to delays within which decisions had to be made by the minister and certain proposed procedures to be taken before the courts which would be conditional upon the right of the minister to move within the specified period. It was a procedural point with respect to the necessity of the minister's decision within the defined period.

In so far as Senator Hayden's amendment is concerned, Senator Croll, Senator Hayden felt, following, I think, the Ontario precedent of analogous legislation, that the hearing officer should not be given the jurisdiction or right to deal with the subject matter of the policy decisions of the minister that would lead to a proposed expropriation.

As I understand it, and as Senator Hayden just indicated, he thought it was being done for the protection of the minister, but he probably received information that this is an instance where the minister may not desire such protection. Am I right on that?

Senator Hayden: That is the conclusion to which I came. What I would like the minister to do is give us his connotation of the word "report". In discussing this, Mr. Minister, it was pointed out that the hearing officer is simply an extension of your ear. In other words, he gathers together all the parties who are objecting to the expropriation, and hears their story—what their objections are—and then he is supposed, as the bill says, to report to you on the nature and grounds of the objection. I was concerned that the report, as I conceive a report, goes further than simply

a statement of what these people said; that is, that there might be some opinion or some recommendation in it. Your assurance went this far, that that is not the intention, but you cannot tell how it will work in practice. I suppose that if there is anything incorporated in the report that smacks of comment or opinion you, as minister, will insist on having it struck out.

Honourable John N. Turner, Minister of Justice: Mr. Chairman and senators, first of all, I want to thank you for your courtesy in inviting me to explain my and the Government's position on the bill with respect to the amendments that were put informally before your committee.

I suppose, Mr. Chairman, that one of the reasons why I can be a little freer in dealing with the minister's position is that within the terms of the bill I am not the minister; it is the Minister of Public Works. I am assured that the Minister of Public Works is willing to contemplate a hearing in as wide terms as possible, not only as to the merits of the expropriation or the property expropriated, but also the policy behind the expropriation itself. For this reason we do not limit the parties who may appear at the hearing to those having an interest in the property, either real, personal or leasehold. Conceivably, municipal planning boards, regional planning boards, or even provincial boards or communities could appear to object to the policy of the minister's expropriation. The duty of the hearing officer, as nearly as you have put it, is to act as his ear and to report those objections to him—the nature and grounds of the objections—and then it will be up to the Minister of Public Works to decide, in the light of those objections, whether to proceed with the expropriation. That will be an administrative decision for which he will be held accountable to his colleagues in the Government and to Parliament. That being so, and since the hearing officer himself takes no position, we felt that the Minister of Public Works could risk the lack of protection you wanted to give him.

Senator Hayden: As Minister of Justice, are you satisfied that the use of the word "report" without any qualification is such, in the conotation in which it is used, that it only embodies a statement of the representations which have been made.

Hon. Mr. Turner: I believe I can say that in the way it is drafted, and the instructions we give to hearing officers will be so phrased.

Senator Hayden: Mr. Minister, when you in the House of Commons refer a bill to a committee, you ask the committee to examine and report on it. What is the connotation of "report" there?

Hon. Mr. Turner: Of course, the words here, Mr. Chairman, are "report in writing on the nature and grounds of the objections made". There is nothing about his recommendations or his assessment.

Senator Hayden: Of course, there is nothing in the reference to the committee, but in the report you sometimes get recommendations.

Hon. Mr. Turner: I suppose it is conceivable that the odd hearing officer may trespass beyond his terms of reference.

Senator Hayden: Who is going to regulate and discipline him.

Hon. Mr. Turner: I think it might be pointed out to him that he has exceeded his terms of reference, but in any event the minister is not bound by any recommendations which he may choose to make, because that is not within his terms of reference.

Senator Hayden: I can see, if he did step out of line, that it might in some way reflect without any foundation on the minister and on the policy decision.

Hon. Mr. Turner: Conceivably.

Senator Hayden: I did not think that an administrative official should be empowered to pass on a question of policy. But if you do not want it, I am not going to press it.

Hon. Mr. Turner: Our view is that the minister has sufficient protection here.

Senator Flynn: The report would not be binding on the minister.

Hon. Mr. Turner: The report is not binding in any event.

Senator Croll: What is the third one, Mr. Chairman?

The Acting Chairman: We are down to the third point which was suggested by Senator Flynn which, at the request of this committee, has been reduced to a formal amendment, a copy of which I have given to Senator Flynn. The senator's first reaction is, Mr. Munro, that we may not have quite covered his point in full. Would you be good enough to speak to this, senator?

Senator Flynn: Mr. Chairman, I think the amendment meets my point, but not entirely.

The Acting Chairman: I think your review appears on page 15 of the proceedings of March 18, 1970.

Senator Flynn: My idea was that I wanted to embody in the act the principle that, unless the contestation of the expropriated party was adjudged frivolous by the court, the expropriated party would be entitled to all his costs even if the amount determined by the court is the one offered by the expropriating party. In other words, if the offer was adjudged to be sufficient the expropriated party would nevertheless be entitled to his costs unless his contestation is adjudged frivolous by the court, the idea being that the expropriated party is entitled to disagree with the offer which is made by the expropriating party. If he does that in good faith he should not be penalized, or should not see his indemnity diminished by the fact that he would have to pay the costs.

The amendment which has been drafted by the department meets this to some extent. This is clause 36 (2) which reads:

> Where the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under section 29 in respect of an expropriated interest does not exceed the total amount of any offer made under section 14 and any subsequent offer made to such party in respect thereof before the commencement of the trial of the proceedings, the court shall, unless it finds the amount of the compensation claimed by such party in the proceedings to have been unreasonable, direct that the whole of such party's costs of and incident to the proceedings be paid by the Crown...

My objection is to the wording, "unless it finds the amount of the compensation claimed by such party in the proceedings to have been unreasonable". I do not think this is the test. Suppose he has asked for a lot more than is offered, but his contestation is made in good faith. He should not be penalized just because he asked for a lot more. I think it should read "unless it finds the contestation made by such party in the proceedings to have been unreasonable". The principle is in the contestation and not in the amount that is claimed by the expropriated party.

The Acting Chairman: I am drawing your attention, Senator Flynn, to page 15 of the previous proceedings and the expression you used "that unless the contestation of the expropriated party is futile". You used the word "futile". You did not use the word "frivolous", which probably would be too broad.

Senator Flynn: I think it would be better if you replace "the amount of the compensation claimed by such party" by "contestation made by such party".

Senator Hayden: Mr. Chairman, I think the difference is that Senator Flynn thinks that the attitude of the contestant in approaching the contest is what should govern. If the offer is $100,000, and finally there is an award of $110,000—how do you determine whether an amount is unreasonable?

Senator Croll: Are we talking about unreasonable or unrealistic?

Senator Flynn: Unreasonable.

Senator Croll: How do you define "unreasonable"? You might be able to define "unrealistic". If something is worth $50,000, and $100,000 is asked, then it is unrealistic, and it may be unreasonable too. "Unrealistic" seems to me to be a more down-to-earth word.

Senator Flynn: If the experts of an expropriated party give the opinion to the court, and so advise their client, that in spite of the offer of $100,000 by the expropriating party their client is entitled to $200,000, and the court comes to the conclusion that $100,000 is sufficient, then, in that case, the amount which is claimed by the expropriated party is so far away from the amount offered that it would be adjudged to be unreasonable. But I do not think this is the test. If he contests the amount offered, but adduces no further evidence, and if he does not show any good faith in the evidence which he brings before the court, then even if the difference is only $10,000, I think the court should be entitled to punish him for this frivolous contestation, to use the word of Senator Phillips. In the other case that I mentioned it would be unreasonable not to allow him the costs just because the experts were so far apart in their assessment.

Senator Hayden: I am inclined to agree. The test should be the conduct of the contestant.

Senator Flynn: Yes, that is why I speak of contestation.

The Acting Chairman: Honourable senators, I think it might be well to hear from the minister on the point.

Hon. Mr. Turner: Mr. Chairman, basically, as I understand Senator Flynn's proposal, the claimant should be entitled to his costs if he contests before the Exchequer Court, in any event, provided that the amount of his claim, or the type of his claim, is not unreasonable.

Senator Flynn: His contestation.

Hon. Mr. Turner: I want to get to that point. We were concerned when we first looked at this proposal that it would make negotiations very difficult. In other words, if the owner of the expropriated interest were to know that his costs would be covered in any event then the negotiating procedure would not have such a binding influence on the parties.

Senator Hayden: You mean, by its intimidating effect.

Hon. Mr. Turner: You can put it in any way you wish. It might mean that the negotiations would be considered to be just a formal preliminary to proceedings.

We think that in terms such as this we could live with the amendment, first of all, because the court ordinarily awards costs to the claimant any way—and even within the terms of this bill there is a discretion given to the court. Secondly, we felt that it was likely that the court would tend to construe the word "unreasonable" that we have here against claimants if it became apparent that the negotiating procedure was not being used properly, and claimants were coming to the court as a matter of course. Obviously, the court would tend to interpret the awarding of costs in such a way as to not encourage a flood of litigation that did not have any reasonable basis.

First of all, I can accept Senator Flynn's amendment, so now we are just talking about how it should be drafted. What I am trying to achieve here is an objective test. I get a little nervous when we start talking about *bona fide* intention. A *bona fide* intention is a subjective test that has to be measured in objective terms by evidence. There must be some sort of evidence adduced. Therefore, I am looking for an objective test which the court can assess.

Secondly, I do not think there is much difference, if there is any at all, between contestation and compensation, because the only type of contestation is over the amount of compensation. The only type of contestation that brings a matter before the court is the amount of compensation, and nothing else. The objective test that we felt was reasonable is the amount of the compensation he is seeking, reasonable under the circumstances. If the amount is reasonable then the contestation is reasonable, and if the amount is unreasonable then the contestation cannot be reasonable. I know there is a shading of difference, but I do not want to put the court in a position where it has to assess intention.

Senator Flynn: It can be based on the evidence adduced by the expropriated party. I suggest to you, for instance, that if the Government offers $50,000 and if the expropriated party says he wants $55,000 then the test would not be whether the amount claimed was unreasonable because it cannot be unreasonable to ask $55,000 when you are offered $50,000. But if on the *bona fide* advice of experts he claimed twice the amount offered it might be unreasonable if the court did not accept the viewpoint of the experts.

The Acting Chairman: Could we not marry the two ideas to the theme of "unreasonable" and "reflecting bad faith".

Senator Flynn: If it reads "unless it finds the contestation made by such party in the proceedings to have been unreasonable", it will be based on the evidence that is adduced.

Senator Croll: Mr. Chairman, if you start reflecting bad faith you are getting down to a basis that should not be there in a civil action. It is something which is completely foreign to it.

Senator Flynn: It is the contestation that has to be unreasonable; not the amount claimed.

Hon. Mr. Turner: Suppose the Government's valuation is in the neighbourhood of $50,000, and suppose there is a special interest, history, or family tradition attached to the property. I am not talking about special use, because that is covered. Suppose the attachment that the expropriated owner has to the property really prevents him from having a reasonable attitude toward how it should be valued. He might be in good faith when he says that he wants $150,000, and that he believes the property is worth $150,000. Even though this man is in good faith in asking three times the value of the property, the court is put in a difficult position.

Senator Flynn: I remember the famous case of *Fraser*.

Hon. Mr. Turner: I was in that case.

Senator Flynn: You will remember the difference between the final decision of the Supreme Court of Canada and the decision of the trial court. I believe it was 50 times more than the amount assessed by the trial court.

Hon. Mr. Turner: Of course, that did not go to a matter of intention. The reason we were able to persuade the Supreme Court to give so much to Fraser was that the Crown had a special use for the property, namely the building of the Canso Causeway.

Senator Flynn: That is why I suggest to you that if you offer $50,000 to someone and he says that the property is worth $300,000, and if the final judgment says that the offer is insufficient but the claim of $300,000 is unreasonable, the expropriated party would not be allowed his costs, whereas if the difference between the two was only $10,000 the interpretation on the wording of this amendment would be different. I suggest to you that it is the contestation itself that is of the essence, and not the amount which is claimed by the expropriated party in comparison to the amount offered.

Hon. Mr. Turner: I like your point, senator, and I think we have met it.

Senator Flynn: I am not satisfied. If you claim just a little more than what is being offered you will have a contestation.

Hon. Mr. Turner: Not necessarily. Mr. Munro points out that if an expropriated owner were to go for $5,000 more than what was offered and were only to achieve that, the court might well hold in the circumstances that it was not reasonable to put the court to the test for such a difference. That is possible, but what we do not want to discourage is a reasonable claim. I feel that a reasonable claim can be assessed by a reasonable claim for compensation. Since the contestation is necessarily related to the compensation, and since the court will have to have an objective test, I would suggest to you that we get a more accurate reflection of what we want to achieve by relating it to the contestation rather than to the institution of proceedings.

Senator Flynn: I wanted to make it relevant to the evidence adduced by the expropriated party. That is where we find the attitude of the expropriated party, to see whether it is reasonable or not. There is quite a difference. If I have an expert telling me that I should claim three times the amount offered, and he comes before the court and says "I believe in good faith that this man is entitled to three times what is offered", then I think that I should be allowed my costs in a case like that, even if I do not succeed. On the other hand, if I came for only $5,000 more than $100,000, and I brought no evidence to justify the additional $5,000, then my contestation is not reasonable, and I should not be entitled to costs.

Senator Hayden: Mr. Chairman, I was wondering whether the minister would consider introducing the fictional reasonable man.

Hon. Mr. Turner: Of course, we have reason in here right now. That is the test that we have here. It might well be that a claimant is in perfect good faith in relying on an outrageous evaluation by a valuator who was trying to convince him.

I leave it to you, senators. I feel that the intention of the party in going to court, and the assessment of that intention as reasonable or not, is related directly to the amount of compensation which he is trying to obtain, because that is the only issue.

Senator Croll: Mr. Chairman, I will move the amendment.

Senator Flynn: Thank you, Senator Croll.

The Acting Chairman: I was directing myself to Senator Flynn who was dealing with the subject. I was hoping that he might move it.

Senator Flynn: I will leave the responsibility to Senator Croll since he is entirely satisfied with the wording, and I am not.

Senator Croll: No, it is your amendment.

The Acting Chairman: I would prefer directing myself to you, Senator Flynn. I would like to know if half a loaf is better than none. Would you be willing to move the amendment.

Senator Flynn: I am not inclined to move the amendment. I think it is an improvement, but I am not entirely satisfied. Since Senator Croll feels that everything is correct, I will let him move the amendment.

Hon. Mr. Turner: I suggest that it is not a question of half a loaf or a loaf. I think the senator is getting a full loaf, but he does not like the baker.

The Acting Chairman: Senator Croll, would you move the amendment in the form in which we have before us.

Senator Croll: Yes. I move that on page 36, strike out subclause (2) of clause 36 and substitute therefor the following:

> "(2) Where the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under section 29 in respect of an expropriated interest does not exceed the total amount of any offer made under section 14 and any subsequent offer made to such party in respect thereof before the commencement of the trial of the proceedings, the Court shall, unless it finds the amount of the compensation claimed by such party in the proceedings to have been unreasonable, direct that the whole of such party's costs of and incident to the proceedings by paid by the Crown, and where the amount of the compensation so adjudged to be payable to such party exceeds that total amount, the Court shall direct that the whole of such party's costs of and incident to the proceedings, determined by the Court on a solicitor and client basis, be paid by the Crown."

The Acting Chairman: That is seconded by Senator Urquhart. All those in favour of the amendment?

Senator Choquette: I would like to ask a question of the minister. I have already intimated that I am not pressing any amendment. Why is it that under a similar act in Ontario an application to court is necessary to extend the time for making an offer? Why is it not necessary under this act, and why is it left to the discretion of the minister? Is there any special reason for that?

Hon. Mr. Turner: Because under the Ontario act they do not have to pay interest if they get the time extended.

The Acting Chairman: Are you ready for the motion, honourable senators?

Hon. Senators: Agreed.

The Acting Chairman: Shall I report the bill as amended?

Hon. Senators: Agreed.

Senator Hayden: I move that we adjourn.

The Acting Chairman: Thank you, honourable senators. Thank you, Mr. Minister.

The Committee adjourned.

Queen's Printer for Canada, Ottawa, 1970

Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 6

WEDNESDAY, MAY 27th, 1970

Complete Proceedings on Bill C-4,

intituled:

"An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves."

WITNESS:

Mr. J. H. Hoffos, Q.C., Departmental Counsel, Department of the Solicitor General.

REPORT OF THE COMMITTEE

Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 4

WEDNESDAY, MAY 27th, 1970

Complete Proceedings on Bill C-5,

intituled:

"An Act to provide for the relief if persons who have been convicted of offences and have subsequently rehabilitated themselves."

WITNESS:

Mr. J. H. Hollies, Q.C., Departmental Counsel, Department of the Solicitor General.

REPORT OF THE COMMITTEE

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman.*

Argue
Aseltine
Belisle
Burchill
Choquette
Connolly, J. J. (*Ottawa West*)
Cook
Croll
Eudes
Everett
Fergusson
Flynn (*ex officio*)
Gouin
Grosart
Haig
Hayden
Hollett
Lang
Langlois
Martin (*ex officio*)
Macdonald, J. M. (*Cape Breton*)
McGrand
Methot
Petten
Phillips (*Rigaud*)
Prowse
Roebuck
Smith
Urquhart
Walker
White
Willis

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of Proceedings of Senate of Thursday, May 21st, 1970.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Fournier (*de Lanaudière*), seconded by the Honourable Senator Bourget, P.C., for the second reading of the Bill C-5, intituled: "An Act for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves".

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 Fournier (*de Lanaudière*) moved, seconded by the Honourable Senator Denis, P.C., that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

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

ROBERT FORTIER,
Clerk of the Senate.

21784–1½

MINUTES OF PROCEEDINGS

Wednesday, May 27, 1970.
(4)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 4.00 p.m.

Present: The Honourable Senators: Aseltine, Cook, Eudes, Fergusson, Hollett, Méthot, Phillips (*Rigaud*), Prowse and Urquhart. (9)

Also present but not of the Committee: The honourable Senator Fournier (*De Lanaudière*).

In the absence of the Chairman and on MOTION of the Honourable Senator Aseltine, the Honourable Senator Phillips (*Rigaud*) was elected *Acting Chairman*.

Ordered: That 800 copies in English and 300 copies in French of these proceedings be printed.

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

The committee proceeded to the consideration of bill C-5, intituled: "An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves."

The following witness was heard in explanation of the Bill:
Mr. J. H. Hollies, Q.C., Departmental Counsel, Department of The Solicitor General.

After discussion and on MOTION of the Honourable Senator Cook, it was *Resolved* to report the said Bill without amendment.

At 4.40 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Gerard Lemire,
Clerk of the Committee.

REPORT OF THE COMMITTEE

Wednesday, May 27th, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-5, intituled: "An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves", has in obedience to the order of reference of May 21st, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

LAZARUS PHILLIPS,
Acting Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Wednesday, May 27, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-5, to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves, met this day at 4.00 p.m. to give consideration to the bill.

The Clerk of the Committee: Honourable senators, in the unavoidable absence of the chairman is it your pleasure to elect an acting chairman?

Senator Urquhart: I nominate Senator Phillips.

Hon. Senators: Agreed.

Senators Lazarus Phillips (*Acting Chairman*) in the Chair.

> Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 800 copies in English and 300 in French be printed.

The Acting Chairman: Honourable senators, the subject matter is a consideration of Bill C-5 which you will remember is the Criminal Records Act. We have before us Mr. J. F. Hollies, Q.C., Senior Solicitor, Legal Services Division, Department of Solicitor General. In addition to his own eminence and worth, Mr. Hopkins informs me that he served in the Royal Canadian Air Force with Mr. Hollies during the last war, so that adds a special tag of approval upon you, Mr. Hollies.

Mr. J. F. Hollies, Senior Solicitor, Legal Services Division, Solicitor General Department: Thank you, sir.

The Acting Chairman: This bill received second reading in the Senate, Mr. Hollies, and there was some observation made which necessitated a motion to send this bill to the Standing Senate Committee on Legal and Constitutional Affairs. We will be grateful to you if you will be good enough to go over the bill in general terms and give us the benefit of your views and guidance.

Mr. Hollies: Mr. Chairman, honourable senators, I really have no set piece prepared and I do not think this will come as a grave disappointment to you. This was, if I may say so, introduced very thoroughly in the Senate by Senator Sarto Fournier.

