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HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 1

Bill C-70—An Act respecting the International Development Association

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TUESDAY, June 14, 1960

WEDNESDAY, June 15, 1960

WITNESS:

Mr. L. Rasminsky, Deputy Governor, Bank of Canada.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

22733-0—1

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq., M.P.

Vice-Chairman: E. MORRISSETTE, Esq., M.P.

and Messrs.

Aiken	Hales	Nugent
Allmark	Hanbidge	Pascoe
Asselin	Hellyer	Pickersgill
Baldwin	Horner *(Acadia)*	Robichaud
Bell *(Saint John-Albert)*	Howard	Rowe
Benidickson	Jones	Rynard
Bigg	Jung	Skoreyko
Brassard *(Chicoutimi)*	Leduc	Slogan
Broome,	Macdonnell *(Greenwood)*	Smith *(Winnipeg North)*
Campeau	MacLean *(Winnipeg*	Southam
Cardin	*North Centre)*	Stewart
Caron	MacLellan	Stinson
Cathers	Martin *(Essex East)*	Tardif
Creaghan	McIlraith	Taylor
Crestohl	McIntosh	Thomas
Drysdale	More	Woolliams.
Fisher	Morton	

NOTE: As may be noted, changes in the membership in accordance with orders of reference are recorded in the above list.

Antoine Chassé,
Clerk of the Committee.

REPORTS TO THE HOUSE

TUESDAY, Feb. 23, 1960.

The Standing Committee on Banking and Commerce has the honour to present its

FIRST REPORT

Your Committee recommends:

1. That it be empowered to print such papers and evidence as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto.

2. That it be granted leave to sit while the House is sitting.

Respectfully submitted,

C. A. CATHERS,
Chairman.

(Concurred in on Thursday, Feb. 25, 1960.)

FRIDAY, June 10th, 1960.

The Standing Committee on Banking and Commerce has the honour to presents its

FIFTH REPORT

Your Committee recommends that its quorum be reduced from 15 to 11 Members, and that Standing Order 65(1)(*d*) be suspended in relation thereto.

Respectfully submitted,

C. A. CATHERS,
Chairman.

(Concurred in on Friday, June 10, 1960.)

THURSDAY, June 16, 1960.

The Standing Committee on Banking and Commerce has the honour to present its

SEVENTH REPORT

Your Committee has considered Bill C-70, An Act respecting the International Development Association, and has agreed to report it without amendment.

A copy of the Minutes of Proceedings and Evidence respecting this Bill is appended.

Respectfully submitted,

C. A. CATHERS,
Chairman.

NOTE: Second, third, fourth and sixth reports were in respect of private bills.

22733-0—1½

ORDERS OF REFERENCE

HOUSE OF COMMONS,
TUESDAY, February 16, 1960

Resolved,—That the following Members do compose the Standing Committee on Banking and Commerce:

Messrs.

Allmark,	Drysdale,	Morissette,
Anderson,	Fraser,	Morton,
Asselin,	Hanbidge,	Nugent,
Bell (*Carleton*),	Horner (*Acadia*),	Pascoe,
Benidickson,	Jones,	Pickersgill,
Bigg,	Jung,	Regier,
Brassard (*Chicoutimi*),	Leduc,	Robichaud,
Campeau,	Macdonnell,	Rowe,
Cardin,	MacLean (*Winnipeg*	Rynard,
Caron,	*North Centre*),	Slogan,
Cathers,	MacLellan,	Southam,
Chevrier,	Macnaughton,	Stewart,
Coates,	Maloney,	Stinson,
Creaghan,	Martin (*Essex East*),	Taylor,
Crestohl,	McIlraith,	Thomas,
Deschambault,	McIntosh,	Winch,
Drouin,	More,	Woolliams—50.

(Quorum 15)

Ordered,—That the said Committee be empowered to examine and inquire into all such matters and things as may be referred to it by the House; and to report from time to time its observations and opinions thereon, with power to send for persons, papers and records.

WEDNESDAY, June 1, 1960

Ordered,—That the name of Mr. Hellyer be substituted for that of Mr. Chevrier on the Standing Committee on Banking and Commerce.

WEDNESDAY, June 8, 1960.

Ordered,—That the names of Messrs. Aiken, Baldwin, Bell (*Saint John-Albert*), Broome, Fisher, Hales, Howard, Skoreyko, and Smith (*Winnipeg North*) be substituted for those of Messrs. Anderson, Bell (*Carleton*), Coates, Drouin, Winch, Deschambault, Regier, Fraser, and Maloney respectively on the Standing Committee on Banking and Commerce.

Ordered,—That Bill C-70, An Act respecting the International Development Association, be referred to the said Committee.

FRIDAY, June 10, 1960

Ordered,—That the quorum of the Standing Committee on Banking and Commerce be reduced from 15 to 11 Members, and that Standing Order 65(1)(*d*) be suspended in relation thereto.

MONDAY, June 13, 1960

Ordered,—That the name of Mr. Tardif be substituted for that of Mr. Macnaughton on the Standing Committee on Banking and Commerce.

Attest

LEON J. RAYMOND,
Clerk of the House

MINUTES OF PROCEEDINGS

HOUSE OF COMMONS, Room 112-N
TUESDAY, February 23, 1960

The Standing Committee on Banking and Commerce met at 11:00 o'clock a.m.

Members present: Messrs. Asselin, Bell (*Carleton*), Bigg, Brassard (*Chicoutimi*), Campeau, Cardin, Caron, Cathers, Chevrier, Creaghan, Hanbidge, Horner (*Acadia*), Leduc, Macdonnell (*Greenwood*), MacLean (*Winnipeg North Centre*), MacLellan, Martin (*Essex East*), Morissette, Morton, Nugent, Rynard, Slogan, Southam, Stewart, Thomas, Winch.

The Clerk of the Committee attended the election of a Chairman.

Mr. Morton moved, seconded by Mr. Bell (*Carleton*), that Mr. C. A. Cathers be elected chairman. Mr. MacLean (*Winnipeg North Centre*) moved, seconded by Mr. Slogan, that the nomination be closed.

And the question having been put on the motion of Mr. Morton, it was unanimously adopted.

Mr. Cathers having been declared elected took the Chair and thanked the members for the honour.

Mr. Campeau moved, seconded by Mr. Bigg, that Mr. Emilien Morissette be elected Vice-Chairman.

On motion of Mr. Morton, seconded by Mr. Southam, nominations were closed. And the question having been put on the proposed motion of Mr. Campeau, it was unanimously adopted.

The Chairman read the Orders of Reference.

Mr. Morton moved, seconded by Mr. Rynard, that a recommendation be made to the House to reduce the quorum from 15 to 10 members.

After discussion, and the question having been put on the proposed motion of Mr. Morton, it was, on a show of hands, resolved in the negative on the following division: yeas, 8; nays, 11.

On motion of Mr. MacLean (*Winnipeg North Centre*), seconded by Mr. Brassard,

Resolved,—That the Committee ask authority to print such papers and evidence as may be ordered by the Committee.

The Chairman suggested that the Committee consider the question of sitting while the House is sitting. Whereupon Mr. Caron moved, seconded by Mr. Chevrier, that the Committee do not consider the question of sittings while the House is sitting at this time. After discussion, and the question having been put on the proposed motion of Mr. Caron the said motion was, on a show of hands, resolved in the negative on the following division: yeas, 7; nays 18.

Mr. Slogan moved, seconded by Mr. MacLellan, that the Committee request permission to sit while the House is sitting. After discussion and the question having been put on the proposed motion of Mr. Slogan, it was, on a show of hands, resolved in the affirmative on the following division: yeas, 19; nays 7.

On motion of Mr. Bell (*Carleton*), seconded by Mr. Thomas,

Resolved,—That the Subcommittee on Agenda and Procedure comprising the Chairman and six other members to be named by him be appointed.

At 11:40 o'clock a.m. the Committee adjourned to the call of the Chair.

THE SENATE, Room 256-S.
TUESDAY, June 14, 1960
(6)

The Standing Committee on Banking and Commerce met at 9.30 o'clock a.m. The chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Allmark, Bell (*Saint John-Albert*), Benidickson, Broome, Cathers, Drysdale, Fisher, Hellyer, Horner (*Acadia*), Jones, Leduc, Macdonnell (*Greenwood*), Martin (*Essex East*), McIlraith, McIntosh, More, Morton, Nugent, Pascoe, Skoreyko, Southam, Stinson, Thomas, Woolliams.—24.

In attendance: Honourable Donald M. Fleming, Minister of Finance, and Mr. L. Rasminsky, Deputy Governor, Bank of Canada.

On motion of Mr. Drysdale, seconded by Mr. Morton,

Ordered,—That pursuant to Order of Reference of Thursday February 25, 1960, 1,000 copies in English and 500 copies in French of the Minutes of Proceedings and Evidence relating to Bill C-70 be printed from day to day.

The committee took into consideration Bill C-70, An Act respecting the International Development Association.

The Chairman introduced the Minister of Finance, who addressed the Committee briefly.

Mr. L. Rasminsky, Deputy Governor of the Bank of Canada was called. The witness explained the purpose of the Bill and was questioned thereon.

And the examination of Mr. Rasminsky still continuing, it was postponed until the next sitting.

At 11.00 o'clock a.m. the Committee took recess.

AFTERNOON SITTING
(7)

The Committee resumed at 2.00 o'clock p.m. The Chairman, Mr. C. A. Cathers presided.

Members present: Messrs. Aiken, Allmark, Bell (*Saint John-Albert*), Benidickson, Broome, Cathers, Drysdale, Horner (*Acadia*), Jones, Macdonnell (*Greenwood*), McIntosh, Morton, Nugent, Robichaud, Skoreyko, Southam, Stinson, Tardif, Thomas, Woolliams.—20.

In attendance: Mr. L. Rasminsky, Deputy Governor, Bank of Canada.

The Committee resumed from the morning sitting consideration of Bill C-70, An Act respecting the International Development Association.

The examination of Mr. Rasminsky was continued.

At 4.00 o'clock p.m. the Committee adjourned to meet again at 3.30 o'clock p.m. tomorrow, Wednesday, June 15.

Antoine Chassé,
Clerk of the Committee.

Room 112-N, HOUSE OF COMMONS.

WEDNESDAY, June 15, 1960

(8)

The Standing Committee on Banking and Commerce met at 3.37 p.m., the Chairman, Mr. C. A. Cathers, presiding.

Members present: Messrs. Aiken, Allmark, Bigg, Brassard (*Chicoutimi*), Broome, Campeau, Cathers, Crestohl, Drysdale, Hanbidge, Horner (*Acadia*), Howard, Macdonnell (*Greenwood*), McIntosh, More, Morton, Nugent, Rynard, Southam, Stinson, Tardif, Thomas and Woolliams.—23

In attendance: Mr. L. Rasminsky, Deputy Governor, Bank of Canada.

The Committee resumed, from Tuesday, June 14, consideration of Bill C-70, An Act respecting the International Development Association.

The examination of Mr. Rasminsky was concluded.

The Chairman thanked Mr. Rasminsky for his appearances.

The Preamble, Clauses 1 to 5 inclusive, the Title, the Articles of Agreement and Schedule A were adopted and the Chairman instructed to report the Bill without amendment.

The Committee adjourned at 4.30 p.m. until 9.30 a.m., Thursday, June 16, 1960.

Clyde Lyons,
Acting Clerk of the Committee.

EVIDENCE

TUESDAY, June 14, 1960

The CHAIRMAN: Gentlemen, I believe we now have a quorum. We are here to discuss an act respecting the International Development Association. The minister has come. He can only stay a few minutes, so we will commence the proceedings by calling on the minister for a few remarks regarding this bill.

Hon. DONALD M. FLEMING (*Minister of Finance*): Mr. Chairman, thank you very much for the opportunity of attending the meeting and for saying perhaps just a brief word of introduction of this measure. I know that you are going to have a very interesting time, and I wish it were possible for me to remain and be a listener throughout these proceedings; but I have a cabinet meeting on now and I am afraid I must go.

The bill has had some discussion in the house, perhaps not in detail as to the articles of association of the International Development Association; but the discussion in the house, I think, did reveal a very clear identity of views shared by all members of the house in regard to the purposes of the International Development Association.

Mr. Rasminsky will be able to trace the history of this proposed organization. I first came in contact with the genesis of such an idea two years ago, in the summer of 1958, in Washington, when what was known as the Monroney plan was put forward. Many people then began to think more actively of an international organization that might be set up in some sense as a parallel organization to the International Bank for reconstruction and development; but would be designed to meet needs that are not now met by the International Bank, particularly with respect to loans to what were often commonly called soft currency countries. We think now, perhaps, more particularly of the so-called under-developed countries which might not be expected to be in a position to repay hard loans in hard currency.

It had been expected that, at the meeting of the governors of the bank, which was held in October, 1958, at New Delhi, this question would be presented for decision. Actually, it was not. The subject was only slightly touched upon at that meeting in New Delhi. But in the succeeding months the idea was taken more firmly in hand at Washington, and by the time the governors of the bank fund met in their next annual meeting—this time in Washington, in late September, 1959—the matter had developed to the point where we all knew that we would be called upon to take a decision, in some sense in principle, or at any rate a decision as to whether the executive board of the bank should be asked to take this project in hand and give it intensive study.

There were at that time certain misgivings entertained by various countries. We had certain misgivings ourselves, and I expressed them when speaking to this resolution at the meeting in Washington. Other countries shared our concerns, and some of them had additional concerns of their own.

However, it was possible, in the course of discussion, to meet in part, at any rate, some of the misgivings that were expressed, and in the end there was, I think, unanimity in supporting the decision then taken to instruct the executive board of the bank— that is the board as distinguished from the governors—to take this subject in hand and to pursue it.

Canada's representative on the executive board is Mr. Louis Rasminsky, the deputy governor of the Bank of Canada, who is here with us this morning.

All through the autumn and the winter the executive board was meeting at various stages in pursuing its labours on the drafting of the articles of association. This finally issued in the document that is attached as an appendix to bill C-70. I will not trespass on the subject of the articles themselves, and the details: Mr. Rasminsky is more competent than anyone else in Canada to deal with that subject. Indeed, I suppose there are few people in all the world who know as much about this subject as Mr. Rasminsky.

So far as the Canadian government is concerned, we are asking parliament in this measure to approve of Canada's adherence to the association and to authorize Canada's subscription to the initial capital of the fund, that being $1 billion in gross, Canada's share as set forth here, is $37,830,000 United States dollars.

May I say just this one word in conclusion, Mr. Chairman. I am very happy that this opportunity has been presented for the banking and commerce committee to have a good look at questions pertaining to these important international organizations in the financial field, and Canada's association with them today. I think Mr. Macdonnell, Mr. Benidickson and Mr. McIlraith—I think Mr. Martin was not a member of the committee—are the only three members of this committeee today who were members of the banking and commerce committee in the autumn of 1945.

That was the last time that the banking and commerce committee, as I recall it, had a thorough opportunity of examining into questions of this kind. That was when the Bretton Woods legislation was under review. They will, as I do, remember very well the proceedings of that committee and the profound impression that was left upon us all by the testimony of Mr. Rasminsky.

I think all hon. members are aware that Mr. Rasminsky has been deputy governor of the Bank of Canada for some years. He has played a leading part in Canada's relations with international organizations on the financial side, and more; and more than anyone else, he was the draftsman of the articles of the United Nations charter relating to the economic and social council. No Canadian has had as close contact over these 15 years with these important international financial institutions, the International Bank and the international monetary fund, as Mr. Rasminsky has, and I think the committee is in for a very interesting period now in hearing Mr. Rasminsky on this question and hearing his review of the purposes, the plans, the structure and the articles of the International Development Association.

Thank you very much, Mr. Chairman.

The CHAIRMAN: Thank you, Mr. Minister.

Some Hon. MEMBERS: Hear, hear.

Mr. MCILRAITH: Mr. Chairman, I have one question, if Mr. Fleming could take a moment to answer it. I will try to be very short. He spoke about the need for this legislation and the authority of the association to meet needs not now met by the International Bank for reconstruction and development. Could he elaborate a bit on that point?

Mr. FLEMING: Mr. Rasminsky will be able to elaborate on that. To put it as simply as possible: the International Bank has made loans that were intended to be repaid in hard currency, not the currency of the country which was borrowing the money. While it has been a most beneficial international institution, nevertheless it had to have regard for the maintenance of what would be regarded as sound business principles in relation to the assistance that it was giving in the form of loans.

It has been the feeling of the senior authorities of the International Bank that there is a field where international financial assistance has been required, on a loan, or a loan plus aid basis, which was outside the scope of

the bank's activities; and hon. members are aware that the new International Development Association is going to be very closely linked with the International Bank. Indeed, the International Bank will be supplying the president, management and personnel for the new organization. I think that is a guarantee of success of the International Development Association, because of all international associations which have been set up since World War II, I think it is no exaggeration to say that none of them has experienced greater success or enjoyed a greater quality of management than has the International Bank.

There is no organization in this international field that has given a better account of itself, or has more completely measured up to the hopes and purposes of its founders than has the International Bank for reconstruction and development.

Mr. McILRAITH: Thank you very much.

The CHAIRMAN: Before calling on Mr. Rasminsky, I should like to have a motion regarding the printing—750 copies in English and 200 copies in French—of the minutes of proceedings and evidence relating to this bill. The two bills are included, C-70 and C-58.

Mr. JONES: Mr. Chairman, there is a great deal of interest throughout the country in this bill, and I was wondering if possibly it might not be helpful to have a few more copies printed this time.

The CHAIRMAN: To which bill are you referring? This one?

Mr. JONES: The testimony on bill C-70.

Mr. DRYSDALE: 1,000 in English; 500 in French.

The CHAIRMAN: We have the Bank of Canada here; we have to be careful of the dollars now. Will somebody move?

Mr. DRYSDALE: I would move, Mr. Chairman, that we have 1,000 copies printed in English, and 500 in French.

Mr. McILRAITH: Mr. Chairman, it seems to me that you are dealing with two different matters at the same time. One bill will have much more public demand for it than the other. Why print the same number of copies of both?

Mr. DRYSDALE: This is for bill C-70.

The CHAIRMAN: The two bills are combined here, C-70 and C-58. I think that C-58 will also be quite a—

Mr. McILRAITH: I was going to suggest that you deal with them separately. Bill C-58 will require from five to six times as many copies as this one will.

The CHAIRMAN: Six times as many?

Mr. McILRAITH: Yes, I would think so—5,000. This is about a few hundred.

Mr. DRYSDALE: Mr. Chairman, to bring it to a head, for bill C-70 I would move that 1,000 be printed in English; 500 in French.

Mr. MORTON: I second that.

The CHAIRMAN: All agreed?

Some HON. MEMBERS: Agreed.

Mr. MACDONNELL: Mr. Chairman, why do we need to settle this now? The reason I ask is this, that I observe what Mr. McIlraith has said, and I think he is perfectly entitled to say it. I think it is possible that this committee may arouse some interest in this bill C-70, which I think is twenty times as important as the other—although at the present time I do not think the Canadian public thinks so at all.

Is it necessary that we settle on the number at this moment? If so, I have nothing more to say.

The CHAIRMAN: I understand that it is.

Mr. DRYSDALE: We could have a re-run, if there are more required.

The CHAIRMAN: The motion is for 1,000 in English, and 500 in French.

Mr. DRYSDALE: Yes—seconded by Mr. Morton.

The CHAIRMAN: All agreed?

Agreed.

The CHAIRMAN: We are very fortunate today to have Mr. Rasminsky from the Bank of Canada. You have listened to the introduction of the minister, and I will not add anything to that, except that I am renewing an old acquaintance with Mr. Rasminsky. I think it goes back now 30 years.

Mr. LOUIS RASMINSKY (*Deputy Governor, Bank of Canada*): Man and boy.

The CHAIRMAN: But we will not mention that. Mr. Rasminsky, will you go into this as thoroughly as you wish, because I know a great many of the committee are exceedingly interested in this problem.

Mr. RASMINSKY: Thank you very much, Mr. Chairman. I am very glad to have the opportunity of meeting again with the banking and commerce committee of the house and of going over some aspects of this proposed legislation providing for Canadian membership in the International Development Association. I do not think that I would be making the best use of my time if I were to try to cover again the ground that Mr. Fleming covered in introducing this measure in the house.

The general purpose of the measure, I am sure, is by now well known to all members of the committee. The proposal for an international development association is based, I would say, on two essential considerations. One consideration is that the underdeveloped countries of the world are in need of larger amounts of capital from abroad than the amounts of capital that they can properly borrow, in terms of foreign exchange. Their need for capital arises, obviously, from the very low standards of living prevailing in these countries, which permit of an inadequate amount of savings out of their domestic incomes.

If these countries are to increase their standards of living at a rate which is economically and socially tolerable, their domestic savings have to be supplemented by savings from abroad. This has been recognized in very large measure since the end of the war. In fact, I would say that one of the really remarkable developments of the last 15 years has been the extent to which the countries of the west—the richer countries of the world—have assumed this obligation; have taken it for granted. It has become part, it seems to me, of the current thinking of the community, of the current morality, if you like, that the richer countries should do something substantial to help the underdeveloped countries to raise their standards of living.

The question of the adequacy or inadequacy of what is being done is another matter, in which there could be differences of view, and no doubt these will be aired in the course of the meetings of this committee. The reasons for the assumption of this new—as it seems to me—attitude are varied. The attitude is based partly upon moral considerations, upon the thought that there are some duties involved. To some extent, no doubt, it is based upon far-sighted economic considerations; on the thought that without this help—excuse me, let me put it positively; that with this help, if the underdeveloped countries in the world succeed in raising their standards of living, we will all stand to benefit from that, in terms, not only of political stability, but in terms of increased opportunities for doing profitable business with these countries.

Whatever the reasons may be, it is the case that a fair amount—a very substantial amount—of foreign assistance has been made available to the underdeveloped countries in various forms. At least one half of the essence of this measure is that it provides additional amounts of assistance on terms that are less onerous, that are easier on the underdeveloped countries, from a balance of payments point of view.

There is a limit to the extent to which any country, rich or poor, can incur foreign indebtedness without storing up trouble for the future. This measure provides assistance; its purpose is to provide assistance in a form that does not store up trouble for the future for the underdeveloped countries; that is, on terms that do not necessarily constitute a drain on their future foreign exchange receipts in order to pay the interest, and ultimately the principal, on such indebtedness in amounts that they would find burdensome.

That is point one of the genesis, the background of thought of this proposal. The second half of it, I think, is the fact that this effort is being made cooperatively on an international basis. This provides certain advantages. Countries do not have to make an exclusive choice between international giving, or lending, or aiding, and national lending, or aiding. We in this country are engaged in very important bilateral aid programs, and at the same time we are participating very wholeheartedly in these international programs. Both have their advantages. An advantage of the international programs is, first of all, that it provides machinery, in the form of an institution with a trained staff, a going concern, to administer the aid. Secondly, the international approach has the effect of bringing in countries which perhaps would not otherwise do enough, would not do as much as they are able to do bilaterally. It spreads the responsibility around the world in a cooperative effort.

That is as much as I propose to say about the general background of this proposal. I think most usefully I can employe the rest of my time in doing two or three things. First of all, I thought I would touch on the various points which were raised in the debate in the House of Commons on June 7, by speakers other than the minister. As I read *Hansard* there seemed to be unanimous agreement among the spokesmen for the various parties in the house that this measure should be supported. At the same time various speakers raised questions or expressed some doubts on two or three points. I think the most important of these are the following. The question was raised by Mr. Regier and also Mr. Paul Martin: why have a new international institution for this purpose and why should not this extra aid be given either through the international bank which is a going concern or through the Colombo Plan. I believe Mr. Martin went on to indicate the main reasons why he agreed it should not be done through the international bank. If I may I would like to say something about the relationship of the international bank to this proposed body.

Mr. MacMillan raised the question: how will this institution work; will it finance projects of a type which the bank itself does not finance?

Finally, Mr. MacMillan and Mr. Martin expressed some concern about the role that the use of United States counterpart funds, arising out of the agricultural surplus disposal program of the United States, would play in this, no doubt fearing that the existence of some provisions permitting counterpart funds to be used in this organization might encourage or stimulate surplus disposal programs of the United States. As I recall it Mr. Martin particularly was anxious to make sure that the United States understanding of these provisions was the same as ours.

I think these are the most important questions raised in the debate in the house of June 7. I know that other members of the committee, and particularly Mr. J. M. Macdonnell, have other questions they propose to raise in the committee, but perhaps they can be dealt with by way of question and answer.

What I propose to do then is to say something about these questions and perhaps preface that by saying something to supplement what the minister said about the origin of this proposal. I will then answer the other questions raised in the house by referring to some of the highlights of the articles of agreement which are attached to the bill.

Mr. BENIDICKSON: The minister himself indicated that at the international conference he perhaps was the chief spokesman of a government which had some misgivings about the proposal. I wonder if Mr. Rasminsky, in addition to answering some of the questions of the members of the committee and the questions which were raised in the debate in the house, would outline to us what were the misgivings and to what extent they have been eliminated by amendments in the agreement.

Mr. RASMINSKY: I will try to do that, Mr. Benidickson.

First there is the question of the relationship between this organization and the I.B.R.D.—that is the international bank. If I may say so, the question why set up a new institution when you already have a going concern in the international bank, is a very important and relevant question. As the minister indicated, the international bank has been a very successful institution which has gone a long way towards achieving the objectives for which it was set up. I do not mean by that that there is not still a great deal of work to be done.

Mr. MACDONNELL (*Greenwood*): Would you say a word about the magnitude of it.

Mr. RASMINSKY: I was proposing to do that, Mr. Macdonnell. The bank has an outstanding record of successful operations to aid in the development of underdeveloped countries. The bank has made 250 loans to 50 countries and colonies, totalling in excess of $5 billion. These loans have been building up at a crescendo rate—I am thinking of loans for development and reconstruction—from $150 million in the first years that the bank went in for this type of lending, through to $300 million, $400 million, until now it is lending at the rate of about $700 million a year, and there is no reason for expecting that the $700 million a year rate is the ultimate. I think the expectation would be that it would continue to grow. The bank's loans have been made for a variety of purposes. Loans for electric power and transportation have been the most important classifications. Large amounts, however, have also been loaned to finance industry, agriculture, forestry and general economic development. The loans made by the bank are made either to or are guaranteed by governments. There has not been a single default.

Mr. MARTIN (*Essex East*): Is the guarantee 75 per cent?

Mr. RASMINSKY: No. I think you have in mind the 80 per cent and are thinking of the unpaid capital of each member which constitutes a guarantee fund. The way the bank finances itself is this. Each member of the bank was assigned to it a certain number of shares to which it subscribes, the number being roughly proportionate to the country's economic strength or economic size. The original Canadian subscription was $325 million. The original United States subscription was about ten times that amount, $3,250 million. The British was about $1,450 million. Of this original capital subscription, 2 per cent of each member's subscription had to be paid in in gold and 18 per cent had to be paid in in the form of local currency—in our case, in Canadian dollars—which could be used by the bank to finance its lending operations only with the consent of the country concerned. The unpaid portion, the 80 per cent, constitutes a kind of guarantee fund. The significance of that guarantee fund is that it enables the bank to issue its own debentures to private capital market and the bank has done so to a very substantial extent. The 80 per cent of each country's unpaid capital subscription is a guarantee that can be called upon if necessary to enable the Bank to meet its obligations. Each country is fully responsible up to the full amount of its unpaid subscription. This of course, gives the bank's own debentures a first class financial rating because behind the bank's debentures stands the guarantee of the members of the bank to the

extent of their unpaid capital. Naturally, the market does not appraise the guarantee of each member equally, but the market obviously puts a high value on the guarantee of the United States government, the British government, the Canadian government, and the German government and some others.

Mr. MARTIN (*Essex East*): There was a world bank issue about two or three years ago sold to the public in Canada and my understanding of that was that the Canadian government guarantee was only 75 per cent. Am I wrong on that?

Mr. RASMINSKY: I am afraid you are. The Canadian government guarantee does not extend to any particular issue. It does not extend to the issue put out in Canada; it extends to all the obligations of the bank. If the bank was unable, from its own resources, to meet the interest and amortization of its own debentures, wherever issued, it would have a call on the unpaid capital subscriptions of all the members of the bank to the full extent of their unpaid capital which was 80 per cent of their initial subscription.

The beauty of this method is that the guarantee through the unpaid capital provides a safe bridge which enables private investors who are looking for income to put their money through the international bank into undeveloped parts of the world where they never would dream of putting their money because they would regard this as too risky. The bank appraises the project and if it feels that the country is a good credit risk and that the projects themselves are good it makes the loan. It is able to tap the private capital market through issuing its own debentures to get some of the money to put into underdeveloped countries.

Mr. MACDONNELL (*Greenwood*): Have they had to turn down many good credit risks by reason of not having sufficient funds?

Mr. RASMINSKY: For the first several years of its operations the bank was in the position that it could lay its hands on enough money to make all the loans which the bank wanted to make; that is in terms of the soundness of the project or in terms of the overall credit worthiness of the country, which of course depends partly on how the country is managing its own affairs. A couple of years ago the issue of debentures had risen to a point where there was not a great deal of margin left between the amount of debentures which were outstanding and the 80 per cent subscriptions, that is the guarantee fund of the countries to which the market attached importance. This situation did not arise at any precise moment of time, but when it became clear that within a couple of years of lending at this rate we would reach the point where the market might say these bank debentures are not as good as they used to be because we are now asked to rely not only on the guarantee of countries such as the United States, Canada, the United Kingdom to which the market we attach a great deal of importance but also on the guarantee of country "X" to which we do not attach importance—when that situation was foreseen a move was started to double the capital subscription of the bank. As you know that was done and was approved by the house last year. Incidentally, Canada more than doubled its capital subscription, from $325 million to $750 million. Now the capitalization of the bank instead of being about $10 billion is about $20 billion. I would say we again are in the position where the bank has access to enough money to make all the loans that the bank thinks it should properly make.

The sources of finance to which the bank has had access are roughly the following: out of the capital subscriptions paid in—that is the 2 per cent which everybody had to pay in gold and the 18 per cent which the countries had to pay in national currency which was usable only with the consent of the country; the paid in capital subscriptions—counting only the 18 per cent which in fact has been usable—have provided about $2 billion. The funded debt of the

bank, that is the issue of debentures by the bank, has provided rather more than that—about $2,100 million. These debentures have been issued in the United States, Canada, the United Kingdom, Belgium, Germany, the Netherlands and Switzerland even though Switzerland is not a member of the bank. Another important source of funds for the bank has been the sale of loans out of its portfolio, generally without the guarantee of the bank. The fact that the bank has seen fit to make the loan has given many of the loans a standing that probably they would not have had otherwise. Parts of the loans that the bank has made have been sold to private investors. This, plus principal repayments received by the bank—and as I say there has been no default on bank loans—has provided another billion dollars approximately.

Finally, out of its operations—that is out of the reserves that it has built up out of net income and the statutory reserve made up out of a 1% commission incorporated in the interest rate—the bank has had available about another $500 million. That is the sum of the total reserves, most of which of course have gone back to the underdeveloped countries because they have been used in lending operations.

I think it is apparent from what I have said about the bank that the bank relies to a substantial extent on private capital as a source of its finance. Most of the 18 per cent money, which is likely to become available, has been paid in already. Mr. Black the very successful president of the bank is constantly nagging countries to make their 18 per cent subscription available to the bank for lending and he has been a very good nagger. He has been quite successful in this, and there is not a great deal more to look forward to in that connection in the future. It will be the case in the future that the bank will more and more have to look to private capital through the issue of debentures backed by this guarantee fund.

That means, of course, that in its own lending operations the bank has to conduct itself in a way that will enable it to sell its debentures. This means, in turn—because obviously the bank would not be successful if it had to call on the guarantee of the member governments as a steady diet—that the banks loans, if they are made in foreign currency, must be repayable in foreign currency, so that foreign currency is available to enable the bank to meet its own obligations.

Mr. HELLYER: In the event that the guarantees did have to be called on, would that be on a proportionate basis to the total capital subscribed?

Mr. RASMINSKY: Yes, it would be on a pro rata basis, depending on each member's capital subscription. But if any country failed to meet its guarantee, they would go around again, complete the circle again, to make up for that deficiency.

Mr. MCINTOSH: Mr. Chairman, I have two elementary questions. You said that last year Canada increased her subscription to $750 million, when the original was only $325 million.

What was the reason Canada over-subscribed: what was the advantage to Canada?

Mr. RASMINSKY: Canada, incidentally, was not the only country to increase its subscription by more than the normal 100 per cent. There were a number of other countries who did so, including—I can tell you the important ones at the moment—Western Germany and Japan.

Mr. MCINTOSH: I was thinking more of the reason why.

Mr. RASMINSKY: Yes, I understand that. The reason was this, that the original relationship of the subscriptions, the size of the subscriptions, reflected the economic size of the various members of the bank at the time that these articles of agreement were drawn up in 1944.

Between 1944 and last year the relative economic size of Canada increased very considerably. The economic size can be measured in various ways; population is one indicator. Other indicators are the size of foreign trade, the size of the gross national product, and the extent of your capital facilities. Canada, economically, is a much larger country now than it was in 1944, in relation to other countries.

Mr. McINTOSH: Are provisions made so that when the increase or decrease in the monetary situation is made, your capital commitment will decrease or increase accordingly?

Mr. RASMINSKY: No, there is no automatic provision along the lines you suggest; but it is open to any country at any time to apply for an increase or a reduction in its capital subscription. I suppose that if there were a radical change in the position of any country, it would consider doing so. But advantage was taken of this general doubling of the capital subscription of all members to make a rather large number—perhaps altogether there must have been 15 or 20—of individual adjustments of particular members.

Mr. McINTOSH: My second question is in regard to the variation of interest rates. With regard to the bank making a loan to a country, and interest paid on its debentures, is there a difference?

Mr. RASMINSKY: Yes, there is. The basis on which the bank calculates its interest rates is this: it takes as a starting point the rates of interest that it has to pay currently on its own debentures. For example, the last issue of debentures of the bank was made in the United States, and it carried an interest rate of 4¾ per cent. That is, then, the starting point.

Then there is the statutory commission to which I referred, which was fixed in the articles of agreement for a term of 10 years at 1 per cent; but which can be varied, since 10 years have elapsed, by the executive directors. The executive directors, however, have not varied that rate, so it remains fixed at 1 per cent. To that the bank adds a figure which, depending on what the interest rate that it is paying is, might be ⅛ of 1 per cent, or ¼ of 1 per cent, to cover its overheads—administrative expenses, and so on. That builds up, at the present time, to the rate of 6 per cent, which is what the bank charges on its loans.

Mr. JONES: Did you mention the figure, sir, of the total capital now available to the bank?

Mr. RASMINSKY: The total capitalization of the bank is about $20 billion.

I think that perhaps I have said enough to indicate why the bank, as an institution, had to be very cautious about getting into the business of making what have been called soft loans.

If the bank made a loan, let us say, to India, using American dollars which it raised through the capital market, and that loan were repayable, not in American dollars but in Indian rupees, then the investor in the bank debentures would naturally feel that the debenture was less secure than if the loan were repayable in dollars.

At the same time, it was desired to take advantage of the accumulated experience of the bank and the wisdom of the bank management, and that resulted in the present proposed structure. The I.D.A. will be a separate legal entity; but it will be closely identified with the bank. It will, in a sense, be an affiliate of the bank. It will have the same governors. Mr. Fleming, as Minister of Finance, is governor of the bank. He will act *ex officio* as governor of the I.D.A.

These provisions are set out in article VI on page 10 of the bill. It will have the same executive directors as the bank. The president of the bank will be the president of the I.D.A.; and the intention is to use the staff of the

bank; not to engage a large, new staff for this operation. That is set out in article VI, section 5, on page 13 of the bill. The last sentence of clause (*b*) reads:

> To the extent practicable, officers and staff of the bank shall be appointed to serve concurrently as officers and staff of the association.

Mr. MARTIN (*Essex East*): I suspect it will have the same vague relationship with United Nations that the bank has.

Mr. RASMINSKY: I think it will have the same general relationship to United Nations that the bank has, yes, Mr. Martin.

Mr. DRYSDALE: I wonder if you would give perhaps a concrete illustration of the type of loan that you envisage under the International Development Association that would be granted, that would not be given under the International Bank.

Mr. RASMINSKY: Yes; I do plan to do that. I am sorry that I am taking so long with this; but I do intend later to come to that particular question—what way the I.D.A. will operate.

I hope that this deals adequately with the question regarding the International Bank. Dealing with the question of the Colombo plan, that type of operation, the bilateral operation, is an alternative; but these are not exclusive alternatives, and both have their advantages. There certainly is nothing inconsistent between this type of operation and what we are doing under the Colombo plan.

I think that perhaps, in view of the length of time that I have taken on this, I will skip over what I was proposing to say about the origin of this proposal. Mr. Fleming has really dealt adequately, I think, with that. I will get on to the question that Mr. Benidickson asked, as to what misgivings we and others had, and how they have been dealt with.

When this matter came up for discussion at the annual meeting last year, Mr. Fleming first of all expressed our general approval of the proposal. He said:

> We in Canada have examined carefully the various features of the United States proposal. We are satisfied that funds, beyond the amounts which the bank can be expected to provide, and on terms less onerous than those which the bank must, in its nature, charge, should be made available to the less developed countries for economic development. If, as suggested, the new organization supplying the funds is set up as an affiliate of the bank, it can make full use of the bank's wealth of experience.

Then he went on and said this:

> The operations of the association should not be such as to make it more difficult for the International Bank and other providers of capital to maintain their lending standards. The continued flow of capital in large amounts to less developed countries depends on the maintenance of these standards. In our opinion, the distinction between grants and loans should not be blurred, and provisions regarding repayment, while properly less onerous than those which are available in commercial loans or through the International Bank, nevertheless should not be such as to store up trouble for the future.
>
> For example, an attempt by the association to make extensive use of any local currencies received in payment of loans could create risks on the one hand of contributing to inflation if used locally, and on the other hand, of aggravating the exchange problems of borrowing countries and contributing to uneconomic trade diversion if used to finance exports. These risks would also be present if attempts were made on any large

> scale to use local currencies representing the counterpart of sales of surplus agricultural commodities which might be contributed by way of special subscription. We must also be alive to the possibility that such subscriptions might, under certain circumstances, interfere with ordinary commercial trade in the commodities in question.

The pre-occupations that he expressed then—and they were shared by several other governments—related essentially, I would say, to three things. One, to the possibility that the use of local currencies by the bank—and by that I mean the currencies of the debtor countries, the currencies of the underdeveloped countries—it might lead to inflation in the countries concerned, because to use those currencies is like an act of credit creation, if they are not backed by a corresponding amount of goods.

The second concern that he expressed was that if these currencies were used to finance international trade, this might lead to an uneconomic diversion of trade. Suppose, for example, the I.D.A., finding itself with large amounts—let me use the same example again:—of Indian rupees, went to another member, let us say, Pakistan, and said, "We have these rupees, and we would like to use them. We would like you to make room for some imports from India". I stress that I am picking those countries out of the air, just as examples. "We would like you to make room for imports from India and, if necessary, do this by excluding imports from other countries". Why, then, the exclusion of imports from other countries would be, of course, an uneconomic diversion of trade.

The third preoccupation that Mr. Fleming expressed was the fear this might facilitate agricultural surplus disposal activities on the part of the United States which would interfere to an unwarranted extent with normal commercial markets.

How were these fears dealt with in the articles of agreement? My general impression is that they were dealt with as adequately as could have been hoped for, having in mind the different views of different participants and the need to arrive at an agreement that would be generally accepted.

On the fear of inflation, for example, if you look at article IV, section 1, on page 6 of the bill, you will see at the very bottom of the page that the currency of any member listed in Part II—these are the borrowing countries, the weaker countries—can be used for administrative expenses, et cetera. Then at the bottom of the page:

> and, in so far as consistent with sound monetary policies, in payment for goods and services—

In other words, there is in the agreement here an injunction on the management and the board of this association against using local currencies in a way which is inconsistent with sound monetary policies. So that this possibility that Mr. Fleming feared is one that has to be taken account of in the administration.

Mr. MACDONNELL: Mr. Chairman, may I ask a question of Mr. Rasminsky, through you. We now appear to be getting into the details of the measure. I am just wondering if it would be convenient to be told now, or would he prefer to wait till later—because I am very anxious that we should have a breakdown, as far as it can be given—the amounts which have been used for assistance up to the present. I am reading a sentence from an article by Adlai Stevenson, with which you are familiar, in which he says:

> Informed opinion tells us that at least $5 billion a year is needed from all sources public and private, domestic and foreign.

I am anxious, also that at some stage we should have, if it is possible, the relationship—if there is any relationship—between this $1 billion and the amount which these men who have studied it closely think is necessary.

I do not want to interrupt Mr. Rasminsky, if he says he would prefer to deal with it later. If he prefers to deal with it later, that is all right with me. I just want to be sure that I do not bring it up later and find it is an inconvenient time.

Mr. RASMINSKY: I am in your hands, Mr. Chairman. I will do whatever you prefer. I had planned an exposition covering the points I mentioned at the outset. If you wish, I will interrupt what I was going to say and deal with that now.

Mr. MARTIN (*Essex East*): Mr. Chairman, dealing with the question which Mr. Benidickson put to Mr. Fleming, it seeems to be in proper order now, I would think.

Mr. MACDONNELL: I just wanted to be sure that I was not going to rock the boat by bringing that up later.

The CHAIRMAN: We have to adjourn at 11:00 o'clock and the plan was that we would adjourn and come back at, say, 3:00 o'clock; but that would only be for an hour. As Mr. Rasminsky pointed out, he has an appointment at 4:00 o'clock today which he has to fulfil. What is your thinking regarding a plan of adjournment?

Mr. MACDONNELL: I infer from what Mr. Rasminsky says that he prefers to go on now as he was doing, and I have no question to raise about that.

The CHAIRMAN: Is that satisfactory to the committee, that we adjourn at 11:00 o'clock and come back at 3:00 o'clock and go on, say, for close to an hour? Of course, Mr. Rasminsky would have to leave the committee, and I do not think we would want to continue on our own.

Mr. HORNER (*Acadia*): No.

The CHAIRMAN: Is that satisfactory?

Mr. HORNER (*Acadia*): May we not meet earlier than 3:00 o'clock—at 2:30? That would give us another half hour. Or continue on past 11:00 now? I do not think you are going to get the subject covered.

Mr. MCILRAITH: Is there any need to cover it today? Why do we not go ahead until we finish this? Let us go ahead until we finish it.