Basically the bill is designed to remove the stigma from those who have really and truly rehabilitated themselves after having been published for a criminal offence. It does this in a variety of ways, but basically it provides for the sealing of their judicial records, the segregation of those records, keeping them apart and closed from the public, not to be made available to the public except with special permission from the Solicitor General of Canada. That permission can only be given for one of two reasons, to aid in the administration of justice or because the security of the state or its allies is in some way involved.

There is provision in the bill for non-disclosure of records that have been pardoned. It has the effect so stated in the bill of "vacating the conviction." That is, the conviction shall be deemed no longer to have force and effect and to be evidence that the man, after the proper inquiries have been made by the National Parole Board, is deemed to have rehabilitated himself.

Senator Fergusson: I presume this applies to women as well?

Mr. Hollies: I should hardly like to exclude the honourable senator from the ambit of the bill. I realize she does not need to benefit by it.

Senator Fergusson: I realize it is covered in the Interpretation Act.

Mr. Hollies: The bill certainly covers the very few female offenders that we have—and have had.

Senator Hollett: Very few?

Mr. Hollies: Yes, sir.

Senator Fergusson: The number is very small.

Senator Prowse: Chivalry is not dead!

Mr. Hollies: Nor is truthfulness, for I can prove that by statistics. The pardon, as I was saying, is evidenced by the fact that he or she is, in the eyes of the parole board, deemed to be of good character and the previous conviction should no longer be treated as being an adverse reflection on the character of the person pardoned.

Senator Aseltine: No matter how many previous convictions he has had?

Mr. Hollies: That is quite right, sir. There are cases where the offender has a great number of convictions. For example, one man I am thinking of from the Province of Quebec had something like 15 convictions. They were incurred a considerable time in the past and were occasioned by the fact that he had been an alcoholic. Then he joined Alcoholics Anonymous and became a highly respected member of the community. He is certainly one of the people contemplated by the bill. In actual fact that man was pardoned under Letters Pattent by the Governor General.

Senator Aseltine: In fact all these convictions against him would prevent him from getting employment.

Mr. Hollies: Apparently not. I do not have his personal history to that extent. Whether he had private means or help from relatives I do not know.

Senator Aseltine: I thought he had been refused employment. In any event, the provisions of this bill would cover his case.

Mr. Hollies: That is so, sir. The senator raises the other important aspect of the bill that employers, so far as the legislative competence of Parliament extends, are forbidden to have on their application forms any question requiring an applicant to disclose an offence for which he has been pardoned.

Senator Prowse: I can see where people should perhaps have the right to put on the form that they have never been convicted of a criminal offence. Would they add to it, "Have you ever been convicted of a criminal offence for which you have not received a pardon? "

Mr. Hollies: Precisely, sir. The idea behind this is to get the person over the first hurdle in gaining employment. I would be less than frank if I did not say what is going to be open to employees. Experience has shown that the first hurdle to get over for the person who has come into conflict with the law is the application form. If the employee can say in response to a question that it is true he has been convicted of an offence but that he has been investigated and rehabilitated and there is pardonable proof, then he stands a good chance of getting a job.

Senator Fergusson: I understood Mr. Hollies to say that the man he was referring to had been granted a pardon under Letters Patent. That does not answer the question as whether people committing a number of offences would be pardoned under this act.

Mr. Hollies: In answer to a previous question, I was using that example as typical of the experience. If I may extend on that. I am now speaking for the National Parole Board and I really have no authority to do so. The practice within the department will be that if a person has a number of offences they will take a harder look at him. The inquiries will be more far-reaching than they would be in the case of an isolated offence. It may be that in view of the fact a person has had ten offences, they may consider that the minimum time is not sufficient in order to determine rehabilitation.

Senator Fergusson: But he would be eligible for consideration?

Mr. Hollies: Certainly.

Senator Fournier (De Lanaudière): As I am not a member of the committee I would like to ask the permission of the chairman to say a few words.

The Acting Chairman: Of course, as senator sponsoring the bill in the Senate.

Senator Fournier (De Lanaudière): I am sorry I have been a little late. So far as the United States are concerned, when you cross the border, you might be asked the question "Have you ever been sentenced? " So, having regard to the present bill, what would be the answer?

Mr. Hollies: The man must either lie or he must say "Yes, I have been." The bill does not remove the fact of conviction.

Senator Fournier (De Lanaudière): And does he have a certificate to the effect that he has been pardoned?

Mr. Hollies: Yes, sir, the schedule to the act sets out the pardon in the form in which it will be granted. And each grant of a pardon will be accompanied by that certificate to the man.

Senator Fournier (De Lanaudière): So that might be a matter of agreement between the Government of the United States and the Government of Canada so that if a man declares he has been sentenced but pardoned the doors will be opened to him in the United States?

Mr. Hollies: Quite, senator. This in fact was one of the proposals put forward in the Ouimet Report—that there should be an international agreement to recognize rehabilitation in some such fashion as you suggest.

Senator Fournier (De Lanaudière): Mr. Chairman, I would like with your permission to make a comment. I had the honour to sponsor this bill in the Senate. It is not a perfect bill; it is a first try. I think we should vote this bill as it is and let us get what experience we can from it. After a while in the light of that experience, we may be able to bring about some corrections, and I will be delighted to sponsor it, and the corrections, if I have the occasion.

Thank you, Mr. Chairman.

Senator Urquhart: Mr. Chairman, this bill simply give a person who is being convicted a certificate of good behaviour. Is not that all it amounts to?

Mr. Hollies: With respect, I think it goes a great deal further.

Senator Urquhart: It does not wipe out the crime.

Mr. Hollies: That is true.

Senator Urquhart: And if he is asked the question "Have you ever been convicted of a crime? " in filling out an application for employment, he must say yes.

Mr. Hollies: Yes, except that question is in itself forbidden so far as the Parliament of Canada has legislative competence. That is so far as matters within the federal sphere are concerned.

Senator Urquhart: But that question is there aways. "Have you ever been convicted of an offence? "

Mr. Hollies: It is now on some application forms in the federal sphere, to use the same term. But it is not on either type of application form in general use in the public service.

Senator Urquhart: But in private business?

Mr. Hollies: In private business we have taken the view that we cannot legislate. But it is there, yes, and this is why, if I may, following on what Senator Fournier (De Lanaudière) has said, it has never been the contention of the department that the bill is a cure-all. We would hope that provincial legislation will complement it so that they will deal with the areas over which they exercise control.

Senator Urquhart: Well, I still think it is merely a certificate of good behaviour.

Senator Aseltine: Has any progress been made to that effect with the provinces?

Mr. Hollies: No, senator, the provinces have not been formally approached on this at all. The proposition has been that we would hope the Parliament of Canada will give the lead, and then we can go out and waive the bill, or the act as it will then be, in the face of the attorneys general and the premiers and say, "Please do something yourselves".

Senator Méthot: What about the insurance companies, on life for example? Is there not a practical question involved there?

Mr. Hollies: Last time I got insurance I did not have to answer that question. I do not know what the general practice is, quite frankly.

Senator Prowse: They send somebody around to talk to your neighbours usually.

Mr. Hollies: That may have been why the R.C.M P. was scouting around me recently! I thought it was just a security check.

Senator Fergusson: Could Mr. Hollies tell us exactly what is the meaning of clause 8(d):

> . . . any work, undertaking or business that is within the legislative authority of the Parliament of Canada.

What does that cover?

Mr. Hollies: This is the wording used in connection with the Canada Labour Code. It is the wording devised by Justice to cover the general ambit of everything in the competence of the Parliament of Canada. For example, it covers the contractor who has contracts for such things as construction and the provision of services to the Government of Canada. It obviously does not cover such things as a private construction company incorporated in Manitoba not having any contracts with the Government. The words "work, undertaking or business . . . within the legislative authority" are within that general framework. I cannot be more precise. I do not know if it has ever been subject to definite legal interpretation. I am sorry. I am not trying to fudge the question; I just do not know the complete answer to it, and I doubt if it is ascertainable.

Senator Fergusson: I thought it had a wider meaning than that, but I am probably wrong.

Mr. Hollies: What happened was that the Department of Justice was given instructions to draft this in the broadest possible terms, and they said that the broadest possible terms had been used in the Canada Labour Code; those were the broadest they could devise and they would adopt the same language for this bill.

Senator Hollett: I notice that the word "offence" has not been defined. At least I do not see any definition. What is an offence under this bill? If a man is convicted of murder, surely he does not get away as easily as this bill says, does he?

Mr. Hollies: First of all, senator, I draw attention to clause 3, the application for pardon:

> A person who has been convicted of an offence under an Act of the Parliament of Canada or a regulation made thereunder may make application for a pardon in respect of that offence.

That delimits the offences. It would cover murder, but the man's punishment for murder can never be said to have expired five years ago. Even if he is put on parole he is still deemed to be under sentence of imprisonment, so a man could not get a pardon . . .

Senator Hollett: I was wondering just how far up the scale this bill goes.

Mr. Hollies: Let us take the next most heinous offence to murder, whatever offence may be considered to be next in the scale. Say it is rape. A man may get a 20 years sentence for rape; he could get life, but say 20 years. Until he has served that sentence and for five years thereafter he may not apply for a pardon. The five years is a minimum period, and he might not get a pardon even on the minimum period. It would depend on the thorough reports. He may be completely reformed.

Senator Prowse: This bill does not give him a pardon. It gives him a right to apply for it.

Mr. Hollies: Precisely.

Senator Prowse: And then they may pardon him.

Mr. Hollies: They may or may not, depending upon the conclusions they reach after the investigation.

The Acting Chairman: I would like to put a question now if Senator Fournier will allow me to go first.

Senator Fournier (De Lanaudière): I have received my answer. I have been enlightened by the replies given by Mr. Hollies.

The Acting Chairman: In clause 3, to which you made reference in replying to Senator Hollett, there is reference in effect to the Criminal Code, which is an act of Parliament, which would include treason. Are there not instances under the Criminal Code, or some other statutes, pursuant to which a conviction leads to certain consequences in terms of dollars or other effects? When under this bill you vacate the conviction, does that mean that retroactively you vacate the consequences of the original conviction on a technical basis?

Mr. Hollies: No sir.

The Chairman: Because in the Senate, Mr. Hollies, a question was raised as to what was meant by vacating the conviction.

I forget which senator raised that point.

Senator Urquhart: It was Senator Choquette, who said it would be erased.

The Chairman: The question was as to what specifically was meant by the phrase vacating a conviction.

Mr. Hollies: The question, Mr. Chairman, was indeed posed to the Department of Justice.

The Chairman: Honourable senators, the phrase "vacates the conviction" appears in clause 5, paragraph (b), on page 3.

Mr. Hollies: As I understand the thrust of your question, sir, the first portion of it is whether the vacating is retroactive.

In my view it is not. I think I am on safe grounds in saying that is the accepted interpretation.

This has certain practical consequences when you consider a conviction under the Criminal Code for dangerous driving, which may have resulted in the provincial authorities suspending a licence to drive. In my opinion that suspension is valid and will remain valid. Notwithstanding the fact that there may be a subsequent pardon affecting the conviction, it does not affect the consequences which have flowed from it. It has no retrospective effect.

Its effect is that from the grant of the pardon it is deprived of force and effect in law.

A number of examples can be given. Under section 654 of the Criminal Code there are certain disabilities as to holding office under Her Majesty, contracting with Her Majesty, and the like, which are attendant upon what might generally be called frauds upon the Government.

Those who have been convicted under sections 102, 105 and 361 of the Criminal Code. Upon a grant of a pardon those disabilities are from that time removed.

In a small different sphere, supposing I were convicted of drunken driving today, suffer my punishment, apply for a pardon in due course and am granted a pardon. It would not be open to the Crown, should I be foolish enough to commit the offence again, to treat that offence as a second offence. It would, however, be possible that quantum of sentence, as distinct from the laying of the information as a second offence, would be affected if the Solicitor General allowed the court to be informed that this was not a first offence.

Senator Fournier (De Lanaudière): A person convicted of having committed a cold blooded murder on the occasion of a holdup, for instance, should not benefit by this law. We should make an exception for the murderer.

We have been kind and generous to them when voting that they would not be hanged or killed. We should not go any further.

Mr. Hollies: With respect, Senator Fournier, the murderer is not eligible for a pardon under this bill because his sentence has not expired. The board is precluded from making inquiries in the case of an indictable offence until five years after completion of the punishment.

Whether it is capital murder or non-capital murder, that man is under a sentence of imprisonment for life. Even if he is paroled, according to the Parole Act, he is deemed still to be under his term of imprisonment. Accordingly, there is no eligibility for a murderer to apply for a pardon under this act. There could be an application for a free pardon on the ground that he was wrongly convicted, where his innocence has been subsequently demonstrated; or even the lesser pardon—what is often called the conditional pardon—under the Letters Patent constituting the office of the Governor General. I think in practice that no such pardon has ever been applied for.

Senator Prowse: The same thing would apply to the habitual criminal, would it not?

Mr. Hollies: Senator Prowse, declaring a person a habitual criminal is a matter of status and has been so found by the courts. It is not an offence. It is only in respect of an offence that you can apply for a pardon.

The Acting Chairman: Honourable senators, I am certainly not suggesting an amendment, but it might be useful to have Mr. Hollies, and through him the department generally, consider the desirability in due course of dealing with the subject matter of the phrase "vacating the conviction", because there are certain instances where it is retroactive. For instance, if a man has lost his driving licence it remains retroactive even if the conviction is vacated, as you said before. On the other hand, in certain instances, such as doing business with the Crown, it runs in the future and is not retroactive. So you have an ambivalent situation with respect to the phrase "vacating the conviction" and its consequences.

Mr. Hollies: I must have lacked clarity in my exposition, senator. I was attempting to say that the pardon is not retroactive at all. I was saying, for example, that the consequences which may flow from the provincial authorities' cancelling a driver's licence show that the pardon is not retroactive,—those consequences having occurred before the pardon took place. There is a similar situation with respect to the devolution of estates, where a person cannot benefit by his own wrongful act. If you take the case of causing

death by criminal negligence, an estate may vest otherwise than would have been the case had that offence not taken place, because the wrongdoer cannot benefit from it. If you make the effect of the pardon retroactive, you then reopen the estate to determine distribution.

The Acting Chairman: The point I am making is that we are accepting and incorporating in this bill a phrase which is not defined. I think it is certainly worthwhile drawing your attention to it for departmental consideration. I have no other purpose in mind.

Mr. Hollies: Very good, sir.

Senator Prowse: Mr. Hollies, I am of the same opinion as the Chairman with respect to having a definition of that expression, and I believe other senators would also like to see it defined.

The Acting Chairman: We certainly would have no intention of holding up the bill, but it is worth consideration. Are you ready for the question, honourable senators? May I have a motion to report the bill to the Senate without amendment?

Senator Cook: I so move.

Hon. Senators: Agreed.

The Acting Chairman: Thank you very much, Mr. Hollies.

The committee adjourned.

Queen's Printer for Canada, Ottawa, 1970

Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 5

TUESDAY, JUNE 16, 1970

Complete Proceedings on Bill C-186, intituled:

"An Act to establish a commission for the reform of the laws of Canada"

WITNESSES:

Department of Justice: Honourable John N. Turner, P.C., M.P., Minister of Justice and Attorney General of Canada; Mr. D. S. Thorson, Associate Deputy Minister; Mr. J. W. Ryan, Director, Legislation Section.

REPORT OF THE COMMITTEE

21823—1

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman.*

Argue
Aseltine
Bélisle
Burchill
Choquette
Connolly, J. J. (*Ottawa West*)
Cook
Croll
Eudes
Everett
Fergusson
Flynn (*ex officio*)
Gouin
Grosart
Haig
Hayden
Hollett
Lang
Langlois
Martin (*ex officio*)
Macdonald, J. M. (*Cape Breton*)
McGrand
Méthot
Petten
Phillips (*Rigaud*)
Prowse
Roebuck
Smith
Urquhart
Walker
White
Willis

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Tuesday, June 9, 1970:

"Pursuant to the Orders of the Day, the Senate resumed the debate on the motion of the Honourable Senator Martin, P.C., seconded by the Honourable Senator Smith, for the second reading of the Bill C-186, intituled: "An Act to establish a commission for the reform of the laws of Canada".

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 Martin, P.C., moved, seconded by the Honourable Senator Smith, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

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

ROBERT FORTIER,
Clerk of the Senate.

21823—2

MINUTES OF PROCEEDINGS

TUESDAY, June 16, 1970.
(5)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 4.00 p.m.

Present: The Honourable Senators Argue, Aseltine, Burchill, Connolly (*Ottawa West*), Cook, Eudes, Fergusson, Gouin, Hollett, Langlois, Macdonald (*Cape Breton*), McGrand, Phillips (*Rigaud*), Smith and Urquhart. (15)

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel; Mr. Pierre Godbout, Assistant Law Clerk and Parliamentary Counsel, and Director of Committees.

In the absence of the Chairman and on Motion of the Honourable Senator Urquhart, the Honourable Senator Phillips (*Rigaud*) was elected Acting Chairman.

On Motion duly put it was *Resolved* to print 800 copies in English and 300 copies in French of these proceedings.

The Committee proceeded to the consideration of Bill C-186, intituled: "An Act to establish a commission for the reform of the laws of Canada".

The following witnesses were heard in explanation of the Bill:

The Honourable John N. Turner, P.C., M.P., Minister of Justice and Attorney General of Canada;

Mr. D. S. Thorson, Associate Deputy Minister, Department of Justice;

Mr. J. W. Ryan, Director, Legislation Section, Department of Justice.

After discussion and on Motion of the Honourable Senator Cook, it was *Resolved* to report the said Bill without amendment.

At 5.20 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

DENIS BOUFFARD,
Clerk of the Committee.

21823—2½

REPORT OF THE COMMITTEE

TUESDAY, June 16, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-186, intituled: "An Act to establish a commission for the reform of the laws of Canada", has in obedience to the order of reference of June 9, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

LAZARUS PHILLIPS,
Acting Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Tuesday, June 16, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-186, to establish a commission for the reform of the laws of Canada, met this day at 4.00 p.m. to give consideration to the bill.

Senator Lazarus Phillips (*Acting Chairman*) in the Chair.

The Acting Chairman: Mr. Minister and Mr. Thorson, may I on behalf of the committee bid you welcome here.

We have convened this afternoon, as you know, Mr. Minister, to consider Bill C-186 which has received second reading in the Senate and is now before the Standing Senate Committee on Legal and Constitutional Affairs. I assume with all the free time you have had at your disposal, you have had an opportunity to read every speech delivered in the Senate on Bill C-186.

Senator Aseltine: Including mine.

The Acting Chairman: Including Senator Aseltine's on the question of cost.

The Hon. John N. Turner, Minister of Justice: A very practical speech, senator.

First of all Mr. Chairman and senators, I apologize for being late. We had a number of matters to deal with, both in the other place and in connection with delegations concerning a number of current issues in our country. They held me up. They ranged from abortion on the one side to drugs on the other.

I am delighted to be here and I want to say first of all, in answer to your rhetorical question, that I did, as a matter of fact, read the speeches as they were delivered in the Senate. I do not know whether it would be presumptuous on my part to compliment the other place, as we call it, on the high quality of the speeches delivered and particularly on the research that went into the preparation of the speeches. I think I can say that they compare very favourably with the speeches made in the House of Commons, and as a matter of fact they display more research. I am very grateful to all honourable senators who participated in the debate.

I am not going to repeat what I said both before our own committee on Justice and Legal Affairs and before the House of Commons on second reading, but I think it is quite clear that living as we are in a society which is being convulsed by rapid change, and a society which is being dominated by a crisis of authority or a crisis of legitimacy, as it has been called, where every institution is being questioned, whether it be the state, the family, Parliament, the political party, the church, business, labour—where everything is being challenged on grounds of relevancy, grounds of communication with people, grounds of reflecting contemporary morals or contemporary attitudes of law and order. The law has been caught in the crunch, because these institutions reflect legal realities, and in an age of change social problems have become legal problems and legal problems have become social problems. A good many of our social problems today are provoked by the law, and in certain cases by the rigidity if the law and the failure of the law to reflect current thinking and current attitudes. As a result, as I say, our social problems have become legal problems and our legal problems have become social problems. Therefore it is necessary for the law to reflect the changing structures and changing attitudes of society. Nowhere is this more important than in the realm of the criminal law which is clearly a federal matter, because it is within the criminal law that the fundamental values of life, liberty, reputation, pocketbook and safety are tested and sanctioned.

Law reform, therefore, is a very relevant exercise for a late twentieth century legislature. The question is then—what are our best institutions for law reform? Obviously the Parliament of Canada is the prime institution for law reform in its federal aspect, and there

is nothing in this bill that takes that primacy away from Parliament, because the policy of and responsibility for the institution of reform will remain with Parliament and with the Cabinet responsible to Parliament. But it has become quite clear that we cannot just hope to deal with the reform of the law on a episodic or haphazard basis. The Criminal Law Reform measure introduced by Mr. Trudeau when he was Minister of Justice responded to certain policy necessities and provoked policy initiatives. The Bail Reform Bill which I introduced in the House of Commons last week was a policy matter of the utmost importance.

We will be introducing in the next session of Parliament another major reform bill on various aspects of the criminal law. As you know, we are moving in the elements of public administrative law as well. However, these are episodic; these are to meet what have become current problems of great importance to the country; but we in the Department of Justice, the Cabinet, or the standing committees of either house of Parliament I suggest and submit to your committee, do not have the time to review the law on a continuous basis.

If this law is to pass, one of the first matters I would like to refer to it would be the reform of the Criminal Code, but the entire Criminal Code, not just its housekeeping aspects but general aspects that will involve policy for which some future Government and minister may have to take responsibility. I believe that the criminal law needs that type of scrutiny. I think there are other branches of the federal law that need the same type of scrutiny.

Now, how will it work? The commission will be an independent commission. I want to deal with some of the points that were brought up about its independence, particularly by Senators Haig and Flynn, but it will be an independent commission. The terms of the chairman, the vice-chairman and the other two full-time members will be up to seven years; it will be a fixed term during good behaviour. The two part-time members will have terms of three years.

The commission will decide its own program of study and research. It will submit that program to the Minister of Justice of the day for approval. The reason I believe it should submit a program for approval—that is to say, the items of study and research—is that obviously, in order to remain a creditable institution, the Law Reform Commission has to deal with issues that the people, through the Parliament of the day, deem to be relevant. Nothing would hurt a Law Reform Commission more than to be dealing with problems that were not of some importance to the people.

So the commission has to submit this program to the minister, and the minister must approve it. Under the bill the minister also has the right to suggest priorities for study items that he would like added to the program, because he, being responsible to the Cabinet and to Parliament, has to respond to the people of Canada as to what a body paid for by funds given to them by the people of Canada should be studying. But that is the limit of the minister's control, the program, by way of suggesting priorities and by way of approval of the program itself.

The contents of the reports are completely within the jurisdiction of the commission, and the commission can go to the minister or to the universities, or the provinces, or other jurisdictions, to the legal profession...

Senator Aseltine: To the law societies?

Hon. Mr. Turner: ...to the law societies, the criminologists, the sociologists—any source—and the content of those reports is the business of the commission. The commission can submit reports, programs, interim or final, on topics from time to time to the minister, and the minister is bound to table those reports in Parliament. He cannot hide them; he cannot send them back. Moreover, if the minister has refused an item on a program, within the terms of the bill he has to report that refusal when he tables the report. In other words, the fact that the minister has had something to do with the content of the program, the agenda of reform, must be registered in Parliament.

I think that is quite clear from clauses 17 and 18 of the bill. Clause 17 reads:

> The Commission shall each year prepare and submit to the Minister a report containing a summary of its activities unde this Act for the immediately preceding year, in such form and containing such information with respect to any studies or other activities undertaken or directed by it as the Minister may direct.

Clause 18 reads:

> The Minister shall, within fifteen days after
>
> (a) the approval by him of each program for studies prepared by the Commission pursuant to section 12,
>
> (b) the receipt by him of each report of the Commission submitted to him under section 16 on the results of any study undertaken or directed by the Commission pursuant to any program for studies described in paragraph (a), or
>
> (c) the receipt by him of the annual report of the Commission, submitted to him under section 17,
>
> or, if Parliament is not then sitting, within any of the first fifteen days next thereafter that Parliament is sitting, cause to be laid before Parliament a copy of such program or report, together with, in the case of a program, a statement indicating any item or items proposed by the Commission and not approved, and in the case of a report, such comments, if any, as the Minister sees fit.

In other words, the minister becomes responsible to Parliament for any interference, if you will, with the commission, but he can only interfere with the program, and not with the contents of the report and not with the contents of the research.

I know that Parliament has to approve the funds from year to year, but Parliament approves the funds for the C.B.C., and Parliament approves the funds for a lot of independent or quasi-independent organizations. The people would expect that the Minister of Justice would be responsible for the amount of money being spent, and we estimate that it will cost from $250,000 to $300,000 a year for the Law Reform Commission, to begin with. The commission is relatively small. We are not making a large commission, and if specialties are to be dealt with then the commission will contract out that work.

Senator Aseltine: I presume the minister read my speech?

Hon. Mr. Turner: Yes, senator, I read your speech, and that is why I addressed myself to this subject.

Senator Aseltine: I am afraid I have to disagree. I have been here 36 years, and I have never seen a commission that did not cost three or four times the original estimate.

Hon. Mr. Turner: We are not so skillful as are honourable seenators in that sort of work.

Senator Aseltine: I hope that you can keep those costs down to somewhere near half a million dollars a year.

Hon. Mr. Turner: I hope we can, but I want to suggest to you...

Senator Aseltine: I am sorry; I should not have interrupted you.

Hon. Mr. Turner: No, it was a perfectly relevant question. But, in the Department of Justice we are not dealing with wharves, causeways, roads to resources, or Bonaventures...

Senator Connolly (Ottawa West): Or Meach Lake.

Hon. Mr. Turner: No. We are just dealing with the reform of institutions which demand only people. If you look at the budget of the Department of Justice, and at the social consequences that can be derived from law reform, you will then see that there is no other place in the total budget of Canada where the people get more bang for their buck than they do out of law reform.

Those are my initial observations, Mr. Chairman.

The Acting Chairman: With your approval, honourable senators, I should like to direct one question to the minister.

Mr. Minister, in the debate, and more particularly in your remarks, you have made it very clear that under clause 12 the powers and duties of the commission are subject to the direction of the Minister of Justice, but that the independence of the commission comes when it prepares its report and files it, and thereafter the publicity given to it is dealt with in the procedural manner you have indicated. I have read the evidence given before the committee in the other place, and I would like to say I concur in the statement—and I know that the members of the committee agree with me—that Mr. Thorson is to be congratulated upon the draftsmanship of this bill. Having said that I should like to direct your attention to clause 12(1)(b) on page 6 of the bill. I am wondering whether the drafting gives effect to what you have just said. The commission is given the right, it "may initiate and carry out—". You have an initiation and a completion by the commission of the subject matters dealt with in paragraphs (c), (d)

and (e). You seem to draw a differentiation between the subject matters that are prepared and submitted to the minister from time to time, detailed programs for the study of particular laws.

In order to give effect to what you have said, it may be necessary in paragraph (b) to state "subject to the provisions hereinafter mentioned they may initiate and carry out...".

Hon. Mr. Turner: I am going to ask Mr. Thorson to reply to that.

As you have mentioned, the bill has been very ably drafted, not without assistance, in the sense that we had the opportunity of reviewing the English and Scottish acts, the New York State Law Reform Commission and the Ontario Law Reform Commission. Mr. Thorson, the Deputy Minister, Mr. Maxwell, and I had the opportunity of discussing the operation of these commissions under the statutes governing those jurisdictions.

We hope that what you find here, senator, are improvements on the earlier statutes.

Having said that, perhaps Mr. Thorson would deal with your point.

Mr. D. S. Thorson, Associate Deputy Minister, Department of Justice: Mr. Chairman, it might be helpful just to back up on paragraph (b) a little to explain the manner in which we visualize the commission will function.

First of all, this is an empowering section, at least as far as paragraphs (a) and (b) are concerned. Paragraphs (c), (d) and (e) are mandatory in their language.

Paragraph (a) authorizes the commission to receive suggestions for changes in the law leading to reform from any source whatever, including members of the public. It is a wide open mandate, in other words, to receive suggestions from whatever source for the reform of the law.

Paragraph (b) again authorizes the commission, to the extent that it needs such authority, to initiate and carry out or supervise, perhaps through the facilities of a law school or other like facility, any kind of research that it deems necessary for the proper discharge of its functions, bearing in mind the kind of functions that are dealt with in clause 11.

The Acting Chairman: Without the consent of the minister, Mr. Thorson?

Mr. Thorson: Yes, absolutely, sir, without the consent of the minister.

It is recognized that the commission may have to enter into research programs in order to ascertain the areas of real difficulty so as to come to some conclusion as to the kind of studies that should be included in a program.

For that purpose they may very well wish to examine into, for example, the legal institutions and systems of law of other jurisdictions apart from the federal jurisdiction in Canada before coming to any conclusion as to the matters that ought to be included in a program.

The Acting Chairman: And that can be done without the direction or concurrence of the minister?

Mr. Thorson: Yes sir, it can.

The Acting Chairman: Then the direction and concurrence of the minister is related to "municipal" activities, as it were, as distinguished from non-Canadian activities?

Mr. Thorson: Yes.

The Acting Chairman: That is somewhat by way of modification, is it not, of the observations you, Mr. Minister, have just made?

Senator Aseltine: There would not be any limit.

The Acting Chairman: I am not suggesting it should not be done that way, but I simply draw your attention to it as a matter of phraseology, that there is a very important distinction.

Hon. Mr. Turner: Well, I accept that.

The Acting Chairman: Incidentally, you might find yourself in the interesting position of having an appropriation for the annual activities of the commission where its expense may be in excess of its appropriation because you have given it the authority under (a) and (b), unless you make it clear that its activities under (a) and (b) might be within the framework of the appropriation. I am not suggesting an amendment; I am merely calling your attention to it.

Hon. Mr. Turner: I would say that all money expended would have to be within the scope of the appropriation.

The Acting Chairman: Of course, but I again say that the Leader of the Government in the Senate (Hon. Mr. Martin) seemed to

emphasize, as you did, the fact that the activities of the commission were conditioned, circumscribed and informed by the Department of Justice through its minister, whereas under (a) and (b) this is not quite so.

Hon. Mr. Turner: We can look at the words used:

> may initiate and carry out, or direct the initiation and carrying out of such studies and research of a legal nature as it deems necessary for the proper discharge of its functions.

Its functions relate to the program, or the preparation of a program. I think you have to read it within the...

The Acting Chairman: If you are satisfied with it, I have done my duty by drawing your attention to it.

Hon. Mr. Turner: We have tried to draw the balance between an independent commission and yet some responsibility to the people of Canada for what they are doing. Allan Leal, the Chairman of the Ontario Law Reform Commission, disagrees with us, but we found, on the basis of talking to the Lord Chancellor in England and the chairmen of the two law commissions there, that a creditability with the people and a creditability with Parliament was a necessary balance to the independence that they both enjoyed. I am sure the Ontario Law Reform Commission could not survive for too long if instead of dealing with landlord and tenant they were off worrying about the rule about perpetuities.

The Acting Chairman: I can quite see the necessity for (c) to (e) inclusive; but I have made my point, and if you are happy to live with it as is, it is perfectly all right with me. Are there any questions, honourable senators?

Senator Aseltine: I believe that I was the only speaker in both chambers who took any strong objection...

The Acting Chairman: Forgive me, Senator Aseltine, but the minister points out to me that there is a vote in the other house.

Senator Aseltine: I could probably ask my question before you are needed.

Hon. Mr. Turner: If I do not go there you may find when I come back I am not the minister!

The Acting Chairman: Some of us would like you to go, Mr. Minister.

Hon. Mr. Turner: Could we adjourn?

the Acting Chairman: No, I think we will carry on.

Senator Aseltine: It might be half an hour before they call the vote.

The Acting Chairman: May we not carry on with Mr. Thorson?

Hon. Mr. Turner: Perhaps Mr. Thorson could carry on.

The Acting Chairman: Yes, he can answer any questions that may arise.

Senator Urquhart: We will see the minister in the morning at 10 on another matter.

Senator Hollett: He may not come back.

Hon. Mr. Turner: Oh, I will be back.

The Acting Chairman: Shall we suspend with the question of expense?

Senator Aseltine: I would like to ask a question of the minister.

The Acting Chairman: May we, therefore, honourable senators, suspend Senator Aseltine's point and deal with the bill itself and any observations we may have to make with respect thereto? After all, we do have our duty in committees to deal with the form of the bill as such. I do not think you would mind, Senator Aseltine, if we proceeded with the form of the bill.

Senator Aseltine: I have no objection.

The Acting Chairman: Does the form of the bill, as we move along, meet with your approval, honourable senators? Shall I read the sections and get reactions or shall we assume that the phraseology of the bill is agreeable to the members of this committee? Are there any suggested amendments or any questions for clarification such as I directed to Mr. Thorson, that honourable senators would like to make?

Senator Cook: If there are no questions, I move to report the bill as is.

The Acting Chairman: I would rather wait until the minister returns before reporting the bill. Once we report the bill, we are more or less *defunctus officio* as far as the deliberations of the Committee are concerned.

Senator Hollett: If we pass this bill are we going to need another minister?

The Acting Chairman: No.

Senator Hollett: The Minister of Justice is carrying a load in the office already and this is going to give him a lot more work.

The Acting Chairman: Quite to the contrary. May we have Mr. Thorson deal with that?

Mr. Thorson: I would think this commission would be of very considerable assistance to the Minister of Justice in the discharge of his duties. There are many areas of the law where, practically speaking, it is virtually impossible on a day-to-day administrative basis to come to grips with areas where changes in the law are clearly needed. The kind of resources that can be brought to bear, the study that must precede the formulation of change, are simply inadequate for the task. Rather than be a burden to the minister in terms of having to cope with the implementation of the committee's report, I would have thought that it would work the other way around.

Senator Hollett: This is new work.

Mr. Thorson: Yes.

Senator Hollett: He has not had to contend with this before.

Mr. Thorson: Of course, a great deal of law reform work is done now year by year within the department.

Senator Hollett: I know that.

The Acting Chairman: The point was raised by Senator Hollett, Mr. Minister, that instead of relieving you of a responsibility, the subject matter of the bill and assigned to the commission that this will be increasing your duties because you must clear this as to the type of work to be done under section 12. He thought this would be increasing your work.

Senator Hollett: I was wondering if you were not carrying a burden enough now as Minister of Justice of Canada. You do not have much spare time. This is setting up another commission which will be bringing recommendations to you every day or week which you will have to study.

Hon. Mr. Turner: I do not think so. What happens in practice with the other commissions and what I would expect would happen here is that the chairman would see the Minister of Justice of the day not more than once or twice a year on the matter of the program. Once the program was determined that would be the end of it. That is what happens as between the Lord Chancellor in the United Kingdom and Sir Leslie Scarmon of the English and Welsh Law Reform Commission. That is what happens between the Lord Advocate of Scotland and the Chairman of the Scottish Law Reform Commission, and that is what happens, I understand, between Mr. Leal and Mr. Wishart in Toronto. Mr. Wishart does not have the power of direction which, with great respect, I think is a weakness in the legislation. The program is then determined, say, a revision of the criminal law or of the Canada Evidence Act—can you come up with an evidence act that in its criminal law aspects has some consistency with provincial evidence acts? Once that is developed the commission has a job ahead for two or three years. I do not anticipate, senator, this being much of a burden. The commission for its success depends very much on the personality of the chairman.

Senator Burchill: As a layman, I take it that the chief object of the commission is study and research on matters to be initiated by them. Are they going to choose the maters upon which they are going to make the study?

Hon. Mr. Turner: Primarily, yes, subject to the approval of the Minister of Justice of the day and subject to the Minister of Justice being able to suggest items to be included in their program,—matters of special priority, as Mr. Thorson reminds me, within the terms of that section. Subject to that, the commission is on its own.

Senator Burchill: Then the report is brought into the department of the minister and, if approved, legislation is drafted in the department? Is that it?

Hon. Mr. Turner: There are one or two ways of doing it. A report can come in in general terms with recommendations, and it is sent to the minister. Under the bill, he has the duty to table it in Parliament. It then becomes the property of the people of Canada, through Parliament, through both houses. Then the Government has to take a position eventually on what to do with the report. Conceivably, it could reject the report. Conceivably, the Minister of Justice could say, "Fine, I believe this is a very useful

suggestion for reform and I will introduce legislation and incorporate the suggestions." Or the commission might—and this is what has happened in the United Kingdom and in some jurisdictions—the commission might have its own draftsman and accompany its report by a draft statute. This has the benefit of rendering more precise the wording of the report and shortening the legislative problems for the Government. But that is only a draft statute appended to a report. The Government need not take any responsibility for it. Parliament may decide of its own motion, through a standing committee, either of the Senate or of the House of Commons, to opt to implement that report. The Minister of Justice or the Government may decide to, or they may not. Once a report is tabled it becomes the property of the people of Canada, but it only becomes a legislative measure if the Minister of Justice of the day incorporates it into the Government program.

Senator Burchill: Thank you very much.

Senator Aseltine: Mr. Chairman, when I was interrupted by the bell, I was stating that I believe I was the only speaker from both houses of Parliament who took any strong objection to this bill. I read all the speeches made in the other place and those that I did not hear in the Senate I read, and I found no one who made any really strong objection to the bill.

Therefore, I thought I should say something about my own views. So I spoke on the second reading. I said that I was all in favour of law reform when absolutely necessary, but took strong objection to the setting up of a permanent law reform commission at this time. I stated that such a commission would cost a great deal of money to operate and that the Government should not spend money now, or in the near future, when we are presently fighting desperately to control inflation and all governments—federal, provincial and municipal—are cutting expenses to the bone.

That was when I gave my estimate of the expenses of this commission. I did not think we should spend that money now.

Why has this law reform business reached such proportions, all of a sudden? I know that the minister promised, during his election campaign, that he would bring in a bill of this kind. But I was not expecting a bill like this, to create a permanent commission, that it would be brought in now when we are trying to get away from spending so much money. We are postponing this and postponing that and now, all of a sudden, we bring in this bill to set up this commission, which is going to cost us millions of dollars, before it is all through with.

That was my main objection, and then I went on to say that we had 365 members of Parliament and 102 senators to do reform work of this kind. The minister has answered that point for me and I will not go any further on it.

I still think that the Senate and the House of Commons can do a great deal of this work themselves, by setting up either a joint committee of both houses, or a Senate committee on law reform. I hope and pray that this commission will not do a lot of tinkering with our laws.

I hope the minister will check very carefully all that they are trying to do, and prevent anything like that happening, because these laws have performed very satisfactorily over the years. As I said, I have been in practice for 50 years and I have never found very much difficulty in interpreting the laws I had to deal with. I hope there will be no tinkering done in the future, and that the minister will give it very, very careful attention.

Right at this moment I wish to say that I am very pleased that we have as Minister of Justice, as long as this Government is in power, a man like the present minister who is energetic and apparently knows the law.

Hon. Senators: Hear, hear.

The Acting Chairman: He does, I can assure you of that, Senator Aseltine.

Senator Aseltine: I have another question.

Hon. Mr. Turner: At this stage I shall leave for the vote in the House of Commons.

The Acting Chairman: Well, we may be passing the bill while you are away. If we do so, we will get the message to you.

Hon. Mr. Turner: I have often learned, senator, that when I am away things move faster.

Senator Aseltine: I do not want the bill to be passed without asking this question which was sent to me by Senator Flynn.

The Acting Chairman: As you will notice, Senator Aseltine, I am holding up the motion

of Senator Cook until you have a full opportunity of asking any questions you want to ask.

Senator Aseltine: It has to do with the power to review provincial legislation and recommendations for its improvement and all that kind of thing.

The Acting Chairman: I think perhaps Mr. Thorson could answer that.

Senator Aseltine: Well, I would like to read the question as sent to me by Senator Flynn.

The Acting Chairman: Please do.

Senator Aseltine: Senator Flynn would like me to ask the minister whether the Federal Law Reform Commission would have any power to review provincial legislation and make recommendations for its improvement. Could the commission on its own initiative embark on a study of provincial laws with a view to suggesting how the latter might be improved? That, Mr. Chairman, is Senator Flynn's question.

The Acting Chairman: Before I ask Mr. Thorson to answer that question, Senator Aseltine, and that does not necessarily mean that it will not be supplemented by the view of the minister on his return, could I draw your attention to clause 11 which Mr. Hopkins has specifically drawn my attention to.

Senator Aseltine: This question was raised in the house as well, and in the Senate too.

The Acting Chairman: Let us first of all look at clause 11, Senator Aseltine, on page 5. There it states:

> The objects of the commission are to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada...

Now, the laws of Canada surely would not be the laws of the provinces of Canada, but having said that, I would hand the question over to Mr. Thorson for the present. If you are not completely satisfied with that, we will have to wait for the return of the minister.