The CHAIRMAN: We have already for Thursday, in this committee, the combines legislation. I do not know how your time is taken up.

Mr. RASMINSKY: I am available all week, Mr. Chairman.

Mr. BROOME: I think we should meet at 2:00 o'clock today.

Mr. HORNER (*Acadia*): Two o'clock.

The CHAIRMAN: All agreed?

Mr. MCILRAITH: No, I do not agree with 2:00 o'clock. There is an important measure in the house.

Mr. MORTON: Let us not waste time talking about procedure; let us get on with the evidence, and we can come to that point next.

The CHAIRMAN: I was trying to get this planned.

Mr. MORTON: I know.

Mr. BROOME: I suggest that Mr. Rasminsky should continue and complete his presentation without interruption, and we make notes of any questions that we want to ask. Then, when it is completely finished with, if we have any questions we can go back to any part.

The CHAIRMAN: I think that is a good suggestion.

Mr. HELLYER: Yes, with the exception of relevant questions, based on the presentation being given directly—relating to the information being given.

Mr. BROOME: I do not think there should be any exceptions. You can make notes just as well as anybody else.

Mr. HELLYER: Some questions are more relevant than others.

Mr. JONES: May we proceed now?

The CHAIRMAN: Yes. I want to get this settled. Are we going to adjourn till 2:00 o'clock?

Some Hon. MEMBERS: Agreed.

Mr. MCILRAITH: Adjourn till 3:00 o'clock.

Some Hon. MEMBERS: Two o'clock.

The CHAIRMAN: Then we will adjourn to 2:00. Is that satisfactory to you, Mr. Rasminsky?

Mr. RASMINSKY: Yes, I am available the whole of the week, at any time you like, except for 4:00 o'clock today.

The CHAIRMAN: I think it would be better if we continued with Mr. Rasminsky's statement, and then we will ask the questions.

Mr. MCILRAITH: May we have it recorded, Mr. Chairman, that the adjournment until 2:00 o'clock is not an agreed adjournment; that it is by a majority vote?

Mr. DRYSDALE: With Mr. McIlraith's dissension.

The CHAIRMAN: Is Mr. McIlraith the only dissenting vote?

Mr. MCILRAITH: No—Mr. Martin.

Mr. MARTIN (*Essex East*): I do not want to be meticulous; but this just shows how ridiculous it is for us to be dealing with an important matter like this at this stage of the session. It is impossible for many of us to be here at all this afternoon, because of our work in the house. Because of Mr. Rasminsky's other engagements, I would be prepared to meet at 2.00 o'clock; but I certainly would not want it to be taken as a precedent, because there is a limit on what one can stand, physically, in the discharge of obligations.

Mr. DRYSDALE: Let us go on, Mr. Chairman.

The CHAIRMAN: All right, gentlemen, it is agreed that we reconvene at 2:00.

Mr. RASMINSKY: The second preoccupation that Mr. Fleming expressed in the speech from which I quoted was the fear that there would be some trade distortion effects. If you look at page seven of the bill, article 4, section (*a*) of the articles of agreement you will notice, the reference to this currency payment. I am reading from the bottom of page six:

> —in addition when and to the extent justified by the economic and financial situation of the member concerned as determined by agreement between the member and the Association, such currency shall be freely convertible or otherwise useable for projects financed by the Association and located outside the territories of the member.

So that if these currencies are to be used internationally there is the injunction that it must be justified by the economic position of the country, and that the consent of the country must be obtained.

In addition, elsewhere, there is a general injunction—and this is on page nine, article 5, section 1 (*g*)—which requires the association to make arrangements to ensure that the proceeds of any financing are used, "with due attention to considerations of economy, efficiency and competitive international trade and without regard to political or other non-economic influences or considerations." I think that provides some safeguards against the second possibility.

On the question of supplemental resources, which is provided for in article 3, section 2 of the act, this is the provision under which the counterpart fund of the United States, arising out of their agriculture surplus disposal

programs, finds its way into the hands of the association. It goes back to the original Monroney resolution introduced to the Senate on February 24, 1958, which has one of its main objectives "to permit the maximum use of foreign currencies available to the United States through sale of agricultural surpluses and through other programs by devoting a portion of these currencies to such loans"; that is long-term loans available at low rates of interest. This has become a very incidental feature of the present proposals.

All that these proposals, and all that section 2 (*a*) provides is that the association may enter into arrangements on such terms and conditions consistent with the provisions of this agreement, including the provisions, of course, that I have just been talking about regarding inflation and competitive international trade; and to receive from any member supplemental resources in currency of another member provided the association shall not enter into such arrangements unless it is satisfied that the member whose currency is involved agrees to the use of such currency.

So that you have three things here. Firstly you have no right on the part of the United States to put this currency into the I.D.A. Secondly you have the normal safeguards regarding the use of this currency against inflation and trade distorting effects. Thirdly, you have the requirement that the member whose currency is involved has to agree that this currency should be made available to the association.

In addition to those things you have, if I may say so, the record of discussions that took place both at the governors' meeting in which Mr. Fleming participated, and the very detailed discussions that took place in the executive of the board. I can assure you that in the excutive board discussions that I had these preoccupations very much in mind. I said for example, at one of the meetings that the statements I had made at a meeting before regarding some of the difficulties involved in local currency loans applied equally to local currencies arising out of supplementary contributions. I said that I took for granted that if I.D.A. found it possible to make any extensive use of local currencies without having any adverse effects on the member whose currency was involved, the first source of local currencies that the I.D.A. would use would be the capital contribution of the member concerned.

I do not want to read the whole of this, but I said that, referring to the supplemental contributions, the government here had focused on the possible relationship between the proposal for supplemental contribution and the surplus agricultural disposal program of the United States. I went on to say my government would not like to see the I.D.A. develop as a kind of adjunct to the surplus disposal program of the United States. Of course, what I said in these meetings is not the law of the land, but these views were echoed by several directors, and they are reflected to the extent that I have indicated in the articles of agreement. They are certainly views that the management will be aware of.

Mr. MARTIN (*Essex East*): I would just like to ask a question at this point. I am concerned with the quotation from the letter of transmittal by the President of the United States and in the fact that his view did not follow in agreement with the section which you have just quoted of the articles of agreement. He speaks only of the agreement with the member concerned, and that if the surplus be made available it should be disposed of in terms of desirability, but says nothing, as it does in the section, of whose currency is involved in terms of agreement by the members as a whole.

Mr. MACDONNELL: On what page is that found?

Mr. MARTIN (*Essex East*): I was referring to the report of the national advisory council in which there is a letter from the President. I quoted this at page 4331 of *Hansard*.

Mr. RASMINSKY: Mr. Martin, in the special report of the national advisory council dated February, 1960, they dealt with it. I agree that the President does not refer specifically to these things. This is the way the national advisory council deals with it; they say "The articles do not specify any amount of funds which might be transferred to the association by the United States or by other countries under the provisions described above. Nor can the council predict what magnitudes might be involved. The flow of these funds will depend not only on the future amount of P.S. 480 sales, and on the extent to which countries are willing to agree to transfer the use of their currencies by the I.D.A., but also on the rate that the specific productive utilization of this currency can be developed."

I would not say that was an enthusiastic statement of possibilities. I cannot guarantee, of course, that the American hopes and aspirations are the same as ours in this connection, but against the background of the whole record of these discussions I think that the management of the institutions will be quite cautious about bringing proposals forward regarding these supplementary contributions.

Mr. MARTIN (*Essex East*): I am sure of that, but I am concerned with the wording of the President's letter.

Mr. RASMINSKY: Finally, Mr. Chairman, in regard to the operations of the I.D.A., they must of course be guided by the purposes of the I.D.A. which are stated in article 1, and that is:

> The purposes of the Association are to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world included within the Association's membership—

The less developed areas of the world in a sense are defined as the countries in part 2. They are not legally defined, but they are in fact the countries in part 2 of the schedule. This does not mean that some loans might be available to finance less developed areas of countries in part 1 including particularly perhaps colonial areas of countries in part 1.

The provisions regarding operations are set out in article 5 starting at page 8.

Section (b) indicates that whatever the association does must be of high developmental priority in the light of the needs of the areas. Ordinarily the financing will be in terms of specific projects, so that the association can finance any project or any program of high developmental priority which will make a contribution to increasing the standard of living of the country receiving that money, whether or not the project is revenue producing or directly productive. For example, there would be nothing in the articles of agreement, to prevent the association's money being used to finance projects such as water supply, sanitation, pilot housing schemes which are not directly productive but which are socially useful and which would make an important contribution, provided they did make an important contribution to development.

One cannot be certain, of course, that this will work out because the institution has not started to function yet. My own guess would be that there will in effect not be any very deep distinction between the types of project financed by the international bank and the types of projects financed by the I.D.A. I can conceive that in many cases some project will be financed by the two institutions. I think that the real distinction between these institutions will relate to the nature of the repayment provisions of the loans and will result from the fact that the financing of I.D.A. must be less onerous than the financing of the bank. I think the real distinction will lie there and that the I.D.A. will make loans that will perhaps provide for very long periods of grace before

repayment starts, and that are very long in their repayment provisions, and perhaps will extend over periods of over 40 or 50 years. They will be made at lower rates of interest than the international bank loans, and conceivably at no interest at all, and that the principal or interest, or both are repayable in the local currency of the borrowing country rather than in foreign exchange.

The provisions regarding this are quite flexible, subject to only one element of non-flexibility, and that is that the financing must take the form of loans, and the new constitution has provided that they cannot undertake the form of grants.

Mr. MACDONNELL: You do not fear that there will be a conflict of interest and the two institutions will be making loans to the same borrower? Of course, they have the same management and there will not be a conflict there. Will the same countries be concerned with each of the lending institutions?

Mr. RASMINSKY: Membership in the I.D.A. is open to all members of the international bank. It is not certain that all members of the international bank will join, but it is certain that all members of the I.D.A. will be members of the International bank so that there is no possibility of conflict of interests arising there. One can imagine that there might be a possibility of conflict of interests in the sense that a country would prefer to get a less onerous loan than a more onerous loan. The way Mr. Black deals with the question is by saying that though there may be a soft loan entrance to the bank and a hard loan entrance to the bank, both entrances wind up in the same place, namely in his office.

The CHAIRMAN: We will adjourn until 2 o'clock, and meet in this same room.

AFTERNOON SESSION

TUESDAY, June 14, 1960
2.00 p.m.

The CHAIRMAN: We are ready now. Would you carry on, Mr. Rasminsky?

Mr. RASMINSKY: I have really finished my remarks, Mr. Chairman.

Mr. NUGENT: Could I ask a question where we left off on this? When we left off you told us the loan applications were all going to come under the same system, whether from the international development association or from the international bank. It seems to me that this indicates that we will see a sudden drop in applications to the international bank, and that everybody will first try out to get in through this association. Am I correct in this?

Mr. RASMINSKY: Well, as the question relates to the future, I cannot say whether that is correct or not. I should not think that it would necessarily work that way. I think, for a number of reasons, that the countries of the underdeveloped countries that are in a more advanced stage of development, and particularly those which feel that they can establish their credit in the private capital markets, so they can borrow independently in their own names—I would suspect the countries of that sort would, on the whole, not be too anxious to borrow soft loans from the bank. In some cases, I think they might prefer to see the bank rate their credit-worthiness high enough to make loans available to them on the conventional terms the bank uses in its ordinary loans.

Another factor I imagine will play a part in this—in fact, it is bound to—is the question of the quantity of money involved. The I.D.A. is being set up with an initial capitalization, as you know, of $1 billion which will be paid in roughly at the rate of one fifth a year. Actually, the payments in the first year are rather more, and are 23 per cent of the total, and then the rest

in equal amounts over the next four years. The I.D.A. will officially have therefore, about $200,000,000 a year of resources, unless steps are taken to replenish its resources. This obviously is not enough to satisfy all the demands for loans of the underdeveloped countries. The applicant will have to work out with the bank just what the state of his credit-worthiness is. Obviously, the bank will want to concentrate loans of this soft type on countries whose position is such that they cannot incur foreign exchange indebtedness, in other words on the weaker countries.

In saying that, I have in mind a weakness which results from the position of that country in the world economy, and not from the fact that that country was carrying out very unsound domestic policies. The I.D.A. is certainly not going to be used, at least, I will be surprised and disappointed if it is used, to enable countries not to do the best they can to manage their own affairs. It is not intended as that sort of hand-out to countries, but is intended to enable countries to manage their affairs well. Just the same, there are some countries which either because they are in a very early stage of development or because production is concentrated on commodities which are weak in world market, can, at least for the time being, not afford really to incur large amounts of foreign exchange indebtedness. This will undoubtedly be taken into account by the management of the bank.

There is the possibility of a conflict of the sort you have in mind in asking the question, but I do not think that that is likely to lead to very serious difficulties.

The CHAIRMAN: Mr. Horner?

Mr. HORNER (*Acadia*): I think, Mr. Chairman, Mr. Rasminsky stated this morning he would explain what type of loan would be available under the I.D.A., but not available under the international bank. Would there be that possibility, that there would be a loan of that type?

Mr. RASMINSKY: There might be. For example, I mentioned as an example of the types of loans the I.D.A. might make, this morning, as one example, the pilot housing project. I do not think that the world bank would make a loan of that sort. It is difficult to categorize this type of loan. It may be that this sort of loan is on the borderline between social development and economic development. The concentration of the bank will be very much on economic development.

In the case of the I.D.A. it is provided in the charter that the loans must be of a nature that have a high priority from the point of view of economic development, but they could be loans which are less directly related to that.

The bank has gone in a lot for power loans, for example, as I believe I mentioned this morning—

Mr. HORNER (*Acadia*): That is right.

Mr. RASMINSKY: —and for transportation loans. There may be distinctions of this type that develop in the character of the loans, but, as I said this morning, I believe it is more likely it will turn out to be the case that the chief distinction does not lie between loans of one type made by the international bank and loans of another type made by the I.D.A., but the distinction lies rather in the terms of repayment of the loan itself.

Mr. HORNER (*Acadia*): On this same question? You mentioned a high priority being given to development loans. Concerning surplus disposals of U.S. agriculture, how would that fit in to high priority from the point of view of economic development? That would not fit, would it?

Mr. RASMINSKY: What is involved in the U.S. surplus disposal is not the disposal of the surplus itself; it is the use of the local currency counterpart that arises from the surplus disposal. For example, if the United States had given,

let us say, ten million bushels of wheat to Pakistan under their public law No. 408, i.e. their surplus disposal program, then it could have been a part of the arrangement with Pakistan that Pakistan, which was going to sell that wheat and obtain Pakistani rupees in exchange, paid over to the United States the Pakistani rupees resulting from that sale.

Those Pakistani rupees might have a value of, say, $15 million, depending on the price attributable to the 10 million bushels of wheat. So that the United States was then holding Pakistani rupees equivalent to $15 million. I do not know, offhand, what the rate of exchange on Pakistani rupees is, but let us take it as 4 to the dollar, and say that the United States is holding 60 million Pakistani rupees. That is what is called counterpart funds.

Under the provisions regarding what is referred to in the articles of agreements as "supplementary contributions", the United States could try to arrange with the international development association to take over from it, let us say, that 46 million—if that is the figure I used before.

Mr. HORNER (*Acadia*): 60 million.

Mr. RASMINSKY: 60 million of Pakistani rupees. In exchange for that the United States would simply get a certificate of some sort, and would not get stock in the association or any additional voting rights. The association would then be confronted with a request from the United States to take over the 60 million Pakistani rupees. The question that it would have to ask itself, as I pointed out this morning is, whether it wants to take over these rupees or not. The United States has no right to hand its rupees over. The question that the I.D.A. has to ask itself is: can I make use of these Pakistani rupees within the provisions of this agreement—namely, to refer to the one you mentioned, for some object of high development priority. Some of us have some doubts in our minds as to whether many opportunities of that sort will arise, because Pakistan, to continue this example, certainly is not short of Pakistani rupees. Her main shortage is foreign exchange, and it is not Pakistani rupees.

However, there might be occasions, maybe even in conjunction with something that the international bank is financing, when there would be some local objects of expenditure, payment for services or payment for some goods produced in Pakistan, to be used in connection with a project which is regarded as important. There could conceivably be occasions that would arise where use could be made of these counterpart funds for objects of high development priority. But it would have to be in that way, and not through disposal of the agricultural surplus itself that this situation would arise.

Mr. HORNER (*Acadia*): In your estimation there would not be a large amount of this which would be available for these counterpart funds, do you think—a large amount of use for this?

Mr. RASMINSKY: My own guess, Mr. Horner—and it is just a guess—would be there would not be very large opportunities arise for an effective use of these counterpart funds, because, as I say, what these countries are short of is really not their own currency but foreign exchange.

Mr. BROOME: Mr. Rasminsky, I am interested in your remarks that under part II, colonial territories of the nations listed in part I would be eligible for assistance. What happens, then, in territories such as Nigeria, which were colonial at the time of formation of this and which will become independent some time in the future but which is not a contributing nation under part II? Is it the intention of the association to keep the listings in part II open for additional countries to become contributors in the rather minor way they are in part I, so they can qualify for benefits, if the association deems their request meets the articles of the association? I have several questions, in fact.

Mr. RASMINSKY: Yes, that would be the intention.

Mr. BROOME: I do not see any place in the actual article—and I have not studied it too closely—where it is sort of left open, at the end, for other nations to come in.

Mr. RASMINSKY: There is provision in the articles for access of other countries. If you look at article II, section 1(*b*):

> Membership shall be open to other members of the bank at such times and in accordance with such terms as the association may determine.

Mr. BROOME: That would not cover this case because this nation would not be a member of the Bank either.

Mr. RASMINSKY: I realize you are raising a general case, but just to clear up any misunderstanding there might be about the particular case you mentioned, Nigeria has applied for membership in the Fund and in the Bank.

Mr. BROOME: Which comes first—the bank?

Mr. RASMINSKY: They are simultaneous.

Mr. BROOME: But you have to be a member of the bank before you can become a member of the association?

Mr. RASMINSKY: When I referred to the fund I was talking of the International Monetary Fund. Nigeria has applied for membership in the International Monetary Fund and in the International Bank. The executive directors have submitted to the governors, as they are required to do, as this is not a power which is delegated to the executive directors, a resolution to be voted upon before Nigeria gets her independence on October 1.

Mr. BROOME: The applying country is voted upon by the present participants in your bank?

Mr. RASMINSKY: That is right.

Mr. BROOME: My second question is with regard to the 20 per cent fund. Are interest payments paid to participating countries on the basis of the funds they have on deposit?

Mr. RASMINSKY: No, sir. These are part of the capital subscription of each country.

Mr. BROOME: But the world bank—these are sound investments, and they are getting six per cent on this investment, and none of those interest payments come back to the countries which have set up the initial capital?

Mr. RASMINSKY: No. There is a provision in the international bank agreement which authorizes the board of governors of the bank to make such distribution of the net income of the bank as it sees fit. I believe that there is a limitation there which would restrict any return on capital to two per cent per annum. I have it here, and I will just check that, if I may. Yes, this in article V, section 14 of the International Bank Agreement.

Section (*a*) reads:

> The board of governors shall determine annually what part of the bank's net income, after making provision for reserves, shall be allocated to surplus, and what part, if any, shall be distributed.

Section (*b*) reads:

> If any part is distributed, up to 2 per cent non-cumulative shall be paid as a first charge against the distribution for any year to each member, on the basis of the average amount of the loans outstanding out of currency corresponding to its subscription.

Mr. BROOME: I believe you said the actual operation of the bank carried a one-quarter per cent charge, which brought the lending rate up to 6 per cent; therefore, it seems to me that with the very large sums the bank has at its

disposal, and as long as they do not get into some major bad debts, they will be building up a fairly large surplus, which can be used for amplification of their program, or for refunding along the line you have mentioned.

Mr. RASMINSKY: Yes, that is right. In fact, the total reserves of the bank, accumulated partly out of operations, for the reasons you mentioned, and partly out of the one per cent statutory commission, which I mentioned this morning, as at the end of April, amounted to $492 million.

Mr. BROOME: Which actually is profit concerning previous transactions.

Mr. RASMINSKY: It is the excess of income over expenditures on earlier transactions.

The CHAIRMAN: How many years would that represent?

Mr. RASMINSKY: That represents the results of 13 or 14 years operation.

Mr. BROOME: Which lowered the funds.

Mr. RASMINSKY: The reserve may build up in the future.

Up to the present time, the view taken by governments is that the return that they get for paying their money into this institution is the economic development that takes place in the underdeveloped countries.

Mr. BROOME: Yes, I understand. It gives them an opportunity for venture in their business.

Mr. RASMINSKY: Yes. Funds have been retained in the business, and used to make further loans for economic development.

Mr. BROOME: I have a further question.

The CHAIRMAN: On that point, Mr. Broome, would it not be fair to ask one question, and then let us go around the table, and come back to you later?

Mr. BROOME: That is fine, if you want to follow that procedure. You have not been following it in the past. However, it is a fine procedure, if you wish to follow it from now on.

The CHAIRMAN: Yes, we have followed that right along, except for supplementary questions.

Mr. BROOME: In a way, these have been supplementary.

The CHAIRMAN: I thought you were embarking on another subject.

Mr. BROOME: I was going to right now.

The CHAIRMAN: I will call on Mr. Drysdale.

Mr. DRYSDALE: I wonder, to assist me, if you could perhaps give an illustration—and that is what I was trying to get this morning—of perhaps two projects. You could take any example you want to. You could take a suitable project under the I.B.R.D. or under the international development association, and I would ask you to indicate to me what the probable difference would be in, say, the terms of the loan, or in the interest rate charged between the two of them. I realize there is a provision—and I think it is under 51(c)—whereby the executive has a sort of prerogative of deciding whether there should be a loan under the bank of the international development association.

The difficulty I have had is to bring it down to some specific concrete example.

Mr. RASMINSKY: I will be glad to try to do that for you.

As I mentioned before, one can deal with this question with a little more assurance than a question relating to the differences in the type of project itself. You are asking about the terms.

Mr. DRYSDALE: You could take a couple of arbitrary projects?

The CHAIRMAN: He did that earlier this afternoon.

Mr. RASMINSKY: I took as an example a type of project that might be regarded as eligible for I.D.A. financing, but not probably eligible for international bank financing—a pilot housing project.

Mr. DRYSDALE: I was present when you gave that.

The suggestion I made is that you direct your mind to a project which would come under both of them.

Mr. RASMINSKY: Yes, and discuss the terms?

Mr. DRYSDALE: Yes. And discuss as to why the bank would decide perhaps to take it on itself, or pass it on to the international development association.

Mr. BROOME: Would irrigation be such a project?

Mr. RASMINSKY: It might. The international bank has financed several irrigation projects.

Mr. DRYSDALE: Could you just choose your own concrete example?

Mr. RASMINSKY: Yes.

Supposing country "X" is not in too good shape, financially, from the point of view of its international position, but is making a good fist of managing its own affairs, and is, therefore, a country the bank thinks should be assisted, comes in with a project involving, let us say irrigation, which has just been mentioned. Let us say that the amount of this project is $10 million, and the bank having sent people out to the country and having examined the project from the ground up, and made sure that the project itself is a good one, and will contribute significantly to the economic development of that country, the bank decides it is something it wants to do. Well now, the choice that the bank would have, would be to say: we will make this country, for this project, a loan of, let us say the equivalent of $10 million, of which, say one-half is made in United States dollars, and one-half in sterling, and that loan will have a grace period of three years, in which no principal payments are due. After that, there will be blended interest and principal payments, with interest at 6 per cent, of an amount which will amortize the loan in 25 years.

Now, that more or less would be typical.

Mr. DRYSDALE: Under the bank?

Mr. RASMINSKY: Yes.

Now, the bank might say to itself: well, this country is getting fairly close to the margin of the amount of United States dollars and sterling indebtedness that we think it should assume at the present time, having regard to the level of its export receipts and other possible sources of foreign exchange income available to services—the bank might say: maybe we ought to do this without encumbering the foreign exchange position of this country to that extent.

What possibilities then do we have of dealing with this situation? One possibility would be to say: Well, we will give them the 5 million pounds—or, put at their disposal 5 million dollars in United States dollars and the 5 million pounds in sterling; we will not ask them for any capital payments for the first ten years; we will stretch the loan out for a period of 40 years, and will charge them interest at, say 2½ per cent per annum. Well, you could calculate what the difference would be between the annual burden on the foreign exchange reserve of the country under those two things.

I have taken that example at random. There are other things that the bank might do. They might say: Well, we will give them the 5-year grace period; we will ask them to pay 2½ per cent interest in the same currencies that we are putting at their disposal, i.e. United States dollars and sterling; but so far as principal payments are concerned, we will be satisfied if they repay the principal in their own currency, so they do not have to find any foreign exchange for the principal.

Mr. DRYSDALE: If the bank wanted to, could it decide to go on the terms you have suggested by the international development association? Could they do that?

Mr. RASMINSKY: Not if they wanted to stay in business. You see, the bank, as I pointed out this morning, must look to the private capital market for its funds. If it starts looking to government guarantees, that is a once and for all proposition. Once the government guarantees are used up, then the bank cannot borrow any more in the private capital market. So, it would have great difficulty in selling its debentures, and it would then have a fund to be used up, and to be exhausted.

The bank is set up as a permanent institution, with funds that it wants to revolve—that it wants to get back. So, the bank, it seems to me, if it is to continue to operate, must do so on a basis where there is a continuous automatic replenishment of its usable resources in foreign currencies that the underdeveloped countries need, which is achieved through the repayment of its loan.

Mr. DRYSDALE: Then, as far as these articles are concerned, your basic objective in the international development association, is to provide a separate legal entity and a separate bank account. Is that what you are doing?

Mr. RASMINSKY: Well, it is doing those two things, plus a separate and easier source of financing, for the underdeveloped countries.

Mr. DRYSDALE: But, because it is easier, there is a likelihood of not being always able to realize the money, as far as the payments are concerned, and then you do not wish to expose the bank.

Mr. RASMINSKY: That is right. The essence of the difference between these two institutions could be put in that way—that the bank is a revolving fund, with the money coming back, whereas once the original capital and sources of the I.D.A. are used, there is not the same assurance as, in the case of the bank, that the money will flow back in a form that the I.D.A. can use again.

Mr. DRYSDALE: I have one more question. Then, what would have prevented you merely amending the accounts of the I.B.R.D., to have these two functions of creating within the articles a separate legal entity and a separate fund for this particular bank because, comparing them very quickly, I notice there is quite a resemblance in the two sets of articles. That has been one of the basic difficulties, as far as I can see, in whether there is an interest in having it.

Mr. RASMINSKY: I think there probably are two main reasons why it was preferred to do it the way it was done. One is that we would have had to go through the same process anyway to amend the articles of agreement, and the Bank agreement would have required submission to the legislatures of the particular countries. The parliament of Canada approved the articles of agreement of the bank, as they stood in 1945 and 1946. The executive board, or the governors of these institutions, could not have amended that agreement in a material respect of this sort without resubmitting it to parliament anyway. So, there would be no particular advantage from that point of view.

Mr. DRYSDALE: I was going to ask then why that could not be tied in with schedule A in both the acts, where they are exactly the same—perhaps in establishing Canada's contribution, in the amount of $37.2 billion, in one case, and $300 million in the other. Were they exactly the same principles, and if so, in the case of two countries such as Japan and Canada, who are fairly close together, how would you establish the criterion for setting up the contributions?

Mr. RASMINSKY: To answer the first question first, the scale of contributions provided for in the schedule to the act, in front of you, is the

same as the scale of the international bank's subscriptions, after the increase in capital has taken place. The proportion that Canada puts up in the I.D.A. is the same as the proportion of $750 million to the total capitalization of the International Bank; and the new scale in the bank is the same scale that is used for every country.

On the second question—how do you establish the relative position of different countries: all I can say in reply to that is that it is not done with scientific accuracy, but it is done in a way which produces results that people concerned regard as sensible. The criteria that are taken into account in measuring the relative economic size of countries are the value of their output, their population, their foreign trade, their foreign exchange reserves, and one or two other things. Then you look at the result, and there is a certain kind of to-ing and fro-ing: some countries were anxious to have relatively larger contributions; some were anxious to have relatively smaller contributions. But the over-all result is one that, broadly speaking, the countries concerned have found to be sensible.

Mr. DRYSDALE: Was that calculated—

Mr. NUGENT: Mr. Chairman, did we not go over all this this morning, and is he not doing exactly what you just stopped Mr. Broome doing?

Mr. DRYSDALE: This is my last question. I was here this morning, and it was not covered.

The CHAIRMAN: Will you finish.

Mr. DRYSDALE: He threw out my line of questioning.

The CHAIRMAN: You think it over, and we will come back to you. Mr. Macdonnell.

Mr. MACDONNELL: Mr. Chairman, I want, in a sense, to change the subject: I want to look at a different aspect of it. I am hoping that Mr. Rasminsky may be able to give us some idea of the relationship of this $1 billion to the extent of the program.

My own feeling is that this problem of aid to underdeveloped countries is by far the most important problem facing us, and if we do not deal with it properly, 10 years from now we may say, "What on earth were we doing in 1960?"

There are three or four people of world-wide reputation in this matter, and I would like to read a small extract from what each of them has said. I do not think I will take more than five minutes altogether: I do not want you to think that I am straying off into speeches. But I would like to put these three or four statements before the committee. They are from people of tremendous importance who have spoken on this subject.

I would like to read an article by Barbara Ward in the *New York Times* of December, 1959. It will speak for itself:

> As the world enters the nineteen sixties, one fact seems sure. The pace of revolutionary change in every sphere of human affairs will gather momentum.
>
> The breakthrough accomplished in the fifties in weapons, in space research, in every type of scientific advance; the political breakthrough of a score of new nations; the emotional breakthrough of a third of humanity hungering for economic growth—all these forces will expand explosively—

I repeat, "explosively":

> —to make the sixties a period of challenge and change unequalled in human history.
>
> What, in these circumstances, will be the response of the western powers? The answer depends not only upon the new political leadership

available in the west; it depends profoundly upon the sort of people the free nations have become as they face the mounting crises of their age.

I want next to read a short extract from a speech made by a man who I think is one of the world leaders, Adlai Stevenson. This is from a pamphlet reprinted from Foreign Affairs—and if anyone wants to borrow a copy of this and is sufficiently interested in reading it, I can lend it to them: I have several:

> To me the most dangerous realities we now face are the multiplication of nuclear weapons and the disparity in living standards between the rich nations and the poor. So I suggest we must meet the crises of our time in four major areas:

Then he gives the four:

> First, we must end the growing gap between wealth and poverty.

Then he goes on:

> The average annual income in the United States is more than $2,000 as against less than $100 for a third of the world's population. And the worst thing about this disparity is that the rich nations are getting richer and the poor poorer.

Just one other sentence from Adlai Stevenson:

> Informed opinion tells us that at least $5 billion a year is needed—from all sources, public and private, domestic and foreign.

That, I think, will include the borrowing as well as the receiving nations. Then he goes on:

> We shall have to coordinate all aspects of the effort with other nations—not only investment but opportunities for trade, international liquidity and so forth.

Then I wish to read a short extract from a speech delivered by Paul Hoffman, who is head of the special fund of the United Nations. This was delivered in Toronto last October. There are some figures here which I think will interest the committee. Again, it is quite brief, I can assure you:

> Despite the wide range of developmental activities carried on in the fifties, the result in terms of improved living standards, that is per capita income, has been very disappointing. Per capital income in 1950 in the 100 less developed countries and territories is estimated at $110. In 1959 it should reach $125, perhaps as much as $130, a net gain of some $15 to $20 in ten years.

Then he says:

> It is too slow, dangerously too slow, particularly when compared with increases in per capita income in the richer nations. The average increase in per capita income in the western nations between 1950 and 1957 (the last year for which figures are available) was approximately $300—in the United States it was $530. It is quite all right for the rich to get richer; but disturbing and distressing to have the desperately poor people remain desperately poor.

Then he goes on to say:

> The crucial decade of the 1960's is just around the corner.

I want to read one sentence, and one sentence only, from the speech of that able fellow, Eugene Black, of the World Bank. This is a speech he made in Oxford university on March 3 last; and I read from the end of the paragraph which refers to the duty of other people to pull themselves together.

He said that the receiving nations have to become efficient and have to develop skills. They have to be ready to tighten their belts. And then there is this sentence which interests me:

> How important it is that the free world community stand ready to pledge whatever measure—

Listen to this:

—free world community stand ready to pledge whatever measure of its wealth can be usefully absorbed in this endeavour.

That is a pretty comprehensive sentence. That is not a long-haired idea: that is Eugene Black, and it is regarding this matter of $5 billion a year.

I have had some little correspondence with Hoffman, who is the head of this special fund of the United Nations. This is a very difficult task, and I do not know whether it is fair to ask Mr. Rasminsky this question. Before I come to that, however, there is one other thing I want to read. I want to just read this extract from a letter from Hoffman:

> You ask how the figure of $1 billion as initial capital for the International Development Association was reached. My guess is that it is the largest amount which the supporters of the association felt would be acceptable to the membership of the International Bank. My question, Mr. Rasminsky, is perhaps an impossible one for you to answer. But I believe that these people, Stevenson and others, are saying the simple truth when they say that this task faces us, and it faces us now, in the sixties; and if we let it go, we will probably regret it. Mr. Rasminsky, can you relate that $5 billion in any way to this $1 billion? I do not know; but it seems to me that we should not just take this blindly and assume it is going to do the job, if there is no reason to believe it is doing the job.

There is one other question, which probably you can answer. That is, whether requests for aid are being made at the present time which are having to be turned down. Thank you, Mr. Chairman, for allowing me to put these questions.

Mr. RASMINSKY: Mr. Chairman, Mr. Macdonnell was good enough to tell me that he intended to pursue this line of questioning, and I have taken advantage of the opportunity given by that notice to think what sort of reply I might make, and do a little homework on the subject.

Mr. Macdonnell's question, basically, relates to the adequacy of the effort now being made to help underdeveloped countries. He has quoted a figure of $5 billion per annum, being what Mr. Adlai Stevenson indicates is necessary, in his expert opinion.

Mr. MACDONNELL: Can that figure be identified in any way?

Mr. RASMINSKY: I do not know whether it can be identified; but I can identify an even larger figure. I think that as you have indicated, Mr. Chairman, basically the question of what governments want to do to help underdeveloped countries is not a question that I can answer. In a sense, it would be a better question for me to ask Mr. Macdonnell, than for Mr. Macdonnell to ask me. This is a matter of government policy.

But there are one or two things on this subject that I think I could usefully say. First of all, as to the measurement of the amount of capital that the underdeveloped countries need: Mr. Stevenson uses the figure of $5 billion per annum. Paul Hoffman, whom Mr. Macdonnell also quoted—the distinguished head of the special fund of the United Nations—uses a figure of $7 billion per annum.

My understanding of the way these figures are arrived at is this, that you start by deciding by how much you want the consumption, the standard of living of the underdeveloped countries to go up. Hoffman, for example, calculates —this is done in a little book, or pamphlet, entitled *One Hundred Countries; One and a Quarter Billion People,* which was published early this year—that in the fifties the output of the underdeveloped countries increased at the rate of 3 per cent per annum. However, the population increased at the rate of 2 per cent per annum; and therefore the average income per head—in other words, the standard of living increased at the rate of 1 per cent per annum, since the 3 per cent had to be spread around among so many more people.

Hoffman says, "This is not enough. There is this revolution of rising expectations"—as it is called—"and there are these very important political and economic considerations, as well as humanitarian considerations". He says, "We in the west should be aiming at an increase in the standard of living of these low-income countries, not of 1 per cent per annum but of 2 per cent per annum".

The question then arises: how much more do you have to put into these countries to get out an extra 1 per cent per annum in their standard of living? The way that calculation is made is this—or something like this: in the countries concerned, the total value of consumption of goods and services is said to be $100 billion a year. You want to raise that by an extra 1 per cent per year; so you want to have those countries consume goods worth an extra billion dollars a year. How much extra capital do you have to put into those countries to get an annual yield equivalent to $1 billion per year?

This gets into some fairly fancy economics, which I believe the professional men in this regard call the capital input-output ratio. Hoffman says, in this pamphlet—and this I am not able to confirm; I just do not know—that those who are professionally very well versed in the theoretical economics involved believe that in order to get out an extra billion dollars a year you have to put in capital amounting to $3 billion a year. Of course, you do not have to put in the capital forever; you hope that at some stage of the game these countries will take off and produce enough savings of their own to maintain the momentum of growth. But he says that for the time being you have to put in an extra $3 billion a year.

Hoffman makes a calculation—about which I will have something to say in a moment—which suggests that the amount of assistance that is now going to underdeveloped countries from the west amounts to about $4 billion a year. So Hoffman winds up with the conclusion that in order to achieve the purpose that he has in mind, to raise the increase in the annual standard of living from 1 per cent a year to 2 per cent a year, the total amount going into these countries should be $7 billion a year.

I know that that is how Hoffman gets his figure of $7 billion. I do not know where Stevenson gets his figure of $5 billion. There are certain things to be said about these calculations—and I do not say this with a view to trying to disparage them, because these are obviously well-informed people who are putting forward these figures. The first thing to be said about these calculations is that they produce a theoretical result—that they are based upon arithmetic. They are not based upon an appraisal of how much capital the countries concerned can in fact usefully absorb.

In the quotation from Mr. Black that Mr. Macdonnell read, that phrase "usefully absorbed" does, if I am not mistaken, occur—and the capacity of a country usefully to absorb capital obviously depends upon a large number of things, in addition to the capital itself. It depends upon the standard of education, the manpower available, the skills available, the efficiency and honesty of governmental administration; and simply producing a figure such as $7 billion in that way does not in itself establish that at the present time $7 billion can be usefully absorbed.

Another comment that I should like to make on the statistics involved is that in dealing with the part of the world that you are dealing with, the underdeveloped countries, the statistics, these calculations of the standard of living and the level of output are of the most rudimentary sort. I think it would be a mistake to attach too much importance to the precise arithmetic that these figures produce. The margins of error involved in these figures are very high indeed.

Mr. MACDONNELL: Would that apply to the per capita income?

Mr. RASMINSKY: Yes, I think it applies to the whole range of statistics dealing with these countries, Mr. Macdonnell. What I say does not disprove

anything and it does not prove it anytime. I just express my opinion that one should not attach too much importance to these figures.

Then the second general comment that I make on Mr. Macdonnell's question relates to the amount of aid that is now going forward to these countries. Even here you can get this result depending on what you classify as aid and what you do not classify as aid. For example, Hoffman, in this pamphlet which I mentioned reaches the conclusion that in the year 1957-58 which is the most recent year for which these computations have been made, that the total amount of grants and loans made by governments to assist less developed areas amounted to about $3¼ billion. Then you would have to take into account private capital outflow, that is non-governmental investment in these countries. This is calculated, by pooling together various national estimates, at $1.6 billion. Adding the $3.2 billion to $1.6 billion would reach a total in 1957-58 of about $4.8 billion. Hoffman makes certain adjustments in those figures. He says that this includes a large amount from the United States which is really defence support aid. It is going to countries like Viet Nam and South Korea and is not really for purposes of economic development. He makes certain adjustments which lead him to reduce the total figure of about $4.8 billion to $4 billion.

On the other hand I notice the figure he includes for the World Bank in this is $319 million which undoubtedly is the right figure for 1957-58, but it is now $700 billion. These calculations exclude aid going forward from the Soviet Union. I do not know too much about that, but estimates, which are probably as good as can be made in the current state of our ignorance on the subject, suggests that this may be another $800 million—$900 million per annum, and probably is increasing.

Therefore, adding one thing and another, it probably is the case that right now the total amount of aid, public and private, western and Soviet, going to the underdeveloped countries is in excess of the rate of $5 billion a year. Still, of course, it leaves open the very important question Mr. Macdonnell raises; is it enough; should more be done? That, however, is a question which I myself do not feel I can answer because it is a question that governments have to decide in the light of the conflicting demands for expenditures of all sorts.

Mr. MACDONNELL: Is there anything on the record which would show how the figure of $1 billion was arrived at?

Mr. RASMINSKY: The figure of $1 billion for the International Development Association was incorporated in the original United States proposal for this institution. No suggestion was made in the course of the discussion that this figure should be increased.

Mr. NUGENT: Would you answer the second part of Mr. Macdonnell's question in respect of the unanswered pleas for extra capital in these countries.

Mr. RASMINSKI: The answer is yes.

Mr. MACDONNELL: That is creditworthy.

Mr. RASMINSKI: Oh, no. That was not the question. The question I was answering yes to was whether or not there had been unanswered pleas for extra capital; or to put it another way, had underdeveloped countries wished to obtain larger amounts of assistance than they had obtained. The answer to that question is yes.

Mr. NUGENT: You do not have any idea of the volume?

Mr. RASMINSKI: No.

Mr. BENIDICKSON: I believe Mr. Macdonnell has additional information in the letter in respect of the Marshall program.

Mr. RASMINSKI: If I might put this in relation to the question of credit worthiness, if the question were, had countries made applications to the International Bank—countries which were credit worthy—for help in sound projects which would have contributed to their economic development and been turned down by the international bank, I think my answer to that question would have been different. I do not know of any such application.

The CHAIRMAN: Mr. Macdonnell, would you read that part of Mr. Hoffman's letter which deals with that.

Mr. MACDONNELL: With reference to the Marshall plan?

The CHAIRMAN: Yes.

Mr. MACDONNELL:

> You ask about the cost of the Marshall program. The final figure was something under $14 billion and it is my understanding that this will be reduced somewhat by the repayment of some loans made to the European countries.

Of course, there you had people who were highly organized and capable of that in a way the unorganized eastern countries are not. Mr. Hoffman expressed disappointment in what happened in the fifties, the very small increase in net income, and I take it the tenor of his remarks is that we must do better if we are to succeed.

The CHAIRMAN: Mr. McIntosh is next.

Mr. MCINTOSH: I understand this fund is for the use of underdeveloped countries. Is it on the basis of need or ability to pay? I understand you said, in answer to Mr. Broome's question, that all investments were sound investments. I take it you mean financial investments. If such is the case, can these countries not obtain money on foreign markets at a rate of interest at which the bank itself can obtain it and, if not, why do not the countries which are in a better financial position make this money available to them at the same rate of interest at which they can get it from other sources?

Mr. RASMINSKY: The first question is, what is the first thing which is taken into consideration in connection with the international bank loans; is it a matter of credit worthiness or need.

Mr. MCINTOSH: Yes.