Mr. Thorson: Thank you, Mr. Chairman. We did, I think, in drafting this particular bill, take particular care to make sure that in no way could the recommendations of the Law Reform Commission of Canada transgress the jurisdiction of the provinces. As the chairman correctly points out, clause 11 of the bill is confined to the "laws of Canada", which takes its meaning from the British North America Act, and as that expression is used in section 101 of that Act.

In response to the particular question whether the commission could review and make recommendations for changes in provincial law, the answer has to be an emphatic no. It could not do that. The sole degree to which the commission could involve itself in a study of provincial law would be within the sense of paragraph (b) of clause 12(1).

Senator Aseltine: I think that is the one that was proving troublesome to Senator Flynn.

Mr. Thorson: Clause 12(1)(b) page 6 of the bill, as I tried to indicate earlier, is merely an empowering provision which gives the commission the power to engage in studies and research projects of a legal nature in order to enable it to carry out its duties, fully appreciating that, for example, in any review of the Canada Evidence Act, it might be very necessary to study various provincial evidence acts. I think that would go without saying. Now, there is a further area, but before moving to that further area, I should say that that is the limit of its authority here.

Senator Aseltine: But why does it say this, then:

> ...including studies and research relating to the laws and legal systems and institutions of other jurisdictions in Canada or elsewhere;

Mr. Thorson: Yes, sir, that is merely the power to initiate the studies necessary to formulate the program that it proposes to recommend to the minister. The program that can be recommended must relate to the laws of Canada. Indeed, no other program could possibly be put forward or approved by the minister.

Senator Aseltine: Then why clause (b) at all? It raises doubt in my mind and in the minds of others who have read this bill.

Mr. Thorson: The sole purpose is to enable the commission to conduct studies into the laws and institutions of other jurisdictions, because it may be relevant to know, for example, that the Evidence Act of British Columbia or Saskatchewan contains a provision of a certain nature, or that the criminal laws of Sweden have taken a particular approach that is of interest to us in dealing with a similar subject matter. But I repeat,

this is again merely empowering the commission, and does not go to the kinds of recommendations that it can make. The matter of recommendations is very explicit in the bill; it is specifically tied to recommendations relating to reform of laws of Canada.

Senator Cook: This is for the proper discharge of its functions.

Mr. Thorson: Yes, you are carried back to clause 11, that is right.

The Acting Chairman: Senator Aseltine, if Mr. Thorson will allow me to supplement what he says—clause (b) deals with a research aspect, which includes "studies and research relating to the laws and legal systems and institutions of other jurisdictions in Canada or elsewhere". The research of a legal system, of the laws, certainly does not give a commission the authority to abrogate or modify the laws of any of the provinces. Once a report is given, as indicated by the minister, the report is merely one that the minister of Justice is obliged to table in the house. The implementation of such a report would have to be by the Parliament of Canada, and to the extent that the Parliament of Canada, for the sake of argument, would implement a report which would violate the British North America Act and the Constitution of the country, it would be an invasion of the rights of the provinces and, hence, unconstitutional.

Senator Aseltine: When I first read this paragraph I wondered just how far it was intended to go, because some people have mentioned that they were afraid there was something in this bill that gave this commission the power to recommend changes in the laws of some of the provinces—the civil law of Quebec, maybe, and others.

The Acting Chairman: Of course, Senator Aseltine, as soon as you read a phrase in a federal statute, "with respect to studies and researches relating to . . . other jurisdictions in Canada", one's mind is properly and legally alerted to the necessity of making sure that it does not invade the jurisdiction of the provinces.

Senator Aseltine: I think that was the reason for the question.

The Acting Chairman: Yes. I, for one as a lawyer, would strongly support Mr. Thorson, that under this statute there could not possibly be an invasion by this commission of the constitutional rights of the provinces.

Senator Aseltine: And Mr. Thorson backs you up on that?

The Acting Chairman: Would you back me up on that?

Mr. Thorson: Yes, I do indeed fully.

The Acting Chairman: Would you, Senator Aseltine, in view of the absence of the minister, be satisfied with the answer that Mr. Thorson has given you in reply to this question?

Senator Aseltine: But the minister has not answered my other question. I asked why it was thought necessary to bring this bill before Parliament at this time, when it was going to cost a great deal of money and when we are not spending any more money than is absolutely necessary? All governments are cutting down expenses to the bone.

Senator Cook: In that connection I should like to ask a question of the witness, and it is a twofold question.

The Acting Chairman: I should like to dispose of Senator Aseltine's point first. I would have thought that the introductory remarks of the Minister of Justice indicating that in his opinion there has been an acceleration of changes in the climate of the country generally with respect to all of our institutions embracing church, state, economics, labour unions and so on, and that all of these almost revolutionary changes have taken place—after all, senator, when you and I went to law school...

Senator Aseltine: But my point concerns the control of inflation. My view is that this will interfere with what they are trying to do in controlling inflation.

The Chairman: In any event, I would have thought that the minister has answered your question, but if you want him to return then I will not put the matter to a vote until you are satisfied.

Senator Cook: In that connection I was going to ask, Mr. Chairman, how long law reform commissions have been established in other jurisdictions, and if, in an exchange of views with those other jurisdictions, the department has formed any opinion as to the value of those commissions.

Mr. Thorson: In Canada, senator, I believe the original commission was the Ontario Law Reform Commission. I am subject to correc-

tion, but I believe it has been functioning for between five and six years—perhaps a bit longer. My memory is not precise on the point. The law reform commissions or equivalent bodies in other provinces are newer, but the experience with them has generally been a happy one. It is considered that they have been productive of useful changes, but this depends, of course, upon the personnel and on the ability of the chairmen and members.

There is one comment I might make which reflects obliquely on the point Senator Aseltine was making, and that is that an investment in a law reform commission can turn out to be a very wise one financially. The moneys that can be saved in a long term sense can be significant, in terms of sweeping away obsolete laws and practices and, in effect, achieving a streamlining of expenditure techniques and procedures in areas where the commission deals with legislation involving the expenditure of money.

Senator Aseltine: If that is so important why have we been so long in bringing this kind of legislation before Parliament?

Mr. Thorson: That is a very good question, but I am not sure that I am competent to answer it.

Senator Connolly (Ottawa West): That is a policy question. But would you say, Mr. Thorson, that the work of this commission is to facilitate and perhaps reduce the cost of the periodic revision of the statutes?

Mr. Thorson: I would hope that it would have an indirect bearing on that, Senator Connolly. As you probably know, up until now the revision of the statutes has been a rather haphazard thing. The gap between the 1927 revision of the Statutes and the 1952 revision is 25 years. The length of time between 1952 and 1970, when we hope to see the new revision, is another long gap. It is much too long a gap. The statutes in the meantime have become cumbersome and difficult to use. One thing that we hope will be achieved is the avoidance of the need to have a repetition of this. We do not want to see again the kind of time lapse between revisions of the statutes we have seen in the past. The entire statutes of Canada are being placed upon magnetic tape, and this will mean a great deal in terms of our ability to update them and to prepare office consolidations quickly. This should avoid the need for long periods of time between revisions.

Senator Urquhart: They should be revised every ten years.

Mr. Thorson: This is exactly what we aim to do, with no longer an interval.

Senator Langlois: Is it anticipated that in the long run we will eliminate the periodic revisions we have used in the past?

Mr. Thorson: With the use of modern technology we will be able to produce up-dated statutes for the convenience of the legal profession, the judiciary and the legislature very quickly indeed.

By that I mean that if in a given session of Parliament there are amendments effected to the Aeronautics Act or the Canada Shipping Act, for example, they ought to be able to be incorporated into an up-dated office consolidation of the statute very quickly. One concept we are considering is the use of loose-leaf editions. This will enable the up-dated statute to be available to members of the public very quickly indeed.

There is a real breakthrough in this respect with the use of magnetic tape.

Senator Burchill: Again as a layman I would like to ask Mr. Thorson if this commission would have the power, if I may use the expression, to tidy up the statutes?

In my experience in the Senate over the years I have heard many speeches by lawyer senators critical of the fact that the statutes need tidying up, that there are amendments all over the place. When referring to a law it is found that there has been another law enacted somewhere else.

Senator Roebuck was most critical on several occasions.

Mr. Thorson: We do not visualize that the commission's task will be to do what the Statute Revision Commission's task has been historically.

In other words, its task will not be to consolidate periodically the statutes and to publish them in revised form. It will, however, be able to carry out, we hope, a very useful function in the cleaning up of obsolete statutes which are no longer required to be carried in the law, and provisions that are anomalous or do not make sense and that cannot be reconciled with existing, live law. We anticipate that the commission will be able to do that very usefully.

However, in terms of the physical task of compiling the entire body of the statute law, no. We anticipate approaching that task in another fashion.

Senator Aseltine: Have you any information, Mr. Thorson, that you could give us as to when the revision of the statutes will be completed?

In every law office that I have been in, particularly in my own office, we have great difficulty in running down a point of law to find exactly what it is. We have to go back for years and years.

Mr. Thorson: Senator, I know exactly what your problem is. I will ask Mr. J. W. Ryan of the Department of Justice to comment on this. He is the Director of the Legislation Section and has had more to do with the preparation of the revised statutes that is now under way than any other member of the department.

Mr. J. W. Ryan, Director, Legislation Section, Department of Justice: Mr. Chairman, with reference to the point of timing of the revised statutes, the position now is that the manuscript from the Statute Revision Commission is in the hands of the printers.

The process under way at the moment is converting the language of the manuscripts to machinery language—I am taking a little time to answer the question, because there is a difficulty involved—and this magnetic tape is now being processed through composing equipment that runs on a computer command basis to page proofs, which we are presently reading. The printing program or schedule has run behind time about, at the moment, nine months.

There are two reasons for this. First, when we began nobody in Canada, the United States or elsewhere in the world had ever written software or computer programs for the bilingual formating of pages. We therefore had to begin by creating that program ourselves, which it has taken about nine to ten months to create and test out. At the moment the whole of the printing process has been dependent on the creation of this software, which once created will be available generally speaking in Canada to all bilingual formats.

We have closed off the date of the contents of the statutes as of December 31, 1969, and this present Parliament has given us new manuscript in the acts presently in and coming out of Parliament. The final putting together of volumes will take place later this year. It cannot take place before the fall of this year, although the commission may be able to report somewhat earlier than the statute roll can be available to the public generally. At the moment we are contemplating 1970 statutes with the report of the commission in the fall to the Government, and with publication and general circulation in the fall after that. We are totally dependent upon this new technology, and once it is completed we will have considerable time for the future, but at the moment we have to suffer the pioneering pains.

The Acting Chairman: Thank you, Mr. Ryan.

Senator Connolly (Ottawa West): Perhaps the minister would like to comment on this. I should like to go back to a question asked by Senator Aseltine and direct attention to clause 11(b):

> The objects of the commission are to study—without limiting the generality of the foregoing,
>
> (b) the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions;

To me this is a very important clause of the bill. I wondered whether the minister or Mr. Thorson, who was here for the earlier questions, would comment on that.

Hon. Mr. Turner: This is the first Law Reform Commission dealing with the laws of a federal state, but reflecting laws written in two languages and based on two separate legal systems. I therefore think it is important that the federal statutes be equally articulate in each language and reflect the legal institutions evolving from those two separate systems.

In recent years, in the Department of Justice we have changed our drafting techniques. Mr. Thorson and Mr. Ryan could speak more authoritatively than I can, but let me just try to describe it to you. A statute used to be drafted in English primarily and then translated into French. Often the translation did not reflect the meaning, because it was a literal translation and did not reflect the civil law concepts within the law of the Province

of Quebec because they were translations of common law concepts. This got us into a good deal of trouble in the Crown Liability Act, the crown's liability for tort. There is no such thing as a tort under the law of Quebec. There was no comparison within the statute as to the different consequences flowing from delict under the civil law as from tort under the common law.

The law of personal property in Quebec differs from the law of personal property in the other provinces—the law of real property, the law of immovables. There is no such thing as a mortgage. A hypotheque is the same concept but different. There is no such thing as a trust.

Senator Aseltine: How can you put it into French then?

Hon. Mr. Turner: What we are trying to do now is to take a policy memorandum approved by cabinet and have the legislation drafted separately in each language and reflecting each system of law, then have the two versions carried as reflecting the meaning of the policy memorandum of the Government. Therefore, we have to find words in each version that give the same legal consequences deriving from different legal institutions.

Senator Aseltine: Will the commission have anything to do with that?

Hon. Mr. Turner: The commission has to study and keep under review on a continuing and systematic basis the statutes, et cetera, of Canada, making recommendations for their improvement, modernization and reform, including the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions.

Take the criminal law, the law of theft, possession. It may mean something different under the common law in the English-speaking provinces and under the civil law for civil law purposes. When the property passes—even a criminal law under complete federal jurisdiction deals with different concepts of property in the law of theft, and so on throughout the code. We have to insure, senator, that a federal statute has the same meaning in Quebec as it does in the other provinces.

Mr. Thorson has just handed me further examples. The Expropriation Act, which deals with the taking of property involves concepts of real property. We hope we have achieved in the Expropriation Act, which was passed by the Senate and which is now law, wording in those two separate versions which will reflect the same meaning deriving from different legal concepts.

Also, section 3 of the Estate Tax Act. Marcel Faribeault wrote a learned article and made speeches about this. The devolving of estates under provincial law in Quebec followed a different procedure and different substantive law than in the common law provinces. Section 3 of the Estate Tax Act reflected basically common law concepts. In its review of the statutes of this country, as commissioned by the Government or under its own motion, one of the aspects that any federal law commission should have in mind is insuring that whatever legislation was suggested properly reflected two systems of law, two separate sets of concepts in certain branches of the law so the same meaning came out of each version.

The Acting Chairman: As far as I am concerned, as I indicated in the Senate, this is one of the most exciting parts of the bill. Incidentally, in answer to Senator Flynn, through you, it emphasizes the response you received from Mr. Thorson, that the essence is to protect the provincial jurisdiction and not to invade it, and the necessity of harmonization that you get under section 11 accentuates the protective aspects as developed by the minister.

Senator Aseltine: I think he would be satisfied with the minister. Why was it so important, when we were fighting desperately to control inflation, that we should go to all the expense which this law commission will cause the taxpayers?

Hon. Mr. Turner: Let me give two types of answer to that and I think they are both relevant. I tried to indicate in my opening remarks, that because of the rapidly changing structure of society, I felt that a law that is responsive to the need for changing structures and needed legal reform, a law that was responsive, and therefore credible, and therefore enforcible, is something that any society must cast high in its list of priorities.

When we are talking about spending money, we are not talking about how much money we are spending, but about the priorities for that spending. In an age of confronta-

tion, in an age of dissent, in an age of generation gap, in an age where technology is moving so quickly, unless our legal system reflects these changes technologically, in terms of communication, in terms of generations, then our society will not respond and the free process, the rule of law, will be very difficult to maintain.

The second type of answer I wish to give you is this. In terms of what we are trying to accomplish, particularly in those areas of federal jurisdiction like public administrative law, where we are talking about citizens rights against the state, when we are talking in terms of the criminal law, of the citizens rights as against his neighbour and as against the state, we are really not talking about much money. That reform bill which I introduced last week in the House of Commons and which honourable senators will have to deal with, will change fundamentally the whole concept of the enforcement of the law in Canada. Yet it will not cost the taxpayer one cent, except the time of the men and women in the two houses of Parliament and of the witnesses who come to testify. Yet its consequences for the people of Canada are immense.

What are the costs here? We are dealing with a commission of six men and women, a very small commission for a country with two systems of law and ten provinces, and the second largest land mass on the face of the globe. We kept it small deliberately, because we could not hope to cover every kind of expertise on such a commission. We kept it small so that the personnel of that commission would reflect the priorities of legal reform from time to time. Right now, I think that they are criminal and evidential. In three or four years they may well be public administrative law, or the Bankruptcy Act or the Corporation Act. The personnel will reflect those priorities, and if the commission needs expertise, instead of making it a large commission, it goes out and contracts for the men and women who have that expertise, either within or without the law. That was done deliberately to make this as economical as possible.

Senator Aseltine: You have almost convinced me that I should vote for the bill.

Hon. Mr. Turner: Good.

The Acting Chairman: Before you change your mind, honourable senator, may we put the question?

Senator Hollett: That being settled, may I suggest something? I do not like section 12, subsection (1)(a), on page 6. It says: "may receive"—that is "may", mind you—"may receive and consider any proposal for the reform of the law that may be made or referred to it by any body or person." In the first place, the word "may" gives the commission the absolute right to say it will not listen to any such representations. Then, the words "any person" mean that the commission will be swamped with applications from people all across Canada, abortionists and everybody else. I think that should be reworded in some way or other.

The Acting Chairman: Senator Hollett, the receipt of the material and its consideration surely is not of fundamental importance, because all that the commission need do is note its receipt of the communication.

Senator Aseltine: And do nothing about it.

The Acting Chairman: And may not even bother to consider it.

Senator Hollett: I know, but that gives them a terrific power. They do not have to do anything.

The Acting Chairman: Senator Hollett, today without a statute, anybody can write to members of Parliament. Look at all the material that you get. Anybody can write in to anybody.

Senator Urquhart: You do not need to have a statutory provision to send a submission to any minister of Government. That is why "may" is there.

The Acting Chairman: Honourable senators, may I put the question? It is moved by Senator Cook, seconded by Senator McGrand, that we report the bill without amendment.

Hon. Senators: Agreed.

The committee adjourned.

Queen's Printer for Canada, Ottawa, 1970

Second Session—Twenty-eighth Parliament
1969-70

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 6

WEDNESDAY, JUNE 17, 1970

First Proceedings
on
"Procedures for the Review of Statutory Instruments"

WITNESSES:

Department of Justice: The Honourable John N. Turner, Minister of Justice and Attorney General of Canada; Mr. D. S. Thorson, Associate Deputy Minister.

APPENDIX A

Letter from the Honourable D. S. Macdonald, P.C., M.P., President of the Privy Council, and related appendices.

21825—1

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman.*

Argue
Aseltine
Belisle
Burchill
Choquette
Connolly
(*Ottawa West*)
Cook
Croll
Eudes
Everett
Fergusson
Flynn (*ex officio*)
Gouin
Grosart
Haig
Hayden
Hollett
Lang
Langlois
Martin (*ex officio*)
Macdonald (*Cape Breton*)
McGrand
Méthot
Petten
Phillips (*Rigaud*)
Prowse
Roebuck
Smith
Urquhart
Walker
White
Willis

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Thursday, May 7th, 1970.

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

That the Standing Senate Committee on Legal and Constitutional Affairs be instructed to consider and, from time to time, to report on procedures for the review by the Senate of instruments made in virtue of any statute of the Parliament of Canada, and to consider in connection therewith any public documents relevant thereto.

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

ROBERT FORTIER,
Clerk of the Senate.

21825—1½

MINUTES OF PROCEEDINGS

WEDNESDAY, June 17, 1970
(6)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10.00 a.m.

Present: The Honourable Senators: Argue, Connolly (*Ottawa West*), Eudes, Fergusson, Flynn, Gouin, Haig, Langlois, Macdonald (*Cape Breton*), McGrand, Méthot, Phillips (*Rigaud*) and Urquhart. (13)

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

In the absence of the Chairman and on Motion of the Honourable Senator Urquhart, the Honourable Senator Phillips (*Rigaud*) was elected Acting Chairman.

On Motion duly put it was *Resolved* to print 800 copies in English and 300 copies in French of these proceedings.

The Committee proceeded to the consideration of the following Motion by the Senate: "That the Standing Senate Committee on Legal and Constitutional Affairs be instructed to consider and, from time to time, to report on procedures for the review by the Senate of instruments made in virtue of any statute of the Parliament of Canada, and to consider in connection therewith anp public documents relevant there to."

The following witnesses were heard:

The Honourable John N. Turner, P.C., M.P.,
Minister of Justice and Attorney General of Canada;
Mr. D. S. Thorson, Associate Deputy Minister,
Department of Justice.

A letter and related appendixes "A" and "B" from the Honourable D. S. Macdonald, P.C., M.P., President of the Privy Council, to Mr. Mark MacGuigan, M.P., Chairman of the House of Commons Special Committee On Statutory Instruments, was submitted by the Honourable John N. Turner and it was ordered that they be printed as appendix "A" to these proceedings.

At 11.15 a.m., after discussion, the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Wednesday, June 17, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, which was instructed to consider and report upon Statutory Instruments and relevant public documents, met this day at 10.00 a.m.

Upon motion, it was *resolved* that Senator Lazarius Phillips be appointed Acting Chairman.

Senator Lazarus Phillips (*Acting Chairman*) in the Chair.

Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 800 copies in English and 300 copies in French be printed.