Mr. RASMINSKY: I think my answer to that question would have to be both; the bank would certainly not make a loan to a country that was not in need of the capital for its development, and on the other hand it would not knowingly make a loan which would turn out to be a gift or which it would have to write off. It would expect to have its loan repaid. In making that determination it would try to assess the general credit worthiness of the country. Both would be taken into consideration.

I believe the second question was—

Mr. MCINTOSH: It leads from that last answer. Why can they not get money on the foreign markets, if it is a good financial risk?

Mr. RASMINSKY: Well, it depends on what you mean by a good financial risk. The definition of soundness—if I have been using that expression—does not mean necessarily that the bank will make a loan only for revenue producing projects. In fact many of the loans which the bank has made have not been for revenue producing purposes. The bank has made many loans, for example, for irrigation; it has made loans for other types of agricultural development; it has made loans for road transport.

Mr. MCINTOSH: But they expect repayment.

Mr. RASMINSKY: That is right. They expect it to be repaid. So far as the bank is concerned the test of soundness is not, is it sound in a business sense

and that the recipient of the loan at the end of the year will be able to produce a good looking balance sheet; the test for the bank is whether or not the project itself is sound—is this money going to be used in a way which increases the economic strength of the country; and that may or may not be in a way which produces revenue.

Your third question, in a sense, seems to follow from that. You seem to be assuming, if I understood your question correctly, that since there would be a good looking income statement, the borrowing country would be able to borrow on the capital markets of the world.

Well, in most cases as I say there are not good looking income statements. If the country can borrow on the capital markets of the world it has an inducement which can be measured by at least one per cent, because if it can borrow on the capital markets of the world it would not have to pay the bank the statutory commission of 1 per cent. In fact, more and more as the credit of one country and another, helped by the bank, has been established, the borrowing country has turned to the private capital markets of the world.

Australia is a good example of that. The bank made several very large loans to Australia, but these were made at a time when Australia would have found difficulty in borrowing in New York on terms that would have been acceptable to Australia. In recent years that situation has changed.

One of the important contributions which I think the bank has made through its activities is to revive the private international market. It has made private international long-term lending respectable again. I myself feel that this has been a very important part of the bank's activities. The bank, of course, is not supposed to compete with the private capital market. In fact in the articles of agreement of the bank there is a clause which provides that one of the conditions for a bank loan must be that capital is not available from private sources. Obviously, the more we can interest private capital in taking the risks involved in lending to the less developed parts of the world, the speedier the development of those parts of the world will be. I am not sure whether or not I have answered your last question.

Mr. McINTOSH: My thought is this: Is the whole set-up actually for the purpose which they try to lead us to believe, for the help of underdeveloped countries, or is it to help the financial interest of other countries.

Mr. RASMINSKY: The answer is it is for the purpose of helping underdeveloped countries.

Mr. McINTOSH: I am not too sure of that from your answer.

The CHAIRMAN: Mr. Thomas.

Mr. THOMAS: I have a few questions, Mr. Chairman. Has any list been prepared of the desirable developments in the underdeveloped countries for which this $1 billion fund might be used?

Mr. RASMINSKY: I am very sorry, sir. I did not hear the question.

Mr. THOMAS: Has any list been prepared of the possible developments in the underdeveloped countries for which this $1 billion fund might be used over the next five years.

Mr. RASMINSKY: There is no list which I have seen, sir.

Mr. THOMAS: The next question has to do with the differences between the international bank and the international development association. Does the international bank have the function of the creation of credit in the ordinary banking sense?

Mr. RASMINSKY: No sir. The only resources that the international bank will have to work with will be those that are contributed by governments. Of course, it will be for each government to decide where to get the money required to pay its contribution. So far as the institution itself is concerned, however, there will be no creation of credit.

Mr. THOMAS: Would there not be even less danger of the creation of credit under the international development association?

Mr. RASMINSKY: There will be no tendency there either.

Mr. MACDONNELL: Is nobody responsible for going out and trying to work up schemes along the line Mr. Thomas is suggesting, or is it Hoffman who does that.

Mr. RASMINSKY: I am not sure I understand what type of scheme is being suggested.

Mr. THOMAS: You have mentioned a number of schemes such as irrigation, say the railways and roads, and you also mentioned housing projects and you differentiated between those as to whether or not they would come under the international bank or more properly be accommodated through the international development association. I would think that before whoever initiated this scheme or proposal and set up the fund of $1 billion, he would have had in mind where it was to be used and for what purposes it could be used. Surely, there must be some definite plan or scheme for which it could be used.

Mr. RASMINSKY: I do not think there would be any lack of outlets for these funds. The availability of these additional amounts of money on easy terms I think will become widely known and will lead to a volume of applications, at least sufficient to use the fund. I do not think any problems are likely to arise on that score. But if you ask, am I able to point to specific uses which are on a list, then I am afraid the answer to that is no; I do not know of any list which shows things that will come before the board if this is established.

Mr. STINSON: Mr. Chairman, in view of the relatively small increase in net income the less developed countries experienced in the fifties, as Mr. Hoffman said—

Mr. BENIDICKSON: Per capita income.

Mr. STINSON: Yes—in the quotation Mr. Macdonnell brought before us, it comes as a surprise to me that it was not discussed at the meeting when this association was established that a sum in excess of $1 billion might be requested from the member countries. Would it be fair to say that happened because the people who were there were satisfied that they could not expect the United States to contribute any more than, say $320 million dollars, having regard to the other commitments of that government?

I wonder if Mr. Rasminsky could answer that question.

Was it decided that they could not accept more than $320 million from the United States government, and they decided that the total amount could not exceed $1 billion?

Mr. RASMINSKY: I do not know how important a consideration that was in the minds of governments which regarded the billion dollars as an acceptable figure.

I should point out there is provision in the articles of agreement for periodic replenishment of the resources of the institution.

Mr. MACDONNELL: At any time?

Mr. RASMINSKY: There is provision. It is in article 3, section 1(a), which reads as follows:

> The association shall, at such time as it deems appropriate in the light of the schedule for completion of payments on initial subscriptions of original members, and at intervals of approximately five years thereafter, review the adequacy of its resources and, if it deems desirable, shall authorize a general increase in subscriptions.

It goes on to say that no member is obligated to subscribe more. One could not expect such an obligation, as the money has to be voted by parliament. But,

if this institution is successful, no doubt, proposals will be made to increase its capitalization—and there is provision for that in the articles of agreement.

Another thing, of course, that one has to bear in mind, in considering the size of this fund, is that this is not the only source of funds to help underdeveloped countries. This vehicle is being used at the present time to provide an additional $750 million to $1 billion for that purpose. However, it is not intended as a substitute for any programs that are presently going on, and I suppose the expectation would be that these programs will continue in being and, in some cases, increase.

Mr. STINSON: I wonder whether Mr. Rasminsky could relate the anticipated scope of operation of those funds with what could be expected to happen under the United Nations special fund?

Mr. RASMINSKY: I speak with a certain amount of diffidence concerning the United Nations special fund, because I do not know too much about it.

As I understand it, the United Nations special fund is concerned with a very important phase of development operations; that is, in establishing the pre-conditions for development. A lot of the work is done by way of preliminary surveys of resources, partly through air inspections, and in other ways, to provide a solid basis for development. I believe the resources of the special fund of the United Nations amount to about $30 billion a year. In connection with the size of the special fund, allow me to read this paragraph from this pamphlet of Paul Hoffman:

> During its first year, the United Nations special fund granted over $31 million for 44 projects, to speed economic progress in 50 of the underdeveloped countries and territories in Africa, Asia and Latin America. But, as the special fund requires maximum self-help on the part of recipients, the latter will contribute $44 million to these projects, for a total of $75 million.

I think one should regard these two institutions as complementary, the one complementing the other, and not as competitive in any way. I think they are both concerned with the same general area of economic development, but are approaching it at a somewhat different stage—the special fund of the United Nations at the very important preliminary stage, in establishing preconditions for development; the I.D.A., at a somewhat later stage, in financing and helping generally in connection with specific developmental projects.

Mr. STINSON: I raised that second question because, it seems to me, one of the very difficult questions we, as members of parliament, have to decide; that is, whether or not we should propose that we should subscribe $37.83 million to the international development association, or whether we should look at what the special fund is proposing, and if we decide that what they are doing is of greater interest to this country or to the future of the world, press for Canada to make a greater contribution to the United Nations special fund, or any other agency involved in economic assistance. Unless we have a discussion as to the relative value of these things, how are we going to have an informed opinion on how to vote on these questions? I know it is very difficult to assess the relative value of spending proposed in these various fields. However, the difficulty has to be faced, and we have to make up our minds.

Mr. RASMINSKY: Of course, you do not have to choose one or the other.

Mr. STINSON: Well, if we thought this was not a particularly useful project for Canada, as private members of parliament, we might be able to persuade the government not to participate in it, and we could suggest support to some other assistance—and, to that extent, we have freedom of choice.

Mr. JONES: In view of the remarks of Mr. Macdonnell and Mr. Stinson, and the general problem raised in regard to the adequacy of funds for assistance

to less developed countries, I would like to make a couple of comments, and end up with a question.

I would like to refer to the article of Mr. Adlai Stevenson, quoting particularly, I believe from page 196:

> An informed opinion tells us that at least $5 billion a year is needed from all sources.

And I emphasize this.

> From all sources, public, private, domestic and foreign.

That was the quotation.

In discussing this particular bill which is before you, I think we have to bear in mind, as you have pointed out, that this is not the only means by which this problem is being attacked. In my view, at least, I do not think the problem of aid to underdeveloped countries, in the form of capital assistance, can be solved purely by public means.

If I might take a minute or two to read a couple of excerpts from the conclusions of the Atlantic congress, which was held last year in London, you will see that it highlights some of the needs, and gives the conclusions of a group that were discussing this problem for several months before the actual congress took place. It will give you some idea of their thinking. I think Mr. Macdonnell would agree with this. This resolution reads as follows:

> We, the delegates to the Atlantic congress, propose that our nations should form a partnership in freedom with the people of Africa, Asia and Latin America for the great task of development of those continents. Our nation should provide a massive and sustained effort toward this end, believing it to be as essential to the well-being of the world as the welfare of the defence of our citizens. Its aims would be to help the peoples of the less developed countries to achieve a rising standard of living together with individual freedom, human dignity and democratic institutions. It should strengthen the economic as well as the political basis of real independence.

Now, Mr. Chairman, it seems to me that it is within that general framework that any discussions concerning aid should take place.

However, if I might refer for a moment to some of the other means of achieving aid, and then refer back to this particular one, perhaps it might be useful.

Another of the resolutions that was passed reads as follows:

> It will be well for the Atlantic countries to give even more attention than they have in the past to utilizing direct private investment as an instrument for promoting dynamic economic growth in the less developed countries. This is an instrument uniquely at the disposal of the western economies. To this end, we recommend that the highly industrialized, capital generating countries of the Atlantic community should adopt measures that lend encouragement to provide capital flows—through tax concessions, guarantee provisions against non-business risks, through encouraging the establishment abroad of environments compatible to private business operation, and by special efforts to enlist private technical resources in government assistance programs.

Now, having said that, Mr. Chairman, I would submit that the particular bill we are discussing at the present time is simply one of the many means which must be taken in order to provide assistance to the less developed areas.

Mr. Rasminsky, in his evidence today, has indicated a very important and practical by-product of the operations of the bank itself—the encouragement of private loans. This was in answer to Mr. McIntosh's question. It is in that general context I think, Mr. Chairman, that we have to discuss this

particular bill. There are other methods of doing this. I think they are complementary methods. I think the free nations of the west would place themselves in an impossible position, if they try to provide this assistance solely through public means—and just to indicate, Mr. Chairman, that the discussions at the congress last year did envisage the sort of bill we have here, I would like to quote one other short resolution:

> In order to reinforce the attack on world poverty on the scale envisaged we propose that an international development association, adequate in scope to meet the challenge, should be established, comprising all nations willing to participate. This association should be broader than and independent of NATO. It could work either directly or through and with appropriate existing international and regional organizations, including the world bank and other organs of the United Nations.

And, Mr. Chairman, that is exactly what has happened in this particular case. However, in our discussions, I would hope that although it may seem that the need, as referred to by Mr. Stevenson, Mr. Hoffman, Barbara Ward, and others, is great, nevertheless I would point out that each one of those eminent persons has incorporated within their remarks continuously over the years a reference to private enterprise partners. It does indicate to me that this particular step now, a useful step in this venture in partnership in freedom, is but one of the ways to bring it about, and we would be ill-advised if we tried to meet the total need through public means.

The CHAIRMAN: Mr. Broome is next.

Mr. BROOME: I have two or three questions, Mr. Chairman.

The CHAIRMAN: Well, ask them one at a time, will you?

Mr. BROOME: They are short ones: I am not making speeches; I am just asking questions.

The CHAIRMAN: We are trying to distribute this as fairly as possible, and our time is just about up.

Mr. BROOME: Will there be any relationship between this organization and the Ex-Im. Bank?

Mr. RASMINSKY: No.

Mr. BROOME: Indirectly? There cannot be directly. But this association is not likely to bail out the Ex-Im. Bank?

The CHAIRMAN: What is your question, again: what bank?

Mr. BROOME: The Export-Import Bank, the United States.

Mr. RASMINSKY: No, this association is not likely to bail out the Export-Import Bank.

Mr. BROOME: I should hope not. The other question—which is quite short too—is regarding article V. Article V, section 5 says:

> Miscellaneous operations
>
> (v) provide technical assistance and advisory services at the request of a member.

I would like to relate that to another paragraph. This is from section 5 again:

> In appointing officers and staff the president shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible.

Is that really being followed up? In other words, are there Canadian nationals, United Kingdom nationals, Australians, of the participating states or countries working within the World Bank and the organization, and therefore working in this organization too?

Mr. RASMINSKY: Yes.

Mr. BROOME: Or is it that because the United States is the largest contributor, it is more or less under the control of the largest contributor, from a personnel and staff point of view?

Mr. RASMINSKY: No; I would say on the provision which you have quoted, which also occurs in the International Bank agreement—agreement that the administration, that the management of the bank, has made a very serious effort to recruit staff on the widest possible basis. If you look at the numbers of staff and take the proportion of any nationality to the total staff, and compare it with the proportion of subscription of that country—

Mr. BROOME: You cannot have that.

Mr. RASMINSKY: You cannot do that; but, in point of fact, there is a disproportionate number of Canadians on the staff—I mean, disproportionately large. I would not attach too much importance to that, because many of them are girls. They find that in recruiting competent secretaries—

Mr. BROOME: May we keep this to the staff requirements at the executive level now? I am thinking of people in administration and who, therefore, have a hand in policy.

Mr. RASMINSKY: Yes. I would say that Canadians are quite well represented on the staff of the bank. The secretary of the bank, Mr. M. M. Mendels of Montreal, who has done an extremely good job over the years in the bank, is one of the senior officers of the bank. So is the assistant secretary, Lyall Doucett. In the lending department, the assistant director of one of the more important lending departments, the western hemisphere lending department, is Neil Perry, a Canadian. Sidney Wheelock is one of the senior officers of the bank—and there are other Canadians. I cannot think of all the names, but I would say—

Mr. BROOME: It has a truly international flavour?

Mr. RASMINSKY: It has a truly international flavour. And I would say that the attitude of the various individuals on the staff of the bank—and I include the American individuals among those—is that they are working for an international institution, and not that they are working for the United States government.

I think from that point of view the management has been quite successful, (*a*) in recruiting on a wide geographical basis, as it is required to do under the articles of agreement; and (*b*) in trying to create the atmosphere of an international civil service.

Mr. BROOME: The headquarters of both organizations will be in New York, will they?

Mr. RASMINSKY: The headquarters are in Washington. That was determined in the Savannah conference in 1946.

Mr. BROOME: Though they can have branch banks, or branch organizations, are there any?

Mr. RASMINSKY: The Bank has resident representatives in many parts of the world. There is one in Pakistan, one in India, Turkey, and one in several Latin American countries.

Mr. BROOME: But no branches of the bank?

Mr. RASMINSKY: They have a branch office in Paris. I think that about covers it.

Mr. DRYSDALE: There is one point that has bothered me throughout the discussions, and perhaps it is supplementary to what was being referred to earlier. At the present time we are spending $37.83 million, although there seems to be a considerable amount of vagueness as to what the formula is as to how Canada's quota was established.

I am particularly worried, because under the provisions of the articles each member has 500 votes, plus one vote for each $5,000, I think it is; and due to Canada's relatively small contribution, I do not think it has too big an effect in the association.

I can see where we are not, in essence, voting $37.83 million at the present time, but we are voting some unknown factor which could possibly rise up to $100 million, because there is a general increase possible every five years, subject to the votes of the association. I have listened carefully today, and—

The CHAIRMAN: You are wrong in that, are you not?

Mr. RASMINSKY: I am sorry if I have been vague in replying to the question of the way the subscriptions of each country were determined. The subscription of each country in the I.D.A. is proportionate to its subscription in the International Bank. That is the scale that has been used.

The application of that scale in our case results in a subscription of $37 million plus. That is the full extent of our commitment. There is provision in this agreement authorizing the governors to recommend to governments a general increase in subscriptions. But clearly no government is obligated to go from $37 million to $100 million. It would be impossible to do that without the authorization of parliament. The only thing parliament is being asked to do is to vote these articles of agreement which provide for a subscription of $37 million.

Mr. DRYSDALE: What I was trying to get at was this: we are morally committing ourselves for the future. I think that it would be difficult, if the association voted to increase Canada's share to, say, another $20 million or $30 million, for Canada to avoid making that payment. I am thinking of the legal obligation first.

Mr. RASMINSKY: All the association could do would be to give Canada the opportunity to subscribe to additional stock. The association could not vote to increase Canada's share. Throughout the discussion of this matter—the point was even referred to by Mr. Fleming in his opening speech last September, which unfortunately I do not have in front of me; I gave it to the shorthand reporter—but certainly in the discussions that took place in the executive board it was made quite clear, and everybody is in the same position, that the only commitment that governments undertake is the commitment that is incorporated in this document.

Mr. DRYSDALE: You mentioned that it is based on the percentage—I assume—of the payment made to the International Bank for Reconstruction and Development. That, again, takes me back to this question, on the basis of Canada's contribution up to this year. Since it is in essence the same question, perhaps I could ask you this: what is the basis, under Canada's contribution to the I.B.R.D.?

Mr. RASMINSKY: I would be glad to go over that again.

Mr. NUGENT: Do we have to go over these things again, Mr. Chairman?

Mr. DRYSDALE: I do not want you to repeat it, if you have already dealt with it.

Mr. RASMINSKY: If you look at the record of this morning's discussion, you will find I did cover the factors that were taken into account in determining the original scale of contributions to the International Bank.

They can be repeated very briefly: they were, population, size of foreign trade, value of output—that is, gross national product—gold and foreign exchange reserves. These were the main things that were taken into account in determining the relative economic size of the various countries.

Mr. DRYSDALE: The difficulty I have is this: is there a basic formula under which you are operating? In other words, can I, by looking at Canada and

Japan, which are relatively close together, say, "These two countries are in almost the same economic position"?

Mr. RASMINSKY: No, you cannot say that. You can say that in terms of world economy these countries are, give or take a bit, for as I said, no one can determine these things with scientific accuracy, these countries are approximately the same economic size.

Mr. DRYSDALE: The thing that perhaps escapes me—I have not had too much experience in this particular end—is that there would have to be some type of basic formula and a weighting given to factors, such as population, and the gross national product. Is there no formula of that nature?

Mr. RASMINSKY: There was at one time a set of calculations which were never given any official status. It was called the Bretton Woods formula, and it was of exactly the type that you mention; that is, such a percentage of foreign trade, such a percentage of gross national product, such a percentage of foreign exchange reserves. There was certain weight given to population.

There was at one time a formula of that sort which formed a kind of starting place for getting the relative sizes of the contributions of the various countries.

The CHAIRMAN: Gentlemen, it is a few minutes to 4:00 and I guaranteed Mr. Rasminsky that he would be free at 4:00 o'clock.

Mr. RASMINSKY: I do not hold you to the guarantee, to the precise moment, Mr. Chairman.

The CHAIRMAN: I think this would be a good moment to adjourn. I should like your wishes regarding reconvening.

Mr. BROOME: Cannot we report the bill to the house? I think we have been over it enough. I think everybody is in favour of it.

Mr. MACDONNELL: I do not think so.

The CHAIRMAN: I am asking the question.

Mr. ROBICHAUD: We have discussed pretty nearly every angle of it.

Mr. BROOME: We have been backwards and forwards; and we certainly cannot alter the minds of the seventeen nations here. This has been set up and passed by parliaments other than our own. We are either in favour, or we are not.

The CHAIRMAN: Do you mean, by passing the bill?

Mr. BROOME: We have to report it back to the house, do we not?

The CHAIRMAN: That would terminate the work that this committee has to do on it.

Mr. BROOME: And then go on to combines.

Mr. JONES: That seems a unanimous opinion, Mr. Chairman.

The CHAIRMAN: We are going on to combines afterwards; but we will not be doing that before Thursday morning at 9:30. I thought that if it was your wish—and I believe there has been some expression of that wish—we could probably adjourn until tomorrow afternoon, and have Mr. Rasminsky here.

Mr. JONES: I think many of the members have given this subject a lot of thought. Certainly Mr. Robichaud and Mr. Broome—I do not know about everybody. But I think we have all given this problem a lot of thought prior to coming to the committee. There has been quite an extensive discussion. I think you had a motion from Mr. Broome, seconded by Mr. Robichaud.

Mr. BROOME: No, I did not make a motion. What I am concerned about is whether we are fair to Mr. Paul Martin. He has had to be in the house today. I do not know whether Mr. Robichaud can speak for Mr. Martin. I hate to interfere with any committee member.

Mr. ROBICHAUD: I am in no position to speak for Mr. Martin. He may have mentioned to the chairman that he wanted to take a part in this discussion.

The CHAIRMAN: He expressed the wish this morning. Unfortunately, he could not be here this afternoon. I believe he would like to be here. There has been some suggestion from some of the members that they would like to carry on.

Mr. MCINTOSH: If we leave it to Mr. Martin it will be a repetition of the questions.

The CHAIRMAN: Frankly I am not doing this for Mr. Martin. As much as I would like to do these things, after all we have to deal with the committee and it is the wishes of the committee and not the individual which have to be considered.

Mr. JONES: I think the members are all in favor of the bill. It has received very detailed examination in the committee. It is not a subject with which the members are unfamiliar. We had an expression of opinion around the table to the effect that it has been adequately dealt with.

Mr. MACDONNELL: May I suggest one or two things which I think are still vague. It is very hard for me to believe there was any attempt to rationalize this $1 billion. So far as we are concerned it might be all plucked out of the atmosphere. I wonder if Mr. Rasminsky overnight might be able to obtain some information which would help us on this. Secondly, it seems there is another very important point; that is, to what extent if any, is a lead being given to the more backward countries in the way of working up schemes? Mr Hoffman told us something about that in his speech last August in Toronto. We have not discussed that today. I am hipped with this. I think this is incomparably more important than anything else we are doing. I would like to get the last bit of juice out of it, so to speak, in the committee.

Mr. STINSON: We might extract some of that juice Mr. Macdonnell is speaking of tomorrow morning.

The CHAIRMAN: We cannot meet tomorrow morning. I suggest we meet tomorrow afternoon at 3 o'clock, if you wish to. That is just my suggestion.

Mr. MCINTOSH: That will be the final meeting on this?

The CHAIRMAN: That is up to the committee. It is most likely. We will adjourn until 3 o'clock tomorrow afternoon.

The committee adjourned.

EVIDENCE

WEDNESDAY, June 15, 1960,
3:33 p.m.

The CHAIRMAN: Gentlemen, we have a quorum now. Will you come to order. Yesterday we left off in the questioning period, which I do not think we had exhausted.

Mr. STINSON: Mr. Chairman, I think one of the things which was in the minds of some of the members yesterday when Mr. Rasminsky was explaining this measure to us was the reason for the members of the international bank determining upon $1 billion as the total amount to be subscribed by the members of the international development association. Of course, he pointed out that this association was only one of several organizations and funds in the world concerned with making available funds for economic development of the less developed countries. It seemed to me perhaps that one of the reasons they stopped at this figure was that they were unable to get the United States to commit itself beyond its subscription, which was something in the order of $320 million. As I understand it the other contributors subscribed according to the amounts they had subscribed for shares in the international bank.

I think this perhaps is a good time for us to try to see this fund in relation to the other agencies and funds which the western countries have participated in in order to promote economic welfare of the underdeveloped countries. I wonder if, since yesterday, Mr. Rasminsky has thought of anything further he could say to us in this connection.

Mr. LOUIS RASMINSKY, (*Deputy Governor, Bank of Canada*): As to the size of this fund?

Mr. STINSON: And as to the place that this fund has in the overall program of western aid. I know you do not concern yourself directly with these other agencies, but I have no doubt you have some knowledge of them.

Mr. RASMINSKY: First as to the size of this fund, as I stated yesterday the United States made a proposal for a fund of $1 billion for this purpose. In your question you have suggested that the reason for that size was that the United States was willing to contribute their proportionate share of $1 billion, which I think was $320 million. I believe you went on to suggest that other countries were not able to get the United States to increase that amount. As I stated yesterday no other government represented on the executive board suggested that the figure of $1 billion should be increased. I was not instructed by the government of Canada to propose that that figure should be increased. If the figure had been increased, of course the Canadian proportionate share would have been greater than the $37 million. If your question relates to whether there should have been a larger fund, implying as that does an increase in the Canadian contribution, then I would suggest with deference that that question should be directed to the Minister of Finance and not to me. That is a question of policy involving expenditures on which you would not expect me to express a view.

On the second question, as to where this organization fits into the general provision of international aid by the western countries, that is a question on which I might be able to make some comments. I think it would be fair to say that the main vehicle for the provision of aid to underdeveloped countries on a multilateral or international basis by the western countries is the International Bank.

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In the course of my evidence yesterday I gave some indication of the magnitude of the aid that currently is being provided by the International Bank. A very important feature of the use of that method of providing aid is that that method contains what one might call a multiplier effect. The amount of aid that can be provided through the International Bank is greater than the amount of money that the governments have to raise. That situation arises because the International Bank, as a result of the guarantee process which I described in some detail yesterday, is able to tap the private capital market through issuing its own debentures and also through selling parts of loans which it had made out of its own portfolio. I would like to add—which I omitted yesterday—that there are further amounts made available by the private capital market through loans made to bank borrowers simultaneously and in a sense jointly with bank loans. These amounts are not included in the $5 billion which I mentioned yesterday as the total of the bank's lending commitments to date.

As I say, I think the International Bank is the chosen vehicle for the major capital assistance programs on an international and multilateral basis of the western countries. In addition to the International Bank, there are two institutions which are associated with it. These are sister institutions. They play quite a significant role in this connection; one is the International Monetary Fund and the other is the International Finance Corporation. The International Monetary Fund was established at the same time as the International Bank. The articles of agreement were written at Bretton Woods at the same time as the articles of agreement of the International Bank.

The International Monetary Fund has total resources in gold, and the currencies of the member-countries, which now amount to approximately $15 billion. The Canadian contribution to those resources is $550 million. In the case of the International Monetary Fund each country had to pay in principle 25 per cent of its subscription in the form of gold, and the balance in its own currency.

The purpose of the International Monetary Fund is twofold. It embodies a certain code of behaviour in trade and exchange matters. There are provisions regarding the avoidance of exchange restrictions and exchange stability. In addition the Fund provides finance to members to enable them to correct difficulties that may arise in their balance of payment situation. This finance, unlike the finance provided by the International Bank, is short term and indeed is intended to be of a short term character. It is intended to provide time to a country to take the necessary steps to correct imbalances which arise in their international financial picture. These provisions on the availability of these finances, are of particular interest perhaps in present circumstances to the underdeveloped countries. These characteristically are countries which undergo wide fluctuations in their export receipts, because ordinarily they are exporters of primary products which are subject to wider fluctuations in price than the prices of the manufactured goods these countries import, and of course their income position is affected by the ups and downs of demand for those products in accordance with the fluctuations of activity in the industrial countries. The availability, through the International Monetary Fund, of some assurance of financial support for these countries is quite an important factor, I think, in enabling these countries to try to plan their development programs with the knowledge that if things go badly with respect to the prices of their major commodities they always can go to the fund for help to overcome temporary difficulties. I do stress that it is to correct temporary imbalances that this fund exists. That is the second main international institution.

The other institution which is associated with the International Bank is the International Finance Corporation. That is an institution that was set up

some three or four years ago—I cannot, at the moment, think of the exact date—for the purpose of encouraging the flow of private capital to underdeveloped countries.

The international finance corporation has a capitalization of $100 million, which is contributed by members of the corporation—essentially by the members of the bank—again in accordance with the bank's scale of contributions. Our contribution to that was, as I recall, something like $3.2 million.

This organization is a separate legal entity from the bank, although the staff is largely bank staff, and the directors of this corporation are the directors of the International Bank. It tries to act as a catalyst, to encourage the flow of private foreign capital to underdeveloped countries to participate in private industry. It does not make loans to governments; it goes into private institutions. Up to the present it has made 15 or 20 investments totalling, so far as its own resources are concerned, about $15 million or $20 million. I stress that that is so far as its own resources are concerned, because in many cases it has gone into these things in partnership with other foreign capital interests, and with local capital interests of the capital importing countries. So that the total amounts involved have been a good deal larger than $15 million or $20 million.

I think that covers the ground as far as the International Bank, the International Monetary Fund and the International Finance Corporation are concerned. Then there are a number of activities of this sort which come directly under the United Nations.

All these institutions that I have mentioned have a relationship with the United Nations. They are in fact what is technically known as specialized agencies of the United Nations, though they do function independently. The main programs which are directly administered by the United Nations are these: there is a program which is called the expanded program of technical assistance, which was at one time headed up by Hugh Keenleyside, a Canadian; and the special fund of the United Nations that we were talking about yesterday.

The technical assistance program, as its name implies, is concerned with providing expertise in the form of manpower, technicians, to underdeveloped countries who need help in this respect. The total amount of money involved in this program is about $30 million a year, which is raised by national contributions. I think these contributions are essentially of a voluntary nature; I do not think there are assessments involved, as is the case with the other institutions.

Then there is the special fund, which is headed up by Paul Hoffman, which is a more recent institution; it has been functioning for a year or so. There is an advisory board, which has some responsibility for the administration of that fund. As I indicated yesterday, this fund is concerned with helping to establish the pre-conditions of investment, making the surveys, seeing that opportunities that are available come to light, for the investment of larger amounts of money.

Mr. MACDONNELL: May I ask a question there: where does the initiative lie there; is it entirely with the countries that are expected to benefit, or is there an initiative by the official body too?

Mr. RASMINSKY: I think it lies with both, Mr. Macdonnell, and not only with the official body concerned—not only with the special fund; but with all the agencies. I think that basically the initiative would lie with the country concerned, which would come to the special fund and say, "We would like this, or that, project to be financed". But it would also be the case that a country might come to the International Bank with an application for a loan, and he International Bank might say, "Well, before deciding this, we believe that there should be a general survey of your resources, or a survey of this or that river

basin, to see what are the possibilities of power development, irrigation. We think you should talk this over with Paul Hoffman, because it looks to us as though it is the sort of thing that the special fund might well undertake".

To illustrate the type of thing which is undertaken by the special fund, let me pick those that are listed here for the first year in Africa. If anybody is interested in any other part of the world, the information is set out here very conveniently in a geographical classification. In Ghana they undertook a survey of the Volta flood plain; that is, as to what would happen to the area that would be flooded if the huge Volta river project were ever undertaken. In Libya they did some work in connection with a technological institute, in the United Arab Republic, Egyptian region, some work was done in connection with drainage of irrigated land. Also, there was a soil survey in Egypt from aerial photographs. In Nigeria there was a survey of the dam site on the Niger river.

In most cases these surveys are undertaken using some other specialized agency of the United Nations which is well equipped to do the actual work. This particular survey in Nigeria, for example, is being undertaken by the International Bank. Many of the other surveys are undertaken by F.A.O.—those having to deal with agriculture. The survey of the technological institute in Libya was undertaken by UNESCO.

That is the general picture so far as the special fund is concerned. As I say, it is a new institution; but I think that those who have had to deal with it feel quite encouraged by the work that it has done as holding out promise of accomplishing something that will be very useful to the underdeveloped countries. I believe I am right in thinking that these are the major efforts of the western countries as reflected either in the United Nations or, broadly, through the International Bank and the International Monetary Fund.

I.D.A., the International Development Association, if it is established, will supplement these broad multilateral efforts in the ways that we went over yesterday, by providing finance for purposes having high developmental priority, on repayment terms that are less onerous than those involved in conventional loans, or loans of the type that the I.B.R.D. makes.

To complete the story, I think perhaps I should mention that there are regional development banks of various sorts, with more limited membership. For example, there is the European development bank, which has been operating for the last two or three years. There is the inter-American development bank, which was established this last year, with, if I am not mistaken, an initial capitalization of $1,000 million. I am not absolutely certain of that figure, but I am pretty sure that it is right. There is also the Arab development bank, which has been talked about during the last couple of years, though, so far as I know, that bank has not as yet been established.

Mr. JONES: Mr. Rasminsky, in order to complete the picture, I wonder if you could give us some further information. I notice that you have not mentioned the Colombo plan—that type of program.

Mr. RASMINSKY: No; thank you very much. I was dealing with international efforts. But, of course, to complete the picture one would have to mention the bilateral activities of the donor countries. Of course, the first thing that we think of is the Colombo plan. I am sure that it is not necessary for me to say anything about our own contributions to the recipient countries under the Colombo plan.

The Colombo plan is a kind of general term; it is an umbrella. The relationships are actually bilateral, and there is no international institution connected with the Colombo plan. Our own contribution was recently raised by the government from the level of $35 million a year—which it had been for some years—to the level of $50 million a year. In addition, and outside the Colombo plan, we have the West Indies program, a program of economic assist-

ance to the West Indies involving $10 million; and our own technical assistance program. There has also recently, as you know, been discussion on the African situation and some type of a special program for Africa. In addition, one should mention the Commonwealth scholarship scheme that was decided upon through Canadian initiative at the Commonwealth conference in Montreal in September, 1958. That is, I think, the story so far as Canada is concerned.

Of course, quantitatively, the largest amounts of money that have been made available for economic assistance to underdeveloped areas have come from the country which is best able to make them available, namely, the United States. There, the amounts that have been made available have varied from year to year; but they are in the neighbourhood, on straight economic aid, of a billion and a half to two billion dollars a year. Of course, substantial amounts are made available by the United Kingdom through grants; partly through their colonial development fund, partly in other ways, and also through loans to underdeveloped countries.

I suppose, to make the picture complete, one should also again refer to the fact that the Soviet Union has, in recent years, made what seemed to be quite substantial sums available to underdeveloped countries.

Mr. STINSON: Mr. Chairman, I wonder if Mr. Rasminsky knows where one can find something in the way of reliable information on what the Soviet Union has done in this field?

Mr. RASMINSKY: I do not, I am sorry. They, of course, do not publish anything—at least, nothing I would be able to deal with.

Mr. SOUTHAM: There is an interesting observation on that. We here all know of discussions that are now taking place at international level and at governmental level about the world being divided into two ideologies, and the competition for man's mind through these humanitarian efforts. What contribution has Russia been able to make, and how effective is it say, in comparison to the western world, and especially the more privileged nations like ours? I think that is something very pertinent.

Mr. JONES: Have not the Americans made some rough sort of compilation?

Mr. RASMINSKY: The Americans have made a rough sort of compilation. I saw a statement attributed to Secretary Herter the other day suggesting that the Russian provision of economic aid was at the rate of about $800 million or $900 million a year. Judging from the newspaper accounts one reads of their visits to various people and loans made here and there, I have the impression that their rate of assistance to underdeveloped countries is being stepped up.

Mr. RYNARD: Mr. Chairman, I wondered if Mr. Rasminsky, would tell us how much money is going into that fund for the education of students from underdeveloped countries, the amount and how much of it has been taken up?

Mr. RASMINSKY: No, sir, I am sorry, I do not have information on that.

Mr. RYNARD: I wonder if we could get that information?

Mr. RASMINSKY: I am sure it must be available.

Mr. RYNARD: Thank you, very much.

Mr. CRESTOHL: Mr. Chairman, perhaps the question I am going to ask has been asked before. Who sets up the ratio of the contributions? I see that has already been done by the schedule. How is that done, what was the yardstick used for setting it up, and who did it?

The CHAIRMAN: Mr. Crestohl, we went into that twice yesterday morning and yesterday afternoon, and I would refer you to the minutes, when we get them—

Mr. CRESTOHL: Thank you very much, Mr. Chairman.

The CHAIRMAN:—because it is rather lengthy, to go into it all again. Any other questions?

Mr. HORNER (*Acadia*): I wonder if Mr. Rasminsky would care to say as to whether or not this I.D.A. will facilitate Canada in accepting foreign currency and allowing Canada to use it as counterpart funds?

Mr. RASMINKY: I do not see how that could arise.

Mr. HORNER (*Acadia*): You do not think it will?

Mr. RASMINSKY: The Canadian contribution will be a capital subscription. What Canada will have to show for its capital subscription will be a certificate that we have subscribed.

Mr. HORNER (*Acadia*): Along the line of questioning I asked you yesterday on any American surplus disposal, I wondered if Canada could accept foreign currency from any country, then turn this currency over to the I.D.A. and accept a certificate on it, if the I.D.A. was able to use it?

Mr. RASMINSKY: I think, if the government of Canada decided it was in the Canadian interest to do that, that the possibility of doing so would not be excluded.

In connection with our Colombo plan operations, certain of our gifts give rise to counterpart funds with regard to the disposal of which the Canadian government has some say. I do not know what the precise accounting procedures used are, whether we actually have title to the counterpart. For example, these arise in connection with any gifts we have made in the past of saleable products—for example, wheat to India or to Pakistan. As they had been sold there would have been a counterpart in the local currency. We would have some say as to what use was made by the governments concerned of the counterpart. If it were felt that there were any Canadian interest to be served by taking some of these counterpart funds with the agreement of the country concerned, and handing them over to the I.D.A. and getting a developmental certificate, or whatever evidence of the gift we would get in exchange—if it were felt there was any Canadian interest to be served by doing that, I think it is possible that could be done. I might say that, off hand, I do not see what Canadian interest would be served by doing that.

Mr. HORNER (*Acadia*): In the west we hear, from time to time, that Canada should accept foreign currency for the sale of agricultural products; and I wanted to work along this line of thought, that we might be able to sell some more of our agricultural products, accept their currency, and then receive a certificate for development under this I.D.A., for that purpose?

Mr. RASMINSKY: Well, if we were prepared to sell anything for a currency that could not be converted back into Canadian dollars, we would not need the I.D.A. to enable us to do that. We could do it without the I.D.A.

Mr. JONES: It says in the articles that the subscription from countries such as Canada, in schedule A, should be all in gold or convertible currency?

Mr. RASMINSKY: That is right. But in addition to the normal subscription there is also provision for supplementary contributions in the currency of another country.

The CHAIRMAN: Mr. Rasminsky, a question that I had is this: Take a private company—and I will quote an example, the Aluminum Company of Canada, they went into India and established there an industry of between $22 and $25 million. If they came to the bank, or to this association, would they get aid, say they did not have enough capital themselves to do the thing?

Mr. RASMINSKY: They certainly would be eligible for aid. One cannot say in any particular case whether the bank would make a loan, but I could mention that one of the early loans made by the bank was to the Brazilian Traction Company. The bank has made several loans to the Brazilian Traction Company, now aggregating, I believe, something just under $100 million.

All the loans made by the Bank must be guaranteed by the government of the country in which the project is located. Consequently, the loans made by the bank to the Brazilian Traction Company have been guaranteed by the government of Brazil.

There have been other cases too of banks lending to private companies. One that occurs to me at the moment is a loan to a large Indian iron and steel company—I believe it is the Tata iron and steel company. In that case, of course, the loan was guaranteed by the government of India.

Mr. McINTOSH: Just as a matter of information, Mr. Chairman, why was not New Zealand included in schedule A?

Mr. RASMINSKY: That question should really be addressed to New Zealand. New Zealand has not joined the Fund and the Bank.

Mr. McINTOSH: Is there any particular reason why a country like New Zealand did not join? Australia is in it, I notice.

Mr. RASMINSKY: I think New Zealand is the only country in the Commonwealth which is not a member of the fund and the bank.

Mr. McINTOSH: Is there any particular reason you know of?

Mr. RASMINSKY: Of course, it is up to each country to decide whether they see advantages in membership and, presumably, the New Zealanders, up to the present, have decided either that they do not see any advantages of membership or, if there are advantages they see, that they are outweighed by disadvantages. Whether the disadvantages they see are related to their domestic political situation or to factors connected with the institution, themselves, I do not know.

The CHAIRMAN: Gentlemen, shall we go through the bill?

Mr. MACDONNELL: Mr. Chairman, could I raise one point. As I was asking yesterday about the relationship between this $1 billion and the other amount mentioned, I would like to bring to the attention of the committee a statement by Hoffman which, indeed, was directed to my attention by Mr. Rasminsky. I think Hoffman sums the thing up in a pretty sensible way, after pointing out the great advantages of the I.D.A., and says this:

> There is, nevertheless, a major shortcoming in the international development association as currently projected: The authorized capitalization planned for I.D.A. is only $1 billion. One billion dollars over five years! This is obviously too little to come anywhere near meeting the minimum investment gap of $2 billion a year. And yet, there is no other institution either in existence or on the drawing boards that can take up the slack!

Then he goes on and says this:

> There is a great deal to be said for creating I.D.A. more or less as planned so that it can start operations as soon as possible, even though on a small scale, and gain experience. But it is of great importance that we consider I.D.A. from the beginning as an institution that must expand its operations promptly to fill a substantial part of the investment gap. In my view there is urgent need for I.D.A. to expand operations rapidly after the first year. We should contemplate I.D.A. operations through most of the 1960's of no less than $1 billion in investment each year. If I.D.A. is not promptly expanded after a year or so of operations, then a new institution will have to be created.

Now, I have read that to the committee because my hope is we may see fit, as a committee, to draw public attention to that.

I may be a little prejudiced in this, but it seems to me self evident, and I would hope that while approving the bill we might see fit to say something about welcoming it, praising the government for its action—or do anything

you like—and drawing attention to the fact that this competent, practical man, who appraises the situation with his particular practical experience and with his wonderful success in the Marshall plan in Europe, makes this comment.

I do not think it is derogating the responsibility of the government or doing anything wrong, if we just bring this to public attention. In my opinion, an enormous amount has to be done in the way of educating public opinion. If you have something like this on the record anybody who takes the trouble to look at it can say, "Well, the committee had this in mind, and they quoted what Hoffman had to say."

Mr. THOMAS: Mr. Chairman, I think it would only be fair to point out, in that connection, that Canada cannot very well move any faster than our colleagues in this.

Mr. MACDONNELL: I am not suggesting we should. I am only suggesting that we express our views. It would have to be done all together, and provision is made in the agreement for an extension later on. It is not a new idea at all.

Mr. THOMAS: I sympathize with Mr. Macdonnell's point of view.

Canada should be prepared to move just as fast as any other nation in the association.

Mr. MACDONNELL: It is a question of pace, and somebody has to emphasize the need of increasing the pace.

Mr. THOMAS: And express willingness to do so.

The CHAIRMAN: Is that the general feeling of this committee?

Mr. STINSON: Mr. Chairman, could the committee's view be expressed somewhat along these lines—that the committee approve the statement just recently made by Mr. Paul Hoffman, the director of the United Nations special fund, which was as follows—and I think a short statement could then be inserted in the record—such provision to be made in accordance with the appropriate article in the articles establishing this association.

I think that might be an easy way of indicating our feeling.

The CHAIRMAN: Not as a resolution of this committee, but as a recommendation with our report. Is that the wish of the committee?

Mr. MACDONNELL: A recommendation to whom?

The CHAIRMAN: To this government—to the house; we will make note of this statement by Mr. Hoffman.

Mr. MACDONNELL: Right.

Mr. WOOLLIAMS: Is this not correct, Mr. Chairman? In other words, we endorse the objectives but we say, in looking at it, that the fund in itself is inadequate to do the work it will have to do. That really is what we are saying. That is what Mr. Macdonnell is saying.

The CHAIRMAN: Not quite.

Mr. MACDONNELL: No, not quite.

We are saying we are all in favour of the fund; we know there is provision for an increase; we know that so expert a man as Hoffman thinks it will be necessary; we hope the people of Canada will be sufficiently interested in this to keep in touch with what is going on, and if the time comes for an increase, they will be ready to increase it.

I do not think we need to put anything in it which says that it is not adequate at the moment because, it may be. It is conceivable that at the end of the year the fund might not be used up as fast as I think, and as fast as I hope it will be.

Mr. AIKEN: Mr. Chairman, may I suggest that Mr. Macdonnell summarized it very succinctly in expressing his attitude and, perhaps the attitude of other

members of the committee. Perhaps we had better go along with what he has just said, rather than mentioning Mr. Hoffman.

Mr. MACDONNELL: Do you not want Mr. Hoffman mentioned at all? After all, his opinion is of some value; he knows more about this than anyone else in the world. He makes a public statement on it, and I do not think we should fail to indicate that we have a view of our own; but I hope there is no objection to quoting this man, who, really, is an expert.

Mr. RYNARD: I would suggest that Mr. Macdonnell state his opinion, as he has, and back it up by a statement from Mr. Hoffman, who is an outstanding authority. As Mr. Macdonnell says, his work on the Marshall plan is outstanding and, therefore, he has the necessary experience and know-how to know how important this fund could be. I think it is important to include that.

Mr. MACDONNELL: The steering committee will be drafting a report, and submitting it.

I will be glad to make a draft of what I have said for the use of the steering committee.

Mr. MCINTOSH: Mr. Chairman, what are the terms of reference of this committee.

Mr. JONES: Mr. Chairman, are we not to report the bill with or without amendment? I wonder, in view of that, might not expressions of opinion be given in the house? I think they would carry more force there, when they are delivered by an individual member. There are others who may wish to speak on it, and they may do so. However, the normal procedure would seem to me, as Mr. Macdonnell has suggested, that you either report the bill without amendment, amend it, or reject it—and is that not our job?

The CHAIRMAN: That really would not be an amendment.

Mr. Rasminsky would like to give his point of view on this.

Mr. RASMINSKY: Mr. Chairman, it is not a point of view on this, as I would not be entitled to a point of view in regard to this matter. However, although I am sure there is no possibility, or real possibility, of misunderstanding on this score, I would like to say this. As Mr. Macdonnell said, in conversation this morning, I reminded him that Mr. Hoffman had indicated in this pamphlet that he thought this fund should be $1 billion a year. I would not want anything in the record to indicate that I, in any way, had associated myself with that view.

The CHAIRMAN: May I make this suggestion, gentlemen—that the committee, say, appoint one member, Mr. Macdonnell, to get up on the third reading of this bill and express the views of this committee in this regard. I think that would be the simplest way of doing it. I do not know how we could do it otherwise, as we cannot make an amendment.

Mr. STINSON: I think the best solution to this problem is to let the record stay as it is, report the bill without amendment, and one would hope that members of the committee would express themselves, as Mr. Jones has suggested, along the lines that have been discussed, when the bill is back in the House of Commons.

Mr. DRYSDALE: Mr. Chairman, when I raised this same problem before—as to the fact we might be committing ourselves to the future, due to the articles, Mr. Rasminsky pointed out at that time that as it would have to come before parliament, it was not really a subject of consideration before us.

I am just wondering as to the necessity of these observations at this particular time.

The CHAIRMAN: I think we would be quite in order if one of the members of this committee, on the third reading, expressed our feeling that this fund was not adequate, and quoted Mr. Hoffman's views.

Mr. WOOLLIAMS: Mr. Chairman, are we not in this position—that may be an expression of opinion. By the bill, itself, we are endorsing the founder of the association. We could not change that anyhow, as it would have to be by mutual agreement of all the powers. We are only endorsing it as other nations will have to endorse it, along the lines under which it is set up. I think I am right in that.

The CHAIRMAN: I think you are.

Mr. DRYSDALE: If we give this endorsement, it is like giving a carte blanche so far as the amount of money that would be required by the particular fund, and I think we would have to express our views before an increase is made, depending upon the amount of the increase, and again review it. I think Mr. Woolliams is right; all we have before us is the vote for the $38.3 million—and I think that is all we are entitled to decide upon. However, if the members want to express their individual approval in this, I think it might be of some psychlogical value. But, as Mr. Rasminsky pointed out, it has to come before parliament again.

Mr. WOOLLIAMS: If you turn to page 23, you pick up the countries, and these countries, by agreement, I suppose, have endorsed it by legislation, or other different methods. We are doing it by this bill. Therefore, we could not increase or decrease it unless by special agreement.

All I take, from what Mr. Macdonnell has said, is this: looking at the picture in the future, there may be a suggestion come from Canada that the fund might be increased, if the need or demand arises.

Mr. MACDONNELL: Mr. Chairman, I feel quite safe in expressing my own opinion, but I am wondering whether or not I should express the opinion of the members of this committee, as other members may have different views on this.

Mr. CRESTOHL: Mr. Chairman, as we not estopped from suggesting modifying, or making an amendment to the agreement itself?

The CHAIRMAN: There is no thought of that, Mr. Crestohl.

Mr. CRESTOHL: When I recently asked you how the apportionment was made, I did not get the benefit of that information. If that is what we are talking about, we may be completely estopped from discussing the matter.

Mr. STINSON: If that was the case, what are we doing here then?

Mr. JONES: I would disagree with you.

Mr. CRESTOHL: I think, as I see it, we have just the five sections of the act to review and examine. If we have latitude to make suggestions amendments, or modifications of the agreement itself, well then, if I can have an answer to that question—and that is, whether or not we can modify it; then we can discuss it and suggest amendments. However, I do not think we can, as that has already been agreed upon by others. Canada was represented at that meeting where an agreement was reached, and we are bound by it.

The CHAIRMAN: Gentlemen, I think what we should do is carry on.

Mr. MACDONNELL: I am not suggesting that, and I do not think anyone else has.

Surely, Mr. Chairman, there is nothing to prevent us, having approved the bill, and so on, from making any comments we wish.

Mr. CRESTOHL: Oh, yes.

The CHAIRMAN: I would suggest that is the practice.

Mr. CRESTOHL: But I would not want to include that in our report to parliament.

The CHAIRMAN: No.

Clauses 1 to 5, inclusive, agreed to.

Schedule A agreed to.

Articles of agreement, as covered by clause 2, agreed to.

Mr. MACDONNELL: Mr. Chairman, you might be interested to know that in the British House of Commons there was a very strong statement made, when they debated this, in regard to the inadequacy of the amount, by one of the speakers.

I thought that would be of interest to you.

The CHAIRMAN: Let us follow Westminster on that practice.

Preamble agreed to.

Title agreed to.

The CHAIRMAN: Shall I report the bill?

Some HON. MEMBERS: Agreed.

The CHAIRMAN: Gentlemen, we will adjourn until tomorrow morning at 9.30. The meeting will be held in this room.

I might say that personnel from the Retail Merchants Association will be here, in connection with the combines bill.

Then, tomorrow afternoon, at 3 o'clock, we will have the Canadian Association of Consumers. That meeting will also be held in this room.

I have asked the consumers to come tomorrow morning to listen in on the proceedings.

Mr. JONES: Mr. Chairman, before we adjourn, I think we should express our appreciation to the very distinguished testimony which has been given by Mr. Rasminsky.

Some HON. MEMBERS: Hear, hear.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 2

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

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THURSDAY, JUNE 16, 1960

FRIDAY, JUNE 17, 1960

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WITNESSES:

Mr. David A. Gilbert, Managing Director, Retail Merchants Association of Canada, Inc.; Mr. J. T. Crowder, Canadian Wholesale Council; Miss Isabel Atkinson, National President and Mrs. Isabel Winkler, Ottawa Office, Canadian Association of Consumers.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23386-6—1

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. Cathers, Esq., M.P.

Vice-Chairman: E. Morrissette, Esq., M.P.

and Messrs.

Aiken
Allmark
Asselin
Baldwin
Bell (*Saint John-Albert*)
Benidickson
Bigg
Brassard (*Chicoutimi*)
Broome
Campeau
Cardin
Caron
Cathers
Creaghan
Crestohl
Drysdale
Fisher
Hales
Hanbidge
Hellyer
Horner (*Acadia*)
Howard
Jones
Jung
Leduc
Macdonnell (*Greenwood*)
MacLean (*Winnipeg North Centre*)
MacLellan
Martin (*Essex East*)
McIlraith
McIntosh
More
Morton
Nugent
Pascoe
Pickersgill
Robichaud
Rowe
Rynard
Skoreyko
Slogan
Smith (*Winnipeg North*)
Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams.

Antoine Chassé,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

HOUSE OF COMMONS, Room 112-N.

THURSDAY, June 16th, 1960.
(9)

The Standing Committee on Banking and Commerce met at 9.30 o'clock a.m. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Aiken, Baldwin, Bell (*Saint John-Albert*), Benidickson, Brassard (*Chicoutimi*), Cathers, Crestohl, Fisher, Hales, Hanbidge, Horner (*Acadia*), Howard, Jones, Leduc, Macdonnell (*Greenwood*), Martin (*Essex East*), McIlraith, McIntosh, Morton, Pascoe, Pickersgill, Robichaud, Rynard, Southam, Thomas, Woolliams.—26.

In attendance: Honourable Davie Fulton, Minister of Justice; Mr. T. D. MacDonald, Director, Investigation and Research, Combines Branch, Department of Justice; Mr. David A. Gilbert, Managing Director, Retail Merchants of Canada, Inc., and the following members of the Canadian Wholesale Council: Messrs. J. T. Crowder, J. V. R. Porteous, J. B. Porteous, J. G. Dawson, J. Gutsell, T. H. Whellams, D. C. McKellar, S. E. Gilchrist, G. C. Betts, D. Nettleton, Raymond Poupart, A. J. Duhamel, J. C. Briggs, W. J. Irvine and A. Leduc.

The Committee had before it for consideration Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

On motion of Mr. Baldwin, seconded by Mr. Martin (*Essex East*),

Ordered,—That pursuant to Order of Reference of Thursday, February 25, 1960, 2,000 copies in English and 750 copies in French be printed from day to day of the Committee's Minutes of Proceedings and Evidence relating to Bill C-58.

Honourable Davie Fulton addressed the Committee briefly.

Mr. Gilbert submitted a brief on behalf of the Retail Merchants Association of Canada, Inc., and was questioned thereon.

Mr. Crowder also addressed the Committee briefly.

It was agreed that the examination of Mr. Gilbert be continued later this day.

At 11.00 o'clock a.m. the Committee took recess.

Antoine Chassé,
Clerk of the Committee.

AFTERNOON SITTING

(10)

The Committee resumed at 2.05 p.m., the Chairman, Mr. C. A. Cathers, presiding.

Members present: Messrs. Aiken, Baldwin, Bell (*Saint John-Albert*), Benidickson, Caron, Cathers, Crestohl, Fisher, Hales, Hanbidge, Hellyer, Horner

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(*Acadia*), Howard, Jones, Leduc, Macdonnell (*Greenwood*), MacLean (*Winnipeg North Centre*), Martin (*Essex East*), McIlraith, McIntosh, Morton, Pascoe, Rynard, Southam, Thomas and Woolliams.—25.

In attendance: From *Retail Merchants Association of Canada Inc.:* Mr. D. A. Gilbert, Managing Director. From the *Canadian Association of Consumers,* Miss Isabel Atkinson, National President and Mrs. Isabel Winkler of the National Office, Ottawa.

Moved by Mr. Martin (*Essex East*), seconded by Mr. Hales, that the brief of Mr. Gilbert be made part of the evidence. Agreed.

The Committee discussed the calling of a special meeting to inform the members of the future agenda.

The examination of Mr. Gilbert was continued until 3.00 p.m., at which time it was adjourned until Friday, June 17th at 9.30 a.m.

Miss Atkinson then presented a brief on behalf of her Association.

The Committee questioned Miss Atkinson on her brief.

At the conclusion of the questioning, Miss Atkinson was thanked by the Chairman for her appearance.

The Committee adjourned at 5.45 p.m. until Friday, June 17th at 9.30 a.m.

Clyde Lyons,
Acting Clerk of the Committee.

HOUSE OF COMMONS, Room 253-D.

FRIDAY, June 17, 1960.
(11)

The Standing Committee on Banking and Commerce met at 9.38 a.m., the Chairman, Mr. C. A. Cathers, presiding.

Members present: Messrs. Aiken, Baldwin, Benidickson, Caron, Cathers, Fisher, Hales, Hanbidge, Horner (*Acadia*), Howard, Jones, Leduc, Macdonnell (*Greenwood*), Martin (*Essex East*), McIntosh, Morton, Pascoe, Pickersgill, Rynard, Southam, Tardif and Woolliams.—22.

In attendance: Honourable E. D. Fulton, Minister of Justice; Mr. D. A. Gilbert, Managing Director, Retail Merchants Association of Canada, Inc.

A question of privilege was raised by Mr. Pickersgill on the point that the Committee should not question Mr. Gilbert until all the members had received copies of the brief presented to the Progressive Conservative Caucus.

After discussion, Mr. Pickersgill moved, seconded by Mr. Caron, that "there be no questions on the memorandum of May 4th to the Tory Caucus until the document is in the hands of all members of the Committee".

The question being put, the motion was negatived on the following division: Yeas: 10; Nays: 10. The vote being equal, the Chairman cast his vote against the motion.

It was then moved by Mr. Jones, seconded by Mr. Pickersgill that "Mr. Gilbert be requested to return to give further testimony at such time as the Committee may desire".

The question being put, it was unanimously resolved in the affirmative.

The questioning of Mr. Gilbert was resumed.

At 11.00 a.m. the Committee adjourned until Tuesday, June 21 at 9.30 a.m.

Clyde Lyons,
Acting Clerk of the Committee.

EVIDENCE

THURSDAY, June 16, 1960.
9.30 a.m.

The CHAIRMAN: Gentlemen, I see we have a quorum. I would ask the Minister of Justice to come up and sit at the head table.

Hon. E. D. FULTON (*Minister of Justice*): I would be glad to, Mr. Chairman, if the committee wants it.

The CHAIRMAN: I do not think there will be any objection to that.

Mr. PICKERSGILL: Mr. Chairman, I will not raise the same objections as the Minister of Justice raised in the estimates committee some years ago.

Mr. FULTON: The point there is quite different: the honourable member who was then a minister had himself made a member of the committee; and I am not a member of this committee.

Mr. PICKERSGILL: It was before I was made a member of the committee that the minister raised an objection.

The CHAIRMAN: I see we are getting started on the right foot.

Mr. MARTIN (*Essex East*): I would like to disagree with my colleague, and say that if the Minister of Justice is going to be in the room he should be at the head table, but not at the head of things.

The CHAIRMAN: As I say, that is a good start.

Mr. JONES: Perhaps we could get on to the business of the committee, Mr. Chairman?

The CHAIRMAN: I would like to ask Mr. Crowder, who represents the wholesale association, to introduce the delegates.

I might say that due to the lateness of the C.N.R. train—or is it the C.P.R.—Mr. Gilbert and the delegation from the retail merchants association are a little late. So, Mr. Crowder, would you come up here?

I would like to ask Mr. Crowder to introduce the members at the rear of the room by name and by their organization. These gentlemen are here, not to make any presentation, but to answer any questions that the committee might wish to ask.

Mr. J. T. CROWDER (*Secretary-Manager, Canadian Wholesale Council*): These gentlemen, Mr. Chairman, are all members of wholesale associations which are national in scope, and they have been drawn here at very short notice. Some of them are executive officers who have sat in, during the last two years, in considering this legislation. Some of them are pinch hitting for others who could not come.

Our chairman of the wholesale group is Mr. J. V. R. Porteous of the Canadian wholesale council. I would ask you, Mr. Porteous, if you would have the others announce themselves and what group they belong to.

Mr. J. V. R. PORTEOUS (*Canadian Wholesale Council*): I start on my right, with your permission, Mr. Chairman. I am J. V. R. Porteous, Canadian Wholesale Council.

Mr. J. B. PORTEOUS: J. B. Porteous, Canadian wholesale drygoods association.

Mr. J. G. DAWSON: J. G. Dawson, drug Wholesale.

Mr. J. GUTSELL: J. Gutsell, drug Wholesale.

Mr. T. H. WHELLAMS: T. H. Whellams, Canadian automotive wholesalers' and manufacturers' association.

Mr. D. C. MCKELLAR: D. C. McKellar, General Manager, Canadian electrical distributors' association.

Mr. S. E. GILCHRIST: S. E. Gilchrist, Canadian automotive electrical association.

Mr. G. C. BETTS: G. C. Betts, Canadian automotive electrical association.

Mr. D. NETTLETON: D. Nettleton, Canadian jewellers' association.

Mr. R. POUPART: Raymond Poupart, national association of wholesale tobacco and confectionery dealers.

Mr. A. J. DUHAMEL: A. J. Duhamel, national association of wholesale tobacco and confectionery dealers.

Mr. J. C. BRIGGS: J. C. Briggs, national association of wholesale tobacco and confectionery dealers.

Mr. W. J. IRVINE: W. J. Irvine, Canadian toy and smallwares association.

Mr. A. LEDUC: A. Leduc, Canadian toy and smallwares association.

Mr. CROWDER: Mr. Chairman, we will supply you with a list of all the organizations they belong to. All the associations which are identified with the wholesale council are spelt out in the brief Mr. Gilbert will present today—if the train gets here.

Mr. CRESTOHL: When you speak of "wholesalers", is it wholesale distributors or wholesale manufacturers, or is it both?

Mr. CROWDER: Most of them are wholesalers. There are a few manufacturers.

Mr. CRESTOHL: Wholesale distributors and not manufacturers?

Mr. CROWDER: Mostly wholesale distributors; but there are a few manufacturers who belong, because people like General Electric do both wholesaling and manufacturing.

The CHAIRMAN: I might say gentlemen, we welcome you here and appreciate very much your giving your time to come here to give us your views on this very important subject.

I will now ask for a motion regarding printing of the minutes of proceedings. What number of copies in English and in French should we have? I think we had a little discussion on it the other day, when we combined the two bills, but this is for the bill C-58 today.

Mr. BENIDICKSON: Have you any suggestions, Mr. Chairman? I think the other day it was thought this would have a fairly wide area of interest, and that we should have 5,000.

Mr. JONES: 5,000 English and 2,000 French, I think.

The CHAIRMAN: 5,000—that is a lot more than we have ever had before. Those in favour of 5,000?

Mr. BENIDICKSON: I am not making the motion, but I asked if you had given it further thought.

The CHAIRMAN: No. We had a little discussion on it the other day, but it was combined with the other bill.

Mr. MARTIN (*Essex East*): Could we not wait and be guided by the demand that is apparent?

The CHAIRMAN: I think we have to anticipate the demand.

Mr. CRESTOHL: Have you had any request, to guide you in determining the amount?

The CHAIRMAN: I have had no requests for the minutes of this committee, as yet.

Mr. BALDWIN: Under those circumstances, until the demand is made known, I make a motion for the printing of 2,000 copies in English and for 750 in French.

Mr. MARTIN (*Essex East*): I second the motion.

The CHAIRMAN: All those in favour of the motion?

Motion agreed to.

The CHAIRMAN: Now I would like to call on Mr. Fulton, the Minister of Justice, to open the discussion. I understand that he has a very important meeting today, and he will only be here for a short time to listen to the proceedings.

Mr. Fulton?

Mr. FULTON: Mr. Chairman, I appreciate your invitation and the permission of the committee to sit here and attend the meetings. I had intended to be available at all times, at every session of your committee, for such help as I might be able to give. I will do my best to be available at every sitting of the committee, but there are one or two matters over which I have no control or, at least, which I cannot alter—such as the meetings to negotiate the Columbia river agreement. The British Columbia ministers are down here now for that meeting; and the American negotiating team will be here next week for two days' meetings. Therefore, I am afraid I will not be able to be here every time you meet. However, I will have Mr. T. D. MacDonald, the director of investigation and research in the combines branch, present at every meeting; and, perhaps, I could ask Mr. MacDonald to stand so you can identify him.

Mr. Macdonald, or some other senior member of his staff, will be here at every meeting for such assistance as he may give.

Mr. Chairman, I do not think it would be appropriate if I attempted at this stage to take advantage of your invitation by saying how good a piece of legislation this is, because that has been discussed in the House of Commons and, of course, the purpose of this committee is to hear witnesses who are concerned with the operation of the legislation and to discuss with them their views on the working of the legislation; so I will not, at this time, go into any detailed discussion of the bill. If you wish it, at a later stage I will be glad to answer questions, with the assistance of my staff.

However, I would think it would probably be appropriate to wait, in that regard, until you come to consider the bill clause by clause, at which time I and the director will be available to answer any questions you wish to ask.

Of course, during this part of the meetings of the committee, if you want to direct any questions to us we will also be glad to answer and, indeed, to help this committee in any way we can; because it is a complicated piece of legislation, and I think it extremely desirable this committee should give it full study, with the opportunity for as many as possible from outside to be heard and to discuss with the committee their views on how this amending bill will work, and any other changes they think should be made.

I assured the House of Commons, when the bill was debated there, that while we think we have produced a good piece of legislation, the government does not intend to be rigid about it, and if, after discussion, there are ways in which members of the committee feel it could be improved and amendments are moved, I will, as minister, examine them with an open mind. I hope this committee's report, when it reports the bill back to parliament, will be valuable and helpful; and I can assure you that the government will so approach any report or suggestions the committee has to make.

I think that is all I should say, Mr. Chairman; and I am certain that the hearings will prove interesting and valuable.

The CHAIRMAN: Thank you very much, Mr. Fulton.

Mr. PICKERSGILL: I think we all understand that the minister can not be here when these Columbia meetings are being held. That has to be given priority because of its national importance; but I was wondering if the minister could arrange to have the Solicitor General here, for our assistance, when the minister himself cannot be here?

Mr. FULTON: I will certainly see if that can be done.

The CHAIRMAN: Mr. Gilbert, will you come forward, please?

Gentlemen, come to order, please. Mr. Gilbert of the retail merchants association of Canada has finally arrived, thanks to the Canadian National Railways, was it?

Mr. DAVID A. GILBERT (*Managing Director, Retail Merchants Association of Canada Inc.*): No, thanks to the pool train.

The CHAIRMAN: There is a politician for you. All the members of the committee, I believe, have received copies of the brief which were sent to them, and I want to compliment Mr. Gilbert and his association for presenting the briefest brief I think I have ever read.

Now I am going to call on Mr. Gilbert to make a few remarks.

Mr. GILBERT: Mr. Chairman, Mr. Minister of Justice, and members of the banking and commerce committee and also my colleagues who are forming part of our delegation—and with whom I have not had the pleasure of meeting this morning, so very definitely there is no collusion in this presentation. My brief reads as follows:

We wish to express our sincere thanks and appreciation for your courtesy in meeting with us today to discuss the subject of Bill C-58, an act to amend the Combines Investigation Act and the Criminal Code, which has been referred to your committee after passing second reading in the House of Commons, June 6th, 1960.

It is our honour to speak on behalf of the Distributive Trades Advisory Committee, which is a voluntary group officially representative of the majority of the important National Retail and Wholesale Trade Associations in Canada, who support and endorse the views expressed in this submission. They are identified as follows:

Retail:

Retail Merchants Association of Canada, Inc.
The National Foods Division of the R.M.A.
The National Automotive Trades Division of the R.M.A.
Canadian Association of Radio, Appliance and Television Dealers.
Canadian Retail Furniture Dealers Association.
Canadian Jewellers Association.
Canadian Retail Hardware Association.
Canadian Pharmaceutical Association.

Wholesale:

Canadian Wholesale Council.

(The Wholesale Associations identified with the Canadian Wholesale Council are:

Canadian Automotive Electric Association.
Canadian Wholesale Grocers Association.
Canadian Fruit Wholesalers Association.
Canadian Electrical Distributors Association Inc.
Canadian Fishing Tackle and Sports Association Ltd.
Canadian Smallwares & Toy Wholesalers Association.
National Association of Wholesale Tobacco Dealers & Confectioners.
Ontario Plumbing & Heating Council.

Canadian Sporting Goods & Cycle Association.
Canadian Wholesale Dry Goods Association.
Canadian Automotive Wholesalers & Manufacturers Association.
Canadian Electric Wholesalers Association.
Canadian Wholesale Hardware Association.).

In addition to the foregoing, the following organizations endorse our views with respect to the repeal or amendment of Section 34 of the Combines Investigation Act:

Canadian Retail Federation.
Canadian Shoe Retailers Association.
Canadian Manufacturers Association.
Canadian Electrical Manufacturers Association.
Radio, Electronics and Television Manufacturers Association.

It is our intention this morning to confine our statements strictly to that portion of Bill C-58 dealing with Trade Practices:

"PART V.

"OFFENCES IN RELATION TO TRADE".

Since 1957, our delegations have had numerous meetings at high levels of government, including a conference with the Prime Minister and Members of the cabinet. We have met with the Minister of Justice and officials of his department on several occasions.

In the light of our submissions, and the evidence filed with the appropriate government departments, we have made the firm request that the government take the necessary steps to:

> Repeal or amend Section 34, of the Combines Investigation Act to restore normal business relationships between manufacturer, wholesaler and/or retailer—the return of the common-law right of the individual manufacturer, distributor and dealer to direct his own marketing policy.

To thoroughly appraise the unanimity of the industry's support of this request we have, during the past two years, conducted a nation-wide series of meetings in the principal cities and towns of Canada to give retailers, wholesalers and manufacturers the opportunity to individually express their views on this subject. Without exception, these meetings have resulted in overwhelming support of Resolutions urging the Government to repeal or amend Section 34 of the Combines Investigation Act.

Our purpose toddy is to re-affirm our position in respect to Section 34 and to state that it is the carefully considered opinion of all the distributive industries forming this delegation that everyone, including the consumer, would be much better served by the outright repeal of section 34 rather than by amendments.

On the other hand, we realize and appreciate the fact that the government is well satisfied, as the result of enquiries and investigations which have been completed, that the amendments contained in Bill C-58 will adequately meet the situation in respect to unfair and unethical trade practices which are damaging to the consumer interest and the distributive industries.

It is, therefore, the wish of our delegation to convey to the banking and commerce committee, in unmistakable terms, our complete support and endorsement of the provisions of Bill C-58, exactly as they stand, in respect to "Offences in relation to Trade".

It is our view that the amendments are a forward step in the restoration of an orderly system of distribution of consumer products and that they reflect the willingness of the Government to take forthright action in protecting the public interest and, at the same time, safeguarding the future of small business in particular.

Your chairman, Mr. Cathers, has pointed out the brevity of our brief. We have intended it as such, because we have written reams and reams of material on this subject. On May 4, when we were here meeting with the steering committee, and the Department of Trade and Commerce, and the government caucus, we left behind us some 275 pages of documents; so this shows that there is a heap of material on this subject available.

But we felt that for the purpose of our appearance here this morning, our representations should be confined first of all to a statement of re-affirmation of the position of our association, and of all those organizations which make up the distributive trades advisory committee, and who are listed in the brief submission we have made.

We reaffirm our position as one in which we feel that, in the best interest of all concerned, including the consumer, section 34 of the Combines Investigation Act should be entirely repealed. On the other hand we have regard for all those elements which have caused the government to be satisfied with the amendments which have been introduced, dealing with trade practices, to meet the situation; and we are here to advise your committee that we are wholeheartedly one hundred per cent, supporting the provisions of the bill respecting the trade practices section, part V, and that we would like to see your committee recommend them to parliament exactly as they stand.

I do not want to belabour this matter any further, so possibly Mr. Crowder might care to make some remarks. We feel that you might wish to devote the time of this meeting to a series of questions and answers and a general discussion, and we hope that we are prepared to participate in such a discussion to the extent that we may be helpful. Thank you.

The CHAIRMAN: Thank you, very much, Mr. Gilbert. You certainly not only sent us a brief brief, but you have also made a brief presentation. The committee is open now for any questions. First, Mr. Morton.

Mr. MORTON: Mr. Chairman, Mr. Gilbert very kindly has come to us perhaps to answer some of the questions which might be in our minds in respect to this legislation.

One of the problems which prompted the legislation is the matter of the loss leader. I wonder if Mr. Gilbert could explain just how the loss leader practice is hurting the small businessman.

Mr. GILBERT: In reply, I think the very simple answer is that the small businessman, or independent retailer, usually operates a specialty shop; that is, he specializes in apparel, or in appliances, or in hardware, and so on.

His stock-in-trade is the nationally advertised item; and because of consumer acceptance of the manufacturer, and to a certain extent the guarantees of the advertising promotion of the brand, they make the more attractive item for those engaged in loss leader selling; so that some of the larger competitors, and even those who operate discount houses and so-called deep-cut organizations, feature the national product which is nationally advertised, and make use of it as a loss leader.

They find their margin of profit from either stencilled lines, or from obscure brands which, because of their size, they are able to handle. Consequently they seize upon the stock-in-trade of the independent retailer and use those items as loss leader items in order to attract store traffic, or for ulterior purposes.

Consequently when the individual is faced with this situation, he has very few alternatives. He can either meet the price, or, if it is of a predatory character he will lose his profit and go out of business; or he can maintain

the normal price which should provide to him a profit and a return for his services and handling, and if the potential customers will not buy from him at that price, they will go across the street—and that is that.

Mr. MORTON: In this matter of the loss leader, consumer groups seem to be quite concerned with the proposed legislation here, in that they think it would have an adverse effect upon the consumer. Now, can you give any comment in respect to the advantage or disadvantage of the loss leader practice in respect to the consumer?

Mr. GILBERT: First of all, let us make it clear that we are not talking about a legitimate sale, a normal sale, but rather a sale which is made as a result of depressed merchandise. We are talking about predatory elements; and in reply to your question as to the consumer interest, I might cite a case from our files which deals with a store right here in Ottawa.

This store makes it a practice—and it is a common practice—to advertise small appliances at a markup of two per cent. Obviously, this markup is far from sufficient for them to recover their cost of doing business. But they have earned the reputation of being a low-price house for small appliances.

Upon investigation we have discovered in following up one of their advertisements that they also advertise in a quarter page a large upholstered chair, and that the regular price of it is $118, I believe, and that they are selling it for half price, namely, $59.50. That is a great attraction to the woman who may be led to believe that everything in the store is being sold at a price lower than she can purchase it at anywhere else. Yet upon investigation we discovered that these upholstered chairs cost the retailer $28. Yet he had advertised them as regularly $118, and he was offering them at less than one-half price, namely, at $59.50.

This is a manner of approach which we find in some cases of loss leader stores, and this is very positively not in the consumer's interest; because Mrs. Housewife might be misled through that sort of false trade practice into thinking that she could save herself $10, let us say, on a steam kettle or on an iron, but then she is penalized on the other commodities. Yet she will believe that everything in that store is low priced. Thus she is being victimized to that extent.

So it is that in many cases across Canada these loss leader stores are thus engaged in predatory practices, and they are building up merchandise empires on the fiction that they are selling everything at a price below cost. But obviously they are not. They are making their markup on other items.

I believe it is possibly for this reason that the reference is made in the bill for the purpose of attracting customers to the store.

Mr. MORTON: Also in respect to this same thing, there is the matter of new products, and unfair advertising practices which in such a case is an extension of the loss leader. Could you make any further comments on unfair advertising practices which are being carried on?

Mr. GILBERT: Unfair advertising practices are quite widely prevalent. We have from time to time acquired considerable information along these lines and filed it with the appropriate government departments.

You will see, for example, that an article will be advertised—a popular nationally advertised brand, let us say, of steam kettles—at a ridiculous low figure, even to the extent of describing the stock number, and the model as being a 1959 or 1960 release. But upon investigation it will be discovered that while the body of the kettle may have been produced by this maker, nevertheless the element is one that is not of that maker, but of an obscure variety.

There are other methods of false advertising, and they are far too many for me to enumerate. However, I would refer to advertising of a so-called regular suggested price which is fictitious; and that of the pre-ticketing

practice which suggests an unrealistic price upon the item being advertised, so that it may be offered at half price or lower, and it will falsely describe the produce itself, sometimes as to quality, and sometimes as to the year of its make, and sometimes in the manner of description.

Then, by a form of implementation some advertisements will carry the name of four or five leading manufacturers, and below in the advertisement they will list a number of appliances none of them identified as to manufacture, but obviously the customer will assume that they are products of the companies which are listed in the corner of the advertisement.

Mr. MORTON: Another matter that is covered by the act is that of not providing the services that sometimes are expected or which may be expected in respect to certain items; and the act is giving the right here to the manufacturer to refuse to sell to someone who may not maintain that service. Can you deal with the problem involved there?

Mr. GILBERT: You will hear considerable on this question of service, and you will hear it said that people would sooner pay a lower price and eliminate the service altogether. If I can buy an appliance wrapped up in a carton and have it sent out to my home and take a chance that it is the kettle that I bought, and not a steam iron, and that it will be in first class working order, and that I know all about it; to some extent this is being done, and we are concerned with the purchasing dollar.

But when it comes to the matter of service, this has been an area of very great concern to well established retailers and to their distributors, and also to the manufacturers. And here again we are discussing the independent trade, and we are discussing the nationally advertised lines.

When a retailer fails to give a consumer or a customer any service whatever, or fails to deliver the proper measure of service, then the customer's only recourse is to the manufacturer. And since 1951 the manufacturer has had absolutely no control over his distribution whatsoever, and he has had virtually no control as to the outlets which are handling his products; and he has had nothing to say whatsoever as to what amount of service is going to be rendered by the retail outlet.

Consequently these products will find their way into the large scale discount houses, and into the hands of gentlemen who employ predatory tactics, and they are sold without service.

Consequently when the time comes that the product must be serviced, the only recourse of the customer is to refer back to the manufacturer. He can get very little satisfaction from the predatory element handling the product. And service extends into other fields, for instance, into the development of a floor polisher. Perhaps one of the items which has been of the greatest attraction to the price cutter has been the floor polisher. And do you realize how the manufacturers of floor polishers have spent years and hundreds of thousands of dollars in research?

They felt that here was a product that might be developed to the benefit of the housewives of Canada; so they persisted in their work of research and they developed a floor polisher. But there was nobody—no one knew anything about that floor polisher; so they went to their established dealers right across Canada and they said "Here is a new product. It is a floor polisher. Part of the service which you are going to render to our company—as well as in your own interest ultimately—is to acquaint as many of the public as possible with this floor polisher, and you may do so even to the extent of renting it out for 50 cents a week, in order to get it into the housewife's home, and to make her acquainted with the benefits of a floor polisher."

So, right across Canada, month after month, the established dealers of this manufacturer did a tremendous job of promotion and advertising and of creat-

ing a demand for floor polishers; and when this job was virtually completed, or completed to such a point that there was created a real demand for floor polishers, they were marketed, and accompanied by an overall national advertisement, and at that moment they became the greatest attraction to price cutters. Yet those price cutters had done none of this service, and had performed nothing in the way of introductory work to create the foundation for consumer acceptance of this product.

So they sold the floor polisher at cost, and in many cases below their invoice cost, so great was the public demand. The floor polishers would be thrown into a corner of their store, and when people would call in and ask for this particular polisher, they were told "There they are over there; help yourself, and have it wrapped up, and out you go."

But there was no service, and no comment, and it was questionable whether the people selling them actually knew how to operate them. This is all in the area of service, and it is largely for this reason that there is no encouragement to manufacturers today to introduce new products, particularly in the electrical appliance field. You will find there have been very few products introduced in that field.

I have one in mind whose makers were most hesitant. But they finally brought it out, I believe, a year and a half ago. However they were hesitant because of the fear that it would become a loss leader item, and that they would have no distribution, because the legitimate outlets will not handle loss leader items any more; and it has a limited distribution right across the country for the manufacturer.

They are faced with the situation now that without distribution, there is no mass sale, and without mass sales, there is no production. If they should introduce this product, they were fearful that it would become a loss leader item.

Mr. MORTON: You are still talking about not providing service?

Mr. GILBERT: No, this is another item, that of new products. Under marketing conditions since 1951 there has been no encouragement to manufacturers to improve products or introduce improved products.

Mr. MORTON: What other disparging practices are there among these predatory merchants that cut the value of goods?

Mr. GILBERT: With reference to "disparaging", I think I can answer your question: we released a little booklet last year in which we cited the case of a General Electric television set which had been advertised by a dealer as a loss leader, and at a price very close to cost, or even at a price possibly below cost. But upon investigation it was discovered that this advertised item was nailed to the floor. By that expression we mean that there was no intention on the part of the retailer advertising the product to sell it, or to sell any of them.

We call it being nailed to the floor, because it is virtually impossible to walk in off the street and to buy this item. And this refers to all types, and to a degree to discourage the sale of a particular commodity, but to encourage the sale of other items, the sale of other similar items of an obscure make, upon which they have a long margin of profit.

In this particular case everything was wrong with the General Electric television set. "Let me show you how it operates by comparison", the salesman will say; and he will turn on the C.G.E. set, and also turn on an obscure item which is much higher price, an unknown product of a doubtful make.

On the set of the unknown product of doubtful make there will be a wonderful picture while the C.G.E. set is practically not working. But we discovered upon investigation that the unknown brand was hooked up to an aerial, while the C.G.E. set was merely plugged into the wall outlet.

That is how discouragement takes place with respect to the nationally advertised product, and how it is discriminated against as compared to the unknown product, which is promoted thereby with a view to the consumer's acceptance.

Mr. PICKERSGILL: Might I ask a supplementary question: could the witness say whether the General Electric Company took any legal action to protect its good name in such a case?

Mr. GILBERT: Not wishing to become involved with names, I believe that because of the general climate, and because of the general atmosphere of the Combines Act, all manufacturers have been most hesitant in taking any action whatever against unfair trade practices, much as they have disliked them.

Mr. MACDONNELL: You have been using the word "false". I do not know if it is the right word. Now you use the word "unfair". Is there a distinction between them?

Mr. GILBERT: Well, we think that false is a common term which means absolute, outright misrepresentation in sales or in advertising. There may be a case where they will in fact sell a limited number of advertised items at the advertised price, thereby creating the feeling of confidence on the part of the consumer; yet it is not a realistic market. They are in fact selling few of these items to satisfy thousands of people who have come into their store only to be disappointed; and they will employ all kinds of techniques to sell them other merchandise in the store; and we consider it to be unfair.

Mr. BALDWIN: Would you suggest then that false representation would be a more flagrant type of unfair trade practice?

Mr. GILBERT: That is right.

Mr. PICKERSGILL: I wonder if the witness would define the word "unfair trade practice" as he uses it, because it is a very general term; and perhaps explain to us, unfair to whom?

Mr. GILBERT: Well, a definition of the word "unfair" would comprise numerous elements. But in the case of trade practices, we consider the word "unfair" to apply to the person engaged in practices which are not recognized as normal or legitimate; practices—

Mr. CRESTOHL: Recognized by whom?

Mr. GILBERT: Generally recognized as normal or legitimate; practices which are unfair in their treatment to the consumer, involving the various elements we have discussed, misrepresentation, false advertising, disparagement, unfair to competition, because the practices in which they are engaged are intended substantially to lessen, or destroy, competition to their own personal advantage.

Mr. PICKERSGILL: I am particularly interested, sir, in unfairness to the consumer. I wonder if the witness could tell us just in what respects these things are unfair to consumers.

Mr. GILBERT: I think there are many ways in which that question can be answered. I think that to some extent I have covered the unfairness to the consumer. But, first of all, let us put it this way. We have provided to the Department of Justice documentary evidence where loss-leader selling in some of the principal cities of Canada has concentrated 66 per cent of the distribution of this manufacturer, of one of his products, into the hands of two price-cutting retailers.

This is the establishment of a retail monopoly, using as its methods the possibilities enabled under section 34. The loss of distribution throughout that province is a real and a serious inconvenience to the customer—to the consumer.

To come back to the question of price—

Mr. BALDWIN: May I ask a supplementary question before the witness goes on, supplementary to the one Mr. Pickersgill asked? If a customer purchased a specialized article from a store under circumstances—and I now quote from paragraph (d) of the bill, section 14—which indicated he might reasonably expect to receive service for it, and he did not receive service, would you regard that as unfair to the customer?

Mr. GILBERT: Yes, very definitely—positively.

Mr. WOOLLIAMS: I have a supplementary question in reference to the question asked by Mr. Pickersgill, when he asked you in reference to the term "unfair" and how it might affect the consumer. You gave an example of one TV plugged in, without an aerial, and one TV plugged in with an aerial.