The Acting Chairman: Honourable senators, we are here today to deal with the subject matter of the Third Report of the House of Commons Special Committee on Statutory Instruments, and we have with us, as you can well see, of course, our Minister of Justice and Mr. Thorson of the department. I am glad to take some of you away from the turbulent waters of the White Paper consideration and bring you into the placid harbour of a discussion of statutory instruments.

Senator Flynn: Mr. Benson will be grateful to the Minister of Justice for doing that!

The Acting Chairman: Perhaps you would be good enough to take over now, Mr. Minister.

Honourable John N. Turner, Minister of Justice: Mr. Chairman and honourable senators, first of all may I thank you for your invitation again on a subject of extreme importance. Again, might I be presumptuous enough to commend the upper house and the committee for instituting this study and deciding whether there should be some sort of scrutiny or comité de surveillance of the regulation-making power and regulations and statutory instruments? It is something that has been close to my heart as Minister of Justice.

In the philosophical thrust that I am trying to bring to the department there are four objectives, to my mind. One relates to the subject I was talking about yesterday, Mr. Chairman—a more contemporary, flexible, enforceable, human criminal law. The second relates to an objective of trying to equalize access to the law for rich and poor, in procedure and in substance, in so far as it relates to the federal jurisdiction. The third is to try to bring the law up to date with technology, the computer, the ecological revolution in terms of what we face in threats to our environment—where the law really has fallen behind. And the fourth is to balance the rights between the citizen and the state.

C'est ce dernier qui nous intéresse, ce matin.

Pour l'instant, je vais énoncer, en français, un objectif. Mais, je crois qu'il convient avant tout de rétablir l'équilibre dans le rapport entre le justifiable et les dimensions mêmes et l'inaccessibilité du gouvernement ne doivent en aucune manière faire oublier ou diminuer davantage les droits justifiables. Il faut rebalancer les droits du citoyen contre les droits de la collectivité du gouvernement.

I believe that this remoteness of governmental institutions, the inadequacy of methods of appeal, the inadequacy of methods of even knowing what the law and the regulations are, are such that Parliament, in both its houses, would do well to review methods to enhance the rights of the citizen as against the state.

There are four aspects of the problem, as I see it. The first has to do with the enabling power that we find in statutes themselves, the enabling power which delegates the legislation or gives the minister or the Governor in Council or an agency the power to make regulations.

What is the breadth of that enabling power? What restrictions are placed on it at the drafting stage? That is where the problem first arises.

The second is, once the regulation is passed pursuant to an enabling power in a statute, what agencies or bodies are there available to review those regulations, to see whether they stay within the scope of the statute, within the scope of the enabling power, to see that they do not offend some principles of parliamentary procedure or natural justice, and so on. This is the problem that you are facing, the setting up of a scrutiny committee, such as has been recommended already in the House of Commons in the Third Report of the Special Committee on Statutory Instruments, of which I am sure you have taken parliamentary notice.

The Acting Chairman: Of course. We have had a debate on it.

Hon. Mr. Turner: I have read that debate, and I understand that you intend to call as a witness the chairman of that committee.

The Acting Chairman: We do, following you, Mr. Minister.

Hon. Mr. Turner: We have talked about the enabling power—and I will go into this in more detail—in the statute itself and the drafting of the statute; then the passage of the regulation and what aspects there are for reviewing that regulation. The third is the administrative tribunal that is set up pursuant to statute, or sometimes even pursuant to regulation. What are the rights of a citizen against the decisions of those tribunals?

The Federal Court Bill, which you will be receiving some time before the proroguing of the session, either in June or in September or October, sets out, I hope, the beginnings of a code of public administrative law providing methods for review of the quasi-judicial and judicial functions of the federal administrative tribunals.

The fourth aspect is: Are there any minimum rules of procedure of these administrative tribunals themselves? Should we have an administrative procedures act, along the lines of that enacted by the Congress of the United States; or should we have a council of tribunals act, along the lines of that enacted by the United Kingdom?

Those are the four parameters of the problem, as I see it. We are dealing primarily with the power of Parliament to review regulations, but the other three aspects I want to submit to you are equally important, and we need really to achieve control by using all four levers so as to give the citizen new remedies against his Government and against the decisions of his Government.

Today I do not think any of us would argue that there is no necessity for delegated legislation, that regulation-making power is not necessary in a modern government, that you can do everything by statute, and that Parliament can be expected to oversee everything.

I know that honourable senators are well aware of the reasons. It is often a matter of urgency, where things have to be done quickly, and a regulation within the enabling power of a statute can bring the administrative process into action quicker than one could if one had to go before Parliament each time. There is a lack of parliamentary time. There is the need to experiment with legislation of an administrative sort, particularly in new fields like ecology, hazardous products, consumer legislation, and so on.

Now, I want to expand on this a little. The oldest reason given for the delegation of the power to legislate is urgency. I think Parliament has always recognized the need to make new laws with a speed not always available in Parliament. Therefore, Parliament has given power to make laws by way of regulation to other bodies—to ministers, to independent crown agencies, and so on. I believe also that the lack of parliamentary time is a valid one. We are all aware of the increase of legislative business that has come before Parliament, and as Government assumes more and more importance in the every-day life of a citizen—in trade and commerce, corporate affairs, labour matters, public health, pension plans, industrial incentives, broadcasting, languages, and so on—the time available for parliamentary consideration of all these myriad details of policy is no longer available. So Parliament gives the legislative framework for decisions that are delegated to ministers or other bodies by way of regulation.

I think we have to admit too that Parliament may be omnipotent, but it is not omniscient. Parliament may be supreme within the federal jurisdiction, but we cannot predict everything that is going to happen. For instance, Parliament cannot be expected to know what potentially dangerous drugs may come on the market, or what potentially dangerous consumer products may come on the

market, or what new technology in terms of transportation may do by way of threat of pollution to our shores and to some of the industries that depend on our waters. Because of the speed of events in the world we have delegated this by way of the regulation power.

There seems to have been a feeling abroad, and I have noticed it, that some decisions ought to be taken out of the political arena. I have noticed that Parliament attempts to defuse some areas of political controversy by establishing a quasi-independent or independent board or tribunal to deal with it. The Immigration Appeal Board is a pertinent example. These boards or tribunals, which are given a mixture of administrative, quasi-judicial and judicial powers, exercise these powers under a general policy set down under statute by Parliament, and they are supposed to be administered by a non-political tribunal or body thereafter—the National Energy Board, the Canadian Transportation Commission, the CRTC, and so on.

This has always posed a problem for me because one wonders about ministerial responsibility. I do not think you can ever take the politics out of political decisions. Somebody has to make a decision, and virtually every decision has a political connotation, for choosing between interests, between regions, in every decision someone makes. It sometimes disturbs me that there is insufficient ministerial responsibility or accountability to Parliament for some of the decisions that are made under delegated legislation.

The Acting Chairman: If I may interrupt you, it seems to be in reverse proportion to the size of the crown corporation—to wit, CBC and Canadian National Railways. There seems to be some responsibility in the minor tribunals, but the bigger they get the greater the divorcement.

Hon. Mr. Turner: This is a problem, Mr. Chairman and senators, for modern government. How to preserve the independence of some of these boards created by Parliament to administer a certain policy, granted by Parliament under statute, and yet preserve some accountability politically to the people, through a minister. That is in terms of policy, but when those boards are acting judicially, deciding rights between citizens or rights between interests, then the Federal Court Bill, I hope, will come into play to ensure that natural justice is fulfilled, that there has not been any excessive jurisdiction and that the boards are exercising their jurisdiction. But there is a justification for delegated legislative power. Despite Lord Hewart and *The New Despotism*, this is a fact of modern Government and this is why you and I are here.

The House of Commons, the other place, has tried to suggest certain guidelines for restrictions on the enabling power, in the drafting of legislation, and also for the review of regulations passed pursuant to enabling powers of statutes.

I am not going to repeat what I said before a similar committee in the House of Commons, but perhaps, Mr. Chairman, your committee might at an appropriate stage take judicial notice of the proceedings of that committee. What I have said there is available to you, so I will not repeat what I did say there.

You will observe that this report has been accepted in substance by the Government. Yesterday in the House of Commons the President of the Privy Council made a statement to the effect that—I do not know whether you want me to summarize the statement or read Mr. MacDonald's statement.

The Acting Chairman: I think it would be very helpful if it could be read, Mr. Minister.

Hon. Mr. Turner: It is available in *Hansard* of the other place, but I will read the pertinent parts because I think this will outline the Government's position on this report, and a further document is going up to Cabinet to render it more precise.

We have agreed to implement most of the committee's recommendations, and the President of the Privy Council, Mr. Macdonald, suggested that it would require action of three different kinds:

> First, legislative action by Parliament to replace the existing Regulations Act by a new statutory instruments act; second, a number of cabinet directives to implement several of the recommendations which cannot be dealt with by general legislation and, third, amendment of the Standing Orders . . .

. . . of the House of Commons . . .

> . . . for the purpose of establishing a scrutiny committee to review regulations.

Mr. Macdonald said that:

> The Government accepts fully the principle that both Parliament and the public are entitled to be fully informed of, and to have convenient access to, regulations and other instruments made under the

authority of Acts of Parliament. The legislation and other measures that will be proposed by the Government will be guided by this paramount principle, and only demonstrably necessary and carefully defined exceptions to the general requirements of the law relating to the examination, registration and publication of such instruments will be permitted.

The Acting Chairman: Is it in order to interrupt you now, Mr. Minister? The report that we are considering dealt exclusively with orders in council or statutory instruments, and did not deal with administrative tribunals or crown corporations generally, on the assumption that they are separate things or are interchangeable terms.

So, my first question is: Will the proposed legislation only deal with the subject matter of statutory instruments? And my second question is: Is the committee to be formed to be a Commons committee only, and will that interfere, as a matter of Government policy, with the proposed formation of the Senate committee to deal with the same subject matter?

Hon. Mr. Turner: On the first point, as to what the new Regulations Act or the new Statutory Instruments Act will deal with, it will deal with statutory instruments...

The Acting Chairman: Only?

Hon. Mr. Turner: Only. But the word "regulation" will be expanded and redefined.

On the second point, I would like to defer that because I think it is very pertinent to our discussion this morning.

The Acting Chairman: Would it not be more logical that new committees be set up in the other place and a continuance of our committee here to consider the supplementary aspects of administrative agencies, crown corporations, and the like, so that the whole subject matter of administrative action resulting from legislation will be dealt with? As I see it, here you are dealing with it in a partial way and you are not supplementing it by the consideration of the whole question of crown corporations.

Hon. Mr. Turner: I agree with your suggestion that the subject is one whole. Statutory instruments are just part of it. I think the enabling power for the instrument itself, the tribunals that administer the policies, and the regulations of the crown corporations that may operate under the legislation and their procedures are all part of the same question.

The Acting Chairman: It would appear to be more logical. I am not introducing the fringe system and I do not want to complicate matters. It does appear to me that if you are tackling this whole problem that one would think that one should tackle the whole rather than a part.

Hon. Mr. Turner: Far be it from me to suggest the terms of reference to your committee. There is something to be said for the unity of the whole. I shall summarize my presentation to you, describing again what we are doing in those four areas. It may well be a subject for review by a senatorial committee.

The Acting Chairman: It would appear to me that you are eliminating concurrent consideration which is a major aspect of the problem which is related to the four headings that you gave and without blandishment to you, brilliantly and succinctly. The logic of that language calls for the study of these other agencies so as to fit in with the attainment of the four objectives.

Senator Connolly: I did not hear the minister in the beginning and I apologize for being late. In the area of crown corporations, the National Finance Committee of the Senate has given consideration to the operations of certain crown companies. From time to time the officials of those companies appear here and are thoroughly questioned on what they did. Again, I may be repeating and I apologize if I am. Is it intended that that type of inquiry shall he moved out of the Finance Committee and into another committee?

The Acting Chairman: Senator Connolly, as I see it, the activities of the Finance Committee in this respect merely deal with expenditures of money required for the agencies to function rather than with the subject matter of the surveillance and control of such agencies. I would assume it would come under two separate headings.

Senator Connolly: I am not too sure they are as restricted as that. They may be in practice, but in theory the Finance Committee investigates what it will do in respect to the operations of crown corporations.

Senator Flynn: There is always the possibility of duplication of work.

Senator Connolly: Yes.

Senator Flynn: There is a possibility.

Senator Connolly: It might well be a better thing for the Finance Committee not to have to deal with that if it should come under the purview of another committee. So the Finance Committee can restrict itself to consideration of the Estimates, which I think is an important function for the committee.

We have no authority in the House to change the Estimates. For years—and I have said this so often that I want to say it to the minister now—the Senate has been confronted with appropriation bills, often towards the end of a session. Year after year the members of the Opposition, no matter what party formed the Government, would stand up and say, "All we are asked to do is rubber stamp what the House of Commons has done."

The Finance Committee has relieved that situation because it has given an opportunity for senators to investigate items in the Estimates. It might well be, Senator Flynn, that perhaps that would be a better term of reference for the Finance Committee and have the area now being discussed about crown corporations go to another committee for investigation.

Senator Flynn: For the record, may I correct part of your statement, which is not entirely relevant to the question when you say there is nothing we can do about Estimates. We can reduce them and not add to them.

Senator Connolly: Even that has been questioned. If I may say so, when your own party was in office at one time it was suggested that this be done, and immediately the Leader of your party in the Senate said that it interfered with ways and means and that we were not in a position to do it.

Senator Flynn: We can be wrong as well as you can.

Hon. Mr. Turner: I feel a little ill at ease because I come from a non-partisan house.

The Acting Chairman: I was about to say that this is the first emergence of partisanship that I have seen in a long time.

Senator Connolly: This was not partisanship, but the Leader of the Senate was trying to get the appropriation bill through.

Hon. Mr. Turner: Mr. Chairman, I should like to put on record what the President of the Privy Council stated in the other place yesterday:

> (a) Legislative action by Parliament to replace the existing Regulations Act by a new Statutory Instruments Act;

We will be bringing this forth in the fall:

> (b) A number of Cabinet directives to implement several of the recommendations which cannot be dealt with by general legislation; and

And thirdly, a suggestion to the House of Commons that the Standing Orders be amended to set up a Scrutiny Committee.

I want to deal just briefly with each of those three items as they appear in Mr. Macdonald's statement. I will not be too long regarding this because I would rather hold myself open for questioning. On the first item, the new Statutory Instruments Act will update the present Regulations Act in light of the committee's recommendations. We will recommend that the definition of a regulation be expanded in order that certain subordinate legislation that is now excluded from the application of the present act will come within the scope of the proposed new law. It will be proposed that the review procedure of proposed regulations that is conducted by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice be given a statutory basis and that the fundamental principles in light of which the review is conducted be set forth in the legislation. A new system for registration of regulations will be provided and the date of registration will, in most cases, be the day on which a regulation will come into force. My comment here is that the current review procedure of proposed regulations is conducted by officers of the Department of Justice attached to the Privy Council Office. I might say that Paul Beseau, who is here with Mr. Thorson and myself, and whom you may want to question, was our man in the Privy Council and he was at times acting like our man in Peking.

Now, the amount of work required is an absolute phenomenon. I do not know if you have ever seen how voluminous the National Defence Regulations or the regulations under the Canadian Wheat Board Act are, but in any event the review procedure we have now, which is done as a matter of custom, will be given statutory authority. We have expanded the office of legal adviser to the Privy Council from one person to four in order to consolidate and re-enforce this review of regulations at the drafting stage.

Senator Connolly: For what purpose?

Hon. Mr. Turner: For the purpose of seeing that they do not offend against the statutes and the principles recommended in the report of the Statutory Instruments Committee, that they do not contain a hidden tax, are not retroactive, are not vague or uncertain and are not discriminatory and that they are legislative in content. So much for the new Statutory Instruments Act.

The second recommendation involving governmental decisions is very important too. Mr. Macdonald said:

> With reference to the committee's recommendation No. 7, which is concerned with the general principles that should govern the conferring by legislation of regulation-making powers...

In other words, the enabling power of the statute.

> ...a Cabinet directive will be issued to all ministers directing that in future, all such enabling legislation should be drafted in accordance with the principles proposed to the committee as acceptable to the Government by letter dated September 30, 1969 addressed to the chairman of the committee and signed by the President of the Privy Council.

I can provide a copy of that letter to this committee. I think you should have it for the record.

Senator Connolly: Mr. Chairman, I move that the document appear as an appendix to these proceedings.

Hon. Senators: Agreed.

(For text of letter and accompanying appendixes, see Appendix A to these proceedings.)

Hon. Mr. Turner: What this means is very important. As Minister of Justice I have very little absolute power in controlling the breadth and scope of enabling legislation for regulation-making powers as it appears on the statute. A minister comes in and argues—or his support staff or public servants argue—that he needs wide discretionary powers in terms of fisheries, transportation, pollution or hazardous products—you will recall that—and I suggest to him in the Legislation Committee of the Cabinet that those powers are too wide. One minister wants to get his legislation through and he gets the support of a couple of other ministers and they run around those of us who are trying to preserve the rights of the citizen. It is a high-low technique, as we used to say in Notre Dame, Senator Connolly. In any event, that is what happens. We have been trying during the last two years to cut down the scope and to add precision to the enabling powers in statutes.

There will be a Cabinet directive to implement at the Cabinet level the recommendations or the items set forth in the letter from the President of the Privy Council to the committee of the house. You should look at them, Mr. Chairman and, through you, the members of your committee. This will give me, if Cabinet adopts it, more leverage in implementing the recommendations of this report to which I subscribe and which was based in large part on the evidence that our department made before that committee.

The Acting Chairman: Will that authority be included in the legislative act?

Hon. Mr. Turner: No, it will not. That will be an internal Cabinet procedure. It is very difficult to include it in the statute procedures of the Privy Council.

The third part of Mr. Macdonald's statement has to do with the Standing Orders for the purpose of establishing a Scrutiny Committee. It reads as follows:

> The Government agrees with the general recommendation of the committee that a Scrutiny Committee should be established for the purpose of reviewing regulations. During the next session of Parliament the Government will recommend that such a Scrutiny Committee be established and that by the proposed Statutory Instruments Act all regulations with the single exception of regulations the disclosure of which would be injurious to international relations, national defence or security or federal-provincial relations will stand permanently referred to such committee. After consultation with representatives of the parties, the Government will put forward an order of reference in the next session to enable Parliament to establish a Scrutiny Committee.

Mr. E. Russell Hopkins (Law Clerk and Parliamentary Counsel): May I ask one question of the minister, Mr. Chairman?

The Acting Chairman: Please.

Mr. Hopkins: I noticed Mr. Macdonald used the expression "Parliament". I am not clear

as to whether he intends the Scrutiny Committee to be purely an agency of the House of Commons.

Hon. Mr. Turner: The word "Parliament" was deliberately chosen.

Senator Connolly: Would you envisage a joint committee?

Hon. Mr. Turner: That would be for the house to determine.

The Acting Chairman: I am sure you remember in the *Debates of the Senate* that we did not mind being rebuffed from the point of view of no engagement, but having been engaged the engagement was terminated. There was a suggestion of a joint committee and then because of observations made by certain members in the other house the idea was to terminate the engagement without notice to one of the contracting parties.

Hon. Mr. Turner: Well, I will make no comment on that.

The Acting Chairman: We took a rather dim view of it.

Senator Flynn: There is always the possibility of a reconciliation.

The Acting Chairman: I simply want to refer to it, Mr. Minister. We took a dim view of it.

Senator Connolly: In England the House of Lords does this work primarily.

Hon. Mr. Turner: We can get into this later. Members may want my views. I am not going to trespass on the hallowed rights of the Senate or of the House of Commons to choose what committee structure they want. The word "Parliament" was deliberately chosen and it would be wide enough to envisage joint or separate committees.

Having dealt with Mr. Macdonald's statement, which is the Government's position on the recommendations of the House of Commons committee, which you will want to review, I would like to review briefly with you what the Department of Justice is doing by way of trying to equip itself to deal with statutory instruments.

Prior to the integration—perhaps you do not like that word—prior to the incorporation within the Department of Justice of all the legal officers in every department of Government, except the Department of External Affairs—prior to that all lawyers in every Government department reported to a Director of Legal Services in each department. That Director of Legal Services, or what the English would call a senior solicitor, reported to his own deputy minister on administrative matters in giving him legal advice, but he now also reports to the Deputy Minister of Justice. This gives us certain advantages. First of all we get an earlier legal input into all governmental decisions. Secondly, there are better career opportunities for lawyers, because a lawyer just does not get pigeonholed in one department for life. He can now achieve lateral promotion. I think it allows us also to bargain on behalf of the professional lawyers in the Public Service, for salary rights. Our deputy minister can do that with the Treasury Board far more effectively than before.