It is highly possible, it seems to me, that the consumer, the purchaser, might be buying an inferior article under those circumstances.

Mr. GILBERT: Absolutely. I would also comment that the advertised product is one the consumer is aware of for value, quality and service; and when they attempt to make a purchase, they are sold something else, an inferior product. For instance, transistor radios. Today transistor radios are a pretty hot item, especially with teenagers.

Transistor radios may run anywhere from $39 to $79.50, to use some rough figures. About a year ago I walked into a retail store, and he had a beautiful transistor radio sitting on his desk. He said, "Dave, what shall I sell this for?" I said, "It looks to me as though it is an imported item". He said, "Yes, it is". I said, "I do not know what you paid for it. I think you could get $32.50 for it". He said, "I think I can get more than that. I can sell this at $12.95 and take a full margin of profit".

It was made in Japan. Here is your obscure merchandise. The retailer can take a nationally advertised, publicly accepted transistor set, advertise it at below cost, and he can sell ten of those sets. But he has hundreds of people in his store to buy transistor sets, and he can turn around and say, "Here is a set that is of equal quality and equal performance. You are getting a better deal on this one". And he can sell it to you for $29.50 and he has more than a 100 per cent mark-up. This is—

Mr. CRESTOHL: Where is the misrepresentation there?

Mr. GILBERT: There is no misrepresentation on it. The misrepresentation occurs when he attracts the traffic to buy the branded line that has a tested consumer acceptance, and sells them an inferior product.

We know by experience, in the case I am discussing, that on one hand the made-in-Canada item gives satisfaction and long-term performance, whereas the other, cheaper product, fails to satisfy the consumer.

Mr. CRESTOHL: Is not the misrepresentation here that, say, they have 20 radios of that first type the witness described, knowing full well he may get 1,000 customers; he gets 1,000 customers and cannot supply them all, and the balance that come in are induced to buy an inferior radio—is that not misrepresentation?

Mr. GILBERT: That is the whole purpose of loss leader advertising.

Mr. THOMAS: Mr. Chairman, I have been very interested in this discussion of loss leader selling. I wanted to raise the matter of these gasoline price wars that arise from time to time in various sections of the country.

I wonder if the witness could give us the reasons for those, and the opinion of the retail merchants association as to whether or not they are good, or bad.

The CHAIRMAN: Mr. Thomas, I would like to point out—and I would like the feeling of the committee on this—that the automotive retailers' association is presenting a brief and will be here later on. Should that question be asked of Mr. Gilbert, or should it wait?

Mr. THOMAS: It deals with retailing, Mr. Chairman. The automotive trades division may deal with parts.

Mr. GILBERT: Mr. Chairman, I would like to comment on the question. Our short brief designates that we speak on behalf of the retail merchants' association, the national automotive trades division, and to the best of our knowledge we are the only national automotive trades division of dealers in Canada. They are a strong organization: it is organized provincially. We are very concerned about the gasoline price war.

Mr. MARTIN (*Essex East*): Mr. Gilbert, you have been describing who you were. Could you just go on to the heading? I just want to identify your position and exactly whom you represent.

The heading of the brief is the retail merchants' association of Canada. There are a lot of wholesalers in this group, are there not?

Mr. GILBERT: That is right.

The CHAIRMAN: Mr. Martin, under "retail" they have listed there the national foods—

Mr. MARTIN (*Essex East*): I see that.

Mr. GILBERT: Mr. Martin, if I may, I would like to explain—possibly it has not been done; and I regret, once again being late this morning—how this delegation is comprised. I believe that is your question.

We speak on behalf of the distributive trades advisory committee this morning, which is a voluntary group, officially representative of the majority of the important national retail and wholesale trade associations in Canada. This distributive trades advisory committee was organized early in 1958, with its first objective to work toward unity in opinion respecting legislation, to appraise and assess the case of the industry in all retail and wholesale categories from coast to coast in this country; and, after a final determination of the views of this industry, to present, on a united front, the opinions of wholesaling and retailing industry to government.

It is this body upon whose behalf I speak this morning, and these delegates who have been identified through their various trade associations. At the retail level, it represents the retail merchants' association of Canada, of which I happen to be the general manager; the national foods division of the retail merchants' association, which deals exclusively with our food retailers. It would be difficult, Mr. Chairman, for me to give the membership of the other associations; but I can certainly talk about our own, the retail merchants' association of Canada.

We were organized in 1896, and granted a dominion charter in 1910, to represent the independent retail interests of Canada. It is a voluntary, non-profit organization, and to the best of my knowledge our membership today across Canada stands at 25,000 progressive, independent retailers. Within this figure is contained our national foods membership, which I would estimate at approximately 5,000 food retailers across Canada. Within our over-all membership is our national automotive trades division, whose membership across Canada I would estimate at approximately 4,000.

Then we are also identified with the Canadian association of radio, appliance and television dealers; the Canadian retail furniture dealers' association; the Canadian jewellers association; the Canadian retail hardware association; the Canadian pharmaceutical association.

At this retail level, although they are not part of this delegation or part of the distributive trades advisory committee, in support of our views on section 34 is the Canadian retail federation and the Canadian shoe retailers' association.

That, gentlemen, gives you, to the best of my knowledge, a full line-up of all the national retail organizations.

Mr. MARTIN (*Essex East*): All that information is here in the brief that you have presented; but it is a little confusing. First of all, the title of the brief is "The retail merchants' association of Canada", and one would have thought from that that one was going to hear only from the retail merchants; but you represent both the retail merchants and some wholesalers?

Mr. GILBERT: We have made that clear in the opening two paragraphs of the letter which we read.

Mr. MARTIN (*Essex East*): Yes.

Mr. GILBERT: We regret that it is on the letterhead of our association; but, frankly, the work of this distributive trades advisory committee is completely voluntary and it has, to some extent—and to a large extent—been spearheaded by the R.M.A., gathering support everywhere we go throughout the entire industry, which has brought about the formation of this voluntary distributive trades advisory group.

Mr. MARTIN (*Essex East*): Many of the submissions you have made this morning would not be supported by the retail merchants.

Mr. GILBERT: I will answer your question by saying that the submissions we have made this morning are supported by the vast majority of retail merchants, large and small.

Mr. ROBICHAUD: Mr. Chairman, on this very matter: can you advise the committee if the maritime retail gasoline association belongs to your group?

Mr. GILBERT: Not as such. We operate our own automotive trades division right across Canada through our provincial retail merchants' association offices, and the automotive dealers in the maritime provinces hold direct membership in our retail merchants' association. They are not identified in any way with the maritime automobile trade association.

Mr. ROBICHAUD: Are you aware that this group which I have mentioned is definitely against the proposed amendment to section 34?

Mr. GILBERT: I am not aware of that—but it would amaze me.

Mr. THOMAS: Mr. Chairman, I wonder if we could have the discussion on the question I asked.

The CHAIRMAN: Would you answer Mr. Thomas' question, if you recall it.

Mr. GILBERT: Yes—about gasoline. Mr. Thomas, I should like to reply to your question that, first of all, we have been most seriously concerned about the gasoline price wars, particularly in the metropolitan Toronto area, where I think they probably have been bigger and longer than anywhere else in Canada—certainly last year.

Beyond any doubt whatever, the results of these gasoline wars have been extremely harmful to the gasoline dealers, who can testify that, while their volume of sales in some cases may have increased, their net profit has dwindled perilously. Now, because of the nature of the laws that prevail, I believe it is difficult for anyone other than the combines department itself, or the restrictive trade practices commission, to put their finger on the true fault and the real cause of these gasoline wars.

Mr. CRESTOHL: I have a supplementary question. How is this adversely affecting the consumer?

Mr. GILBERT: The consumer is, here again, being adversely affected. First of all, they are gaining in the short-range, over-all picture by a lower price, temporarily, on gasoline. But there are cases where they do not know what kind of gasoline is going into their tank; and ultimately—and I have had this information from other parts—because of the low quality gasoline that is being pumped into their thanks, they are faced with a major overhaul job which is far more costly than the penny savings they have made through the

gasoline price war: plus the fact that as distributors are forced to leave the scene, the convenience disappears; plus the fact that during a price war, try to get any service. Go in and buy a chamois, and spend $1.95 for it, so that you can clean your own windows. Pull up at these pumps during a gasoline war: they have not time to check your oil or anything else. Well, they might check your oil, because they get full mark-up on that. But you do not get service.

Mr. CRESTOHL: Would you not say that gasoline that so seriously affects your motor should be taken off the market altogether?

Mr. GILBERT: It should be standardized and identified.

Mr. CRESTOHL: But once it is on the market, it is of the best Canadian standard?

Mr. GILBERT: Supposedly—not necessarily.

Mr. THOMAS: May I say there, Mr. Chairman, that if Mr. Gilbert could show us where these gasoline wars are harmful to the economy, then I think we are safe in assuming that anything which is harmful to the economy is bad for the consumer and for everybody else.

Mr. GILBERT: Gasoline wars, like any other price wars, are harmful to the economy and the over-all picture. We are using a product here because of its nature of distribution, the elements of which differ from those of other products' distribution.

On the other hand, it seriously affects the economy when it puts people out of business; and obviously a prolonged gasoline war is ruinous to many of the independent dealers. These people are employees of people: they have anywhere from three, five, seven to 12 people employed on their service stations. When they go under because they cannot sell gasoline at a loss, or they require a margin of profit on their sales in order to arrive at a net profit on a balance of the year—if they fail; if they go out of the picture, as hundreds and thousands of them are doing across the country, is this not seriously affecting the economy of the country?

Where do these employees go for their next job? Why are there so many mobile employees in the automotive industry today? That is part of the answer—it comes from unfair, unjustified, vicious price cutting.

Mr. CRESTOHL: What would be fair competitive practice, in those circumstances? Is that not fair, open competition?

Mr. GILBERT: Certainly it is open competition; and if the economies which are being offered to the public can be justified in terms of efficiency, we say, God bless them; give them cheaper prices. We have the innovation today of the self-serve stations with three, four, five and six gasoline pumps, where you can drive up, pour your own gas and save three cents. If that is going to be the new type of distribution, go ahead. The dealers might as well close their stations today. We may move faster that way; but let us bring greater efficiency within the business, and let us keep it fair.

Mr. BENIDICKSON: On this question raised by Mr. Thomas, I think Mr. Gilbert has probably advanced a good suggestion there, that we should inquire, as to what information is required in the unfair trade practices, of the government itself. But, as I recall it, there has been a suggestion that some of the supplies of gasoline have actually been provided by those who have spent millions of dollars in connection with national advertising of the best known gas brands, with the result that they have in fact supplied dealers—that is, their traditional dealers—with brands to create this price war.

Are the members of the retail merchants' association who belong to the national automotive trades division satisfied that these big refineries who have nationally advertised brands, upon which they spend millions of dollars, have

not contributed in some way to this difficulty that you say is resulting for the individual station owner?

Mr. GILBERT: Mr. Benidickson, it is because of the very nature of the situation that I made my earlier statement, that the over-all investigation, in order to arrive at the facts of the matter, should properly be vested, in my opinion, in the restrictive trade practices commission and the combines investigation department. We hear numerous reports as to what is causing the gasoline war, what is contributing to it, and I can verify statements along the lines that you have just made. As the retail merchants' association say—or any other trade association—we are not a branch of the R.C.M.P. We have our functions as trade associations to perform, and we have to go about them in the hope that the laws of the country are right and are such—

Mr. BENIDICKSON: We hope you do not become a branch of the R.C.M.P.

Mr. GILBERT: I hope so too.

The CHAIRMAN: Mr. Benidickson, is your question quite in order to Mr. Gilbert? After all, that question—

Mr. BENIDICKSON: My point was this, that I thought there was an anomaly; that we initiated our discussion this morning on a basic presentation that there was harm being done in the retail business because certain products which had been exposed to a substantial campaign of national advertising needed correction; that there was harm that needed correction.

Also, there was a suggestion that the retail merchants had the support of manufactures in the presentation of this brief. I was just pointing to the fact that this seems to be an anomaly, in that I have understood that the manufacturers of these nationally advertised brands have actually entered into some conduct that has been complained about by retailers, in that it is suggested that in many cases they are responsible for the gasoline price war.

The CHAIRMAN: The Canadian manufacturers' association would, I think, probably be the proper people to whom you should direct your question.

Mr. PICKERSGILL: Mr. Chairman, I should like to put a question to the witness. I would like to ask the witness if he regards any competition in prices as a price war?

Mr. GILBERT: Not based on the true elements of true competition.

Mr. PICKERSGILL: Would the witness define what he means by the "true elements of competition".

Mr. GILBERT: Lower prices brought about by greater efficiency in business, new merchandising techniques and new merchandising innovations.

Mr. PICKERSGILL: And does the witness think that the parliament of Canada should make laws to determine what these things are; or should it be left to the free play of the economy?

Mr. GILBERT: I just do not quite get the question.

Mr. PICKERSGILL: The witness said that competition in prices should be determined by greater efficiency, and by certain other criteria that I do not exactly remember.

Does the witness think those criteria should be laid down under the law made by the parliament of Canada; or does he think this could safely be left to the free play of a competitive economy?

Mr. GILBERT: I believe that the laws of the country should be such that they preserve the free enterprise principle in Canada, and that they regulate any trend or tendency toward unfair or dishonest trade practices.

Mr. PICKERSGILL: What I am trying to get at, Mr. Chairman, is this: I think the witness perhaps does not see what I am trying to get at. Does he think free enterprise includes freedom to set your price?

Mr. GILBERT: Freedom of the individual.

Mr. PICKERSGILL: Yes, of the individual merchant to set his price. Does he think free enterprise includes that?

Mr. GILBERT: I would like to explain our philosophy on this thing. We feel that if a manufacturer has manufactured a product which is sitting in his warehouse and the ownership of that product is vested in that manufacturer, so long as that is the situation then that manufacturer should have the right to sell the product to whom he pleases and in accordance with the terms of his wish. Having sold the product to a retailer—or a quantity of these products—we say that it is the right of that retailer to sell those products at any price he may elect—he can even give them away if he wants to go that far—but there should be no law requiring the manufacturer to sell to the retailer a second order of goods if that retailer's merchandizing practices have disrupted the manufacturer's system of distribution.

Mr. BALDWIN: I have a supplementary question. Do I take it that you feel the law should be such that it permits a greater measure of competition without having too much government control.

Mr. GILBERT: In the broad principle, that is it.

Mr. MARTIN (*Essex East*): Then whatever control would be provided would be provided not by the government but by the industry itself?

Mr. GILBERT: I think the answer to your question is found in the provisions of the bill itself.

Mr. MARTIN (*Essex East*): I am asking what you feel?

Mr. GILBERT: That is our feeling. I would like to get back to the question about gasoline—

Mr. MARTIN (*Essex East*): No.

Mr. GILBERT: It is tied in with the same question.

Mr. MARTIN (*Essex East*): This is the fundamental point.

Mr. GILBERT: We feel that some onus of responsibility for marketing policies must be placed at the doorstep of the manufacturer. That ties in with the case of the oil companies. We believe bill C-58 in its provisions amending section 34, is a step in the right direction.

Mr. MARTIN (*Essex East*): What you really believe in is a system of law not sponsored by government but by the particular industry concerned.

Mr. GILBERT: No sir. That is too all embracing a statement. We feel the onus of responsibility in that should be shared by the manufacturer. We also feel, however, that the laws of Canada should be adequate in providing against monopolies, mergers, combines, and in the general legislation necessary in the field of merchandising.

Mr. MARTIN (*Essex East*): What the witness said, as I understood it, was that a manufacturer should be free to discipline any retailer whom he thought had misrepresented his products. Is that a fair statement of the witness's position?

The CHAIRMAN: He did not say that.

Mr. GILBERT: I did not say that.

Mr. MARTIN (*Essex East*): Would the witness state what powers he does think a manufacturer should have to discipline a retailer by refusing to sell to him?

Mr. GILBERT: My statement was that it was our opinion there should be no law in Canada which would force the manufacturer to sell a second order of goods to that retailer if the retailer's methods of merchandizing were disrupting the manufacturer's system of distribution.

Mr. MARTIN (*Essex East*): What does the witness mean by disrupting the manufacturer's system?

Mr. GILBERT: By engaging in the unfair, unethical and dishonest practices intended to be remedied by the bill.

Mr. CRESTOHL: And not sell at the prices suggested by the manufacturer.

Mr. GILBERT: At no time have we discussed retail price maintenance.

Mr. HOWARD: It seems there is some conflict. I understood Mr. Gilbert to say that a retailer could sell whatever products he had in his store at whatever price he liked, or in fact, give them away if he desired. Is this generally correct, as I grasp it from your answer.

Mr. GILBERT: There is a simple reason for that. It would be impossible to prevent it. It is absolutely impossible to prevent it.

Mr. HOWARD: At the same time you ask for the repeal of section 34 and for the return to the manufacturer of the right to direct his marketing policies. I think there is a conflict.

Mr. GILBERT: No. We are asking for the repeal of section 34. We, in the industry, feel this is a phenomenal solution to marketing practices which are not in the public interest; but we are not advocating a system of resale price maintenance. We say that by the repeal of section 34 you place the onus of responsibility upon the manufacturer for his system of distribution. Retailers, wholesalers and distributors are going to determine at that point whether the manufacturer's marketing policy is the policy that is satisfactory to him and whether his products are the ones they wish to sell. Obviously, without repeal of section 34, the manufacturer is not in a position to prevent the retailer selling his goods at any price. That is what we are advocating; that there should not be a law which prevents that manufacturer from discontinuing supplies if the practices of the retailer are unfair, dishonest and not in the public interest.

Mr. MARTIN (*Essex East*): You are advocating a system of law which emanates not from the government but from the industry. That is what you are advocating.

Mr. GILBERT: No sir. What the government controls is adequately set forth.

Mr. PICKERSGILL: Several times the witness has used the phrase "the onus of responsibility should be on the manufacturer". Could he explain in very simple language what he means. Does he mean the manufacturer should have control?

Mr. GILBERT: I mean that right now the manufacturer is put in the position by section 34 that he can accept no responsibility for what happens to his products in the market place, and we feel some provision must be made whereby the manufacturer can be held responsible for his marketing policies. For instance, we all have heard of Honest Ed. There are those who are engaging in some of these practices. Let us take the sale of Prestone. The principal cities of Canada are viciously attacked price-wise at the time of year when there is a big commercial demand for winterizing automobiles. These fantastic and unrealistic prices are advertized in full-page advertisements in the daily press. This creates in the consumer's mind an unrealistic and false price in relation to the true value of that product. Obviously those few who are engaged in this practice have no desire to supply the nation with Prestone; but they are going to use it as a loss leader to attract these people to their stores. The thousands of people who handle this product in service stations and hardware stores—or wherever it may be purchased—obviously cannot purchase this product for the price at which it is being advertised or at the fictitious price which is now created in the consumer's mind. The obvious thing for the dealer to do is to go back to the maker of this product—the manufac-

turer—and say: "What is your responsibility? How can you sell this product so that it can be merchandized by a few at a price which is less than the price of the ingredients—the raw materials—which go into it, whereas your price to us is so high that we cannot compete and may have to discontinue handling it, to the inconvenience of all our customers in this marketing area?" The manufacturer is then in the position, by virtue of section 34, to say he can accept no responsibility for the marketing of the product after it leaves him. We feel that some measure of responsibility should be restored to the manufacturer whereby he can direct his marketing policy.

The CHAIRMAN: Mr. McIntosh has been waiting.

Mr. MCINTOSH: Mr. Chairman, before I ask my question might I suggest that, rather than having one or two members ask all the questions, you take notice of those around the table who have been trying to ask a question for the last twenty minutes.

The CHAIRMAN: That is right, I am in error. I am trying to get along with these people.

Mr. MCINTOSH: I was going to ask Mr. Gilbert if he would consider it an unfair practice where an appliance dealer advertises appliances at cost, and when the customer comes into the store will not take cash for the article but wants the customer to take the article on the longest terms possible and therefore make his profit on the paper—the interest—he is going to carry. Have there been any instances of that?

Mr. GILBERT: Yes.

Mr. MCINTOSH: That is why you say you want the control in the manufacturer, so that he can refuse that type of retailer additional merchandize with which to do the same thing.

Mr. GILBERT: That is right. That is an undesirable practice in the interest of the consumer.

Mr. CRESTOHL: It is not an unfair practice.

Mr. GILBERT: It is unfair in so far as it is using the manufacturer's product as a gimmick to attract people to the store.

Mr. MCINTOSH: The law does not prohibit that.

Mr. GILBERT: No. The law provides that the manufacturer cannot restrict, restrain or refuse supplies to any people engaged in that practice.

Mr. AIKEN: You have pointed out the danger of loss leader selling, and some other points, and have pointed out the danger of outright resale price maintenance. Would you say that the provisions of this bill would provide a reasonable balance between the two points of view and bring some balance into the whole problem?

Mr. GILBERT: We believe that the provisions of the bill are a forward step and certainly that it will—to use your own words—bring about a balance in the system of distribution which is in the interest of the retail and wholesale industry, as much as the consumers' interest. There is nothing in this bill, in our interpretation of it and the interpretation of those with whom we have consulted, which permits resale price maintenance.

Mr. AIKEN: You would prefer to see a bill which goes the whole way, and abolish this section; but as an alternative do you agree this is a step towards a balance in the two points of view.

Mr. GILBERT: It is for that reason we are in 100 per cent agreement with the provisions of bill C-58.

Mr. WOOLLIAMS: I would like to come back to a question asked by Mr. Pickersgill in which he asked was the witness asking that the manufacturer discipline the retailer. I think what you are asking really is that the law disci-

pline the retailers who are carrying on unfair and unusual competition. You are not asking the manufacturers to discipline the retailers, but are asking the law to discipline them in reference to unfair competition, just like we have laws in reference to the morals of society.

Mr. GILBERT: Yes. We believe that by transferring section 412 from the Criminal Code to the Combines Investigation Act that the law is there and is now going to be more enforceable than heretofore, and that it will deal with the most undersirable and most unfair practices.

Mr. RYNARD: Mr. Chairman, surely the manufacturer has the right to protect the product he is selling and to see that it gets the proper service from the retailer who handles it. I think it is as simple as that. If that product is going out and is not getting the service it requires, certainly the customer is being gypped.

Mr. GILBERT: We agree.

Mr. PICKERSGILL: On several occasions the witness referred to products of an obscure nature and rather suggested in a good many cases that known and nationally advertized products were being advertized by retailers, not with the intention of selling them but by being—I think this was the phrase used—nailed to the floor, and just there to be used as a cloak for switching the customers interest to the other product. Does the witness think that there should be any discrimination of any kind between what he calls an article of obscure make and a nationally known article.

Mr. GILBERT: I do not quite know to what you refer when you say discrimination between. However, we know the situation is this, that in some lines where you have products of excellence manufactured in Canada they are bait for the loss leader specialists. The predatory retailers all over this country are searching abroad for lines which they can bring into their store, which are unidentified lines and comparatively unknown things which appear to compare with the item manufactured in Canada which they are unable to merchandize profitably. This is the area in which the situation under section 34 has been seriously affecting the economy of Canada.

The CHAIRMAN: Mr. Crowder of the wholesalers council would like to make a few remarks.

Mr. MCILRAITH: We are not dispensing with the other witness.

The CHAIRMAN: No.

Mr. JOSEPH T. CROWDER (*Merchandizing Counsel, The Canadian Wholesale Council*): Two points came up this morning. I think at one time the witness tended to get a little off the track. We were speaking about loss leaders and the attitude that the wholesaler takes towards the retail customer. I might give you two examples of sales which have been brought to my attention. In one case a furniture dealer on St. Clair avenue sold fresh bread at 5 cents a loaf for which he paid 12 cents. That came out in the investigation. In another case, a certain large semi-department store near the corner of Bathurst and Bloor streets—I will not mention any names—was offering to sell two packages of a well known brand of tooth paste for 39 cents. They cost the wholesale drug house 51 cents for the two. Our attitude in this is that any retailer who attempts to do business on that basis regularly is headed for bankruptcy. That is our first reason for supporting the claim of the retail trade that this is unsatisfactory.

Mr. MCILRAITH: But you want to pay that difference of 7 cents, in the case of the bread, to the newspapers or the radio or some other form of advertizing?

Mr. CROWDER: No. We want him to have the privilege of selling it at a normal mark-up as a result of competition.

Mr. McILRAITH: He was a furniture dealer and was not in the bread business. Therefore, it was an advertizing gimmick.

Mr. CROWDER: Yes.

Mr. McILRAITH: It is an advertizing gimmick which you consider is unfair.

Mr. CROWDER: Yes. Anything which demoralizes a business is fundamentally unsound and undesirable.

Mr. McILRAITH: I wanted to make the point that it was an advertizing gimmick.

The CHAIRMAN: May I interrupt at this point. This afternoon at 3 o'clock we are having the Canadian consumers association. Do you want to adjourn now?

Mr. McILRAITH: I want to examine both these witnesses.

The CHAIRMAN: I would entertain a motion that we reconvene at 12 o'clock.

Some hon. MEMBERS: No.

Mr. CRESTOHL: Do you have some additional names on your list of persons who wish to ask questions of this witness?

The CHAIRMAN: No.

Mr. CRESTOHL: I have signalled.

Mr. AIKEN: Mr. Chairman, we have another group who are scheduled to be here at 3 o'clock. If we are going to carry on in this way I think we should hear the group which has been asked to appear at that time. Undoubtedly we will be hearing different persons at the next several meetings all of whom come here on appointment. If we have a carry-over from meeting to meeting then we will be in an awful position very shortly.

The CHAIRMAN: That is why I suggested we reconvene at 12 o'clock.

Mr. McILRAITH: I want to be on record that I am in absolute opposition to that.

Mr. HOWARD: Mr. Chairman, I would move that we reconvene at 2 o'clock.

The CHAIRMAN: All in favour?

Contrary?

Agreed.

AFTERNOON SESSION

THURSDAY June 16, 1960.
2.00 p.m.

The CHAIRMAN: Order. I believe we have a quorum.

Before we commence, there is a motion that I will have to entertain, and that is that the brief that Mr. Gilbert has presented, but did not read, should be printed. I would like to entertain a motion to have the brief printed in the record.

Mr. BENIDICKSON: I so move.

Mr. HALES: I second that.

Motion agreed to.

Mr. FISHER: Could I ask one question for information? I was not here this morning, unfortunately. I understand this is the brief that we have in our hands here?

Mr. AIKEN: Yes.

The CHAIRMAN: Every member of the committee was supposed to have gotten one.

Mr. FISHER: I also understood this morning that Mr. Gilbert made reference to a much fuller presentation that was made to the trade and commerce committee of the government caucus. I wonder if he had that available for those of us who did not receive it?

Mr. GILBERT: I have a few copies available.

Mr. MCILRAITH: Is it your intention to present it to this committee?

Mr. GILBERT: There are quite a few in circulation among the house members. I do not have sufficient copies for all the members of the committee, but I will leave behind what I have, and can cable the office and see that they mail them out this afternoon for all who require them.

Mr. MCILRAITH: I take it it was presented to the party caucus.

Mr. GILBERT: Yes.

Mr. MCILRAITH: And you have no objection to it being presented to all the members of the committee?

Mr. GILBERT: None whatsoever.

Mr. BALDWIN: We never hear anything that could not be heard by any member of the committee.

Mr. MARTIN (*Essex East*): It would be most amazing if it was circulated to one group of the house and this committee, if it was not circulated to all members.

Mr. HORNER (*Acadia*): It was not a group of this committee:

Mr. GILBERT: We have five copies of the document available, those documentary briefs.

Mr. MARTIN (*Essex East*): We are taken under a sort of disadvantage—

Mr. HALES: I object to this.

Mr. MARTIN (*Essex East*): You may object, but may I make my statement? The conservative members were given an opportunity of seeing Mr. Gilbert's important testimony and point of view before we had that opportunity. I do not think it is fair that that kind of underhand proceeding should take place.

Mr. HALES: I have never seen that at all, as chairman of that committee. Mr. Martin, or any of the other members of his party, has the same privilege to invite Mr. Gilbert and his associates down here to speak to them, the same way as we had. They had every right and privilege to do that, if they so wished.

Mr. FISHER: As the person who brought this up, I do not want to demand any extra rights, but it seems to me that the line of questioning I want to follow with Mr. Gilbert raises questions of statistical patterns and proof, or document support, of the fact there has been a colossal difficulty developing for small business since this particular part of the act was introduced. My difficulty was that it is rather hard to ask questions on a document you have not got, or to obtain information. I think the government members will agree with that. One of the things I want to satisfy myself on is as to whether the actual condition of small business has been greatly worsened by the amendments that were introduced a few years ago? I would assume this is the information that has gone to one branch, perhaps the most important part of the house membership. Therefore, I think those of us in opposition would appreciate the chance of going over it.

Mr. BENIDICKSON: We will not finish with the retail merchants today, so perhaps we can have an opportunity of going through the brief?

Mr. FISHER: Perhaps the chairman considers it would be of advantage to have the brief itself printed?

Mr. BALDWIN: It seems to me the way to bring it out is in the course of cross examination of the witness. If anybody wants to ask him as to any particular document that was available, I assume they will have that privilege, and he could produce the document and stand available.

Mr. WOOLLIAMS: He has already said that he is going to pass it on.

The CHAIRMAN: Mr. Gilbert has already stated that any member can have it. I think Mr. Benidickson's suggestion is quite in order there.

Mr. FISHER: Let me make this point then: we will have an opportunity of cross-examining Mr. Gilbert after we have had an opportunity of looking at it?

The CHAIRMAN: I do not think I should make any commitment such as that—

Mr. FISHER: Well,—

The CHAIRMAN: Wait a minute, now.

An hon. MEMBER: That puts us in a terrible position.

Mr. JONES: Why are they in a "terrible position"? You had the same opportunity, and why not invite them, if you are interested in this problem?

Mr. BENIDICKSON: Let us not be fooled by any questions of who was invited and why. The witness said this morning there are 275 pages to this brief. It is going to take a little time to examine that, if we are going to be on a equal basis. 275 pages of documents were presented to members of the government caucus.

The CHAIRMAN: I do not feel I should rule this committee will continue in order to give an opportunity for any member to inform himself on this document. I think I am in order on that.

Mr. JONES: Quite right.

Mr. MCILRAITH: Mr. Chairman, is this committee being run for the benefit of the committee members doing a thorough job and bringing out all the information available on the subject, or is it being run for some other purpose?

Mr. HORNER (*Acadia*): You should do your homework

The CHAIRMAN: I do not think you have any criticism to make on that score. This committee is going to be operated in a fair way as long as I am chairman of it.

Mr. AIKEN: I have never seen these particular briefs, and I do not think a good many other members have either.

Mr. MARTIN (*Essex East*): Maybe you are not in good standing!

Mr. AIKEN: I have not seen it, and I am sure whatever group of the caucus invited the retail merchants association to fill them in on whatever information they wanted—I know there are a good many other members too who have not seen this brief. I still have not seen it.

Mr. MCILRAITH: Since the witness made reference to it this morning and has now stated that he is perfectly willing that it should be made available to the committee and to all the members, what remains to be decided is the procedure of the committee in relation to the document, and should the document—

Mr. BENIDICKSON: "Documents".

Mr. GILBERT: There is one document supported by a document containing the various submissions which have been made to the government of the day on the question of small businesses.

Mr. MCILRAITH: Should these documents not be tabled now and made available to the committee members, and should not the committee members be then given an opportunity, when they have seen the documents, to examine the witness, if they wish to examine him?

Mr. MARTIN (*Essex East*): That is right.

The CHAIRMAN: There is one point here that I think is grossly unfair. These documents were presented some time ago—

Mr. MCILRAITH: May 4.

The CHAIRMAN: The committee has had fair warning the retailers were coming here today, to bring their presentation. I think it is up to the committee to look into all the information they wished, to come prepared to this committee to ask their questions, and not to ask this association to wait here, and return, while people are doing their homework, which should have been done prior to this committee meeting.

Mr. MCILRAITH: I want to deal with that point of procedure, Mr. Chairman. I would have considered it thoroughly improper for me to consult with Mr. Gilbert, who has been very much interested in this subject for years and who has sent forward briefs, before the committee sat.

Mr. JONES: Why?

The CHAIRMAN: Why?

Mr. MCILRAITH: We are not in a goon squad, but we are supposed to be in a committee of the House of Commons.

The CHAIRMAN: Order.

Mr. MCILRAITH: I have the floor, and you contain yourself and retain your seat till I have finished, and then, if you have anything to say arising out of my remarks, you can say it.

Mr. JONES: I think the chairman can handle the order of this meeting.

Mr. MCILRAITH: I think he can do it, and I want to let him.

My point is this, that this document was referred to very properly by a witness in the committee this morning. That is the first reference to the committee—why and how these people have got information from him surreptitiously before he came to the committee? To me it is a wrong suggestion that the committee members have not done their homework, because they did not discover this document beforehand.

Mr. MARTIN (*Essex East*): In any event, what we want to do is to ascertain the position, and we want to do a good job on this committee. These briefs have been produced. Whether they should have been given weight or not, the fact is they have been. Most of us have not seen these briefs, and I think we should have an opportunity of seeing them and studying them ourselves.

If we decide it is desirable we should recall Mr. Gilbert, and it is the decision of this committee, Mr. Gilbert, I am sure, would consider it his duty to come back to this committee. I think that is the situation that concerns us, and, surely, no other.

Mr. JONES: I would like to say a word on some of these remarks.

The CHAIRMAN: I think we have had sufficient discussion on it. I would suggest we carry on with the meeting, and before we adjourn today we will settle this matter.

Mr. CRESTOHL: We have to know how to conduct the examination. If we know we will have the right to examine Mr. Gilbert after we have had access to the documents produced, that is one matter, if we decide now we can carry out the examination in the light of that.

When was it decided Mr. Gilbert would be here as a witness? When was that decided?

Mr. MARTIN (*Essex East*): And who decided it?

Mr. CRESTOHL: And who decided it?

The CHAIRMAN: Mr. Gilbert wrote to my office and arranged a date.

Mr. CRESTOHL: When did he write to you? I am not trying to cross-examine you, but I want the facts.

The CHAIRMAN: That was probably a week ago.

Mr. CRESTOHL: A week ago. Up to a week ago we did not know Mr. Gilbert would appear here today and, therefore, we could not have access to a document we did not even know existed. It is possible, had we known Mr. Gilbert would appear here, that our caucus might have invited him, too, to come and appear, and we would have heard him. We did not know that. Otherwise probably we would have invited him. The other caucus did invite him and had that benefit; and today we are trying to inform ourselves of information that he read before that committee.

The CHAIRMAN: One member from your side was on the steering committee, and I think that he was in fact aware of that some time ago.

Mr. CRESTOHL: A week ago.

Mr. MCILRAITH: I try to get a copy of the steering committee decision, and I cannot find the committee's decision about witnesses at all. I tried to get it at noon, so we would know the sequence of the witnesses. We are entitled to that much information in the committee.

Mr. BALDWIN: Mr. Gilbert said that he would make them available. It may well be that after an examination of the proofs—I have never seen one, and my friend, Mr. Woolliams has not. They may be made available and if after examination of the briefs we find there is material requiring examination, we could come back. I do not think we should settle anything about recalling Mr. Gilbert. But if the briefs are made available to us individually, we can settle that later.

Mr. MARTIN (*Essex East*): Mr. McIlraith suggested that. Mr. Chairman, I know you are trying to dispose of this matter in the fairest possible way. It seems to me that once the steering committee has made its decisions, there ought to be an opportunity at the committee hearings for the whole committee to discuss the business of the committee. I am not aware we have discussed the business of the committee. We have come to our first meeting, and we have Mr. Gilbert here. There has been no decision of this committee, or confirmation of the decision of the steering committee. We ought to discuss now the whole business of the committee for the next two or three months. This is going to be a very long—

Mr. MCINTOSH: How long?

Mr. HORNER (*Acadia*): Four months!

The CHAIRMAN: This is the first meeting on this bill.

Mr. MARTIN (*Essex East*): I know that. However, before the steering committee decides to take a certain course of action, the members of the committee should be given an opportunity of passing and confirming the procedures which the steering committee has decided upon. I have in my mind certain witnesses I want to have called. I am sure other members have too. We ought to have a business session of the committee, and that ought to take place almost first thing, so we can plan the work we have ahead of us. Not that I want to interfere with Mr. Gilbert's presentation, now we have him here; but I think that has to be done.

The CHAIRMAN: I can assure you I had a great deal of difficulty getting the steering committee together, and Mr. McIlraith knows that, and I was a little surprised to hear a complaint that he had to phone to see whether he was on the steering committee.

We will carry on.

Mr. MCILRAITH: There is a point still outstanding, just before we proceed.

It is my understanding of the steering committee that it makes recommendations or suggestions or submissions to the main committee for consideration and adoption or rejection, as the case may be.

The CHAIRMAN: That is correct.

Mr. MCILRAITH: What I was trying to find out was what they had submitted to this committee, and I cannot find it. It may be in the minutes, I do not know, because in many recent sittings of this committee I was elsewhere engaged. I want to know, if the steering committee brought forward its recommendations and suggestions to this committee. Has this been dealt with yet?

The CHAIRMAN: No, it has not, because this is the first meeting.

Mr. CRESTOHL: Could you tell us, for example, who are the witnesses that were suggested should be here at this meeting?

Mr. MACDONNELL: Could I suggest that we leave this discussion until we are by ourselves and hear the people who have been asked to be here today?

The CHAIRMAN: Is that satisfactory, Mr. Crestohl?

Mr. CRESTOHL: I beg your pardon?

The CHAIRMAN: When the meeting has adjourned today we will give you that information.

Mr. MCILRAITH: If necessary we will have another meeting to discuss this?

The CHAIRMAN: Yes.

Mr. MCILRAITH: That is agreeable.

The CHAIRMAN: Now, Mr. Crestohl I think has a question.

Mr. CRESTOHL: I would like to ask Mr. Gilbert what he can tell us about these one cent sales and if he considers them as a loss leader operation?

Mr. GILBERT: Mr. Chairman, first of all I do not think it is the purpose of this hearing to try to get down to singular cases respecting any sale whatsoever.

Mr. CRESTOHL: I think, Mr. Chairman, that you will decide whether a question has a purpose. I do not think the witness should judge that.

Mr. GILBERT: You are asking me to pass judgment on what is a loss leader sale, and I believe, as the bill is set up and as the present law is set up, that is a task for the court and not a task for a witness.

Mr. CRESTOHL: You told us this morning, Mr. Gilbert, at some length, and you took great pains in trying to explain to us when an operation is a loss leader operation and when it is not a loss leader operation, and I am asking you, is the one cent sale conducted by some retailers,—and you have been the manager of the retail association,—in your opinion a loss leader operation?

Mr. GILBERT: You are posing a question that has all the general elements of merchandising wrapped up in it.

The one cent sale, possibly, as you are relating it, is the type of sale that you will find seasonally in drug stores. They are now spreading out into other fields of merchandising. Each of these cases, on its own merits, must be analyzed as to what is actually in these one cent sales, as to whether they are loss leader items—or whether they are genuine sales, and the reason for these sales. We take no exception to the clearance sale, and the sales of depressed merchandise. This is not a complaint in our over-all remarks about loss leader selling. In the situation we know from our practical knowledge in respect of one cent sales that there are sales which would not be typified as loss leader sales because of the nature of the product which is being sold at this special price.

Mr. CRESTOHL: Perhaps we could get at it in another way. Just for clarification,—and I have not seen anywhere a complete definition of a loss leader,—but when is an article or transaction considered a loss leader? Is it considered a loss leader, for instance, when it is sold below cost? Is it considered a loss leader when it is sold below a determined price which the manufacturer wants it sold at? Is it a loss leader when it sold below the net cost, or below the cost including the overhead operation? I would like as full a definition as possible of when a transaction is a loss leader transaction. Presumably it is when an article is sold below a certain price level. What is that price level?

Mr. MACDONNELL: Are you asking for a legal definition of a loss leader?

Mr. CRESTOHL: A legal definition or a definition that this committee can understand in their deliberations, as to what a loss leader transaction is.

Mr. WOOLLIAMS: I would object to that question, because this witness cannot give a legal definition.

Mr. MARTIN (*Essex East*): I do not think Mr. Crestohl meant that. I think he means that he wants to get from this witness, who is an experienced man, his understanding of a loss leader.

Mr. WOOLLIAMS: From a factual point of view?

Mr. MCINTOSH: I think we should have both definitions.

Mr. MARTIN (*Essex East*): Yes, we want both definitions, but this witness can only speak from his experience.

Mr. GILBERT: This is a question that has been posed before countless numbers of witnesses since 1951 by different government bodies.

We are satisfied in the trade to accept as a definition of a loss leader a very simple definition which is contained in the bill at page 9, bill C-58, under clause 14(b), dealing with section 34 of the act:

> (*b*) that the other person was making a practice of using articles supplied by the person charged not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles.

The phrase "selling articles not for the purpose of making a profit" satisfies us.

Mr. MARTIN (*Essex East*): That is one definition, is it not?

Mr. GILBERT: Yes.

Mr. CRESTOHL: And the question of price does not enter into it?

Mr. GILBERT: Not according to this definition.

Mr. CRESTOHL: That is a definition which the government has set up and which the law is setting up. What is your definition as a practical business man and as manager of the retail association?

Mr. GILBERT: In our definition we could add many words generally, but it would resolve itself in the same definition as contained in this clause.

Mr. JONES: I wonder, Mr. Chairman, if the witness could clear up one point arising out of Mr. Crestohl's questions? I rather took it that he was speaking in regard to a definition of a loss leader as being on a single transaction whereas the clause that he has referred to, being in accordance with your own opinion of the practice, regards a loss leader as being a practice in itself rather than one single transaction. Could you elaborate on your views in that regard?

Mr. GILBERT: You wish me to elaborate as to the predatory nature of the loss leader?

Mr. JONES: The sale of a single item, for example, would not in your opinion in fact be a loss leader, but according to this clause it is the practice

of using articles supplied by the person charged not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store, and the emphasis is placed on the plural of the words "practice of using articles"?

Mr. GILBERT: It speaks of a common practice of merchandising policy. This is the area to which we referred when we were making the remarks in respect of predatory price cutting. It is the merchandising policy of the operator whether he be a retailer, a distributor or wholesaler in making a practice of merchandising all other goods for sale for purposes other than to make a profit.

Mr. MARTIN (*Essex East*): This is the first time I understand there has ever been a definition put in the act as to the meaning of loss leader.

Mr. GILBERT: I think that is correct.

Mr. BALDWIN: Would you say that one clearance sale was not a loss leader, but a series of clearance sales perhaps which had become habitual, and you would then call it a practice, and it would become a loss leader?

Mr. BENIDICKSON: Clearance sales were dealt with this morning. Mr. Gilbert exempted them and said he was never complaining about them.

Mr. GILBERT: There is no purpose in disputing a legitimate clearance sale regardless of the type of operation. We might take the apparel business as an example, and obviously at the close of the summer season and the close of the fall and winter seasons there is a certain amount of merchandise on inventory, and the operator offers this merchandise at reduced prices in order to liquidate his inventory and make room for new incoming stock. This is the type of sale we know as a legitimate type of sale, and have since 1951, or prior to 1951. Unfortunately there are those operators who are pushing sales from one end of the year to the other under the banner of numerous titles; they may be clearance sales, fire sales, general manager sales. There is no end to the imagination that is used, but it is new inventory and new stocks at depressed prices. We feel that this is making a common practice of loss leader selling.

Mr. HOWARD: This is a supplementary question in respect of the definition of making a practice. There are stores, for arguments sake, on an anniversary of their opening, or the incorporation of their business, that put an anniversary sale on. They make a practice every year of selling items at below cost as you indicated, not for the purpose of making a profit but for the purpose of attracting people to the store. Does this situation not then fall within the prohibition? Is this not making a practice also?

Mr. GILBERT: No, I would have to disagree that this is a practice. Making a common practice refers to this as being part of the merchandising policy week by week, month by month, or year by year. There is no difference whether they call it an anniversary sale or a summer sale. They are clearing out certain items, and for that matter, I would suggest it might be rather dangerous to suggest they were loss leaders despite the fact that the sale offered the goods for a purpose other than making a profit. Purchasers look for these special occasions of high private enterprise.

Mr. HOWARD: Would that not be making a practice?

Mr. GILBERT: No, I would not consider that a practice.

Mr. JONES: Mr. Chairman, I wonder if in view of the definition that the witness has referred to at the top of page 9 of the bill, whether he could distinguished between these two practices which were prevalent, or became prevalent in the west for some time in the late thirties. One type of operation was that stores were selling many articles of goods. These outfits came into the communities in the west, and by selling certain of their goods at greatly reduced prices it had a tendency to drive the local merchants out of business.

That was one type of practice, and that has reference to that portion of the definition which says "attracting customers to his store in the hope of selling them other articles".

I have in mind another practice that was carried out at the same time by large companies, and bread companies particularly, who came into small areas and encouraged shopping by underselling the local baker by offering bread at less than half the cost of the bread and forced the baker out of business. Then he completed that operation, and put the price up to where it had been before, or higher. I wonder if you could distinguish between those two types of operations in regard to whether in your view they are loss leader selling?

Mr. GILBERT: In your closing remarks I believe you have put your finger right on the pulse of loss leader selling. When the market or the competition is eliminated by cutting prices, this is where our main contention of argument lies. As you point out this has happened, or did happen many years ago in the bakery field. To translate this to our modern methods of marketing we believe these are direct sales from the manufacturer, in this case to the consumer, and I do not think it is part of the material content that we are discussing here now. This is another area which is highly involved and would come under other aspects of the legislation that we are not discussing here this morning. In respect to the sale of almost door to door multiple items back in the old days direct from the distributor or wholesaler to the consumer, our association took severe exception to this practice, not because actually it was loss leader practice, but because there was an element of unfair competition, because these people paid no local taxes and so on. Secondly, wherever people offered cuts on these prices under the situation paralleling almost today in the discount catalogue, and we took a severe exception to the discount catalogue.

Mr. JONES: I have had many representations from people in my own constituency about that particular problem. I think it is covered in another section of the bill, rather than the particular point being dealt with here now.

Mr. GILBERT: That is right.

Mr. JONES: People from across Canada who do not pay taxes out west sell articles at prices supposedly far below ordinary retail prices, but in fact which are above the cost of the shoddy and cheap articles that actually are sold. I would take it from your answer, in respect of the other question, that you are satisfied that in order for it to be a loss leader type of sale the vendor must be offering for sale several different articles of merchandise, and not just one, as in the case of the bread companies where they forced the small baker out of business by means of underselling him.

Mr. GILBERT: I do not think I said that. This act might be simpler if it said "article or articles". The use of the plural, in our interpretation, would be the repetition from time to time of selling even the same article. Thus the plural case would be the case of the predatory retailer who, for instance, wants to pick on a brand or line of electric frying pans. If he sells these for purposes other than to make a profit once, he will then possibly, while there are a multiple of similar items involved, have the use of the plural. It becomes common practice if he continues to do so. It does not have to be a variety of items. It can be the same item. If he runs specials on the same item or other items of that manufacturer with regularity, obviously he is making a common practice.

Mr. HORNER (*Acadia*): Could you tell us whether or not there are any provincial laws against loss leader selling.

Mr. GILBERT: Yes.

Mr. HORNER (*Acadia*): How many are there and where are they?

Mr. GILBERT: The province of Manitoba, in relation to food products, has a minimum 5 per cent mark-up act.

Mr. HORNER (*Acadia*): Are the words "loss leader" used in that act?

Mr. GILBERT: I do not believe so.

Mr. HORNER (*Acadia*): Does it exist in any other province?

Mr. GILBERT: I believe the province of Alberta—this might be substantiated—has an act not unlike the Manitoba act.

Mr. MACLEAN (*Winnipeg North Centre*): Only on food products.

Mr. MARTIN (*Essex East*): There is no definition of loss leader.

Mr. GILBERT: No. These are minimum mark-up acts.

Mr. WOOLLIAMS: I think Mr. Martin and these other senior members of the bar might appreciate this. If there was a legal definition of loss leader in the act, unless it was made part of the criminal law there might be some question of its constitutionality.

Mr. MARTIN (*Essex East*): There is no doubt about that. That is the reason why we think taking it out of the code is a big mistake—that is section 411.

Mr. FISHER: I would like to develop a completely different line. I have been quickly through these two briefs. I cannot comment upon them. I have not been able, however, to find anything of a statistical nature which sets out the problem the small business is facing. I have looked through the royal commission on price spreads and have done a certain amount of analyses of the people in the trade. I have gone through the bureau of statistics for statistics in respect of the number of new businesses initiated and the number of bankruptcies. I cannot find any pattern which would indicate that small business has been in increasingly serious trouble since the 1951 amendment—nothing startling. We made the request of the minister that perhaps he could indicate this to us. I think you might be able to tell me where I could obtain this kind of information. It seems to me it underrides the urgency of what you are asking for or what you are supporting.

Mr. GILBERT: There is a blue memorandum report here, which is confidential, but which is available in confidence to the committee.

Mr. FISHER: Is it in this one?

Mr. GILBERT: It may not be in that book. Those were quickly run-off yesterday before I left. This is prepared from facts and figures from a large manufacturing firm in the small appliance field. It gives the record of their distribution from 1951 to 1959. We also have appendicated some figures.

Mr. MARTIN (*Essex East*): Could you give us the answer. You say it is in this. We would all like to have the answer. Could you give it to us.

Mr. BENIDICKSON: This is in respect of the deterioration which developed since the new law in 1951.

Mr. MARTIN (*Essex East*): Yes.

Mr. GILBERT: I will not use the names of the suppliers. They are here. This information was put together by the employment of a system whereby warranty cards were returned to the manufacturers after the purchase had been made from the retailer from whom the goods were purchased, and this showed the price at which they were purchased. It states that in 1951 a certain number of retailers in Toronto stocked and sold the product produced in Canada. By 1956 the number of retailers had declined, showing a retailer loss of 45.8 per cent. This trend continued on in 1957. The number of retailers handling this product this year decreased to 60.5 per cent. In other words, because of the loss leader or predatory price technique, they observed in their dealership a loss of 60.5 per cent retail outlets during the period.

Mr. McILRAITH: I would like to clarify that. You have jumped to the conclusion that because of that fact it was due to the loss leader selling. It may have been due to a dozen things.

Mr. GILBERT: The preamble to my remarks was the manner in which this record was developed. It was developed from the warranty slips forwarded by the purchasers to the manufacturer stating from whom the appliance was purchased and at what price, and from this information they have been able to determine who accounted for this situation and why it developed.

Mr. McILRAITH: In other words the remainder was sold through other outlets.

Mr. GILBERT: They come to that conclusion here.

Mr. FISHER: I think I know the name of the particular manufacturer and distributor. As a matter of fact I think I have seen some of that information. However, you have no statistical analysis which show us anything on a fairly broad field as to the perilous condition, in some ways, in which the small business reportedly is.

Mr. GILBERT: We do not have it in a factual way. We did produce bankruptcy figures in this document, but we agreed that the use of these figures may not be entirely conclusive.

Mr. MARTIN (*Essex East*): Have you a list of all the bankruptcies there?

Mr. GILBERT: Not the bankruptcies. In 1959 there has been a climb in bankruptcy in the trade sectors. It is an alarming increase. In 1951, for instance, there had been 387 business firms with liabilities of $5,693,000.

Mr. BENIDICKSON: In the retail trade?

Mr. GILBERT: Yes. In 1955 this figure climbed to 673 with liabilities of $15 million. In 1957 it climbed to 915 bankruptcies with liabilities of $23 million. The people are going broke in a bigger way. In 1959, there were 907 business firms in the trade sector with liabilities of $25,948,000.

Mr. FISHER: Would you agree that another figure which would be relevant with these figures is the number of new businesses which are launched in this new field.

Mr. BENIDICKSON: The total volume of the retail trade.

Mr. GILBERT: This is difficult information to get. In the postwar years, between 1945 and 1950 we saw the greatest number of new retailers enter the field which we have had in the history of this century. Because of the developments between 1951 and 1959, in proportion to the increase in the sales volume, there has actually been a decline and believe me, gentlemen, today there is no incentive whatever for anyone with the amount of money necessary to invest in the retail business to get into the retail business. There is no incentive whatever.

Mr. McILRAITH: Where is the difference in the construction business? There is a much higher rate of bankruptcy in that business. How do you relate that to the subject we are discussing.

Mr. GILBERT: I believe a study of the D.B.S. figures will indicate that the proportion of business failures in the last two years is predominantly in the retail trade sectors.

Mr. FISHER: In order to wind up this particular line of questioning, I would like to ask this: most of the people who belong to your association subscribe to the free market and competitive idea. Is it not natural to assume, as Canada gets on a larger scale—we have had a large population increase and a great volume of business—that in a future competitive situation a certain proportion will go to the wall. Is that not true?

Mr. GILBERT: Yes; but when we mentioned the failures, these figures make no allowance for the people who have left the scene quietly and peacefully and who have wanted no further part in the retail business, and have just closed up their business and left the scene.

Mr. FISHER: I come from the Lakehead where we have a number of large family concerns which quietly get out of the business; but in every case they have not gone bankrupt but have sold out to very large enterprises such as Simpsons Sears and firms like that. To me this indicates a problem about which I find nothing in your brief. Have you any views as to how we can redress that?

Mr. GILBERT: Our suggestion, first of all, is: let us either repeal section 34 and restore a system of orderly marketing or at least, in the interest of small business, adopt and pass bill C-58 exactly as it stands as an assistance to small business because, certainly, gentlemen, something must be done if we are going to maintain the competitive forces of the efficient independent operator in Canada.

Mr. MARTIN (*Essex East*): That is what we all want to do.

Mr. FISHER: So your association would tend to argue that if we have the effects of this particular bill that this quiet moving out of the field of these enterprisers could be curtailed, and that it might bring the smaller person with a bit of capital back into the retail trade.

Mr. GILBERT: We could not forecast the extent to which the departure from the retail scene would cease, but the legislation would be a great encouragement to the independent operator to remain in business, and it would attract new people into our competitive system in Canada.

Mr. FISHER: Do you think we should have a change in the act—I will not talk about the previous act passed by another government—as a result partly of the representations your organization has made, without any clear-cut statistical analysis available to all of just what is happening to small business. You yourselves have no pattern to offer us, and the government has not offered us a pattern. Do you not think this is odd?

Mr. GILBERT: It is our opinion, first of all, that a sufficient number of official inquiries has been conducted to justify the action which is proposed in the bill.

As far as we are concerned, I do not think that as members of parliament representing your constituents from all parts of Canada, you need any opinion from us, other that what your own constituents and business have told you.

Mr. FISHER: I have to say, there, Mr. Gilbert, and for the benefit of the other members of the committee, I always deal with the local person for our entire grocery purchases and everything. But we are getting here a rather great change in one aspect of this act. It seems to me this may more effectively be undertaken if we knew something more about the difficulties the small businesses are operating under. I wonder if your organization ever considered it part of its duties to prepare such an analysis? The reason I ask this is that the tobacco growers, for example, hired economists to make analyses such as this to present to the Minister of Finance in their particular field. I wondered if your organization has considered this.

Mr. GILBERT: We have not made a study of this kind. As far as the general application of the principle that we are endeavouring to apply here is concerned, we believe that within the framework of government and the dominion bureau of statistics, there is a network of organization to procure the figures required, if there is a sincere and honest need for them. But what we have done in our representations is to put before you a realistic appraisal of the situation. We have gone beyond this. We have travelled from one end of Canada to the other,

as we have indicated in the letter, and there was a series of meetings in the principal cities and towns, well attended meetings, I say, largely by retailers, but also by wholesaler and manufacturers' representatives.

There has been complete unanimity on the opinion that section 34, in its present form, was severely damaging to the industry at all levels of distribution.

Mr. McILRAITH: Mr. Gilbert, in the early part of your brief you list among the retail associations you represent the national automotive trades division.

Mr. GILBERT: Of the R.M.A.

Mr. McILRAITH: Yes.

Mr. GILBERT: That is, of the retail merchants' association.

Mr. McILRALTH: Now, what I wanted to clarify here was this, that I obtained an order repeating an order for return, reference No. 155, notice of motion 115, dated June 8, 1960, from the Minister of Justice, and in it is included "the submission of the national automotive trades association." Is that the same association?

Mr. GILBERT: Unfortunately it is not, and I am not able to speak on their behalf or answer any questions on their behalf. I might say that during the past two years—and, I think, largely because of our energy in respect of seeking some solution to the problems on marketing—we have had an impressive voluntary membership among the automotive dealers and service station operators everywhere in Canada. This is true more particularly in the last six months.

As a result of the vast number of these dealers we represented, on December 15, 1958, by our regular constitution, we formed a national automotive trades division, as a particular division of the retail merchants' association, and it has been in operation since that time.

Mr. McILRAITH: What I wanted to clarify was that this brief, in that parliamentary document, is a brief of a different association from the one you represent?

Mr. GILBERT: Yes, that would not be our brief.

The CHAIRMAN: I think I can clarify that, Mr. McIlraith.

The automotive retailers' association have presented a brief and will appear. They have asked for the date of Thursday, June 23.

Mr. McILRAITH: This is the national automotive trades association. That is the brief I am referring to, and I want to make it clear. It is flatly opposed to the proopsition contained in your brief, and I want it clarified it is a different association.

Mr. GILBERT: This would not affect your committee, but my reply to that is that if that statement is true, this possibly accounts for the rapid growth of automotive gas dealers and the membership in the retail merchants' association.

Mr. McILRAITH: That may or may not be, but I wanted to get the identity at the moment. I have several questions for you, Mr. Gilbert, if I may.

Turning to page 3 of your brief—and I think your whole argument and evidence this morning and this afternoon have made it abundantly clear what you really would prefer is the repeal of section 34 of the existing act—

Mr. GILBERT: We have so stated.

Mr. McILRAITH: Yes. We are on common ground there.

The CHAIRMAN: May I interrupt, Mr. McIlraith? Is it 3 o'clock. Would you like to start in on this series of questions at our next meeting? We have to arrange that.

Mr. McILRAITH: Yes, Mr. Chairman.

The CHAIRMAN: What is your situation, Mr. Gilbert?

Mr. GILBERT: It is not very good. I am due back in Toronto this evening, and I am leaving for our annual meeting on Sunday morning. Then I have to go to Vancouver.

Mr. MCILRAITH: How long are you away on the annual meeting?

Mr. GILBERT: That will keep me occupied until the end of next week, or Thursday of next week. I am touring British Columbia for a series of meetings the following week.

The CHAIRMAN: That is two weeks.

Mr. GILBERT: That is right.

Mr. FISHER: Could we not give him a date some time in mid-July to come back?

The CHAIRMAN: You should at least smile when you say that, Mr. Fisher.

Mr. MARTIN (*Essex East*): There is just one question I would like to ask Mr. Gilbert.

The CHAIRMAN: Just a moment, Mr. Martin.

Mr. MARTIN (*Essex East*): It was a question really that should be followed Mr. Fisher's.

The CHAIRMAN: Mr. Martin, just a moment. After all, the Canadian association of consumers have an appointment for 3 o'clock, and I do not think we should encroach upon their time. I would like to know the wishes of the committee regarding this.

Mr. FISHER: I would like to have Mr. Gilbert back again, myself.

Mr. HORNER (*Acadia*): Would it not be possible to meet tonight at 8 o'clock?

Several Hon. MEMBERS: Oh no.

Mr. MARTIN (*Essex East*): Mr. Gilbert has made some pretty important statements today, which I would like to clear up now. It would only take a minute—

Mr. MACLEAN (*Winnipeg North Centre*): Could we leave it to the steering committee to arrange an appropriate time?

The CHAIRMAN: We discussed that on the steering committee, and the idea was to have all the hearings as soon as possible, and then go over the bill clause by clause. If Mr. Gilbert is going away on a two or three week tour, it is going to leave it far beyond the date we hoped we could fix as a target to close the presentations.

What time do you leave tonight, Mr. Gilbert?

Mr. GILBERT: I am on the 5 o'clock flight.

Mr. MCILRAITH: I see no possibility of examining all the witnesses who would wish to make presentations within two weeks.

Mr. MARTIN (*Essex East*): Surely, we cannot proceed on the basis of an hour for this and an hour for that?

Mr. MCILRAITH: We have to have a proper program.

Mr. MARTIN (*Essex East*): This is a committee of parliament, Mr. Chairman, and we have to do our work in an orderly way, and I have never heard of witnesses being scheduled for 3 o'clock, and somebody else for 4 o'clock.

The CHAIRMAN: I would like to know how you would have set it up.

Mr. MARTIN (*Essex East*): This is parliament, and I am sure that Mr. Gilbert is interested in seeing that there is a most careful examination of this problem.

If this committee said to Mr. Gilbert: "We would like to continue with you," I am sure that he would accommodate himself to the exigencies of parliament.

The CHAIRMAN: There is no doubt about that. Here is the situation: these ladies have come a long way.

Mr. MARTIN (*Essex East*): I am not talking about the ladies, Mr. Gilbert.

Mr. JONES: But they are scheduled to make their presentation at 3 o'clock, and I think they should be heard.

Mr. MACDONNELL: I think this discussion should go on after we have heard this 3'oclock deputation, and not now.

The CHAIRMAN: We do not want to have to adjourn at all, but Mr. Gilbert would you be available—

Mr. GILBERT: I shall endeavour to make myself available.

The CHAIRMAN: Would you see if you could?

Mr. GILBERT: I am most anxious to cooperate.

Mr. MCILRAITH: I do not see, with the importance of this retail merchants' association, the importance of the kind of evidence he has given us today, a prospect of finishing with him in a few minutes. I would think it would be better to let him go. He has two weeks' commitments, as I understand it, and then he would be available.

Mr. AIKEN: This is what bothers me: suppose we do not get finished with the ladies who are here from the consumers this afternoon, and suppose we do not finish with the other witnesses who are to be called. How are we going to make an ordinary presentation out of this, if we do not get finished with the ladies? Do we bring them back some other day? How far can we go on with extending the meetings?

I appreciate, perhaps, Mr. Gilbert might come back. Perhaps the ladies feel that if Mr. Gilbert is going to come back they would like to come back and say something to counteract what he might say. I do not know how long this is going to go on.

Mr. MACDONNELL: I move this deputation of ladies be heard now.

The CHAIRMAN: You heard the motion, gentlemen?

Motion agreed to.

The CHAIRMAN: We are honoured this afternoon by the presence of the Canadian association of consumers. Miss Atkinson is the president of the national association and Miss Winkler is the Ottawa executive director of the office.

You have a brief in your hands and I hope that every member has read it and digested it. Miss Atkinson is prepared to read it or just speak on it, whichever you desire.

Mr. MCILRAITH: Could we have her read it?

The CHAIRMAN: All right.

Miss ISOBEL ATKINSON (*President of the National Association of the Canadian Association of Consumers*): Thank you Mr. Chairman.

Mr. MARTIN (*Essex East*): Do you live in Ottawa?

Mr. JONES: Miss Atkinson lives in Saskatoon.

Miss ATKINSON: I have been a resident in Ottawa for nearly four years. I just got back to Saskatoon when I was recalled to attend this hearing.

May I say, Mr. Chairman, that it gives me a great deal of pleasure to be present here, and I realize the interest which is taken on the proposals made in bill C-58, and to hear the discussion which attended Mr. Gilbert's presentation. My brief is, altogether, five pages,—not 250. I do not intend to read it because I thought perhaps it had been read. We sent out 50 copies and I understood that a copy was sent to each member, but some of the members I find have not brought them with them and for that reason I will offer to read it.

As you probably know, the Canadian association of consumers, and this is just preamble, is one independent volunteer organization which has as its sole objective unity of representation, giving a voice to the Canadian consumer.

You will note from the brief our concentration on clause 34. We have a strong interest in other parts of this bill which is intended to be proposed to amend the Combines Investigation Act, but there is a limit to our strength and our facilities and we decided to concentrate our presentation on the amendments under clause 4.

Our opposition to resale prices maintenance has been repeatedly stated and reaffirmed, not only to the various departments and committees which have considered this matter before, but it has been reaffirmed by our members at local and provincial levels, and during discussions at meetings of the national delegate body. We felt that we definitely have a mandate from our consumer members to appear before you and present this case for them.

We feel that the enactment of the proposed amendment to clause 34 will seriously weaken this safeguard to consumers and make successful prosecution difficult and unlikely.

Mr. Gilbert's presentation of the distributors' case appears to pass on the desire to prevent that form of competition which he referred to as loss leader selling.

Our members and other consumers have never complained of the so-called loss leader selling. They do complain of the continuing of the price maintenance afforded by their wide use of lists and suggested prices.

I will refer to the brief itself now.

Gentlemen:

1. This submission will be limited very largely to a consideration of clause 14 of bill C-58, which amends section 34 of the Combines Investigation Act prohibiting the practice of resale price maintenance. The reason for this limitation is not that we necessarily approve of the remaining amendments but rather that many of them involve technical issues relating to the jurisprudence in combines cases and complex economic considerations which require a degree of specialist knowledge that is beyond our competence and our limited budget.

2. The C.A.C. has on numerous occassions—beginning with our original submission in November, 1951, and continuing at intervals up to our latest submission in April, 1960—made representations to officials or ministers of the government, expressing our firm and unqualified opposition to the practice of resale price maintenance in any form or degree. This opposition was, and is, based on a careful analysis of the fundamental and general consequences of the practice as well as on its impact on the specific interest of the consumer.

Mr. JONES: Mr. Chairman, I wonder if Miss Atkinson would like to sit down?

Miss ATKINSON: I felt that my voice would carry a little better if I stood, Mr. Jones. My voice might not reach out as I am not used to addressing a body like this.

We make no apology for emphasizing the consumer interest since it undoubtedly comes closer to representing the "public" interest than does that of any other group. Our representations have been repeatedly reaffirmed by our provincial and local branches, and by delegates to our national annual meeting from both C.A.C. branches and participating organizations.

3. We would first raise a question as to the grounds for any amendment of section 34 at this time. In view of the findings of the careful and exhaustive analysis of "loss leader" selling by the combines branch, which culminated in the report of the restrictive trade practices commission, we fail to understand on what objective facts an amendment is being proposed which will restore in

a particularly undesirable form the right of suppliers to withhold supplies from retailers who engage in so-called "loss-leader" selling. Allegations as to the extent and seriousness of "loss-leader" selling should, at the least, be once again examined by the commission before such a crippling amendment is considered. Indeed, we would go further and contend that the practice of announcing and advertising "suggested prices"—

This is a very widespread practice.

—sometimes they are not even designated as such—should be examined by the commission to determine how far it is, in fact, being used as a device for maintaining resale prices. It is our strong impression that in many fields such "suggested prices" are effectively undermining the prohibitions contained in section 34. If price competition has made any inroads into the pricing practices of the pharmaceutical trade, to take as an example a trade which is most vociferous in its demands for resale price maintenance, few consumers are able to detect the fact in the prices they are obliged to pay.

4. Turning now to the amendments to section 34, it appears, on the surface, that the ban on resale price maintenance is not being eliminated but rather certain pricing, servicing and advertising practices are being brought under a limited control. Closer examination, however, makes it clear that successful prosecutions against "dealers" who enforce resale price maintenance will be most unlikely if these amendments are adopted.

Under proposed subsection (*a*) "no inference unfavourable to the person charged" with attempting to enforce resale price maintenance shall be drawn if "he and any one upon whose report he depended had reasonable cause to believe and did believe" that the seller made a practice of using the articles supplied as "loss leaders". "Loss leader" selling of a product is defined as being "not for the purpose of making a profit thereon but for purposes of advertising". But at what level is it considered that a profit is being made? And why should the seller be forced to make a profit on the item in question rather than on his stock as a whole; and of course, who decides what the profit is? These are surely basic questions and the only answers that seem at all likely are very disturbing to our members.

5. With reference to the definition of "loss leaders" proposed in the amendments, it is clear that the supplier who wishes to enforce a policy of resale price maintenance can defend himself against a charge under section 34 if the seller of the article in question does not charge a sufficiently high price to cover his costs of operation plus something for profit. Obviously, the supplier has no way of knowing what the costs of the individual seller are, but he does have access to reports made by trade associations and by the dominion bureau of statistics on the average cost of operation for the trade in question. Sales which do not make possible the earning of such a mark-up will provide a plausible basis for the supplier's "belief" that the article was not sold for the purpose of "making a profit thereon". It might be added that this was the definition of a "loss leader" that was favoured by almost every trade association making public representations before the restrictive trade practices commission in the "loss leader" inquiry.

In the anti-competitive atmosphere which has developed in certain distributive trades and industries, it is but natural that a man who makes a price lower than the bulk of his fellows will be suspected of having failed to count all his costs. If this frame of mind is to be encouraged by legislation of the type we have here, what then will happen to the innovator who develops a cheaper method of distribution—e.g., the discount house—or even the seller who is able to perform the standard functions of distribution more efficiently?

6. Then, too, there is the notion—one that can only be adequately described as "dangerous"—that a seller must sell a product to "make a profit thereon".

Since the only basis known to the supplier of determining whether or not a profit is being made is the average cost of operation for the trade in question, all items sold below that level are presumably being sold as "loss leaders" or "for the purpose of attracting customers to his store in the hope of selling them other articles". It will apparently come as something of a shock to those who drafted this legislation to discover that a number of staples in the grocery trade are habitually sold at very low mark-ups—from one-quarter to one-half—or even less, in some cases—of the average for the trade. Among these are: butter, coffee, tea, eggs, sugar, flour and margarine (see the green book on "Loss Leader" selling, pp. 75-94). The suppliers of all these, and other, grocery items would be in a position to enforce resale price maintenance on grounds provided under clauses (a) or (b) of the proposed new subsection (5). It is surely ill-conceived legislation which makes possible such unwise interference with competitive pricing practices; nor is there reason to believe that this condition applies only to the grocery trade.

7. The other grounds on which a supplier can claim protection against a charge of enforcing resale price maintenance are equally open to manipulation. Trade journals, such as the *Hardware and Metal and Electrical Dealer,* and individual appliance dealers never tire of emphasizing that only by charging the "regular price" is it possible to provide "service" on electrical appliances. Hence, the supplier can plausibly claim to have "reasonable cause to believe" that those dealers who sell for less than the "regular price" do not provide "the level of servicing that purchasers of such articles might reasonably expect". What about the dealer who reduces his selling price and provides no service to buyers, who then purchase their servicing elsewhere at less than the reduction in price he has received? Are all consumers to be forced to pay for a level of servicing that "purchasers"—a generalized entity—"might reasonably expect"? Surely, one of the purposes of enacting the ban on price maintenance was to give consumers a choice as between limited and full-service dealers with an appropriate price differential. This choice clause (d) could effectively deny them.

8. Clause (e) offers a defence which almost every manufacturer who has employed resale price maintenance can resort to with conviction. It is one of the basic articles of faith among such manufacturers that price-cutting debases the reputation of their products in the eyes of consumers. Hence, they will certainly find "reasonable cause to believe" that the dealer who sold below the "regular" or "suggested" price "was unfairly disparaging the value" of the article in question. The manufacturer might even "have reasonable cause to believe" that the dealer was engaging in misleading advertising, a defence which he can claim under clause (c).

9. In summary, it is our firm opinion that the amendments to section 34 proposed in bill C-58 will effectively undermine the prohibition of resale price maintenance. Furthermore, it appears to establish powers to enforce resale price maintenance which would have been of doubtful legality before section 34 was enacted.

10. There is an aspect of the powers and procedure established by this amendment which seems to us to be altogether undesirable and distasteful. The manufacturer is given a degree of power to control the retailer by intimidation which should not be permitted. The manufacturer can cut off supplies to any retailer if there is "reasonable cause to believe" that he is engaging in any of the five practices set out under subsection (5). How does the retailer protect himself against such action by the manufacturer? Must he go through the courts? If so, how many dealers are prepared to do so, and how many can afford to face the costs of appeals which the powerful manufacturer will resort to? In effect, the manufacturer, as we see it, will enforce this

section of the Combines Investigation Act, not in the interest of the consumer or the public, but in his own interest. This can only be described as a most extraordinary state of affairs.

11. Finally, we wish to comment on the reason given for this, and other, amendments to the combines legislation; that it is designed to protect the small dealer. We dealt with this matter in some detail in our original submission on resale price maintenance in November, 1951; thus our present comments will be less detailed than they could otherwise be.

Essentially, it is well-established that even a thorough-going system of resale price maintenance will provide little protection for retailers unless freedom of entry into the business is controlled and freedom to increase services is controlled. When competition in price is prohibited and entry is restricted, dealers, in order to attract customers, will provide more and more services—many of which will be of little advantage to consumers. Net profit will decline and the stage will be set for a demand for a higher margin. This is not a theoretical possibility but is an established type of development, noted by Dean Grether and other authorities on resale price maintenance. When entry is not controlled, new retailers will be attracted by the apparently substantial margins; volume per retailer will decline, and net profit will decline. This also is a clearly established type of development, which is recognized by many Canadian retailers.

12. The only protection for the small retailer that can be derived from resale price maintenance is of a short-run character and is purchased at an inordinately high cost to consumers. It is our contention that assistance for small dealers should be found in other directions. There should, first, be effective protection for the small dealer against unfair and uneconomic price discrimination. In view of the negligible use which has been made of section 412 of the Criminal Code, we feel that it is of little value in this respect. Second, we feel that mergers which result in undue concentrations of market power undoubtedly place the small dealer in a weak position. We can only view with concern the failure of the combines branch to take any action against recent mergers and concentrations of control among the very large corporations which are extending their field of activity in the food industry through supermarkets.

As an addendum, I should like to say that we are living in a period of radical change in methods of distribution, as in other sections of the economy. More of these changes have been applied to distribution in the foods field than any other field. The inevitable adjustment was painful and harsh in its effect on some retailers, as we recognize; but the desire for a measure of restriction in competition, as sought in these amendments as originally provided by us, by price maintenance and by the still used lists of suggested prices, is, in our opinion, part of the resistance to these changes which are of positive detriment to consumers, are not in the interests of consumers and should not be approved. Thank you, gentlemen.

The CHAIRMAN: Thank you, Miss Atkinson.

Miss ATKINSON: I would not mind questions, or some comment.

The CHAIRMAN: You are prepared to answer some questions?

Miss ATKINSON: Yes, within reason.

The CHAIRMAN: I saw Mr. Aiken with his hand up earlier, getting ready—and Mr. Fisher after that.

Mr. AIKEN: Miss Atkinson, I presume that with the experience you have had in this field you are acquainted with the report known as the MacQuarrie report, in 1951, concerning resale price maintenance?

Miss ATKINSON: Yes.

Mr. AIKEN: Do you believe, as a matter of principle, that loss leader selling is a detrimental practice, generally speaking, as is stated in the MacQuarrie report?

Miss ATKINSON: I think the evidence, sir, and the questions directed to Mr. Gilbert today indicated that never yet has there been a satisfactory definition of what loss leader selling is. Unless you really know what you mean by loss leader selling, it is rather difficult to say whether it is detrimental or not.

There are statements made that anything which is sold beyond reasonable mark-up is loss leader selling. Occasionally it has been said that to sell for less than a product costs is loss leader selling.

I believe that three or four years ago there was a case in connection with the distribution of certain electrical appliances, in which a firm in Toronto was charged with loss leader selling. The evidence proved that the list price at wholesale for the article was about the same level as the price at which it was sold, but the purchaser had got a generous cash discount, a more generous advertising allowance, and instead of spending the advertising allowance on newspaper advertising he deducted it from the price of his goods—consumer supplies. Then he sold it at a much lower price than other dealers. That is considered loss leadering by some people. But it was not selling without any profit.

Mr. AIKEN: What I was referring to was this, that in this report they seem to understand what loss leader selling is, in general terms, if it was not given a legal definition. They said they believed it to be a monopolistic practice which did not promote general welfare, and therefore considered it not compatible with the public interest.

Without trying to define it in its precise terms, would you say that loss leader selling, as it is generally understood, is a bad practice?

Miss ATKINSON: Well, sir, I cannot see that loss leader selling is as detrimental as is charged by the retailer. In the first place, if it is indulged in for a long time, a man who is selling on loss leader prices is going to lose too much money on it.

Mr. MARTIN (*Essex East*): That is what the next sentence of the report says.

Miss ATKINSON: After all, how wide are you going to impose controls on people? I happen to have been in business for some years myself, and have experience of it. This is done almost everyday by some of our big food supermarkets: they begin by offering special prices and special conditions of sale as an introduction. Is that advertising, or is it loss-leadering?

Mr. AIKEN: In other words, your answer is that since loss-leadering cannot be defined, there is nothing wrong with it?

Miss ATKINSON: I think there is something wrong with the name of loss-leadering, actually, or what they mean by loss-leadering. What they mean, actually, by loss-leadering is painful competition.

Mr. AIKEN: It is what?

Miss ATKINSON: Painful competition.

Mr. AIKEN: You do not agree, though, that it is worse than painful competition; that it is improper or monopolistic practice—unfair?

Miss ATKINSON: I think that such methods might be used by certain firms in an improper way; but I do not think that this legislation would restrict or control that. There was some reference, or an interview in the press of a big merchant not very long ago, and some reference was made to legislation which was being considered, I think in this bill, and he said, "Well, of course, it will not make very much difference, because whatever they enact, we will get around it some way".

If business methods of what we think are a questionable type are going to be used, I do not think this legislation will prevent the inventive but unreliable businessman finding some way of conducting his painful competition.

Mr. MARTIN (*Essex East*): I think, in fairness to the quotation, you ought to read the next sentence.

Mr. AIKEN: If you wish. This particular quotation had two parts to it. First there was the one I read, which said it was a monopolistic practice which does not promote general welfare, and is therefore considered not compatible with the public interest.

The second part, that the application—if I understand it correctly—of loss leader selling was not at that time sufficiently serious to the economy for anything to be done about it?

Miss ATKINSON: Yes, I remember that.

Mr. AIKEN: Mr. Martin, I think, is trying to trip me up a bit.

Mr. MARTIN (*Essex East*): No, no.

Mr. AIKEN: I want to find out, first, if you considered loss leader selling was bad. If so, we will have to go on from there and find out whether it is, at the present time, dangerous to the public or not.

Miss ATKINSON: Well, I think that selling which is intended to make a fair amount of business in order that another firm may take the business over is unfair competition, shall we say.

Mr. AIKEN: Yes.

Miss ATKINSON: That is a very different matter from much of what is charged as being loss leader selling.

Mr. MCINTOSH: How is it different?

Miss ATKINSON: Well, Mr. Gilbert gave you a case this morning.

Mr. MCINTOSH: I am asking you how is it different in your opinion?

Miss ATKINSON: I would consider it was probably practised by a firm that had considerable capital and was able to expend some of that capital in invading a field and making it difficult for a local established business to carry on. I do not think there is a great deal of that done, but I think it has been done on occasion, and I think that is unfair and bad practice, perhaps; but I do not see how you are going to stop it by this legislation.

Mr. AIKEN: I am not concerned about the actual changes at the moment, but the loss leader can be, and at times, is an unfair trade practice?

The CHAIRMAN: Mr. Fisher?

Mr. FISHER: Do I understand, Mr. Chairman, the witness is ready to agree that small business may be, at this particular time, in certain difficulties—is that correct—in the main, across the country?

Miss ATKINSON: Yes, I think it is very difficult. We are living in a period when all types of business—as you probably know, even farming has become large-scale—are turning to mass-production both in primary and secondary production.

Mr. MARTIN (*Essex East*): The chairman is one of those large-scale farmers.

The CHAIRMAN: I am a large farmer!

Mr. MCINTOSH: We have another committee to deal with that subject, too.

Miss ATKINSON: An individual may survive, if he is giving service of value to the community. I happened to be an individual at one time, in a small business, and I think we survived because of the service we were giving; but people have to face conditions of today. I do not think the farmer is going to be preserved by special privilege legislation. It will be by discovering ways and means of effective production and distribution.

Mr. FISHER: You and your organization see small business being in difficulty, but you do not feel the difficulties are occasioned as a result of resale price maintenance cut off in this legislation?

Miss ATKINSON: Up to as large an extent as is charged by retail merchants.

Mr. FISHER: Is it correct to assume from your brief that you feel there are other areas of decision and government action that might be more effective?

Miss ATKINSON: I think if we were to know what is best to do, we would have to have a very thorough investigation, with a great deal of statistical information, and so on, to give us a picture of what is happening today. It is changing so rapidly I do not know how you can keep up with it.

Mr. FISHER: Do you hear the questions I asked Mr. Gilbert, in an effort to find out?

Miss ATKINSON: Yes.

Mr. FISHER: Do you know of any place where one can get a statistical pattern which will indicate the difficulty of small business?

Miss ATKINSON: I was very interested in your questions, and I felt they were pertinent, and we want that kind of information. As I listened to Mr. Gilbert talking about the difficulties caused to small retailers, I felt that the thing needed, much more than this legislation, was a system that required that supply be made up to a standard. How can you say something is misleading advertising if you have no standard for the article that is advertised, and you cannot say what the commodity is really worth? He spoke of radios listed at $39.50 and another at $59.50. The consumer has very little information as to comparable values. Then he went on to speak of an imported model that was sold for $12.95, which he implied was just about as good. I would have liked to ask Mr. Gilbert what was wrong with the imported radio, apart from its being imported. He did not seem to think there was anything wrong in it. If we had a system of standards we could, at least, define the quality of some things. Having said that, I happen to realize that to establish those standards is a tremendously difficult thing.

Mr. FISHER: I want to ask you a question in relation to your organization's views on the economy of scale.

Miss ATKINSON: What do you mean by "economy of scale"?

Mr. FISHER: It seems to me that you seem to suggest the government might consider action to block off mergers in this increasing concentration. The argument of concentration is usually economies of scale. How real is the economy of scale in the retail trade?

Mr MARTIN (*Essex East*): He is asking you what you mean by "economy of scale"?

Miss ATKINSON: I realize, to some extent, what you mean—the very large corporate body is able to operate. I think that is quite true, and I think the consumer has benefited by economies achieved as a result of large-scale operation. They have lost something very valuable, because in getting that large-scale operation business to a great extent has been depersonalized, and the personal relationship is far more important than many people realize; and that was provided by independent merchants. But there is no doubt at all very great economies have been achieved. I am particularly aware of them in the food industry. I think this is their need, the application of many of the same methods of greater efficiency, shall we say, in some cases, mechanization and so on, to other branches of distribution. For instance, in the food industry the wholesale handling has been reduced to one-half or one-third of what it used to cost thirty years ago, and there has been a great reduction in the retail handling of foods. That is beginning to be offset by the fact there is a great concentration of power in the hands of a comparatively small number of their

large-scale food distributors, and judging by the price spreads report they are depending more on promotion and advertising than price competition to maintain and increase their volume.

Mr FISHER: One of the reasons why your brief comments about legislation on the merger and concentration is it would be more valuable to the businessman than this particular one?

Miss ATKINSON: I do not think our brief really suggested there should be any legislation on that subject. There was a suggestion that The Combines Investigation Act has not been used to really give us a picture of what is happening in that field. I think that what has happened already is only the beginning of what is going to happen in the next 15 or 20 years. There is going to be a very big change in distribution. At the present time, there is a movement in the United Kingdom, a parliamentary committee not like this, but a standing committee which is conducting hearings over a period of two years, as they expect. It has just been hearing representations that there should be standards established for goods in the consumer field, that there should be inspection, and that they should not rely just on brand names as a commodity that is becoming known just because it is nationally advertised, but for which we do not have any details. We do not know under what name it is established, or the engineering standard, or what anything else is. One national advertising campaign may be a great deal bigger than another and make a bigger impression, not because the goods are better, but because they are spending more money on promotion, and the consumer has no way of finding out what the comparative values are in the great field of consumer goods. This is true even of foods.

Mr. FISHER: I have more questions, but I have had my share for a while.

Mr. BALDWIN: Miss Atkinson, first I want to say this is a very interesting and very informative and instructive brief, and it obviously shows there has been a great deal of preparation.

Mr. MARTIN (*Essex East*): Hear, hear.

Mr. BALDWIN: Would you mind looking at page 4, section 10, about the middle of that paragraph you say this:

> How does the retailer protect himself against such action by the manufacturer? Must he go through the courts? If so, how many dealers are prepared to do so—

and so on. I wonder, is it not a fact that the dealer would not be in court except as a witness in a criminal prosecution launched against the supplier, even as he is under the existing legislation?

Miss ATKINSON: I do not know just exactly how this bill will be enacted. I think even when the bill is enacted it is rather difficult to know the law will work, and I do not feel I am in a position to say how this would affect the situation.

I presume that if a dealer was refused supplies because he had sold at less than the price the manufacturer thought was proper, he might wish to take action, and that is what this provision is supposed to make possible. But how many dealers would be in a position to take action, and could afford to go to law on a matter like that?