Prior to that integration, the Department of Justice officers had very little to do with the drafting of regulations. Those were drafted internally by each department. Because the departmental solicitors are now being integrated into the Department of Justice, more drafting of regulations is being done by our own officers, as solicitors seconded to other departments.

Senator Fergusson: How long has this integration been in effect?

Hon. Mr. Turner: It was a recommendation, Senator Fergusson, of the Glassco Commission. It has been going on since then. It was accelerated when I became minister. The only department which has not been integrated is the Department of External Affairs and that is a special problem because of the type of law the department deals with. I do not deal with military law. The Judge Advocate deals with that department. The Department of National Defence also remains separate.

Senator Flynn: This has been experimented with in Quebec for several years.

Hon. Mr. Turner: And very successfully. With integration more drafting of regulations can be done by us, but it is obvious that we can only set out ground rules throughout this tremendously large governmental machine. We can attempt to reduce the amount of revision work done by the legislative section under Mr. Ryan and Mr. Beseau, which reports eventually to Mr. Thorson. We can start to improve the drafting of regulations. They still have to be reviewed by the legislative section, internally, of the Department of Justice or the unit we have in the Privy Council Office.

A program for this purpose has been submitted by the legal officers of the legislative section. We have set up training seminars on the requirements of drafting regulations. Unfortunately, the shortage of staff, Mr. Chairman, in that section at the moment, prevented our program from being started this spring as we had anticipated. It is my intention to enlarge it and try to get these seminars under way. When we succeed in getting the necessary training available to every department with solicitors assigned by the Department of Justice to those departments, we hope that we will begin to be able to prepare regulations in accordance with established standards as to form and draftsmanship and to meet the recommendations, at least, of the committee of the House of Commons, and fulfill any guidelines that may be set by any scrutiny committee set up by Parliament. In other words, we are trying to anticipate parliamentary review by putting ourselves in a position to assist the machinery available throughout the Government service.

I believe that we will achieve more uniform regulations and those less likely to offend against good drafting procedures, and the inadvertent or unusual can also be avoided more easily than at the present.

In the past the role of the Department of Justice in the preparation of regulations has arisen from the provision of the Regulations Act and the provision of the Canadian Bill of Rights, neither of which gave the department a very dynamic or positive role at the drafting stage. It is hoped that we will be able, if we achieve that Cabinet directive, to play a more positive role, both through our departmental solicitors in the original drafting and by applying control draft lines and a general supervision, so that in the preparation of the regulations and the preparation of the enabling statute we hope to have more internal authority than we now have.

Let me just summarize. In other to open up new remedies for the citizen against decisions made by his Government, there are several aspects to which Parliament must direct its attention. First, the enabling power in the staute itself. This is the key. The Minister of Justice and the President of the Privy Council, jointly, will be submitting to Cabinet a Cabinet directive giving the Department of Justice some control, pursuant to the recommendations of the committee, in accordance with the letter of the President of the Privy Council, setting out parameters of enabling powers. That is something which a scrutiny committee of the Senate or a scrutiny committee of the House or a joint scrutiny committee would want to watch in the statutes themselves and call the Minister of Justice to account.

Senator Connolly: As the statutes are being considered?

Hon. Mr. Turner: Yes, or a committee of the Senate dealing with the substance of the statutes or a committee of the House of Commons dealing with the substance of the statutes might say that they do not like this power to make regulations and then we will refer it to the Scrutiny Committee.

Senator Flynn: You will not continue with the practice of giving power for making regulations which may be deemed necessary for the purposes of the act?

Hon. Mr. Turner: Senator Flynn, I do not have our guidelines before us. Why don't I read the pertinent part of the letter into the record? The letter is dated September 30, 1969, and is addressed to the Chairman of the House of Commons Special Committee on Statutory Instruments, and signed by the President of the Privy Council, the Honourable Donald S. Macdonald—so as to distinguish him from the other Donald Macdonald.

Senator Argue: Honourable was enough.

Hon. Mr. Turner: I am now quoting from the letter:

> When bestowing the power to make regulations upon a person or a rule-making authority, care should be taken to ensure that the statute is not couched in unnecessarily wide terms. Specifically, certain powers should not be granted except after careful deliberation. These powers include the following: (a) power in a statute or in a regulation made thereunder to exclude the ordinary jurisdiction of the courts;

The exclusionary clauses...

> (b) power to amend or add to the enabling Act or other Acts by way of regulation;
>
> (c) power to make regulations having retrospective effect;
>
> (d) power to subdelegate regulation-making authority;
>
> (e) power by regulation to impose a charge on the public revenue or on the public other than fees for services;

(f) power to make regulations which might trespass unduly on personal rights and liberties;

(g) power to make regulations involving important matters of policy or principle."

That, I hope, answers Senator Flynn's question. First, the enabling power, the all-important first step that Parliament should be careful to observe. Secondly, the review of the regulations, once passed, by a permanent Standing Scrutiny Committee. The words of the Government statement in Parliament yesterday are wide enough to contemplate either separate committees or joint committees. I suggest that is a matter for both Houses of Parliament to work out.

Senator Connolly: You visualize a standing committee?

Hon. Mr. Turner: This will be a standing committee, Senator Connolly.

Third, we have an enabling power and regulations and the Scrutiny Committee. But what about the delegation of power that is exercised judicially or quasi-judicially? Say, two of us are competing for a licence, a broadcasting licence, or I want a higher rate either for a telephone system or interprovincial trucking firm, whenever that part of the Transportation Act is proclaimed, or for shipping of the Great Lakes; and you object. Whenever there is, in effect, a judicial proceeding, then if Parliament deems fit and both houses pass Federal Court Bill, there will be set up a new code of public administrative law that we sorely need, if I may modestly say so, in this country. When this bill—if it does reach this house—comes before this committee, I would direct the attention of the committee particularly to clauses 18, 28 and 29. The effect of these clauses is to transfer the traditional, ancient common law prerogative writs of *certiorari, mandamus,* prohibition, and injunction from the provincial superior courts to the new federal court. This Bill sets up as an alternative remedy, in clause 28, a very wide reviewing power—and I want to read it to you. Clause 28(1):

Notwithstanding section 18

...which is the prerogative writ section...

or the provisions of any other Act, the Court of Appeal

...of the Federal Court...

has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis,

... we are not interfering with administrative policy...

made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

(a) failed to observe a principle of natural justice

...failed to grant a hearing, failed to give equal chance to the parties to be heard, to cross-examine, to see the other side's witnesses and evidence

or otherwise acted beyond or refused to exercise its jurisdiction;

... excessive jurisdiction or failure to exercise jurisdiction...

(b) erred in law in making its decision or order, whether or not the error appears on the face of the record;

... No more avoiding a challenge on errors of law by refusing to give reasons for judgment.

or

(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.

I think that you, senator, have often appeared before these boards, as have a number of other senators here and myself. You present your evidence; your opponent presents his evidence; and you wait for the decision and when and if it does come, it is based on evidence that neither side submitted, and you wonder where the material came from. I believe this is a third strong arm for the citizen against the state.

Senator Flynn: It sounds like an improved writ of evocation that we have in the Quebec Code of Civil Procedure.

Hon. Mr. Turner: There are some similarities. I believe that the remedy is even wider here.

Senator Flynn: That is why I said "improved".

The Acting Chairman: I would like to congratulate you that the younger lawyers who are developing their practice will do well with the interpretation of natural justice and

the necessity of discriminating between administrative decisions and quasi-judicial decisions.

Hon. Mr. Turner: We do not attempt to define that in the bill.

Senator Connolly (Ottawa West): Could I revert to the other question about the scrutiny committee on standing orders?

Hon. Mr. Turner: May I just finish? I will be five more minutes.

Senator Connolly (Ottawa West): All right.

Hon. Mr. Turner: The final avenue is: What do we do with these boards and tribunals themselves? We can review the enabling power setting it up; we can review the regulations that relate to it; we can provide some sort of judicial review; but what about the procedures of these boards themselves? We have so many of them that it is difficult to conceive of standard rules of procedure. A subject that we have to explore in the Department of Justice, and that I believe Parliament should explore, is: Should there be a code of minimum procedural protection before these boards? Should there be something similar to an administrative procedures act as enacted by Congress, or should we use the United Kingdom technique of setting up a council of tribunals Act? The American technique is to set up minimum rules of procedure. The British technique has been to set up a review or scrutiny tribunal sitting over administrative tribunals, to which complaints can be brought if procedure has been offended, without defining what those minimum procedures are.

Those are two alternative techniques, and I believe that Parliament is going to have to choose: (a) whether we need it; and (b) what method we are going to use.

The Acting Chairman: Would you like to express an opinion of your preference on that? It would be interesting to know.

Hon. Mr. Turner: I am inclined at the moment—without taking a fixed position—towards an administrative procedures act. However, I do recognize the tremendous variety of procedures necessary. Obviously, you cannot conduct a National Energy Board hearing the way you are going to conduct a transportation hearing, a broadcasting hearing, or an immigration hearing.

Trying to get minimum procedures that will apply equally well to all these boards may be too Herculean a task. I am going to suggest something very un-Canadian to you, Mr. Chairman: obviously we need some facts before we have policy! In other words, there is going to have to be a lot of research done on the mechanics of these boards and tribunals.

That is the conclusion of my presentation, and I am sorry I have been so long, but it is a subject that is very close to my heart and I am delighted that the Senate and this committee are taking cognizance of it.

The Acting Chairman: Thank you very much, Mr. Minister.

Senator Flynn: Would boards include the powers given to a department or minister or official?

Hon. Mr. Turner: In the Federal Courts Bill, yes.

Senator Connolly (Ottawa West): Mr. Chairman, there is just one small point on the second-last matter that the minister discussed. Senator Langlois brings it to my attention. When I asked whether or not it was intended that the scrutiny committee be a standing committee, if it is to be a joint committee, as Senator Langlois suggests, it can hardly be a standing committee, and perhaps when the act is drafted that may be taken into account.

Hon. Mr. Turner: I will take a note of that, through you, Mr. Chairman. Really, I think the Government would be interested in the views of the Senate as to how this ought to be done.

Senator Connolly (Ottawa West): Senator Fergusson suggests that the restaurant committee is a standing committee.

Senator Fergusson: And the library committee.

Senator Flynn: I do not think it should be included in the act, because this is a matter which rests within the province of Parliament.

Senator Connolly (Ottawa West): Senator Langlois raised the doubt as to whether it could be a standing committee, so I am glad we have raised it now. Obviously, it could be.

Hon. Mr. Turner: Despite some commentaries that one has read to the contrary, this Government is very solicitous of the rights of Parliament, and the legislation will not be drafted in any way so as to bind the procedures of either house as to how they conduct

this type of scrutiny. It will provide for regulations being referred to scrutiny committee, but what type of committee will be left to each house, or to both houses jointly.

The Acting Chairman: Are there any other observations, honourable senators?

Senator Argue: Mr. Chairman, I would like to apologize for having been late and missing the burden of the minister's remarks but as a layman, who knows little or nothing about the law, I have been impressed by what he has said regarding the Government's determination to carry out the recommendations of the house committee on statutory regulations, etcetera.

I have made it something of a chore myself to study the new Wheat Board policy on Lift. I think that this offends, in almost every way, against the recommendations of that committee. The minister has made some comments as to how these things get by. I wonder if he would care to make any comment on how this came about. I am not a layer and I cannot do as good a job, but as a farmer who understands the Canadian Wheat Board Act and how it has been applied, I would say that this policy has turned the Wheat Board Act into its opposite: it has made it a punitive measure; it has been used not as a marketing instrument but as a coercive instrument to prevent farmers seeding crops; and it has in it a retroactive aspect because it relates to summer fallow of a previous year. It has in it, I would suggest, a very serious penalty provision, because you either conform with the new policy or you are unable to market your grain.

I know the minister's difficulties, but I would really be interested if he would care to pass some remarks, as a distinguished lawyer, about whether or not this darned thing does offend these regulations, because if it should not, then in my opinion, there is not anything you could not get away with.

Hon. Mr. Turner: Through you, Mr. Chairman, all I will draw Senator Argue's attention to is the fact that he can read the recommendations of the House of Commons committee, compare those recommendations to the statute, and determine for himself whether they are in accord.

I might point out to him that this was not an ordinary statute; this operation was set up by an appropriation act. I think that he has recognized the difficulty I find myself in, but I think that he has drawn something of some importance to the attention of this committee.

Senator Argue: Appropriation Act, yes, but it is based on regulations of the Canadian Wheat Board, and without the powers in the Canadian Wheat Board Act, again being a layman, I would suggest to the minister it could not be operative. I think his non-comment is quite significant! I am interested in having another run at this thing.

Senator Flynn: Eventually, you may use the committee of review, the standing committee of review.

Senator Argue: I wonder if I might conclude? As I understood from the minister responsible for the Wheat Board, this is a one-year policy; it ends in one year. I wonder what position we would be in, as a Parliament or as a country or as a farmer, that might be different if they are thinking of some kind of a policy like this again—and I hope they never consider this kind of policy again, because it is offensive on all grounds, and I think the Government will recognize that too. But, in any case, what happens at another time? In other words, if it is a one-year policy, I take it they have to go through the same procedure to do it over again, if they wish to—but maybe they do not.

Hon. Mr. Turner: I think, senator, through you, Mr. Chairman, the guidelines which will be accepted by the Government speak for themselves, and presumably any future legislation would have to meet those guidelines. Exceptions are contemplated, but exceptions would have to be justified before a scrutiny committee, if it were set up.

Senator Argue: After they had gone into effect.

Senator Flynn: Of course.

Hon. Mr. Turner: You would have two whacks at it: firstly, at the enabling stage, the statute itself; and, secondly, at the regulation stage. While it is true that the regulation might have been passed before it reaches the scrutiny committee, still the scrutiny committee can be a vehicle of some importance and provide a vehicle for just the argument you are making.

Senator Argue: I appreciate that, and I think that if a Canadian Wheat Board Act, or any other act that affects a large number of people, is going to operate in a reasonable, fair and acceptable way, then no Government should undertake this kind of far-reaching change in the regulations or the provisions without some scrutiny and some discussion in

advance. We have had a discussion on it, and I think the stand I have taken has great support in the Senate, on principle. They may think I have gone too far in some of the ways I have expressed it...

Hon. Mr. Turner: Mind you, if I may interrupt, Parliament chose the vehicle of an Appropriation Act to set this operation up.

Senator Argue: I realize that.

Senator Flynn: Mr. Chairman, I wanted to ask the minister this. I suppose a joint standing committee, or a committee of either house, such a review committee, could entertain any complaint made by an individual. I mean, we could provide not only for regular review of regulations, but also entertain any complaint made to us if our regulations would so provide. Adding, of course, the remedies of the Federal Court which you have just mentioned, would you agree with me that we would not, with that machinery, need an ombudsman in the federal administration? It would, in some way, because you have said even the administrative decisions of ministers would come under the machinery of review and correction.

Hon. Mr. Turner: Obviously, Mr. Chairman, the terms of reference of the scrutiny committee, or committees, whatever they may be, will determine the scope of those committees. However, I would assume that the committee would have the power to hear grievances and witnesses. That would depend on what the terms of reference would be.

I think I should underline the fact that in order for this committee, or these committees, to be effective they are going to need some very skilled supporting staff.

You have mentioned the ombudsman. The ombudsman is an extra legal remedy. It is a remedy that in some jurisdictions has been found necessary because the methods of administrative or judicial review have been found to be inadequate.

I would suggest that the more we are able, in the measures I have tried to outline to this committee, to improve the avenues of administrative and judicial remedy, the less necessary an ombudsman might be.

I visited Sweden last October and talked for a day, exchanging two meals with him, with the Swedish Ombudsman Mr. Bexelius. I also had an afternoon with the Parliamentary Commissioner or Ombudsman of the United Kingdom. And, of course, I know the Canadian Provincial Ombudsmen—le protecteur du peuple du Québec, et les autres.

There seem to be certain difficulties that one would have to overcome if we were to have an ombudman in Canada. First of all, no federal state has yet had an ombudsman at the federal level, and about 19 out of 20 of the complaints that he would receive would undoubtedly relate to provincial jurisdiction.

Secondly, the geographical area of Canada is immense. The ombudsmen currently in operation in the Scandanavian countries, in the United Kingdom, in Hawaii, in four Canadian provinces and in New Zealand are all in relatively cohesive geographic entities. Most of them are very small countries geographically. I take this from conversations with these men, that an ombudsman to be effective must personally see the complainant. He must often personally visit the areas in which the complaint arises. And if an ombudsman, in order to discharge his duties, has to set up a supporting staff that turns him into a second bureaucracy, superimposed on the other, then you have defeated your own purpose, because you have one bureaucracy imposed upon another, from which, by the way, there is no appeal.

Senator Flynn: This is my view. I thought you had covered the ground perfectly with this machinery, so that we could dispense with an ombudsman.

Hon. Mr. Turner: The ombudsman idea, which was injected into the Swedish Constitution in 1812, was made necessary by certain differences in their parliamentary procedure from our own. First of all, there is no ministerial responsibility there. Secondly, there is no responsibility of an inferior to a superior in the public service; they are governed by regulations. Thirdly, a Member of Parliament, in the Swedish Parliament, cannot bring a complaint on behalf of a constituent by way of grievance to the attention of the House of Commons or the Senate. So, obviously, there would be no avenue for airing these complaints in the legislatures and no ministerial responsibility by elected representatives, and other methods had to be found.

We do have ministerial responsibility; we do have a grievance procedure; and if a Member of Parliament is doing his job he is the best ombudsman a citizen can have.

Now, I am not closing my mind to it, but I am suggesting that there are hurdles that have to be passed.

Senator Flynn: But on top of the committee of each house of Parliament, you have, of course, the Federal Court which will play a significant role, if I can assess what you said properly.

Senator Gouin: I have been greatly interested in the question by Senator Flynn and in the answer given by the minister concerning what we would call complaints against the application of a regulation, but I want to make a suggestion concerning what I would call some preventive courses.

In Quebec we have a Minimum Wage Board, when it is a general ordinance—I would take the extreme case, universal application. We had beforehand, I know, an inquiry in which I represen ed the producers, the consumers, the employers and the trade unions. When a regulation is what I would call of vital importance, would it not be advisable also that the parties at large would have the opportunity to be heard before the regulations are adopted?

Hon. Mr. Turner: I think in certain cases it would be very useful. As a matter of fact, that procedure has been followed in certain increasing numbers. Through the influence of the Department of Justice we are suggesting this to other departments. Perhaps Mr. Thorson would like to speak on that.

Mr. Thorson: I think you will observe, in a number of statutes presented to Parliament this session, that there is provision for the advance tabling of proposed regulations. Examples which occur to me are the new automobile safety Act and the Arctic Waters Pollution Prevention Act. I believe there are one or two others, as well. The Territorial Seas Bill is a third example.

One cannot generalize that all regulations can or should be tabled in advance of the effective date of their making, but increasingly we are working toward provision for advance publication in appropriate cases.

Senator Flynn: Does this procedure mean that when you give notice of regulations which will come into force you will invite objections or representations at the same time?

Mr. Thorson: Yes. The whole purpose, of course, is to present the public, not with a *fait accompli* but with a proposal, coupled with an invitation—in the statutes which I gave as examples presented to Parliament this year—to interested members of the public to comment.

Senator Fergusson: I would like to speak on the Ombudsman question, which has been brought up. I am not saying that we ought to have a federal Ombudsman. I am not impressed with the fact that there would be a large proportion who would be thinking about provincial matters, because I should think you would only need to have some ordinary person who would be able to refer this to the province involved. That should not take too much work. I am thinking of the very excellent work being done in New Brunswick by our Ombudsman, Dr. Flemmington. It is not only the number of administrative matters which he can adjust, and of course he has done a number of them, but it is the confidence people have in knowing that they have someone they can go to. I think it has great value in that way. Whether or not the help which he has been able to give in actual cases is impressive I do not know. I know from the feeling in New Brunswick that it is a good thing for the people to know that they have an Ombudsman.

Hon. Mr. Turner: I am still of open mind, Mr. Chairman. It is far more difficult to achieve this at a federal level than at a provincial level.

Senator Flynn: We would give publicity to the machinery set up here. If people generally knew they could come to a committee of the Senate or the House of Commons or a joint committee of both houses, they would have the same feeling of confidence as there apparently is in an Ombudsman.

Senator Fergusson: I disagree with you, as to how it would affect people. They know nothing about machinery that is set up, and it would not impress them as much as knowing there is someone they can go to.