Mr. BALDWIN: This is defined as being a prosecution. The point I would like to make and ask you if you would not agree with me—and it is not a technical point—as a prosecution is conducted by the crown, the retailer would only be a witness. If there was an appeal, the appeal would be conducted by the crown. You refer in your brief to the retailer having to face the cost of an appeal. In my opinion, this is a criminal action, and not a civil action which would be launched.

Miss ATKINSON: I am afraid I am not sufficiently a lawyer to be able to go into legal technicalities.

Mr. BALDWIN: That is a good position to be in quite frequently.

Mr. WOOLLIAMS: So you will know, Mr. Baldwin is a lawyer.

Miss ATKINSON: I assumed so.

Mr. BALDWIN: On page 2, paragraph 5, you bring up, in the first four or five lines, a point which I think appears to be the essential heart of your complaint. You said:

> With reference to the definition of "lossleaders" proposed in the amendments, it is clear that the supplier who wishes to enforce a policy of resale price maintenance can defend himself against a charge under section 34 if the seller of the article in question does not charge a sufficiently high price to cover his costs of operation plus something for profit.

I wonder if more than that has not got to be done. Have you a copy of the amendment in front of you?

Miss ATKINSON: The bill?

Mr. BALDWIN: Section 14 of the proposed act?

Miss ATKINSON: Yes.

M. BALDWIN: The opportunities for a defence which are afforded a supplier are set out in paragraphs (*a*) to (*e*) of section 14 (5).

Is it not a fact that in order to make a substantial defence, the supplier would have to prove not only that he was selling not for the purpose of making a profit but in addition for the purpose of advertising?

Miss ATKINSON: You said "supplier".

Mr. BALDWIN: I am thinking of the supplier or distributor who is being prosecuted. These are obviously set out for his defence, as I understand it.

Miss ATKINSON: Yes.

Mr. BALDWIN: I wonder if you agree with me that it is not enough for him, as I read it, to show that the dealer is selling goods not for the purpose of making a profit but also for the purpose of advertising—

Mr. FISHER: Not "also".

Mr. BALDWIN: And also. That is the way I read it.

Mr. FISHER: Where? I cannot see the "also" there.

Mr. BALDWIN: That is a question we can argue later.

Miss ATKINSON: I assume only one of these things—

Mr. BENIDICKSON: It is not (a), (b), (c) and (d).

Mr. BALDWIN: Paragraph (b) says: If he is making a practice of using articles supplied by the person charged, and selling such articles at a profit or for the purpose of attracting customers to the store, would that not be something which the supplier would have to establish as well, for a defence? Is there not more in it than just saying that the dealer was selling something at a price less than enough to make a profit?

Miss ATKINSON: Well, I think many of these things would be difficult to establish, of course, but nevertheless this is rather a complex situation which now exists and which is satisfactory with the consumer, in so far as it prohibits, as we say, price maintenance. We do feel that in spite of that ban, that had all the effect of having re-sale price maintenance, and goods will be selling at suggested prices which will, as you might easily find, show that things may be manufactured in the east, but they are sold at the same price over more than half the country. It is a little higher in the west,

because of the idea that it costs more to transport them to the west; but still they are uniform prices for a great many nationally advertised articles. I think those uniform prices are not, I suppose, achieved by a short withholding of supplies at the present time; but we do not think they may be uniform prices and suggested prices because we think it is impossible for the manufacturer to know what it costs various types of retailers to operate their businesses, and therefore they are not in a position to judge what the mark-up ought to be. It should be left to the retailer.

Mr. WOOLLIAMS: I would like to join in the remarks that Mr. Baldwin made in reference to the brief, and I would congratulate your group for setting out such a favourable brief.

There are two or three things I want to cover with you.

I notice you are from the city of Saskatoon, and I gather the incoming companies are pretty well as prevalent in Saskatoon as they are in Calgary, where I am from. Was it the feeling among the consumers that the little store is disappearing and becoming part of the larger stores like Safeway, and some of the other bigger chain stores and that by mergers they will get larger and larger? Do you really honestly feel that this loss leader practice—and I suppose none of us can really come to an agreement at the moment as to a definition of loss leader, although we have some idea what we mean when we use the term,—is driving the little retail store owner out of business, so that the consumer is being driven now to the big monopolistic chain stores?

Miss ATKINSON: I do not think the loss leader is having that effect on the small merchant. I do think that the large scale competition is driving them—the small businessman—into what we call the volunteer chain, and particularly if he is in the food business. There are literally thousands of small independent merchants who have become members of the volunteer chains. They retain a degree of independence in the operation of their businesses and in their ownership, and receive the benefits of the large scale operation as a result of that situation. That is one of the ways in which existing conditions have helped the independent merchant to develop and to survive.

Mr. WOOLLIAMS: With the greatest respect, I must say that the small merchants whom I have had correspondence with disagree with you. They do feel that this loss leader practice is one of the economic factors that is driving them to the wall and putting them out of business. With the greatest respect I must bring that to your attention. As far as the information I have, the small business would go along with the suggestion that this loss leader practice is a factor that is putting them out business.

Miss ATKINSON: May I reply to that?

Mr. WOOLLIAMS: Certainly.

Miss ATKINSON: I have felt there is a strong tendency in the retail food business, where I have had a good deal of acquaintance, to obtain price competition. In regard to the loss leader, unless we have a definition for it how are you going to have a difference.

Mr. WOOLLIAMS: I was suggesting that some of the big chain stores in Saskatoon or Calgary sell eggs and butter, etc. away below the price, to encourage people to come into their store and buy all those other items that can be purchased in these chain stores. What do you say about that suggestion?

Miss ATKINSON: I have not ever myself, bought anything at a loss leader price, either eggs, vegetables, butter or milk. I have heard of this situation in regard to milk.

Mr. WOOLLIAMS: I think that is commendable.

Miss ATKINSON: I have not seen these things offered for sale at those prices, even. I think there may be cases of that kind, but I do not think they exist for long, or continue for long. I think they are apt to apply for a short term, as special sales attraction.

Mr. WOOLLIAMS: Assuming that it is true it is driving the small man out of business, for one reason or another, some of which Mr. Fisher mentioned earlier today, do you feel in your opinion that these chain stores will get larger and larger until we will finally be dealing with one concern?

Miss ATKINSON: I hardly think so. I think there is a natural corrective. I think that the large chain stores are becoming so de-personalized that a man might go into an independent business in a variety of fields and, by offering personal service, might be able to build a good business.

Mr. WOOLLIAMS: Of course it was thought 20 or 30 years ago that that was true in regard to the little store on the corner. Some economists believe, I get the impression from what I have read, that the stores will get larger and larger and eventually we will be dealing with one or two concerns. I think you will go along with me in this regard, Miss Atkinson, that there is some evidence looking back in the last ten years that this is occurring.

Miss ATKINSON: It is occurring to a certain degree. I do not consider it altogether a happy condition, but I do feel that in the last 15 years, particularly since the war, with the increasing urbanism, the tremendous growth of our urban units has been such that I very much doubt if the small independent merchant would have been able to serve efficiently and adequately the increasing population in some of our large metropolitan and semi-metropolitan units. We need the large-scale food distribution, and this has succeeded because it has given the consumer something that they needed, and that is service; and in the beginning they offered very definitely better prices.

Mr. WOOLLIAMS: Thank you very much.

Mr. HORNER (*Acadia*): Miss Atkinson, you stated in your brief, or perhaps before you started reading your brief, that the supplier would not know whether or not the retailer was selling his goods at a cost which could be considered a loss leader. Do you not think that even some loss leader goods are sold below the price the supplier sells to the retailer, and he would then know that they are being used as loss leaders. I am thinking of a particular case in Calgary. The Safeway store plastered a big banner across the window in this large store stating that they were selling two loaves of bread for 14 cents. I do not know anything about the cost of bread to the retailer but I know what it costs to produce the wheat. The supplier would know that these goods were being sold below cost, would not he?

Miss ATKINSON: We have not yet established that it is a crime for a businessman to sell something which he has bought and possessed at a set price, if he wishes to.

Mr. HORNER: (*Acadia*): You mean if he wants to clear it from his store?

Miss ATKINSON: No, even if he wishes to use it as advertising or sales promotion.

Mr. HORNER (*Acadia*): That is what this bill is covering.

Miss ATKINSON: Yes.

Mr. HORNER: (*Acadia*): And that is, that the manufacturer can refuse to sell his goods to the supplier if this is done.

Miss ATKINSON: As I said, it is objectionable perhaps for many reasons, but is it a crime?

Mr. HORNER (*Acadia*): We do not say it is a crime. Under this bill it is not going to be a crime; it just gives the manufacturer the right to refuse to sell any further goods to the retailer. It will not make it a crime.

Miss ATKINSON: Are you going to have a special group of manufacturers with effective powers not only in respect of cases of that particular kind, but in other cases which are not nearly as acute as the one you have set out?

Mr. HORNER (*Acadia*): No, the manufacturer will be faced with prosecution if he refuses to sell to this dealer.

Miss ATKINSON: Who is going to prosecute him?

Mr. HORNER (*Acadia*): He will be prosecuted under the Combines Investigation Act.

Mr. MCILRAITH: Who will prosecute him?

Mr. HORNER (*Acadia*): The crown will. This is covered purely under clause 14.

Miss ATKINSON: Before the case is brought under the combines act you have to have a group of people to make an application.

Mr. HORNER: (*Acadia*): I believe you have to have six persons. The crown will do all the prosecution; but the manufacturer is threatened with prosecution if he refuses to sell goods to a retailer.

Miss ATKINSON: We have been recently interested in some things you may have heard about which are called trading stamps. We understand under the new law which was passed by the federal government that the provincial attorneys-general had the duty of prosecuting any defaulter under this act. We find it most difficult to get some of the attorneys-general to even think about these cases, never mind taking any action.

Mr. MCILRAITH: You would never get a prosecution under the act as the bill is now.

Mr. HORNER (*Acadia*): That is just your opinion.

Mr. WOOLLIAMS: That is the supreme court speaking now.

The CHAIRMAN: Do you wish to continue, Mr. Horner?

Mr. HORNER (*Acadia*): I think I have made my point.

Mr. FISHER: What point?

Mr. HORNER (*Acadia*): One point I thought I made quite clearly, Mr. Fisher is that the supplier would definitely know in some cases because he knows what he sold the goods to the retailer for, and can see that the retailer is selling those goods below cost.

The second point I made was that the retailer would not be prosecuted by anybody for selling goods below the cost, but he may be deprived of further supplies from that supplier. He has access to all markets. There would be many other suppliers, but he could not get that particular brand. I used the example in respect of the bread in the city of Calgary. There are half a dozen other bakeries in the city of Calgary, and the retailer could buy from any one of them.

Mr. MCINTOSH: Miss Atkinson, I have read some place that there are 50 some different definitions to socialism. Mr. Fisher may not agree with that.

The CHAIRMAN: I will call you to order on that point; we are not discussing socialism here.

Mr. MCINTOSH: I was just using that as an example, Mr. Chairman.

The CHAIRMAN: I was anticipating a little trouble.

Mr. MCINTOSH: During the course of your remarks Miss Atkinson, you used several terms. I did not catch them all, but you used the terms loss leader competition, painful competition and unfair competition. In order that we may understand what you mean by loss leader competition, would you distinguish it from what you called painful competition.

Miss ATKINSON: I have never felt I was capable of defining what loss leader competition was because I have never met anyone who could explain what it is. I certainly am not competent to say what anybody would consider loss leaders.

Mr. BENIDICKSON: It is defined in the bill.

Miss ATKINSON: Consumers are interested in bargains. When they see good prices they consider them as bargains; they do not consider them as loss leaders. They do not know what the goods cost and they are only interested in what they sell for.

Mr. MCINTOSH: Did you not say in answer to a question put by Mr. Aiken, when he was giving you an example, that it was painful competition and not loss leader competition? You must have defined the two there, when you made that statement.

Miss ATKINSON: I refused to consider that it was loss leader because I do not know what loss leaders are. I said, not loss leaders, but painful competition.

Mr. MCINTOSH: At page 4 of your brief you say that when competition in price is prohibited and entry is restricted, dealers, in order to attract customers, will provide more and more services—many of which will be of little advantage to consumers. Could you give an illustration of what you mean by the services?

Miss ATKINSON: In the price spreads report I was rather surprised to find out that some of the promotional activities I had criticized were described as services. I do not consider they are services really to the consumer. They add to the cost, but they are not really serviceable.

Mr. MCINTOSH: You do not really mean services there in this brief?

Miss ATKINSON: Possibly it is a wrong word.

Mr. MCINTOSH: What word would you use instead?

Miss ATKINSON: Well, use "practices" perhaps.

Mr. MCINTOSH: Thank you.

Mr. HALES: Miss Atkinson, I gather from your remarks that you realize the food business is getting into the hands of very few operators, and you admit it is not a happy condition. We are proposing new legislation to help this problem, and you do not approve of this legislation. Are we to assume you are taking the attitude that the small operator or small businessman is on the way out, and therefore we must assume that and let it go, and you are not in favour of helping him stay in business.

Miss ATKINSON: No sir, I do not think the small dealer is going out of business. I think some of them will not be able to survive, but some of them are competent and able businessmen who are well established in the community and despite the keen competition in the food field they are still doing over 30 per cent of the food business in the country, in addition to what is called the voluntary chains. In other sections of business there is a tremendous amount of retail distribution in the hands of personal firms or what you would call comparatively small businessmen.

Mr. HALES: Did I understand you to say you have never bought loss leaders, or were you referring to certain commodities like butter, bread, eggs and milk?

Miss ATKINSON: Possibly it is because, not having come from a large family, I have not shopped as much as some people. I have heard, however, of bread being offered at 14 cents a loaf. I have never been able to buy it at that price. I have heard of eggs being sold at quite a low price but I never ran across that.

Mr. HALES: You would agree that is not true in respect of consumers generally?

Miss ATKINSON: I think some consumers may have been offered goods and bought them at less than cost. As a matter of fact I have known one who sold at less than cost for a definite purpose—perhaps to clear them out or as a matter of advertisement, or an inducement to buy; but, I do not think the average businessman can afford to do an excessive amount of that sort of sacrifice business.

Mr. HALES: That is what is putting the small retailer out of business.

Miss ATKINSON: I do not think it is.

Mr. HALES: That is one of the reasons.

Mr. MARTIN (*Essex East*): The witness is not saying that; you are saying that.

Miss ATKINSON: I am not saying that.

Mr. HALES: That is one of the reasons.

Miss ATKINSON: I do not say that.

Mr. HALES: That is loss leader selling. It is one of the reasons.

Miss ATKINSON: No. I think many other modern business methods,—for instance, the use of self service, automation, and so on,—are providing economies which the individual merchant in many cases cannot meet.

Mr. HALES: I have one other question. Does your association realize in these loss leaders, again particularly in respect of food, that it falls right back and finally is very detrimental and harmful to the producer or the farmer.

Miss ATKINSON: I just have been saying that I do not recognize the term loss lead. I think what you mean is price competition.

Mr. HALES: Let me put it this way. If the article is sold at less than cost price, the effect eventually finds its way back to the producer and is very detrimental to the producer or farmer.

Miss ATKINSON: I think the conditions vary so much in the retail business that it is very difficult to say. When I was in business a very large firm sold us a line of goods. I happened to analyze the cost of handling it and so on, and I found that we could not make any money on it, and in fact lost money continually. We had a talk with these people. We had a contract with them to handle this line of goods in the store. They told us it is not an item to make a profit on, but is a service to the customers and will induce them to come into the store, and when they are there they will buy something else. That is different from what anybody else has mentioned today. There are all sorts of things done in business and retail distribution which is hard to define.

Mr. HALES: Do you agree that it finally finds its way back to the producer, and that he is the one who suffers?

Miss ATKINSON: I think sometimes it is the retailer who suffers, but more often it is the consumer. Of course if the consumer gets low prices he benefits. I do not know what lines would find their way back to the producer.

Mr. HALES: Let us take one item. Take these broiler chickens at 2½ or 3 pounds selling at 35 cents a pound. That is less than what they cost, and it falls right back to the producer who has to take a very low price in order that they can be sold at that price.

Miss ATKINSON: What do you mean by less than what they cost? There is a differential between the cost to the small producer and the cost to the large-scale producer. Are you taking the cost to the small or the medium sized producer.

Mr. HALES: The cost to the largest stream-lined producer.

Miss ATKINSON: I just do not know what the situation is there. I think a temporary situation existed, and what probably would happen would be that

the market would be cleared of the surplus which depressed the price and that the price would come back up to normal.

Mr. McILRAITH: Before we continue the questioning, could we have some idea of what time you propose the committee will sit, Mr. Chairman?

Mr. FISHER: I would like to see us adjourn at 4:30 if possible.

Mr. HORNER (*Acadia*): Why adjourn so early?

Mr. MARTIN (*Essex East*): We should have a business meeting some time in order to determine how long we will sit and when we will sit, because we want to be in a position to discharge our other duties.

Mr. MORTON: Let us try to get along with this witness so that it will not be necessary to bring her back.

Mr. MACLEAN (*Winnipeg North Centre*): Could we finish with this witness, if there are not too many questions.

Mr. McILRAITH: Let us settle this question now.

Miss ATKINSON: It will not be convenient for me to stay over until next week.

Mr. FISHER: It seems to me the government members are making it very difficult for the opposition members. I am pleading a very special case for the opposition members. It is difficult for us to cover the house. I do not think I am insulting you by saying we have a greater responsibility in dealing with the business in the house because we are fewer in number.

Mr. HORNER (*Acadia*): I do not agree with that for a moment.

Mr. FISHER: You do not have to agree with it.

The CHAIRMAN: This meeting was called for 3 o'clock to listen to the witnesses.

Mr. McILRAITH: 2 o'clock.

The CHAIRMAN: These witnesses were called here for 3 o'clock. There was no limit put on the length of time of the meeting. I think we should carry on with the meeting.

Mr. HORNER (*Acadia*): We will be here until midnight.

The CHAIRMAN: At least until a little later.

Mr. MARTIN (*Essex East*): Some of us cannot stay.

The CHAIRMAN: Mr. Martin—

Mr. MARTIN (*Essex East*): Mr. Chairman, I want to say to you that the business of the committee is something which must be determined, not by the chairman, not by the steering committee, but by the committee. There are certain limitations on what we can do in order to fulfil our function. I am agreeable, because this witness who is a very able witness cannot come back again—I am agreeable to continue; but after that I think we should have a business meeting so that we know where we are going. We have lots of work ahead of us in the next two months.

Mr. HORNER (*Acadia*): Four months.

The CHAIRMAN: We had our meeting of the steering committee. This was the view of the meeting.

Mr. BENIDICKSON: Mr. Chairman, on this point of order, I think we have to look to the future a little bit. Is it not so that after certain testimony has been put down in the record that you have discovered that perhaps we could hear Mr. Gilbert tomorrow. If that is so, should we not know where we are going. Miss Atkinson was asked whether she would be available next week. She said no. She has not yet been asked if she would be available tomorrow.

The CHAIRMAN: We have not asked Miss Atkinson?

Mr. McILRAITH: We never even decided to hear anyone today.

The CHAIRMAN: You were not at the steering committee meeting. I resent this. I tried all day to get you and went over to the other side of the house, made an appointment, and asked you on the committee; then when I tried to get you and could not we asked Mr. Macnaughton to come.

Mr. McILRAITH: The steering committee—

The CHAIRMAN: Mr. Benidickson, have you a question—

Mr. CARON: During the dinner hour this afternoon they changed the time of the meeting.

The CHAIRMAN: No.

Mr. CARON: I had the notice at 2:20 this afternoon.

The CHAIRMAN: Order, order. Mr. Benidickson, you have the floor.

Mr. CARON: You are not going to run the whole show.

Mr. JONES: Mr. Chairman,—

The CHAIRMAN: I am running this meeting and you are out of order.

Mr. CARON: I have the right to complain when something is wrong in the committee. This is the same right I have in the house. You are not to decide alone what is going to be done in this committee.

Mr. MORTON: This committee decided it, and you know it.

The CHAIRMAN: This morning the committee decided to adjourn until 2 o'clock.

Mr. RYNARD: Mr. Chairman, let us go on and then after we are through with the witness we can discuss this. The witness does not want to hear this.

The CHAIRMAN: I agree.

Mr. BENIDICKSON: Mr. Chairman, I would like to revert to some of the first questions advanced to the witness. I think these questions were advanced by Mr. Baldwin. He read from paragraph 5 of the brief of the Canadian association of consumers. He read these words:

> With reference to the definition of "loss leader" proposed in the amendments it is clear that the supplier who wishes to enforce a policy of resale price maintenance can defend himself against the charge under section 34 if the seller of the article in question does not charge a sufficiently high price to cover his cost of operation plus something for profit.

There is something that is bothering me; that is the nebulous nature of the reference to loss leader.

Miss ATKINSON: Well, it is hard to decide what the cost of operation is and how much he needs for a profit. For instance, Mr. Benidickson, if you are in a business which handles a variety of goods, whether they be groceries or something else, the cost of selling one line will be very much more than the cost of selling some other line. Who is going to say which classification these come under, and whether the cost of operation is an average or specific amount?

Mr. BENIDICKSON: You were raising these questions in this paragraph?

Miss ATKINSON: Yes.

Mr. BENIDICKSON: But when Mr. Baldwin was addressing his question to you he referred only to paragraph (*b*) of section 14, and he read paragraph (*b*).

Mr. BALDWIN: Paragraphs (*a*) and (*b*).

Mr. BENIDICKSON: All the reading was with respect to paragraph (*b*). On this business of selling articles for the purpose of affecting the customer, I want to ask you if this paragraph and the questions raised by the association

in this paragraph are not really based on the lack of understanding of many as to what is this business of making a profit in subsection (*a*). Is that the basis of your paragraph, rather than subsection (*b*)? Paragraph (*a*) says—

Miss ATKINSON: I know what paragraph (*a*) says. It says:

> (*a*) that the other person was making a practice of using articles supplied by the person charged as loss-leaders, that is to say not for the purpose of making a profit thereon but for the purposes of advertising;

Mr. BENIDICKSON: Your argument referred to paragraph (*a*) and not to subparagraph (*b*)?

Miss ATKINSON: I feel it is impossible to define. Paragraph (*b*) says:

> (*b*) that the other person was making a practice of using articles supplied by the person charged not for the purpose of selling such articles at a profit but for the purpose of attracting customers—

That is almost synonymous with the previous paragraph, which has to do with advertising.

Mr. BENIDICKSON: You think they are both difficult to establish?

Miss ATKINSON: I think it is very difficult for a manufacturer to decide just what a dealer may be doing, and that he is doing it.

Mr. BENIDICKSON: That difficulty is largely the cause of merchandising at different scales?

Miss ATKINSON: On distribution.

Mr. BENIDICKSON: The distribution costs vary according to the scale of operation of the operator?

Miss ATKINSON: The scale, efficiency and position of the operator. Take two businessmen in the same city, one in the centre and one on the outskirts; he might have difficulties which the other one doesn't.

The CHAIRMAN: Mr. Caron, would you like to speak now?

Mr. CARON: Yes, please. Do you not believe the growing buying powers of the big, growing merchants which can command prices from the wholesaler and the manufacturers is worse than anything against the small dealers?

Miss ATKINSON: I think it is a very difficult problem for the small dealer. Of course, that is what you call discriminatory practices, I suppose. It is something that has been happening. It was exposed in the thirties, in the study of price margins at that time, and it is a wide practice and has become more general, I imagine, now. I do not think this legislation will solve that problem.

Mr. CARON: Is it the opinion of your association that this is worse than the loss leaders?

Miss ATKINSON: We have discussed this material in this act, but we have not discussed the question you have brought up, because it has not become a subject of legislation or policy.

Mr. CARON: But it is to clarify our situation, in case we might oppose it.

Miss ATKINSON: You will notice on the last page of the brief, if you have the brief there, we do refer to the difficulties created by the concentration of marketing power, and they undoubtedly place the small dealer in a weak position. I think that covers it.

Mr. AIKEN: Might I ask a supplementary question, Mr. Chairman?

The CHAIRMAN: Yes, Mr. Aiken.

Mr. AIKEN: I just want to ask if Miss Atkinson has considered section 33A and 33B of this particular legislation, which is intended to cover the situation;

and whether she thinks it does or does not have any usefulness in regard to unfair price discrimination?

Miss ATKINSON: Is that the act or the bill?

Mr. AIKEN: The bill, section 33, which is prior to section 14, the one with which you are particularly concerned.

Mr. BALDWIN: It used to be section 412 of the Criminal Code.

Mr. AIKEN: It is section 33A and 33B.

Miss ATKINSON: I did refer to that when I said it is very difficult to say whether a person is materially misleading and misrepresenting to the public when we have such inadequate information as to standards and quality.

Mr. AIKEN: You do not think it does answer the question. It is intended to?

Miss ATKINSON: This is related to price. This is not misleading advertising, in general. It is misleading advertising in regard to price, and you will see on the fourth line—

Mr. AIKEN: I am referring to section 33A and 33B, and not to section 33C.

Miss ATKINSON: Section 33A and 33B.

Mr. AIKEN: Section 33A reads:

> (1) Everyone engaged in a business who (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors—

and so forth. That is at the top of page 7. This is the discrimination clause, and what I felt you were directly referring to on page 4, at the bottom, regarding effective protection for the small dealer against unfair and uneconomic price discrimination. I wondered if what this bill proposes to do on class discrimination would satisfy your complaint?

Miss ATKINSON: It is more or less in harmony. When the restrictive trade practices commission made a study of discriminatory prices in the grocery trade, they asked for various groups in the economy and our organization to make representations, and our organization was the only one that sent in any representation to them. In our representation we summarized this and sent a report to the Minister of Justice as well. In it we did specify we felt discriminatory pricing practices were unfair and should be controlled.

Mr. AIKEN: Your main objection to this bill is section 34?

Miss ATKINSON: Yes, that is what we say right at the beginning, section 34.

Mr. JONES: Mr. Chairman, I wonder if I could ask the witness a question, which I think she will appreciate receiving, in relation to paragraph 11?

The CHAIRMAN: Yes, Mr. Jones?

Mr. JONES: Miss Atkinson, you say, on page 4, paragraph 11:

> —essentially, it is well-established that even a thorough-going system of resale price maintenance will provide little protection for retailers unless freedom of entry—

"into the business," as I understood you to say—

Miss ATKINSON: That is the intention.

Mr. JONES:

> —is controlled and freedom to increase services is controlled.

I wanted to clear up this point: are you advocating there should be some sort of control

Miss ATKINSON: Absolutely not.

Mr. JONES: You are not?

Miss ATKINSON: No, I happen to have spent some time in New Zealand and Australia, where they have very complete control of freedom of entry into various types of business, particularly retail; and I thought it resulted in a lack of competition which put them decades behind the modern retail distribution. It is too protective.

Mr. JONES: You mentioned another point. You said something about suggested prices?

Miss ATKINSON: Yes.

Mr. JONES: You said that they have not been effectively controlled by the existing legislation, and you feel that is a real danger?

Miss ATKINSON: In respect of sending out lists of definite resale prices which must be maintained. As I understand it, quite frequently there are suggested prices given to the retailer, as being a basis for their price to the public. You will find certain printed articles and certain types of watches and pen and pencil sets, electrical appliances, and certain other things, are very frequently sold at fairly uniform prices in a large city, or even across the country, because they are based on the suggested list price. I think the difference between the suggested price list and the resale price maintenance is that the suggested price list cannot be enforced by a refusal to supply, not legally, anyway; but it does provide a suggestion as to what people should charge, and it does limit competition. We have had a lot of complaints from members on this question.

Mr. JONES: In your view, the previous legislation was ineffective to control all conditions?

Miss ATKINSON: It prevented any punitive action on the part of manufacturers, but it has not prevented their getting around it to a certain extent by offering guidance, shall we say, in talking of suggested prices.

The CHAIRMAN: Mr. Martin?

Mr. JONES: I have one more question.

The CHAIRMAN: We did have a ruling on this.

Mr. MARTIN (*Essex East*): I do not wish to intrude.

Mr. MCILRAITH: Let him finish his line of questioning.

The CHAIRMAN: Go ahead.

Mr. JONES: I am not introducing the question of trading stamps at all, other than by way of analogy. One of the disadvantages to trading stamps is the fact they operate as a gimmick to get people into the stores. That is an element of unfair trading?

Miss ATKINSON: Yes.

Mr. JONES: It would seem to me this business of loss leader selling, or selling below price, is a similar sort of gimmick.

Miss ATKINSON: I think there is a very great difference. When a firm goes into a sales promotion by use of these give-aways, such as trading stamps, it adds to the cost of distribution. If it sells at a very low mark-up, or even at cost, it is not adding to the cost of distribution unduly across the board. It has not made another link in the chain between the producer and the consumer: it is a sales promotion device, but it does not materially impose on the consumer additional cost, but it offers him a bargain.

Mr. JONES: I am thinking of the situation where loss leaders do force people out of business; and I have seen this happen in western Canada. Then, after the man is out of business, the prices go up.

Miss ATKINSON: Yes.

Mr. JONES: From the big competitor raising the price.

Miss ATKINSON: Of course, that is not a recent innovation, and I presume it is pretty nearly as old as merchandising, anyway in some form or another.

Mr. JONES: Another sort of unfair situation which leads to that sort of development.

The CHAIRMAN: Mr. Martin next. I would ask the ones listening here to just listen and do not hold a debate among yourselves, because it is frightfully difficult to hear the witnesses from up here.

Mr. MARTIN (*Essex East*): Mr. Benidickson had really put my questions, Mr. Chairman, and I do not think there is much point in continuing.

Mr. BENIDICKSON: I had not finished. I was looking at my notes when they called Mr. Caron.

Mr. MARTIN (*Essex East*): You were dealing with paragraph (*a*).

Miss Atkinson, you are president of the association.

Miss ATKINSON: Yes.

Mr. MARTIN (*Essex East*): It is obvious you are more than president, and are also a very competent person in your own right, and I would like to know something about your experience.

An Hon. MEMBER: What experience?

Mr. MARTIN (*Essex East*): Your experience.

The CHAIRMAN: I warn you, Miss Atkinson.

Mr. JONES: That is completely unfair, Mr. Chairman. That is quite unfair.

Mr. MARTIN (*Essex East*): I meant your business experience.

Miss ATKINSON: I was in the retail business for 30 years on the prairies. They were very damaging years because they included the dusty and dirty thirties when it was impossible to make any money and very difficult to survive; but we did survive.

I have been a resident of Canada since 1915. I have been very interested in watching the development of the west and learning as much as I could about the development of the east. I have recently become very much impressed with the work of the Canadian association of consumers. This association has made great progress and its officers are more familiar with the processes of government than almost any other organization which I know of. We have had to deal with local and provincial as well as federal governments. We have found out that it is not desirable that some things be dealt with by law. We realize that we are working with people and not dictating to them, and that we are all part of the economy.

I might also say that this movement is a movement of the times and that it is growing in other countries, both the United States and in the United Kingdom, and in some parts of the commonwealth. In western Europe there are very live consumer movements which are asking for and receiving far more constructive development in the consumer protective services than we have as yet.

I appreciate the hearing that you have given me this afternoon and if there are any other questions I will try to answer them.

The CHAIRMAN: You did not think we were finished as a result of what Mr. Martin said?

Miss ATKINSON: He said Mr. Benidickson had asked the questions he intended to ask.

The CHAIRMAN: I have a long list of names of members here who wish to ask you further questions I hope we are not boring you too much.

Miss ATKINSON: No. I came down to attend the hearing and hoped that the hearing would be worth coming to.

The CHAIRMAN: I would say that you are an excellent witness.

Some Hon. MEMBERS: Hear, hear.

The CHAIRMAN: All right Mr. Crestohl.

Mr. CRESTOHL: You are speaking for the Canadian consumers association?

Miss ATKINSON: Yes, sir.

Mr. CRESTOHL: That is a very important source from which this committee seeks information. Somebody spoke before for the retailers and we will have someone speaking on behalf of the wholesalers. The committee appreciates receiving this information.

Just how large is this organization in Canada, in numbers? You speak of the Canadian association of consumers, but what does it embrace?

Miss ATKINSON: Mr. Crestohl, it is a very difficult matter to organize consumers. Fifty years ago it was thought that it was impossible to organize labour, but it was organized. A little more recently it was thought impossible to organize the farmers, but they are organized. These tasks have been very great tasks. We started 13 years ago to organize the consumers. They are unlike the labourers and unlike the farmers. We are not able to stack up finances. Most of the members are not gainfully employed. They are very much employed but not gainfully. Many individuals through various organizations became familiar with our work but did not always become members. We do have a membership in the neighbourhood of 25,000 in Canada. We have picked up that membership in the last 10 years.

Mr. CRESTOHL: We are anxious to see that this legislation, as well as all other legislation, benefits the greatest number of people in our country.

Miss ATKINSON: Yes. In addition to our own membership our organization was helped out by national organizations like the council of women and the dominion council of the United Church WA's, which has over 2,000 members. Altogether, of the national womens organizations, I think 17 are now supporting us. They get word of our activities indirectly through their organizations and they support us. We have meetings and have asked for their support. We have endeavoured very carefully to be as democratic as possible in our representations and try not to say what consumers ought to think, but attempt to get the information and opinions from the consumers.

Mr. MCINTOSH: A supplementary question, Mr. Chairman, are these organizations familiar with this brief that you have presented today?

Miss ATKINSON: They are not familiar with this particular brief but we have had more detailed briefs covering more ground which were adopted properly in 1951, 1953, 1954, and again in 1958. Copies of these briefs have been sent out to the different organizations and we have held discussions to consider them. We have branches in every province across Canada except Newfoundland. We have local and provincial branches. We have a bulletin which is published both in French and English which goes out to our consumers and which gives them an idea of what work is being done.

Mr. CRESTOHL: Miss Atkinson, I am quite satisfied that you probably do not have 17 million consumers in your organization, but the committee members would like to feel that you are speaking on behalf of the average consumer across the country. We are interested in your viewpoint because we do feel that the consumer is the person affected by this legislation.

You are familiar with clause 34? You said a moment ago that you were familiar with it.

Miss ATKINSON: I do not know it by heart, but I have gone over it several times.

Mr. CRESTOHL: You are aware of the present law without these amendments?

Miss ATKINSON: Yes.

Mr. CRESTOHL: You are familiar that clause 34 prohibits re-sale price maintenance?

Miss ATKINSON: Yes.

Mr. CRESTOHL: And you are thoroughly in favour of that?

Miss ATKINSON: We would prefer that it be continued.

Mr. CRESTOHL: You would certainly not urge that the section be repealed?

Miss ATKINSON: Certainly not.

Mr. CRESTOHL: And if someone did urge that the section be repealed you would regard it as being hostile to the consumer population of Canada, would you not?

Miss ATKINSON: We would consider it very unfortunate. We would consider such a movement to be retrograde. I think that is the word we used in our brief. We would consider it a retrograde and regrettable development.

Mr. MCILRAITH: Miss Atkinson, referring to the line of questioning Mr. Horner was pursuing, having to do with prosecutions, are you aware that in the province of Quebec at the present time anyone desiring a prosecution under the Criminal Code must undertake to pay the costs?

Miss ATKINSON: No, I am not aware of that, and I will not make any comment in regard to it either.

Mr. MCILRAITH: You do not know whether that is the case all over the country in the other provinces?

Miss ATKINSON: I think it depends on the circumstances.

Mr. MCILRAITH: You as a member of the association have had occasion to deal with attorneys general in order to have them bring certain action under the Criminal Code?

Miss ATKINSON: No, I must correct you on that, Mr. McIlraith. We have provincial branches, and when a matter arises and a province is concerned we refer it to the provincial branch, and the provincial executive then approaches the appropriate official.

Mr. MCILRAITH: Have the provincial branches approached the attorneys general to bring certain prosecutions under the Criminal Code?

Miss ATKINSON: Only in cases of trading stamps.

Mr. MCILRAITH: What was the result of those representations? Did the attorney general's department bring a prosecution or not?

Miss ATKINSON: In some cases in Saskatoon. We were not alone in our representations. The provincial president in the province of Quebec sent me a report in this regard. They have not done anything in regard to taking action as yet. I think the delegates made representations to the attorney general there.

I was part of the delegation to the attorney general in Ontario in 1957 and we were unable at that time to get action, but more recently, as a result of the provincial C.A.C. sending a delegation to the premier of that province, and as a result of other influences being brought to bear, action is now being taken in regard to the enforcement of that act.

Mr. MCILRAITH: Referring to the proposed amendment to section 4 of the act, you will notice that clause 14 provides a defence for the manufacturer?

Miss ATKINSON: But the manufacturer has to defend himself if charged.

Mr. MCILRAITH: If charged; that is the point I am coming to. The effective action in the first instance is taken and then if the manufacturer or the supplier is charged he is given this defence. Now, assuming a manufacturer or supplier has cut off a retailer, say a small business man, in a case where there

is a real doubt, or it was an improper act to cut him off, are you satisfied that prosecution against the manufacturer under this legislation—

The CHAIRMAN: I would object to that question. It is a hypothetical question which you are asking this witness, and she is not a lawyer.

Mr. HORNER (*Acadia*): You are asking the witness for an opinion.

The CHAIRMAN: Yes, you are asking for an opinion and I do not think that is proper. I would think it is out of order.

Mr. MCILRAITH: I do not want to argue on the point of order, but I think it is quite proper to ask for her comment. A lot of evidence was given by Mr. Horner on this point and I think this witness should be entitled to answer.

Mr. HORNER (*Acadia*): Thank you.

Miss ATKINSON: We have covered that point on page 4 of our brief.

Mr. HORNER (*Acadia*): Section 10 is wrong according to the act.

Mr. MCILRAITH: In any event I think you made the point sufficiently well.

Miss ATKINSON: It may be that we did not know enough about law to draft section 10 properly. That was the opinion of the committee.

Mr. MCILRAITH: There are two other points I want to cover. The first point deals with the small retailer who is going out of business. Would you agree that one of the factors making it difficult for small retailers would be the fact that our large urban centres have been increasing and individuals are using automobiles and are shopping at those large centres where parking space is provided?

Miss ATKINSON: This is not a matter that we did consider particularly. There are firm indications that that might be so, but I do not have any official particulars in this regard.

Mr. MCILRAITH: Do you feel that the accessible parking space provided by the chain stores is a factor in drawing the customers away from the small retail stores?

Miss ATKINSON: Yes, I believe so.

Mr. MCILRAITH: There are other factors of course.

Miss ATKINSON: A great many other factors.

Mr. MCILRAITH: Dealing again with clause 14, I would like to draw your attention to one part of it and ask you if you have any information or opinion about it. Reading from clause 14 at the bottom of page 8 it says:

> Where, in a prosecution under this section, it is proved that the person charged refused or counselled the refusal to sell or supply an article to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe

and then it goes on to say:

> that the other person was making a practice of using articles supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

Then it sets up the definition. The definition is that of a person making a practice of using articles supplied by the person charged, not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles. Now, for the purpose of illustration if a retailer makes a constant practice of selling an electric knife sharpener at a loss, do you feel that the retailer could be cut off in respect of all electrical appliances from that manufacturer?

Miss ATKINSON: Well, Mr. McIlraith, I think that is another hypothetical question and I do not know what the situation would be under those circumstances.

Mr. MCILRAITH: I want to ask you about something more specific, and non-hypothetical. Do you attach any importance to the failure of the clause as drafted to relate "article" in the general part of sub-clause (5) to "articles" in paragraphs (a), (b), (c), (d), and (e)?

Miss ATKINSON: I notice the difference between the two statements. I do not know exactly what significance there is in it. I think possibly that should be corrected. But to me the whole proposal to give a manufacturer that punitive power is bad law. I do not think private firms or individuals should be empowered to punish other private firms and individuals without any recourse to the courts.

Mr. MCILRAITH: With regard to giving the manufacturer power, you find it offensive, or improper?

Miss ATKINSON: I think it is dangerous.

Mr. MCILRAITH: I go along completely with that; but I want to elaborate a bit on it. Then how do you read the last sentence of clause (5), section 14, where it refers to:

any one upon whose report he depended—

Does that not mean another retailer would have an opportunity of inflicting punitive measures against his fellow retailer down the street?

Miss ATKINSON: He might have some, because of such action; but he would not be able to take such action himself.

Mr. MCILRAITH: He could initiate it through his manufacturers.

Miss ATKINSON: He could seek it, I suppose.

Mr. MCILRAITH: And if he were a good customer of the manufacturer, and the other was a poor customer of the manufacturer, he might seek it successfully?

Miss ATKINSON: The manufacturer is usually a much more powerful body or individual than the retailer. That is one reason why it seems to us dangerous to give such power; and I cannot see that in the long run it will be of any benefit to the consumer or to the economy in general—and probably not even to the retailer.

The CHAIRMAN: Dr. Rynard.

Mr. RYNARD: Mr. Chairman, my question has been answered; but from my observation of what Miss Atkinson has said, it would appear that the trend will be away from small business, into big business, because the cost of administration, transportation, and everything such as that, will be lowered. Therefore, there is not much that we can do to help retain that small businessman in business.

I would think that is the trend of her thought, because she mentioned the farmer getting bigger and bigger, and she mentioned the general stores coming into some of the cities because of the necessity to service the people.

Miss ATKINSON: I think in all these fields, Dr. Rynard, there will probably be the development of specialism by individuals, and this may to some extent offset the growth of the large depersonalized factor in distribution. But we have seen a great many changes in the last 15 or 20 years. It is impossible to forecast what changes there will be. I think the only thing we can be certain of is that there are going to be changes, in the retail distribution, as in other fields. We would like to see a lot more efficiency and integrity, in both manufacturing and other fields—and even among consumers, shall I say, if necessary. But all those things are going to be factors in the future development.

Mr. RYNARD: The only thing you see to check that is the impersonalization as the business gets bigger?

Miss ATKINSON: No, I think possibly there is a sort of giantism, which may be defective, develop when it reaches a certain stage. Prehistoric animals were gigantic, but they got too big to exist. I do not know whether there is any possibility of that happening in economic life, or not.

Mr. MACLEAN (*Winnipeg North Centre*): Miss Atkinson, I have attempted to follow your line of reasoning quite closely, and I admit I became a little confused—Mr. McIlraith has not helped me either—with regard to discovering just what your stand is on this subject of small business. Perhaps you can help me.

You have said that as far as the supermarkets are concerned, they are here and they are here to stay: they are approved in principle, as far as the consumer is concerned, right across Canada. You have also said—and correct me if I am wrong—that where you have a small business, where it is reliable, well run, founded for some years, there is no reason why the two, supermarket and small business, cannot operate together.