Senator Flynn: Do you think the word Ombudsman...

Senator Fergusson: I think it means something.

Senator Flynn: It is a problem of educating people.

Hon. Mr. Turner: If I might comment on one remark, Mr. Chairman, with the courtesy of the committee. Last year among my responsibilities I had that of piloting or sharing the responsibilities of piloting the Official Languages Bill through the House of Commons. The Official Languages Commissioner is, in effect, a language Ombudsman. There

was a lot of criticism from all quarters of the House as to the powers given to the Official Languages Commissioner.

It was said that he was, in effect, exercising judicial power, which he was not. It was also said that there was no appeal from him, which was true, because he was not exercising any judicial power and not deciding rights. He only brings matters to the attention of Parliament.

Some of the Alberta members were highly critical of this, so I read them a statute which was drawn in exactly the same terms as the power setting up the Official Languages Commission. The statute was the power setting up the Alberta Ombudsman. In other words, the House of Commons—I do not recall with enough precision how the debate went in the Senate on that date—was very nervous about the powers given to the Official Languages Commissioner. They were no wider than powers enjoyed under those statutes that set up the Ombudsmen in the four provinces.

Senator Flynn: It was a more limited field too.

The Acting Chairman: Before asking for a motion for adjournment, honourable senators, I am sure that you would want me—and of course I am very pleased to do so—to thank the minister for what I believe is a brilliant presentation of the problem, even to the point of being inspiring. I personally think this whole question of statutory instruments and the direction in which he is moving is simply marvellous and I cannot say any more. I, also on your behalf, honourable senators, would like to thank Mr. Thorson for his co-operation in being with us today. Before concluding, Mr. Minister, I will advise you that we intend to call Mr. MacGuigan who, of course, played such an important part, as chairman in the other place, to develop some further thoughts on this matter. We are hopeful, of course, that as a committee we will come up with some constructive considerations.

The committee adjourned.

Ottawa, September 30, 1969.

President of the Privy Council

Mr. Mark MacGuigan, M.P.,
Chairman,
House of Commons Special Committee
On Statutory Instruments,
Ottawa 4, Ontario.

Dear Mark,

I am writing to transmit to you, as Chairman of the House of Commons Special Committee on Statutory Instruments, the Government's answers to questions 13, 16, 17, 18, 21, 22 and 23 contained in the questionnaire relating to statutory instruments that was circulated by the Special Committee earlier this year. These questions, along with the government's answers, are set out for the convenience of members of the Committee in the form of an appendix to this letter, marked Appendix "A".

A further document entitled "An Analysis of the Grant of Power to make Regulations" is also attached as Appendix "B". This latter document, which is concerned with the analysis and classification of the major forms of grants of regulation-making power, is mentioned in Appendix "A" at page 7 thereof.

I trust that this material will prove to be useful to members of the Special Committee and will be of some assistance in the formulation of the Committee's views and conclusions.

Yours truly,
Don Macdonald

encl.

APPENDIX "A"

Answers to Questions 13, 16, 17, 18, 21, 22 and 23

Question 13: Who specifically within your Department or Agency formulates the policies found in your regulations?

Answer: The Minister or other regulation-making authority formulates the policy found in regulations with such assistance and advice as he or it regards as necessary.

Question 17: Is there any reason why regulations could not be published within fifteen days of being made?

Answer: Regulations could be published within fifteen days provided all the necessary personnel and facilities were available. This would involve considerable additional expense both to the Departments and Agencies involved and for the central Agencies. The current inhibiting factors are purely administrative.

Question 16: What circumstances do you envisage would make it necessary to extend the time for publication of a regulation under section 6(2) of the *Regulations Act*, R.S.C. 1952, Chapter 235?

Question 18: What circumstances would, in your view, justify the exemption from publication of a regulation?

Answer: Extension of the time normally allowed for publication of a regulation under s. 6(1) of the *Regulations Act*, R.S.C. 1952, Chapter 235 and exemption from publication of a regulation many from time to time be justified in the following circumstances:

(a) where notification or other form of communication would be more appropriate;

(b) where the safety and security of the country or part of it might be adversely affected;

(c) where information might be disseminated which could deleteriously affect Canada's foreign relations;

(d) where the regulation involves the distribution of information which might adversely affect the relations of the provinces *inter se*;

(e) where the regulations are of limited application and involve the granting of privileges or the relaxation of rules;

(f) where other conditions from time to time necessitate that a regulation should be exempt from publication or that its publication be postponed provided that the provisions of the *Regulations Act* are complied with;

(g) an extension of the time normally allowed for the publication of a regulation may be necessitated where the matter is one of urgency.

Question 21: How would a person, both inside and outside of your Department or Agency, satisfy himself as to the authenticity of a regulation not transmitted, recorded, published or laid before the House in accordance with the *Regulations Act*, supra?

Question 22: How would you prove the authenticity of such a regulation in a court of law, should this be necessary?

Answer: Resort might be made to section 21 of the *Canada Evidence Act* which provides for the production of certified copies as the means of proving a proclamation, order, regulation or appointment made by or under the authority of the Governor in Council or of a Minister of the Crown or the Head of a Department.

Question 23: Please advise as to any suggestions or submissions which you may have respecting the improvement of the mode or process of conferring the power to make regulations and the preparation and bringing into effect of regulations.

Answer: Several matters might be considered in connection with reform of the formulation, enactment and review of statutory instruments.

Firstly, Parliament should take into account certain guidelines when enacting enabling legislation. It should be borne in mind by both Chambers of Parliament that personal rights and liberties should not be unnecessarily curtailed. Therefore, when bestowing the power to make regulations upon a person or a rulemaking authority some care should be taken to ensure that the statute is not couched in unnecessarily wide terms. Specifically, certain powers should not be granted except after careful deliberation. These powers include the following:

(a) power in a statute or in a regulation made thereunder to exclude the ordinary jurisdiction of the courts;

(b) power to amend or add to the enabling Act or other Acts by way of regulation;

(c) power to make regulations having retrospective effect;

(d) power to subdelegate regulation-making authority;

(e) power by regulation to impose a charge on the public revenue or on the public other than fees for services;

(f) power to make regulations which might trespass unduly on personal rights and liberties;

(g) power to make regulations involving important matters of policy or principle.

When considering enabling legislation the Chambers of Parliament might reflect on whether the delegation of a rule-making power is best adapted to achieve the end desired.

Secondly, it would appear desirable for some form of scrutiny to be performed on a continuous basis and a Committee is proposed as the best device to exercise this function. The most appropriate composition of such a committee would appear to be a Joint Committee of members of the House of Commons and Senators. Such a Committee should have the power to sit during the Parliamentary recess. The Committee should have the power to examine and scrutinize all regulations tabled in the House of Commons or in the Senate.

The Joint Committee for the Scrutiny of Delegated Legislation should have the power to call for oral and written explanations of regulations from the Department or Agency which originally proposed such regulations. The Committee should also have the power to remit regulations to the Department or Agency proposing such regulations. The power of remission would in no way affect the status as law of the regulations remitted, but would merely express the disapproval or concern of the Committee in a formal way. The Committee ought also to have the power to report to both Chambers of Parliament. It is envisaged that the Committee would make periodic reports at such intervals as it may determine. It is also expected that the Committee might make *ad hoc* reports for the purpose of drawing the attention of members of the House of Commons and Senators to particular regulations. This latter power would be exercised within the terms of reference of the Committee.

The assistance of qualified staff ought to be made available to the Committee.

The scope of enquiry of the Joint Committee for the Scrutiny of Delegated Legislation ought not to be limited and might include the following enquiries:

1. Does the regulation tend to oust the jurisdiction of the courts?
2. Does the regulation make unusual or unexpected use of the powers conferred by the enabling statute?
3. Has there been any unjustifiable delay in any stage of the making of the regulation?
4. Does the regulation have retrospective effect?
5. Does the regulation trespass unduly upon personal rights and liberties?
6. Is the regulation clear in meaning?
7. Does the regulation impose a charge other than fees for services?
8. Is the regulation enabling statute, and is judicial determination of this question available in an adequate way?
9. Is it necessary for any reason for Parliament to pay special attention to the regulation?

Consideration might be given by both the House of Commons and the Senate to setting aside a certain time on a regular basis for consideration of the reports of the Committee. Both the *ad hoc* reports and the periodic reports of the Committee might be tabled and deliberation of both these types of report could be undertaken. The timing and length of such period of deliberation should depend on the frequency of the reports of the Committee and the wishes of the members of the two Chambers.

Thirdly, requests for broad subordinate legislation-making powers should ordinarily be accompanied by some appropriate pre- or post-review control. While it must be recognized that no mathematical or scientific formula can determine with precision those grants of power that should be subjected to pre- or post-review control, it does appear that control mechanisms such as those found in subsections (3) to (5) of section 5 of the *Atlantic Regions Freight Assistance Act* and in section of the *Maritime Transportation Union Trustees Act* can and should be resorted to more frequently than in the past.

In considering this problem, grants of legislative power can be analysed and classified into at least three forms of categories—see appendix "B".

Fourthly, the *Regulations Act* or the regulations made pursuant thereto should be amended so as to provide for the authority of the Deputy Minister of Justice to review delegated legislation submitted in draft form for approval having in mind the various criteria and safeguards previously referred to; and consideration might also be given to having the Deputy Minister of Justice make a report to the Clerk of the Privy Council where, in his opinion, any draft regulation fails to meet those criteria or safeguards.

APPENDIX "B"

An Analysis of The Grant of Power to Make Regulations

The term "regulations" as here used is all embracing and is intended to equal the definition in the Regulations Act.

A regulation-making authority (abbreviated r.m.a.) includes all authorities other than Parliament itself.

1. *Forms of Grant*

There are three distinct major forms:

(1) Power to make a particular regulation as described in the Act;

(2) Power to make regulations for a specified purpose;

(3) Power to make regulations in relation to a subject-matter.

Forms 2 and 3 are recognized (with slight difference in name only) in the Nolan case (P.C.). Form 1 is added to complete the picture.

There may also be combinations and fusions of these three distinct forms.

2. *Particular Regulation*

This is a power to make a regulation the nature and content of which is described in considerable detail by Parliament itself. Thus, a regulation "to prohibit the import of used automobiles" leaves virtually no elbow room. The r.m.a., and only he, can do just that; nothing more.

The characteristics of this form of power are that in the normal case it is tightly limited and the terms of the regulation are predictable. There can seldom be any surprises.

The *Public Service Superannuation Act* is a good example of powers of this class.

3. *Specified Purposes*

In this form the power given is to make regulations for the attainment of certain objectives or purposes. This is considerably wider than Form 1. The extent of the power depends on the statement of purposes.

The purposes may be governed by the "intent of the Act". Thus, the power may be to make regulations "for carrying the purposes and provisions of this Act into effect", or it may be for certain stated purposes that are clearly ancillary or subordinate to the "intent of the Act" as revealed by the other provisions in the Act. In both these cases, there is a degree of legislative control, enforceable by the courts. The courts can ascertain the "intention of Parliament" from the terms of the Act as a whole, and can say whether the regulation is or is not for the stated purpose. Also, if the purposes of the Act as a whole govern, the nature and kind of regulations that may be made can be envisaged.

The purposes, however, may be stated independently, outside the umbrella of the Act as a whole. Thus, a single-section statute could empower a r.m.a. to make regulations "for promoting the economic welfare of Canada". Or, in an Act with broad purposes (e.g. emergency powers) a statement of purposes might have no discernible verbal relationship to any other provision of the Act. Powers of this kind can be extremely broad—the broader the purpose the greater the power. With a wide purpose, it is very difficult to say that a regulation is clearly outside the purposes, and it is difficult to imagine what kind of a regulation might be made. Hence, there is little legislative or judicial control.

4. *Specified Subject-matter*

Power to make regulations may be in the form of power to make regulations *in relation to* a stated subject-matter. This is the broadest form, befause a *relationship* to a general subject can easily be manufactured. Note that sections 91 and 92 of the *B.N.A. Act* take this form.

The characteristics of this form are that there is virtually no limitation on the power by the terms (purposes, intent, etc.) of the Act itself, but only by the words conferring the power. Since "relationships" can be almost anything, it is also difficult to predict with any degree of accuracy the range of regulations that might be made. Again, the broader the subject, the greater the power.

The courts do have control, for they can say that a particular regulation is not in relation to the stated subject, but the broader the subject or the more general the words describing the subject, the more difficult it becomes for the courts to strike down a regulation.

Two statutes illustrate how powerful these two forms, purposes and subjects, can be. The

War Measures Act (purposes) and the *Fisheries Act* (subject).

5. *Judicial Control*

In all three forms, the courts do have a degree of ultimate control. They can say that a regulation is not

(1) of the kind described—class 1

(2) for the purposes described—class 2

(3) in relation to the subject described—class 3.

This power may be seriously eroded or even taken away by the familiar phrase "as he deems necessary, desirable, expedient, etc." Thus, where power is conferred to make regulations.

(1) "prescribing such fees as he considers necessary" (class 1),

(2) "as he deems necessary for the purpose of" (class 2), or

(3) "as he deems to be in relation to" (class 3),

the courts have little more than a theoretical power to strike down. (For example, *War Measures Act*—Chemicals Reference). The test whether the regulation falls within the Act is thus converted from objective to subjective.

6. *Sub-delegation*

Whether a r.m.a. can delegate to another r.m.a. is largely a matter of construction. There is probably no valid argument against sub-delegation in Forms 2 and 3. A delegating regulation can be said to be for the purpose, or in relation to a subject, specified in the Act.

7. *The regulation-making authority*

For the most part, power to make regulations is under Federal Statutes conferred on the Governor in Council. This has certain advantages and disadvantages.

It is a disadvantage because it is almost impossible for the Governor in Council (which in Canada must be equated to the Cabinet) to examine proposed regulations even superficially, yet, under our theories of Cabinet and party solidarity, the whole Cabinet and party in power must defend them.

If regulations are made by *Ministers,* the same considerations do not necessarily apply. For the most part the Minister would make his regulations himself (with the advice and assistance of his staff and the Department of Justice) and he would take responsibility for them. He would, of course, be well advised to consult his colleagues or Cabinet on important matters of policy, but the ultimate responsibility would be his and not that of the Government collectively.

Certain Boards, Commissions, etc., also have authority to make regulations. Procedural and administrative regulations can properly be made by them on their own, but the power to impose fees or penalties should not be broadly conferred without some control.

8. *Control*

The question to be considered is whether any class of grant of power to make regulations should be subjected to some form of control.

There is no mathematical or scientific formula for deciding what classes of grants should be subjected to further Parliamentary control. This is largely a matter of degree and judgment, and one can only suggest a few general principles or approaches.

There are some situations that are fairly clear.

First, the "deems necessary" formula could be eliminated in all but a few exceptional cases. this changes the test of validity from subjective to objective and automatically reinstates judicial control.

Secondly, class 1 grants of power should not cause much difficulty. In most cases there is full legislative control; the regulation that may be made is minutely described, almost to the point where it might be said that Parliament itself has made the regulation, except for minor details. It must be pointed out, though, that class 1 can also be wide and powerful. Thus, authority to make a regulation "prohibiting the import or export or interprovincial movement of any article" is a wide grant because it is vague and general. A case of this kind would need a second look. In the ordinary case, however, class 1 powers are administrative, procedural, subordinate or ancillary, and should not be objectionable.

Class 2—purposes—may be objectionable or unobjectionable, depending on the terms of the Act and the terms of the power. The thing to look for here is whether the purposes, are expressed in, governed or limited by, or ascertainable from the provisions of the Act *other than the section in which the power is conferred.*

Thus, power to make regulations "to carry out the purposes and provisions of this Act"

should be unobjectionable. Similarly, an Act that is complete or detailed one, with an ascertainable overall intent or scheme, would govern the regulation section.

The Acts that should arouse suspicion are those that are only "sketch" Acts and have little in them other than the grant of legislative power, and those Acts where the language of the powers cannot be restricted or controlled by the language of the Act as a whole. But even these powers are not to be condemned outright; it remains to examine the terms of the power itself to see if the degree of legislative control falls short of an acceptable level. Thus the power to make regulations respecting sea coast and inland fisheries is too wide; but power to make regulations respecting the maintenance and operation of interprovincial or international ferries is not. It is a question of judgment and degree.

Class 3, because it lists subjects, is not so easily identifiable with the purposes of the Act. The words used in conferring the power may get their meaning from the whole Act, but it is not as easy to relate subjects to purposes as it is purposes to purposes. Even in a long and detailed Act, subjects can easily be slipped into the power section that bear no discernible relationship to anything else in the Act. Hence, class 3 must be looked at as being suspect. In many cases, the only legislative control may be in the words conferring the power, and we are back to judgment and degree. Power to make regulations with respect to the licensing of interprovincial ferries may be unobjectionable, but not so a power to make regulations with respect to navigation and shipping.

What is needed for classes 2 and 3 is first to work out the broadness of the description of purposes or subject and then to decide what is acceptable to Parliament and to the people.

9. *Tests for Need to Control*

Two approaches may be taken to see whether a power should be controlled. They are not mutually exclusive, and in some cases come to the same thing.

One is, can the regulations that may be made be predicted with reasonable accuracy? Does the public know what it may expect?

With class 1, there is little difficulty. With class 2, if the purposes are in the Act itself and not just in the power section, it is probably unobjectionable. But if the purposes are described only in the power section, and it is so wide that the public cannot tell what it is going to get, then some safeguards should be inserted or the broad language should be cut down.

With class 3, we depend more on the words of the power alone. The swing should be away from broad general language, and the subject-matter should be closely defined so that we know what to expect. Also a general statement, describing the purposes for which regulations might be made, could be inserted. An example is the *International River Improvements Act.*

Classes 2 and 3 may be combined and thereby impose a double test. Thus the Governor in Council may *for the purpose of* etc. make regulations *in relation to.* This form gives a better clue to what is needed, and provides more room for limiting power by interpretation of the whole Act. The public then has a better idea of what to expect.

Another approach is to ask what legislative control there now is, and whether it is enough. Has Parliament said, expressly or by implication, what kinds of regulations may be made or what they are to be. Bare powers of class 2 and 3 should be looked at with care, and if they are too broad to be acceptable, steps can be taken to cut them down. If the Act is a detailed or full one, the power can be tied to the purposes of the Act. If the Act is a "sketch" Act, the powers should be described in language that leans to the particular rather than the general. And, as indicated above, purposes and subjects can be coupled so as to cut down on broad powers.

10. *Parliamentary Review*

The most effective check on the exercise of power to make regulations is a close examination of the power itself when the Bill to grant it is before Parliament.

Secondly, members should read regulations and protest against any they do not like. Regulations are published and tabled. Greater use should be made of political weapons. Genuine control must necessarily be primarily political rather than procedural. Publicity and criticism, in the last analysis, are the real safeguards.

There are two prerequisites to effective Parliamentary review:

(1) members must read regulations; and

(2) time must be made available to members to speak about regulations after they are tabled.

A House scrutiny committee might well be an effective means of providing opportunity for public examination and criticism. The main functions of such a committee would be to expose regulations to the glare of publicity and bring to the attention of the government and the public any objectionable features thereof.

11. *Judicial Review*

Almost certainly the most effective review power by the judiciary is to declare a regulation *ultra vires.*

Any court, from a Justice of the Peace to the Supreme Court of Canada can hold that a regulation is *ultra vires.* But obviously much depends on the nature of the power. If there are adequate legislative controls as previously described, a very important protection against abuse of power is available.

Queen's Printer for Canada, Ottawa, 1970

Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

Legal and Constitutional Affairs

THE HON. EARL W. URQUHART, Q.C., *Acting Chairman*

No. 7

WEDNESDAY, JUNE 24, 1970

Complete Proceedings on Bill C-212, intituled:

"An Act to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands Act"

WITNESSES:

Department of Indian Affairs and Northern Development: Mr. D. A. Davidson, Acting Director, Territorial Relations Branch; Mr. G. B. Armstrong, Chief, Water Resources Section.

REPORT OF THE COMMITTEE

21827—1

MEMBERS OF
THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman.*

Argue
Aseltine
Bélisle
Burchill
Choquette
Connolly, J. J.
(*Ottawa West*)
Cook
Croll
Eudes
Everett
Fergusson
Flynn (*ex officio*)
Gouin
Grosart
Haig
Hayden
Hollett
Lang
Langlois
Martin (*ex officio*)
Macdonald, J. M.
(*Cape Breton*)
McGrand
Méthot
Petten
Phillips (*Rigaud*)
Prowse
Roebuck
Smith
Urquhart
Walker
White
Willis

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of Proceedings of the Senate, Tuesday, June 23, 1970:

A Message was brought from the House of Commons by their Clerk with a Bill C-212, intituled: "An Act to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands 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 Martin, P.C., moved, seconded by the Honourable Senator McDonald, that the Bill be placed on the Orders of the Day for a second reading later this day.

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

Pursuant to the Order of the Day, the Honourable Senator Prowse moved, seconded by the Honourable Senator Macnaughton, P.C., that the Bill C-212, intituled: "An Act to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands Act", be read the second time.

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 Prowse moved, seconded by the Honourable Senator Hayden, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

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

ROBERT FORTIER,
Clerk of the Senate.

21827—1½

MINUTES OF PROCEEDINGS

WEDNESDAY, June 24, 1970.
(7)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10:00 a.m.

Present: The Honourable Senators: Argue, Aseltine, Croll, Eudes, Fergusson, Gouin, Langlois, Méthot, Prowse, Smith and Urquhart—(11).

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel; Mr. Pierre Godbout, Assistant Law Clerk and Parliamentary Counsel and Director of Committees.

In the absence of the Chairman and on Motion of the Honourable Senator Smith, the Honourable Senator Urquhart was elected Acting Chairman.

On Motion of the Honourable Senator Argue it was Resolved to print 800 copies in English and 300 copies in French of these proceedings.

The Committee proceeded to the consideration of Bill C-212, intituled: "An Act to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands Act.".

The following witnesses were heard:

Mr. D. A. Davidson, Acting Director, Territorial Relations Branch, Department of Indian Affairs and Northern Development;

Mr. G. B. Armstrong, Chief, Water Resources Section, Department of Indian Affairs and Northern Development.

After discussion and on Motion of the Honourable Senator Smith, it was Resolved to report the Bill without amendment.

At 10:45 a.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

REPORT OF THE COMMITTEE

Wednesday, June 24, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-212, intituled: "An Act to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands Act", has in obedience to the order of reference of June 23, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

EARL W. URQUHART, Q.C.
Acting Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Wednesday, June 24, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-212, to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands Act, met this day at 10 a.m. to give consideration to the bill.

Senator Earl W. Urquhart (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, we have referred to us for consideration Bill C-212 which was introduced in the Senate last night by Senator Prowse. Senator Aseltine also spoke in the debate, and the bill was read the second time and referred to this committee. Bill C-212 was read the first time in the House of Commons on May 11, 1970, and I think it would be well for me to read the recommendation that is contained in it:

> His Excellency the Governor General has recommended to the House of Commons the present measure to amend the Yukon Act and the Northwest Territories Act respecting the payment of indemnities and expenses to the members of the Council of the Yukon Territory and of the Northwest Territories; to broaden the powers of the Commissioners in Council respecting the administration of justice and respecting the establishment, maintenance and management of prisons; and to increase the size of the respective Councils and the number of members elected thereto;
>
> Also to amend the Territorial Lands Act to give the Governor in Council the power to set apart and appropriate territorial lands as land management zones and to make regulations controlling the use of the surface of lands in such zones; and further to provide for certain changes in connection with the administration of the Act.

We have with us as witnesses this morning Mr. D. A. Davidson, the Acting Director of the Territorial Relations Branch of the Department of Indian Affairs and Northern Development, and Mr. G. B. Armstrong, of the Water Resources Section of the same department. They are here to assist us in our discussion of this bill.

Are there any questions that honourable senators would like to direct to either of these two gentlemen?

Senator Smith: Mr. Chairman, I am wondering whether either of the witnesses would entertain the idea of making a short statement just to remind us of the principles of the bill.

Mr. D. A. Davidson, Acting Director, Territorial Relations Branch, Department of Indian Affairs and Northern Development: Thank you Mr. Chairman. I shall try to touch on the highlights of the bill.

As you know, the Territories, as regards their constitution, are different from the provinces in that they do not come under the British North America Act. Their constitution is contained in two acts of the Parliament of Canada—the Northwest Territories Act and the Yukon Act. In those acts the Minister of the Department of Indian Affairs and Northern Development is charged with their administration.

The basic element in the acts at this point, is that the councils—fully elected in the Yukon, and partially elected in the Northwest Territories—are legislative bodies. The executive authority in the Government of both Territories resides in the appointed commissioner, and the commissioner is appointed during pleasure by the Governor in Council. Under one act the council must meet once a year, and under the other act it must meet twice a year, but in practice they meet about three times a year and pass the legislation as presented by the administration.

There have been progressive moves, as you will see by looking at the office consolidations of these acts—they were amended in 1955,

1958, 1960, and 1966—towards expanding the executive, and taking it into the Territories. This is the process that has been going on, and difficult as it may be, this is the essential thing in that part of the bill that deals with these two acts.

To set the stage a little bit, I will say that the Yukon Territory has always had its commissioner and administration resident in Whitehorse. They have functioned there as a government in the Territory, and in eyes of the residents of the Territory this is a very important thing.

Up until 1967, the administration of the Northwest Territories was resident in Ottawa. The commissioner, up until 1963, was the Deputy Minister of our department, and then a separate commissioner was appointed, but the government administration in the Territories in respect of territorial ordinances, education, welfare, and so on, was performed by federal staff of the Department of Indian Affairs and Northern Development.

In the fall of 1967, after a building up period, the commissioner's staff in Ottawa was moved physically to Yellowknife. To do this we had to provide not only for the staff to go there, but for housing and all other physical accommodation on the ground. In April, 1969, we turned over the administration of the western part of the Territory, the Mackenzie District. We had to do this in a phased way in order to let the territorial government build up an administration that was able to take on this responsibility. In this process, we transferred our field staff to the territorial government, and we gave them our finances. In April, 1970 we turned over the balance of the Territories—the eastern Arctic, as we call it.

At the present point of time, the territorial administration in Yellowknife has control of all the services for all the people in the Territories, and this is the on-going form of administration for the Northwest Territories. Actually, it brings the Northwest Territories up to the point where the Yukon has been for some years, with a local administration providing all of the provincial-type services, with the exception of health services. Health services are provided by the Department of National Health and Welfare for the very good reason that it is difficult to get medical staff into those remote areas.

Referring to the present bill, what we are trying to do is to move a little further in the process of giving to the Territorial Government power to deal with those things that they can now handle on a purely territorial basis. We are taking them out of the federal act and saying to them: "You will set the qualifications of voters. You will say when certain administrative things are to be done." This authority will go into territorial legislation. The Territorial Governments are now prepared to put forward ordinances that will provide the legislative base for the things that are being remand from these federal acts, and we hope this process will go on further in the future.

One other major change is that in the Northwest Territories we are proposing to enlarge the size of the council. At present it has 12 members, five appointed and seven elected. We are now going to 14 members, four appointed and 10 elected. As you know, the Carruthers Commission has a good deal to say about this. There is also provision in the bill, as it now stands, for further deletion of appointed members without coming back to the federal Parliament.

Then, of course, there are a sections dealing with the administration of justice in both territories. In the absence of anyone from the Department of Justice, I will say just a word as I understand these sections.

Senator Prowse: You are among friends!

Mr. Davidson: In both territories, the Attorney General of the territories is the Attorney General of Canada. The policing in the territories is carried out by the R.C.M.P., and generally this is under a contractual arrangement. It is proposed in the bill to turn over to the territories responsibility for the administration of the courts, and what we commonly call the administration of justice, except the function of the Attorney General, relating mainly to criminal justice. I am sorry, I may not be entirely specific, but that is as I understand it. It is largely for constitutional reasons that they cannot go to the extent of turning over the Attorney General's function. As I understand it, it is considered that there must be an elected representative of the people responsible for this function, and at this point in time the only one available is the Minister of Justice. Short of that, the Territorial Governments will administer the courts and appoint sheriffs, justices of the peace and so on, which is now done at the federal level.

The third portion of the bill has to do with conservation of the northern environment. Mr. Armstrong is our conservation expert and perhaps he would deal with this aspect of the bill.

Mr. G. B. Armstrong, Chief Water Resources Section, Department of Indian Affairs and Northern Development: The sections of this bill dealing with the amendments to the Territorial Lands Act were developed in response to the problems that are beginning to emerge in the north with regard to increasing pace of development of resources and so on, and the dangers of serious ecological damage in that area as a result of resource exploration and development activities.

These amendments to the Territorial Lands Act provide for the designation of land management zones, which would be in areas of particularly sensitive environmental conditions—permafrost areas, areas that might, for instance, be the habitat of water fowl, the nesting grounds of water fowl and that sort of thing. They could also be in areas of particularly heavy or intense economic activity. The amendments also provide that the Governor in Council may make regulations respecting land use or exploration and development operations within these land management zones.

I think the general approach is that we would like to see development proceed in the north, but at the same time would like to afford some protection to the northern environment from needless damage or needless disturbance.

Senator Aseltine: There are the other two acts that were passed this session.

Mr. Armstrong: That is right.

Senator Aseltine: The idea is to have this bill and those two acts working together?

Mr. Armstrong: That is right. The three might be described as environmental management.

The Acting Chairman: Mr. Hopkins would like to ask a question at this stage.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: I was just wondering if the expropriation act is relevant to this taking of land in the Northwest Territories.

Mr. Armstrong: As far as these amendments are concerned, there is no question of expropriating land. In other words, a land management zone would not remove an area from any activity at all. It would simply mean that resource development activities that went on within the land management zone would be subject to certain control or regulations, which would result hopefully in minimizing the damage to the environment.

Mr. Hopkins: The act does use the word "appropriate". In the new clause 3(a) it uses the words, "may set apart and appropriate". Perhaps it is not full appropriation within the ordinary meaning of the word.

Mr. Armstrong: No. I think what you could read there is "designated area".

Senator Smith: It is not taking it away from anybody.

Mr. Armstrong: No.

Mr. Hopkins: Would that not be expropriation, if you took it away from somebody?

Senator Smith: In this case it is appropriating a certain area of land for ecological purposes.

The Acting Chairman: You are setting it aside.

Mr. Hopkins: You are not necessarily taking it away.

Mr. Armstrong: This is not the intention at all. The Territorial Lands Act as it existed up to this time, before these amendments, provides authority for the minister to set aside or almost expropriate certain areas for game sanctuaries and that type of thing. This is not our approach here. What we want to do is to designate areas for management of land, and the management of the use of lands.

For instance, I can give an example that might clear the point up. In the tundra area, in the region of the Mackenzie delta, during the brief summer this tundra is particularly sensitive to any type of disturbance. It is a region of permafrost, and permafrost is in a balance there, at very short depths beneath the soil. It is kept that way by virtue of the fact that there is a moss and lichen cover on it. If this is removed, the permafrost recedes and there is what is known as thermal cast, or you can get thermal erosion; or if a tractor vehicle disturbs the surface down a long slope, the permafrost melts, the soil subsides and you have slumping, so that what started off as a track in the moss might end up, as we have seen in certain areas, as a gulley 12 feet deep, perhaps 30 feet across, with water running down it, soil erosion and so on.

Senator Prowse: A new river!

Mr. Armstrong: Well, it is right along this line. With a regulation which would set out the type of vehicle that could operate on the tundra during certain seasons, which would minimize this disturbance to moss insulation, we think we can go a long way towards preventing this type of thing, while at the same time still permitting the exploration, development and exploitation of resources to take place.

Senator Aseltine: What are the dangerous periods to the permafrost?

Mr. Armstrong: The summer months, depending on the latitude operated at. In the Mackenzie delta from around the latter part of May and the first part of June until about October 1.

Senator Aseltine: That is the summer in the north.

Mr. Armstrong: That is right. At this point we do not intend to say that there be no activity whatsoever take place on the tundra during the summer months with land-based vehicles, because new developments are coming along all the time. Next week there is to be a program of testing a number of these vehicles with a group of scientists who will measure the vehicles—these are of a type that are useful to oil companies—to see what disturbances are involved and what kind of loading problems are involved in their use.

Senator Aseltine: Do you use hovercraft up there? That would solve it.

Mr. Armstrong: This would certainly solve it, all right. There has been some attempt to use hovercraft, but at this point they are not economic. If the oil companies were required to use, for example, nothing but hovercraft, their costs of exploration would probably go up about five times. They are very unreliable, they do not perform like some of the other vehicles.

Senator Aseltine: There has not been much disturbance of the permafrost up to date, has there?

Mr. Armstrong: No, I think this is right.

Senator Aseltine: You are taking precautions to protect it.

Mr. Armstrong: Yes.

Senator Prowse: You assume what could happen if it were not controlled?

Mr. Armstrong: Yes. The north slope of Alaska is probably one of the best examples of what could happen if it is not controlled. There was a lot of activity around Prudhoe Bay before it was fully realized what the implications are of disturbing that area.

Senator Aseltine: Have you been in that area?

Mr. Armstrong: Yes, I have been just into it. I have not really covered it thoroughly. However, we have been working very closely with the Alaska people and we have had a fair number of examples in our own north that we can look at and come up with some ideas on.

Senator Smith: Mr. Armstrong, what did happen in the Prudhoe Bay area that you started to tell us a little more about, due to the use of the kind of vehicles they were using there and its effect. What did happen there?

Mr. Armstrong: To put this in right perspective, if a company or industry is going into a new area about which very little is known and in which very little expertise or experience exists on how to operate, what usually happens is that you take a system you have used somewhere else, in northern Alberta or somewhere like that, and you move it north. Then you try to adapt it to make it work under different conditions, but this does not always work out properly. For instance, take the example of a seismic operation, which is usually the first thing that happens in an area when it is being explored for oil. A seismic operation in the south has involved sending out a "cat", a bulldozer, and making a trail, bulldozing down trees, removing the top soil and making a smooth trail that trucks, wheeled vehicles, can operate on. All the sensitive equipment, seismic equipment, that is used, recording equipment, the drilling equipment, the geophone equipment, is all truck mounted. This is what they did in the north. They went in there in the wintertime, because it is difficult to operate a truck in that area in the summertime. They bulldozed the surface, which is not smooth by any means, it is kind of hummocky. They bulldozed the surface down until they had a smooth trail and then operated the trucks on it.

In the spring of the year, the moss and the insulating layer had been all piled to one side and this perma erosion set in, and what was

just a relatively insignificant trail in the wintertime developed into a regular gully, an erosion channel.

Senator Aseltine: I understand that part of it all right. Why did this bill take so long in the House of Commons committee—six volumes of minutes, which I have not had time to read yet but which I would like to read some time in the future. What was the reason? Were there many objections and, if so, what were these objections. Why were so many amendments put forward? Could you give us some information with respect to those matters?

Senator Smith: Mr. Chairman, I wonder if it would not be improper to have a comment here on what went on in the House of Commons committee?

Mr. Davidson: My first remark was to be that I have nothing to say about what happened in the House of Commons with respect to this bill. I do know that there was a great deal of interest in it.

Senator Aseltine: I understand that, but I was wondering what the objections were to some of the sections of the new legislation.

Mr. Davidson: I would hesitate to go into any detail but in general, particularly on the Yukon side, there were many suggestions for further arrangements in the process which I described as taking authority out of the federal legislation and putting it into the territorial legislation.

Senator Aseltine: They wanted to suggest further amendments?

Mr. Davidson: Yes, in effect, that would be the case.

Senator Aseltine: An increase in the number of members of the council, for example and that kind of thing.

Mr. Davidson: That is right. This is the trend, on the executive side largely, taking it from the federal control, to the territorial control.

Senator Aseltine: The members of council are all elected?

Mr. Davidson: The members of the Yukon Council are all elected.

Senator Aseltine: And in the Northwest Territories they are not?

Mr. Davidson: At the present time five are appointed, one of whom is a deputy commissioner, and seven are elected. We are proposing here that we would reduce the appointed members to four and increase the elected to ten, which is a major change for the territories in terms of new electoral districts.

Senator Aseltine: Could you give us some information now as to the members of the council at the present time? Are Indians and Eskimos members?

Mr. Davidson: Yes, Mr. Chairman. At the present time the electoral districts in the Northwest Territories, which I assume you are referring to, are four constituencies in the west and three constituencies in what we call the Arctic, the Arctic being the Keewatin-Baffin areas and the islands in the north. That dividing line is very roughly the Manitoba-Saskatchewan border.

In the west, the four elected members are white residents In the Arctic, there are two white residents and one Eskimo elected. Amongst the appointed members is one Indian chief, John Tetlichi. The deputy commissoner, by virtue of the act, has to be a member of the council, and he is a white resident. The remaining three are appointed by virtue of what experience they would bring to the council from their own background. One is Air Marshall Hugh Campbell, a retired air staff officer who is well versed in corporate affairs. Another is a businessman from British Columbia, Mr. Gordon Gibson. The third is Dr. Lloyd Barber, who is now the commissoner dealing with Indian treaties.

At least, this is the premise on which, as I understand it, this has been carried on, to bring in these diverse attributes to the council, having then a mixture of both local and outside experience.

Mr. Carruthers dealt with this to some extent, and recommended that this be continued, and the council also favours this pattern.

Senator Aseltine: Did he make any recommendations as to the numbers?

Mr. Davidson: Yes, he recommended that there should be an increase in the numbers of councillors based on population growth. As far as I know we go along with this because we think it is the proper course. Of course, the rate of growth has not been all that great.

Senator Aseltine: Did he recommend more representation from the Eskimo people and from the Indian people? It does not seem to

me that having one Eskimo and one Indian would be enough when the territory is so large.

Mr. Davidson: No, there is no differentiation between electing on ethnic backgrounds. The effect of the amendment here to provide additional electoral districts will obviously provide greater opportunity, particularly now when there are going to be ten electoral districts and they are going to break down into smaller areas and some are going to be in almost purely Eskimo areas. It is a little less helpful in the Mackenzie. As you know, the Indians are all on the Mackenzie side and the Eskimo are on the Arctic coast and the eastern Arctic, and there will continue to be a mixture of Indian and Whites in the Mackenzie in every electoral district practically, but in the Arctic, some electoral districts will be almost 98 per cent Eskimo.

Senator Aseltine: In the Yukon, are there any members of the Council who are either Eskimo or Indian?

Mr. Davidson: No, there are no Indians or Eskimos elected.

Senator Aseltine: I was wondering if the effort to have the Council enlarged to 15 had not something to do with that.

Mr. Davidson: Well, I do not think there is a direct connection. Carruthers related representation to the number of residents—so many residents and so many representatives rather than a specific number. The number 15 which I referred to came up in a resolution of the Council.

Senator Prowse: One of your problems is that you have a population of over 16,000 in the Yukon and you have only 2,500 natives, whereas in the Northwest Territories you have a 50-50 balance.

Mr. Davidson: This is very true. The Indian population in the Yukon is a much smaller portion of the total population than in the Northwest Territories. There are really no Eskimos in the Yukon, although at this point of time with the increasing activity on the Arctic coast, a census at this time will throw up something like 10 or 12 or something like that. But in the Northwest Territories there are more Eskimos than Indians.

Senator Aseltine: Has there been any agitation in those territories to become part of the provinces to the south? I know that a short time ago the Premier of British Columbia was quite anxious to annex most of the Yukon Territory and if Alberta did the same thing, and Saskatchewan and Manitoba, it would solve all these problems. They would simply take over these areas.

Mr. Davidson: Mr. Chairman, we can only refer to things we have seen in print and heard at Council sessions. Locally this is not a popular move at all because it means the end of the Yukon as a separate entity and also of the Northwest Territories.

Senator Prowse: That suggestion comes from provincial premiers who are not residents of the areas concerned.

The Chairman: Any further questions?

Senator Smith: I wonder, Mr. Chairman, whether Mr. Hopkins would have anything to say about the legal language covering the ideas that have been outlined.

The Law Clerk: I only have the one comment after reading the Act carefully. I think it is well drawn and I am satisfied with it.

Senator Aseltine: Do you think it is workable?

The Law Clerk: You should never ask a lawyer that type of question.

Senator Aseltine: I was hoping the Minister himself would be here today, but I think we should thank the representatives who have appeared and who have spoken to us.

The Chairman: I think Mr. Davidson and Mr. Armstrong did exceptionally well and they answered all our questions just as well as the minister would have done if he had been here. We are indebted to them for coming and informing us so well on the type of government that exists now in the Yukon and the Northwest Territories and for explaining the changes proposed in Bill C-212. Thank you, gentlemen, for the informative explanations you have given on the provisions of the bill.

Honourable senators, shall we report the bill without amendment?

Senator Smith: I so move.

Hon. Senators: Agreed.

The committee adjourned.

Queen's Printer for Canada, Ottawa, 1970

Second Session—Twenty-eighth Parliament

1970-71

THE SENATE OF CANADA

STANDING SENATE COMMITTEE

ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. ROEBUCK, *Chairman*

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