We have had the testimony of Mr. Gilbert on the bankruptcy figures, and from Mr. Fisher with regard to his information on the old, family institutions down at the lakehead passing along, which seems to me, in my mind, to conflict.

I would like to know just where you stand on this question, where you have a food supermarket, as we have in the city of Winnipeg—many of them; but we have the dominion food stores in the city of Winnipeg, and their merchandizing is general food articles. Yet they will come along and put on a special sale with regard to drug products, toothpaste, and so on. I notice in that case that at the present time there are three small merchants surrounding this one store: one is a hardware merchant, one is a florist, and one is a druggist.

From time to time this big general store will put on these items well below cost. Are you in favour of this sort of thing?

You said previously that if they specialized there would be no problem. Here we have three stores specializing, you might say, in certain lines of business, and yet you have a large food store coming along, putting on loss-leaders—and when you sell below cost, as far as I am concerned that is definitely a loss-leader—which affects the sales of these small merchants. Is that, to your mind, all right—or is it correct?

Miss ATKINSON: I think it creates a very, very difficult situation for the individual; but I question what is the way to correct it. I doubt if this legislation will correct it.

Mr. MACLEAN (*Winnipeg North Centre*): I would like to get settled, first of all, whether or not you agree with this in principle, that it is a good thing for these supermarkets to do this sort of thing?

Miss ATKINSON: It seems to me that it is one of these uses of power to which we refer in the last paragraph of this brief, where we speak about the way in which the large scale store, the merger and large companies, is perhaps—it says here it undoubtedly places the small dealer in a weak position.

You may recognize, as we do, that there is a very real difficulty; that the small retailer is having great problems, in some cases, of this kind—problems of survival. But how you are going to remedy that particular condition, I do not know. I do not think this legislation will remedy it.

Mr. MACLEAN (*Winnipeg North Centre*): First of all, I just want to get this point established. This is what has been bothering me.

Miss ATKINSON: May I just say this. I think there is a place for large-scale business, and I think there is still a place for the individual business. But the individual businessman is going to have to be a very able and efficient operator, just as the large-scale businessman is.

Mr. MacLean (*Winnipeg North Centre*): We have that much established; and yet we have a picture of these efficient, small business going out of operation.

However, I would like to get established whether or not you agree that, where there is a large supermarket dealing with food articles, and they put on a sale of flowers, say, at the weekend—whatever it may be; peonies, and so on—at a price far below cost, would you consider that this is a good thing, that it is fair?

Miss Atkinson: I do not think I should be called upon to judge in a matter of that kind.

Mr. MacLean (*Winnipeg North Centre*): Because I would call them loss-leaders.

The Chairman: That is the difficulty with being a witness, Miss Atkinson.

Miss Atkinson: There are some things that I am not competent to do anything about.

Mr. MacLean (*Winnipeg North Centre*): That is what we are trying to establish here in this legislation, to help small business; and if this is a loss-leader, perhaps we are helping small business in this respect.

Miss Atkinson: I do not think this legislation will be of lasting benefit to the small dealer, even in that situation.

Mr. Benidickson: Mr. Chairman, I would like to say a word on a point of order. I have been sitting here continuously now for three hours. The committee will recall that this morning Mr. Gilbert indicated that he must leave the city by five o'clock. I suggest that the chairman still has not taken us completely into his confidence, and is not being frank, as to whether Mr. Gilbert is likely to be available tomorrow. It would have a bearing on our length of sitting.

Similarly, I wonder if Mr. Gilbert has been asked whether or not he has extra time available tomorrow. I think that, looking forward to our own obligations, we should ask Miss Atkinson whether she, too, would be available tomorrow. She said she would not be available next week, and Mr. Gilbert said he was not available for two weeks. That is the only official word we have had, and I do not think the chairman is being frank.

Mr. Jones: The chairman is always very frank— an excellent chairman.

Mr. Benidickson: Mr. Chairman, could you answer for me the first question: have you ascertained whether or not Mr. Gilbert is available tomorrow?

The Chairman: I asked him to find out, when he left me. I think he is here now. I can re-ask him the question. What is your situation now, Mr. Gilbert?

Mr. Gilbert: It is very much the same, Mr. Chairman. But if it is the wish of the committee that I remain over, I would prefer to appear first thing in the morning.

The Chairman: Nine thirty?

Mr. Gilbert: Nine thirty will be fine.

Mr. McIlraith: Now we are back into the old difficulty.

Mr. MacLean (*Winnipeg North Centre*): Have we finished questioning Miss Atkinson?

The Chairman: Just a minute.

Mr. Fisher: Let the chairman iron this out.

The Chairman: Let me settle this point first with Mr. Gilbert, before we pass to the next. It is agreed that Mr. Gilbert come here tomorrow morning at 9.30?

Some Hon. MEMBERS: Agreed.

Mr. MCILRAITH: If we have nearly concluded the evidence that Miss Atkinson can give—or if we are nearer to the conclusion of her evidence than we are with Mr. Gilbert, why not let Miss Atkinson finish?

The CHAIRMAN: I am coming to that. Your colleague asked about Mr. Gilbert, and I am trying to settle that point first. I will try and settle both of them. Is it agreeable to the committee that we meet tomorrow morning at 9.30?

Some Hon. MEMBERS: Agreed.

Mr. MCILRAITH: Let me place one thing on record. I was the last one seeking to question Mr. Gilbert. I cannot be here tomorrow at 9.30, believing that this committee would not meet at 9.30 tomorrow—and I was entitled to believe that; that was reasonable.

The CHAIRMAN: That is quite right. I cannot gauge how long these committees are going to sit, Mr. McIlraith, and I cannot gauge what your movements are.

Mr. MCILRAITH: No.

The CHAIRMAN: So I think we will have to—

Mr. MCILRAITH: I was going to make a suggestion, Mr. Chairman, that may be helpful to you. Should we not, then, consider dealing with Miss Atkinson first, who I believe would take much less time than Mr. Gilbert, before the committee: then that would leave Mr. Gilbert for later on tomorrow.

The CHAIRMAN: I think we had reached the point, and my secretary here agreed with me, that the questions were becoming repetitious, and I was wondering if we were not pretty close to the end of Miss Atkinson's case.

Mr. MCILRAITH: Am I right in understanding that she is available tomorrow?

The CHAIRMAN: She is.

Miss ATKINSON: If necessary.

Mr. MCILRAITH: It seems to be clear that the committee is agreeable to sitting at 9.30 in the morning.

Mr. JONES: I do not think we have any more questions.

Mr. MCILRAITH: Yes. If that is so, I believe we could dispose of Miss Atkinson's evidence more quickly in the morning and then we could go on with Mr. Gilbert's.

Mr. MORTON: Did he not say he could only be here provided we reached him early in the morning? You have ignored that.

The CHAIRMAN: Besides that, I only have requests from two more members for questions on the list here, Mr. Macdonnell and Mr. Fisher.

Mr. MACDONNELL: I will be very brief.

Mr. FISHER: I will only be five minutes.

The CHAIRMAN: Well, let us continue questioning Miss Atkinson now, and we will meet with Mr. Gilbert at 9.30 tomorrow morning.

Some Hon. MEMBERS: Agreed.

The CHAIRMAN: Mr. Macdonnell is next on the list.

Mr. MACDONNELL: I just want to ask Miss Atkinson two questions. She is familiar with the fact that Mr. Gilbert came out, on behalf of his principals, quite definitely in favour of the present legislation, though he would have preferred section 34 to be repealed outright. And then he went on to say:

> It is, therefore, the wish of our delegation to convey to the banking and commerce committee, in unmistakable terms, our complete support

and endorsement of the provisions of bill C-58, exactly as they stand, in respect to "offences in relation to trade."

That is the clause we have been talking about. I understand Miss Atkinson does not agree with that, and I want to read a short paragraph of her submission, because I am anxious to know whether there is any other suggestion she has to make.

I read No. 12:

> The only protection for the small retailer that can be derived from resale price maintenance is of a short-run character and is purchased at an inordinately high cost on the part of consumers.

I do not know whether others are more familiar than I am with the full impact of that, but I do not think it has been fully obtained.

> It is our contention that assistance for small dealers should be found in other directions. There should, first, be effective protection for the small dealer against unfair and uneconomic price discrimination.

I would like to point out that is the whole aim of the amendment we have been talking about, and that it is accepted by Mr. Gilbert. I thought that he was very emphatic this morning, and, on the whole, was very convincing in pointing out what he fought against.

As I understand it, Miss Atkinson says that is not adequate, and I think it is fair for us to say to her: What other protection do you suggest against unfair and uneconomic price discrimination?

Now I read on:

> In view of the negligible use which has been made of section 412 of the Criminal Code, we feel that it is of little value in this respect. Second, we feel that mergers which result in undue concentrations of market power undoubtedly place the small dealer in a weak position. We can only view with concern the failure of the combines branch to take any action against recent mergers and concentrations of control among supermarkets.

Now what bothers me is this: I am not able to understand what proposal Miss Atkinson does make, except these generalizations. I am left completely in the dark as to what she thinks should be done. She objects to what is proposed, though Mr. Gilbert thought it was well on the way to remedying the situation, and accepted it whole-heartedly. I would point out, in so far as I am concerned, Miss Atkinson has not discharged the obligation of telling us just what she thinks should be done. No one is more anxious to help the small businessman than we are. What she tells us is that what we are proposing to do is ineffective; but she has not made it clear to me why it is ineffective or what she proposes as an alternative.

Miss ATKINSON: In section 33A, which we do not cover in our brief, although we have referred to it in the discussion, and I have been asked questions about it and answered them—that is on page 7,—there is an action proposed there against discriminatory pricing practices, and we feel that is one of the things which would help the small retailer; and we said we approved of that action there.

Mr. MACDONNELL: That is in your brief?

Miss ATKINSON: That is the action against the purchaser of articles from him:

> In that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that at the time the articles are sold to such purchaser, is available to such competitors.

That is a process that would be forbidden under section 33A. We feel that would protect the retailer from discriminatory pricing practices, such as you mentioned.

Mr. MACDONNELL: So, in effect—

Miss ATKINSON: That is one thing which we feel answers your question.

Mr. CRESTOHL: On a point of order, I would like to draw to Mr. Macdonnell's attention section 3, which is page 1 of Miss Atkinson's brief. She certainly sets forth suggestions there, and gives her opinion on the legislation. It is paragraph 3.

Miss ATKINSON: On page 1.

Mr. CRESTOHL: I think it is the first page.

Mr. HORNER (*Acadia*): Page 1. That is no question of order.

Mr. JONES: It is not a point of order. Proceed.

Mr. MARTIN (*Essex East*): A point of clarification.

Mr. MACDONNELL: I wish you would go through that, the first two sentences. I found the second sentence hard to understand.

The CHAIRMAN: Whereabouts is that, sir?

Miss ATKINSON: It is on the last page.

Mr. MACDONNELL: Page 1 of your brief, and paragraph 3.

Miss ATKINSON: What do you wish me to do?

Mr. MACDONNELL: You read it:

> In view of the finding of the careful and exhaustive analysis of "loss leader" selling by the combines branch, which culminated in the report of the restrictive trade practices commission, we fail to understand on what objective facts an amendment is being proposed which will restore in a particularly—

Miss ATKINSON: It should be "undesirable".

The CHAIRMAN: Miss Atkinson corrected that in reading it.

Mr. MACDONNELL: I see—"undesirable form".

Also the other sentence I wish you would read is the first sentence of paragraph 5, on page 2, with reference to the limitations.

Miss ATKINSON: On loss leaders. Well, I think I have covered that several times, Mr. Macdonnell.

> With reference to the definition of loss leaders proposed in the amendments, it is clear that the supplier who wishes to enforce a policy of resale price maintenance can defend himself against a charge under section 34 if the seller of the article in question does not charge a sufficiently high price—

That is what it says here. Later on it goes on to question the basis on which the sufficiently high prices worked out. I think the additional material makes that paragraph quite clear.

It says:

> Obviously, the supplier has no way of knowing what the costs of the individual seller are, but he does have access to reports made by trade associations and by the dominion bureau of Statistics on the average cost of operation for the trade in question. Sales which do not make possible the earning of such a mark-up will provide a plausible basis for the supplier's "belief" that the article was not sold for the purpose of "making a profit thereon".

The CHAIRMAN: Are you satisfied, Mr. Macdonnell?

Mr. MACDONNELL: No, I am still troubled about that. It says:

> The supplier who wishes to enforce a policy of resale price maintenance can defend himself against a charge under section 34 if the seller of the article in question does not charge a sufficiently high price to cover his costs of operation plus something for profit.

I thought what we were getting at was people selling at such low prices made it difficult for other people.

Miss ATKINSON: It goes on, in the next paragraph to say:

> In the anti-competition atmosphere which has developed in certain distributive trades and industries, it is but natural that a man who makes a price lower than the bulk of his fellows will be suspected of having failed to count all his costs.

I think it suggests to define what is a sufficiently high price is very difficult for the supplier, and he can defend himself by saying he believes the price charged is not sufficiently high. I think the context explains that satisfactorily.

The CHAIRMAN: Mr. Fisher?

Mr. FISHER: I have questions in four areas, but they are brief ones. How much experience and co-operation has your organization had with the retail merchants' association?

Miss ATKINSON: I do not know that we could speak of the extent of co-operation. There are times when, naturally, being interested in the consumer from different aspects, we have met officers and members of the organization. In some cases, I think our branches have been addressed on certain subjects to deal with distribution, by members of the retail merchants association. I have had meetings with Mr. Ranns from time to time to discuss problems of free distribution and so on, because we are prepared to work with and at least exchange ideas, and sometimes to seek action, co-operative action, from other groups. If we cannot get that kind of co-operation we have to do without it and search for other means.

Mr. FISHER: You understand the organization and the makeup and general interest of the retail merchants association very well?

Miss ATKINSON: Yes, pretty well, I think.

Mr. FISHER: In your membership across the country, has the position the small business is in been of much concern to your organization?

Miss ATKINSON: I cannot say what has developed at the local branch level in every case. I know that very often they have worked together. For instance, we will sometimes have a program for some aspect of consumer goods supplies, and we ask the association of, say, furriers or dry cleaners, or some other group, to come and give us some part of their specialized knowledge to our branch.

Mr. FISHER: I gathered from your brief you are critical of the development of the large supermarket, or some aspects of it; and you also seem to be critical of small business in, perhaps, its failure to come up to a certain standard of efficiency. I wonder whether your organization has ever considered the larger problem of how big we should let business grow, and what series of steps would you take to help small business to keep it going? Has this ever been a major concern of your organization?

Miss ATKINSON: I think you should realize this is a voluntary organization, and the question of consumer supplies is one of the biggest questions in the whole economy. We are not competent to deal with every branch of it, and

sometimes we are like the mouse who tried to nibble at the mountain. We are learning a lot as we go along. I do feel, from my experience and that of others who have worked with me in this organization, we should say some very good words for retail distributors in this country. I think, on the whole, we have a very effective, and highly efficient service in retail distribution, as compared with what might be available in some countries. But that any operation which controls the distribution of some $4 to $5 billions worth of foods in the course of a year should be above criticism, is something which is impossible. I am sure you would concede that.

When we are asked for opinion we try to have constructive opinions on them. We try to present the case from the consumers' point of view and not from the retailers' point of view, because we are more familiar with the consumer, and it is our duty to represent her. But I think we should have a reasonable attitude towards these people who serve us and serve us well. Nevertheless, I think there is a place for large scale distribution, so long as it does not abuse its powers. I think there is still a place for the small independent, because I think you will find, if you have the statistics,—and I have not the statistics,—that there are very large numbers of people operating in the retail business fairly effectively, sometimes really effectively, and giving good service in their own trade in their own community.

Mr. FISHER: The minister who introduced the bill has given us indications that these are only minor revisions to the act and that it is not a drastic revision or an overhaul of the act that is contemplated. Do you have any suggestion, or is your organization planning to make any suggestions as to how the overall revision to the act should be approached?

Miss ATKINSON: I think the Combines Investigation Act, as we said in our brief, is a very broad complex act dealing with many aspects of business and we are not competent to deal with it as a whole. We have confined our brief to this particular clause because it was one with which we were concerned and which we did feel we knew a good deal about.

Mr. FISHER: You have in your brief a criticism in respect to the combines investigation branch, I would gather, from your reference to their failure to follow through on what would be the new section 34(a) and the old section 412. Have you any suggestions you would like to make in regard to the combines branch and their failure in your view to act?

Miss ATKINSON: I think there are many branches of government which are intended to be responsible for various things, and in some cases consumer protection, that may not be able, because of the lack of facilities, to operate at the level which modern changing conditions perhaps require. It is very difficult to keep up to the pace. I do not know just what the situation is in this regard, but I do think there has been a number of powerful concentrations, and that we must keep our attention on them if we are going to make sure that the consumer is protected against conditions which might not be altogether favourable to the consumer.

Mr. FISHER: One last question, Miss Atkinson. You have told us that you have not had the opportunity of sending this brief out very widely among the members of your association. What will your association do subsequently in so far as this provision is concerned?

Miss ATKINSON: The material in which this brief is based is very largely gathered in earlier briefs that we have provided and which have been submitted to all our board members and to all our branches. These have been discussed thoroughly. We did not have the time to send this brief out but we did send a notice out that we were going to present it. We were authorized at our last annual meeting to make this presentation based on the policies

which had already been approved and which are incorporated in this brief. The brief will be reported to the board members, provincial presidents and so forth. A report of the hearing that I have had with you today will also be made to our constituent members, and we shall abide by whatever action grows from it at the next annual meeting, which is in October.

Mr. FISHER: I just wanted to make sure that it was going to remain a live issue with your organization.

Miss ATKINSON: It is a very live issue.

Mr. FISHER: Thank you, I have no more questions to ask.

The CHAIRMAN: Miss Atkinson, on behalf of the committee, I would like to thank you for coming here. You have been an expert witness and you may go back and report to your ladies that you have done an excellent job.

Miss ATKINSON: Mr. Chairman, I certainly will report that I have received a very kind and considerate hearing from the members of your committee. Thank you.

FRIDAY, June 17, 1960.
9:30 a.m.

The CHAIRMAN: Well, gentlemen, I see we have a quorum.

We have with us today the minister, and Mr. Gilbert, of the Retail Merchants Association. I have correspondence here that I think should be read, but if it is agreeable to the committee I shall leave it, because Mr. Gilbert, as pointed out yesterday, requested that we get started and finished as soon as possible. So I shall leave the correspondence until later.

Mr. PICKERSGILL: Before Mr. Gilbert starts, might I ask if a firm decision was made by the committee itself to sit at 3:00 o'clock this afternoon?

The CHAIRMAN: This afternoon?

Mr. PICKERSGILL: Yes. That is what was announced on the radio this morning.

The CHAIRMAN: I heard that, but there was no meeting arranged for 3:00 o'clock this afternoon.

Mr. PICKERSGILL: May I take it that there will be no meeting after 11:00 o'clock today?

The CHAIRMAN: That is right.

Mr. FISHER: Might I ask if Mr. Fulton is available for questioning, for example, in relation to Mr. Gilbert's presentation?

Mr. BENIDICKSON: We will not have time for it today.

Mr. FISHER: There are a number of points in the brief presented to the government on which I wanted to question Mr. Fulton, concerning the government's relationship to it. The reason I raise this question is that I do not know of any pattern in committees, but we have had Mr. Hees in committee, sitting up there, and he has been only too willing to come in; but it has not been on legislation.

The CHAIRMAN: The plan was to hear the witness, and then when we come to deal with the bill clause by clause, Mr. Fulton would be available for questioning.

Now, who wants to lead off?

Mr. CARON: I will lead off. Mr. Gilbert yesterday spoke about numerous bankruptcies which he thought were due mostly to the loss leader principle. Is that correct, or am I wrong?

Mr. DAVID A. GILBERT (*Managing Director, Canadian Retail Merchants Association*): The unfair trade practices elements were an important factor in them.

Mr. CARON: Yes, because I have the D.B.S. figures for June 14, and out of the bankruptcies there were 157 in construction, 150 in fabrication, 30 in transportation and communication, 23 in agriculture, and 79 in services.

Therefore it does not appear to me to be worse in your line than in any other line. It seems that construction is worst of any one. How can you explain that comparison with what you said yesterday?

Mr. GILBERT: I explained what I said yesterday was compiled by virtue of the D.B.S. figures, and that the figures which were used were D.B.S. figures. But there is nothing in my remarks or in my submission that I have made dealing with these 1960 figures. I might say that certainly we have a situation in construction currently which might account for the figures predominating in that area.

The CHAIRMAN: On that point, did Mr. Gilbert not point out that he went back in this one industry, in his own business, and he pointed out that from 1945 he came forward?

Mr. CARON: You are quite right but with the questioning which the committee put to him, it showed that it seemed to be worse in the retailers department than anywhere else.

The CHAIRMAN: No, no.

Mr. CARON: I admit that I may be mistaken, because I did not take everthing down in shorthand.

The CHAIRMAN: I think the construction industry was interjected by one of the members, but I just forget who it was.

Mr. BALDWIN: Would the D.B.S. figures include voluntary assignments, or would they just show bankruptcies, where there have been petitions? There might be quite a difference with figures which included voluntary assignments.

Mr. FISHER: There are figures in this report, which is brought out quarterly, covering failures under the Bankruptcy Act.

Mr. Gilbert in his statement to the steering committee of the Department of Trade and Commerce, filed this as an appendix, in order to provide some statistics. Might I ask what was the source of those statistics

Mr. GILBERT: For the period 1945 to 1957, they were procured from Dun and Bradstreet; and for 1958-59, to the best of my knowledge, they were prepared from D.B.S. figures.

Mr. FISHER: This may have caused the problem. But when you presented these figures to the government, did anyone question them, or make any analysis of them, or anything?

Mr. GILBERT: No. These figures were the subject of discussion for a five or ten minute period, but there was no analysis made by members of the committee at that time.

Mr. FISHER: I spent about three hours last night going through the D.B.S. figures and this series back to 1950.

There are two series which I have gone through, and there are a number of new businesses in the various fields which are available. I find there is very little relationship between the statistics you have given in your appendix E, and the D.B.S. figures; and if in introducing this measure the government has acted apparently as a result of these figures which you presented in your appendix E, then there is something badly wrong; and if the chairman would like me to do so, I would be only too pleased to read out the statistics to indicate it.

Mr. GILBERT: May I state in reply to Mr. Fisher that these figures were introduced for the first time at the meeting on May 4 with the steering committee of trade and commerce; they were not presented to the government prior to that time, and they have not been officially presented to the government at any time. They were figures used at that meeting.

Mr. BENIDICKSON: I do not think that phrase is very descriptive for the record. You mention a steering committee of trade and commerce, but do you not mean the steering committee of the Conservative caucus, dealing with matters of trade and commerce? Is that right?

Mr. FISHER: I am very disturbed about this.

Mr. PICKERSGILL: Could we get Mr. Benidickson's point clarified? I do not know what the steering committee of trade and commerce is, yet I have been around here for 23 years.

Mr. HORNER (*Acadia*): It depends on whether or not you had one in your party.

Mr. PICKERSGILL: Does this mean that the witness has been working in collusion with any political party before he came here?

The CHAIRMAN: I had hoped that we could get this thing started this morning on a proper basis, but I do not think you are helping.

Mr. PICKERSGILL: On a question of privilege, may I submit that the chairman has no business whatsoever in saying to any member of this committee that we are going to start this committee on a proper basis. I have as much right to ask questions in this committee as has any other member. The fact is that there are meetings of the committee set at times—

The CHAIRMAN: You are out of order, because Mr. Benidickson has the floor.

Mr. PICKERSGILL: I raised a question of privilege, and if the chairman knew anything about the rules, he would know that a question of privilege is in order at any time, and must be raised immediately.

I submit that the chairman has no right whatsoever to reflect upon the statement made, or upon a question asked by a member of this committee.

Mr. AIKEN: It was made quite clear yesterday that the retail merchants association was invited by the caucus committee on the small business section to appear and to give a presentation, so that the members would have knowledge of the subject. I see no reason on earth, that if the Liberal party wanted to invite them—I see no reason to reflect on the retail merchants association, and I believe they would undoubtedly have come as gladly as they have for any group which asked them.

Mr. MARTIN (*Essex East*): There is a point however, which I think Mr. Aiken has overlooked. It is, of course, the privilege of any political party to consult with individuals, but only on a basis in relation to a parliamentary committee that is fair, and available to all other members of that committee.

Now yesterday Mr. Gilbert presented to this committee a page and a half of brief, or possibly a page and three-quarters of brief, and he told us, just in passing, that he had presented a much more complete brief to a caucus of Conservative members.

My question of privilege is with regard to that document. That document is more voluminous than anything presented to this committee. And I had understood yesterday that we were going to be furnished with copies of the really significant brief, so that we would be in a position to examine its contents and to put questions to Mr. Gilbert.

But I have not received a copy of that document. I was late in arriving this morning because I was searching in my mail. My secretary is ill, and I was searching to find whether or not that document had come in this morning's

mail, but it has not. Therefore I suggest that before Mr. Gilbert should be freed from this particular committee, we should be furnished with copies, and that we should have an opportunity to examine him on it; because in that document he made some very significant statements.

One of those statements was that the condition of small business in Canada had deteriorated since the legislation introduced by the former government. We have the right to ask him whether or not that is a fact. I was speaking to him privately yesterday—and he will confirm this after the meeting—when he said that the figures throughout did not bear out the conclusions he had made before this committee.

There is deterioration, but that deterioration is due to circumstances which have nothing to do with the former administration. It seems to me that this witness has changed his brief. It has not been presented to some members of this committee, and we are handicapped in making a proper examination of Mr. Gilbert.

Mr. AIKEN: Mr. Fisher has the brief, and he said that he perused it for three hours last night.

Mr. MARTIN (*Essex East*): Yes, and he is all ready to make a cross-examination, if you will let him do so.

Mr. HOWARD: May I comment on the question of privilege?

The CHAIRMAN: Yes.

Mr. HOWARD: Personally I do not care whether Mr. Gilbert or anybody else wants to appear before a caucus, or before any committee of a caucus, or anything else, to discuss matters relating to this bill. But reference has been made by Mr. Gilbert to a meeting held, when he presented a brief to a small section of the Conservative caucus. And reference was made yesterday by Mr. Gilbert to two briefs which he had before him.

I asked Mr. Gilbert for a copy of each of these briefs, and I have them. But I do not know if these are the briefs referred to or not. One of them is entitled "Submission to the Steering Committee, Department of Trade and Commerce, on the subject of Small Business".

Now, what is the steering committee of the Department of Trade and Commerce, and was this brief presented to that committee, or was this brief submitted to the Tory small business section, in their caucus? What is this particular document, and to whom was it presented?

The CHAIRMAN: You are the chairman, Mr. Hales, so perhaps you would answer.

Mr. HALES: I would be very happy to answer that question. It is the right and privilege of any party of this house, or of any group, to have any meetings that they may wish to have, and to have any group they wish appear before them.

In the Department of Trade and Commerce we have a caucus committee. Our caucus committee felt that they would like to hear the views of the retail merchants association on this question, and with that thought in mind, we asked them to come and give us their views. So they came and presented their views to us in the form of this brief which is now being discussed.

As I understand it, it is the right and privilege of any group in the government, or on the other side of the house, to invite such a group to come and express their views.

If the opposition party wanted to form a caucus group—which no doubt they have—I think they would have the same privilege and right to invite the retail merchants association to come and present a brief to them. And if they do not invite them to come, it is not our concern.

Mr. HOWARD: You will recall from the outset—first let me say that if a caucus or a group within a caucus wants to meet with anybody, it is their own

business, and I have no complaints—but this brief is most misleading, because it says: "The Steering Committee, Department of Trade and Commerce", and it does not mention any caucus group.

The CHAIRMAN: That is what I was trying to point out. The name is wrong on it, I think.

Mr. GILBERT: According to my information the title was incorrect on that statement.

Mr. HOWARD: And another point flowing from what Mr. Gilbert said yesterday is this: That there was quite a problem to make this available to the committee, because he only had a few copies.

Mr. Fisher and I went to see Mr. Gilbert when we asked him if we could have a copy, and he presented one to us. But the other members of the committee did not have them.

The CHAIRMAN: Mr. Gilbert undertook yesterday to telephone Toronto and to order some more copies. Now, gentlemen, it is not the easiest thing to get additional copies of that prepared and here today.

I think Mr. Gilbert has carried out his instructions, and when they arrive, the members will have them. Then, if there is a request by the members of the committee to have Mr. Gilbert return, at a later date, to discuss this point, that will be fine.

Mr. HOWARD: Mr. Chairman, this raises another point.

Some of the members of this committee have this particular document; others do not, by virtue of circumstances. Some have had an opportunity to discuss it quite thoroughly, and in quite a bit of detail, with Mr. Gilbert privately. Of course, this is a minor detail. Some of us are in the position of having the document before us, through the courtesy of Mr. Gilbert. We will be in a position, therefore, to put questions, while other members of the committee will not be able to follow this line of questioning, because they do not have the document with which to follow it.

If Mr. Gilbert says he will provide these, this is fine and dandy; eventually we will get them. Then the committee should decide, at that time, whether they want to have him back, in order to follow up the line of questioning. This places an unfair advantage on certain members of the committee, because the Tory majority of this committee have gone into detail on this.

If Mr. Gilbert leaves, and does not give an undertaking to come back to discuss this with the other members of the committee who have not had the opportunity of seeing this document, they will not have had an equal opportunity.

Mr. HORNER (*Acadia*): Mr. Chairman, on a question of privilege, we listened to this all day yesterday—about this information not being made public.

An Hon. MEMBER: And you will listen to it some more.

Mr. HORNER (*Acadia*): I am raising a question of privilege, Mr. Chairman. Documents were tabled in the house, at the request of Mr. McIlraith, in connection with everything that came before the government on this question. Mr. McIlraith and the Liberal party are well aware of that. Are we going to make everything public information, so that they can be prepared to ask questions on it as well?

This business of carrying on an argument on this point of view is a bunch of tommyrot.

Mr. BENIDICKSON: If I may interject, Mr. Chairman, I do not think Mr. Horner is too well acquainted with the rules of the house. He should be aware that a return to any motion made by a member is private to the officers of the house, and only obtainable through them.

The CHAIRMAN: Gentlemen, I am going to make a ruling.

We have an undertaking from Mr. Gilbert that he will provide this information to the committee—to everyone on the committee; and when this has been received, if, after examination by the committee, it is felt that he should be requested to come back and discuss certain points, I think that is the only fair thing we can do.

Mr. Gilbert has requested that he be allowed to get out of here as early as possible, and we are spending all of our time wrangling.

Mr. CARON: Could I say a word on that?

Mr. AIKEN: Let Mr. Fisher go ahead.

Mr. CARON: It is very unfair to us, because we did not have time to read that brief.

Mr. JONES: It is not unfair. If you do not have time to read it, that is your fault.

Mr. CARON: Mind your own business; I have the floor.

Mr. JONES: If you minded your own business, you would not be in this spot in which you find yourself.

Mr. CARON: We have not the brief, Mr. Chairman, and it is unfair to us. Mr. Benidickson only received it last night.

Mr. BENIDICKSON: And I did not have sufficient time to read it.

Mr. CARON: We have had no time to discuss the matter, and it is unfair to go on and question Mr. Gilbert on anything, unless we have that brief to study.

I really believe we should adjourn until Mr. Gilbert has given us all the information, and when he is ready to come back, we will question him on his brief, and on the letter sent to us.

Mr. MORTON: On a point of order, Mr. Chairman; Mr. Fisher said that he had spent three hours last night studying this. If such is the case, surely he should have the privilege of going ahead and making his examination.

Mr. Gilbert is going to make the information available, and after we have received this information, honourable members can go ahead, read it, and check the questions that Mr. Fisher has put. If there is any further information they desire, they can get it from Mr. Gilbert.

I suggest, Mr. Chairman, that we look at this in a more practical way, and stop being childish.

Mr. CARON: Who is being childish?

Mr. MORTON: You are.

Mr. CARON: You are railroading us; that is childish? I do not think so.

The CHAIRMAN: Mr. Martin?

Mr. MARTIN (*Essex East*): Mr. Chairman, if I may make a comment; I know you are doing your best to resolve what is obviously a very difficult problem.

I want to present one aspect of this that is suggested by the last remarks.

Mr. Morton started off questioning Mr. Gilbert yesterday. I know Mr. Morton is an industrious member, but I did see that he had all his questions written out on paper. He had an advantage that no one else had.

Mr. MORTON: Well, I prepared them.

Mr. MARTIN (*Essex East*): But you had access to a document which I did not have.

Mr. MORTON: No; I did not see it.

Mr. MARTIN (*Essex East*): All right.

But, Mr. Chairman, the point I want to make is that some honourable members have read this document. Now, pursuant to your suggestion, Mr.

Chairman, they are going to put questions; and those questions will be replied to by Mr. Gilbert. The point I am making is this; it may be that others, if they had had an opportunity of examining this document, would put questions, at the same time, to Mr. Gilbert, which would reveal different replies.

The statement which Mr. Gilbert made yesterday, for instance, about the condition of small business in Canada in relation to the former legislation, is already a statement of the greatest significance, to which no opportunity is given to examine on the part of those who have not seen this document.

Mr. Morton, for instance, will be putting questions, based on this document, this morning.

Mr. MORTON: I have not seen it.

Mr. MARTIN (*Essex East*): Well, others will. I will not have an opportunity to put questions. Consequently, this is not a proper way to have evidence put in.

If Mr. Gilbert is going to give evidence on the basis of this document, it ought to be in the hands of everyone in this committee, for study, before questions are put. I do not believe it is fair to this committee and to the projection of what we regard as the factual situation in this whole matter, to have this one-sided investigation conducted.

Mr. AIKEN: Mr. Chairman, what I want to say is non-controversial.

This is the first time—and I have been here three years—that I have heard it admitted that the lazy government backbenchers came better prepared.

Mr. PICKERSGILL: Mr. Chairman, on the point of order; I think we ought to be told what this document is all about because, according to the evidence that has been given already, this document was shown to a committee of the Tory caucus—and I have no objection to that; it is a free country, and they had that right. However, it was shown on May 4, and this bill was introduced and given first reading on May 6—two days later.

What is this document about? Is it about the bill before the committee, or about something else? If it is about the bill, how did the retail merchants association find out about the bill before parliament was told; and if it is not about the bill, why are we wasting out time with it?

I think the witness should give us this information.

Some Hon. MEMBERS: Let him talk.

The CHAIRMAN: All right; perhaps he can do a better job than I can.

Mr. GILBERT: Mr. Chairman, I believe my remarks should clear up this debate.

There is a slight reflection being cast on the association, and this I want to clear up immediately. The retail merchants association is not in politics. We deal with the government of the day. Our submissions are always made to the government of the day—to this government, and to the former government; and on this question our approaches have been made to the Department of Justice, constantly since 1951. However, we have kept all members of the House of Commons fully informed on what we are doing.

I met with a caucus meeting of the C.C.F. party about May or April last year on this very subject. Also, I met with the Hon. Mr. Pearson, Mr. Benidickson, and with Roger Mitchell, at the same time, on this subject, and I personally handed to them the documents, most of which were reproduced, on the matter at issue now.

Mr. MARTIN (*Essex East*): If you had told us that yesterday, we could have obtained this from Mr. Pearson.

Mr. BENIDICKSON: But, what you presented at that time, was your 1958 annual submission.

Mr. GILBERT: Following which, I have a copy of a letter dated June 4, 1959—"your member reports from Ottawa"—which was issued to businessmen

in his constituency, by Mr. E. Regier, making reference to the entire conversations and discussions held at that time.

The documents in question, and which were reproduced for the meeting of May 4, contained, in large part, our submissions on all aspects of small business, including loans, the small business department, and trade practices.

According to our files, we wrote to every member of the House of Commons last year, regardless of political affiliation, setting out our position in respect to section 34, and in respect to aids to small business; and we forwarded at that time a copy of the submission, which has been reproduced, and which seems to be the point at issue now, together with this little pamphlet, "the bargain that is merely a mirage", all of which clearly sets forward our position, and reproduced, for the general information of all members of parliament, the position of this association with respect to these matters, and a complete reproduction of our brief submitted to the Prime Minister and ministers of the cabinet on September 4, 1958.

So, gentlemen, I do believe that you have in your possession, somewhere in your files, this material.

In complying with the request of yesterday, I am going to ask you to be a little bit tolerant in regard to the reproduction of this material. I was in conversation with my office again this morning, and was informed that the material is in the last stages of work, and 50 copies of it will be expressed to Mr. Cathers. They should be available to the members by the week-end.

Mr. HOWARD: Mr. Chairman, what Mr. Gilbert said was quite correct; we did meet with him in April or May of 1958.

Mr. BENIDICKSON: It was 1959, and the submission was their 1958 annual brief.

Mr. HOWARD: Whatever date it was, we had that meeting. However, there is information in this particular document in question, which was made available to the steering committee, or whatever it was, of the Department of Trade and Commerce, and it was not presented at the time we had this meeting with you.

You make reference to the statistics of 1959, but they were not compiled at the time of our meeting.

The next point I would like to raise is this. You will recall, as soon as the bill was tabled in the house, I sent a copy to you, and asked if you would care to make your opinion available to us. I have not had an answer so far.

Mr. GILBERT: That is quite understandable.

Mr. HOWARD: It may be, but I put it down, as a point of fact, that this is so. It was intended to get additional comments from your association as to the bill presented to the house on May 6. I have not had an answer nor an acknowledgement of any sort.

Mr. PICKERSGILL: Mr. Chairman, the witness did not answer my question as to what this brief was all about.

Was it about the bill or was it not about the bill? As the brief appears to have been presented to the subcommittee of the Tory caucus on May 4, and the bill was introduced on May 6, the witness ought to tell us whether he had any knowledge of what was going to be in the bill, when he presented this brief.

Mr. AIKEN: That is a slanderous statement.

Mr. PICKERSGILL: It is not; it is a question.

Mr. GILBERT: For the record, I have stated the submission dealt with small business and all the aspects which are elements of small business. It made no reference to Bill C-58, which had not been presented. While we would have liked to have added such knowledge to our information, it would be impossible to have knowledge of it.

Mr. MARTIN (*Essex East*): Is it not a fact that you discussed it a few days before the bill was presented in the House of Commons, with an officer of the Department of Justice?

Mr. GILBERT: I did not get your question.

Mr. MARTIN (*Essex East*): Is it not a fact that a few days before the bill was presented, you discussed the bill with an officer of the Department of Justice?

Mr. GILBERT: I would have to deny that statement.

Mr. MARTIN (*Essex East*): You deny that statement

Hon E. D. FULTON (*Minister of Justice*): May I ask a question, in view of the implication?

Is it not a fact, Mr. Gilbert, that the bill introduced previously in the house, which had been public property, was frequently discussed with a representative of your association, and the discussions, as they took place, were on the basis of that bill at all times?

Mr. GILBERT: Bill C-59.

Mr. MARTIN (*Essex East*): I am not objecting. I said it was a fact—

The CHAIRMAN: Mr. Martin, you have received your answer.

Mr. BALDWIN: Surely, Mr. Chairman, our political canter has been long enough. This witness has sat here for a considerable length of time, at a great sacrifice to himself. He is sitting here to answer the questions of members of this committeee who have adequately prepared their case, and who are now in a position to ask questions of him.

I submit, Mr. Chairman, that we should proceed and if, at the end of our examination, there are those here who are not adequately prepared and wish to consider the question of his re-appearance, we should take that into consideration at that time.

I suggest we proceed, by having him examined by those who are here, ready and willing, to question him.

Mr. PICKERSGILL: I move that the committee should not carry on any questioning on this document until the document is in the hands of all members of the committee.

I make a formal motion to that effect.

Mr. CARON: And I will second the motion.

Mr. FISHER: Mr. Chairman, in speaking to the motion, I find it is a very tough problem for me.

I intended to question on the basis of this document very thoroughly, and especially on the presentation of May 4, 1960.

I might explain that I am tempted to support Mr. Pickersgill's motion. I am no statistician, but I spent a few hours checking the statistics presented in this, as against the D.B.S. figures, and I am dismayed at the complete failure of the 1959 statistics to match up. I suggest that to the government members of the committeee as one reason why we should all take time to go into this.

For example, I was not aware, until I got into it, that Quebec has almost always had the highest ratio of failures, especially in trade, as compared with any other province. According to my analysis, Ontario, British Columbia and the prairie provinces have a much lower rate of failures and, according to the way I analyze the statistics, there has been no appreciable effect as a result of the 1951 legislation, in so for as commercial failures are concerned, despite the statistics presented here.

For the reasons I have given, I think it may be worth while, in fairness to the other members who have not this information, and because of my own lack of time to give more attention to it, to postpone it.

There is one other question which bothers me in this connection. At page 5 of the brief—and I would like to read this—it says:

> It is important, however, that such amendments will constitute an effective weapon in the elimination of predatory price cutting, loss leaders, false advertising and misrepresentation, all of which contribute to the destruction of competition and the creation of monopolies in some of our large metropolitan centres in Canada, documentary evidence to that effect has been submitted to the Department of Justice and a confidential memorandum is attached for your scrutiny. (Appendix "D").

Now, appendix D is not in this.

Mr. GILBERT: That is unfortunate. It is in most of the copies. However, some of those were assembled in a hurry, and that might explain it.

Mr. FISHER: I feel I could do much better questioning, if I had appendix D.

There is one last statistical point. Again, my analysis of the D.B.S. figures —these figures from 1955, when they began a new series breakdown—indicated failures, in terms of business, with liabilities of under $5,000, $5,000 to $25,000, and so on. Now, it is startling to me that almost all the failures, the vast majority of them, tend to concentrate and range between $5,000 and $25,000.

The CHAIRMAN: Are you speaking on the motion of whether—

Mr. FISHER: I know.

The CHAIRMAN: I think you are going off it.

Mr. FISHER: The point I am trying to make, Mr. Chairman, is that this is a much more conflicting pattern if you are going to appreciate what the retail merchants are putting over, other than what is apparent on the surface or is apparent in their statistics. I would like to argue that it would be fairest perhaps to all members of the committee if we all had an opportunity of studying this brief, and the opportunity to take some time to analyze its statistical background which I argue is incomplete, incorrect or false and misleading.

Mr. GILBERT: For the information of Mr. Fisher I would like to reply.

Mr. PICKERSGILL: Mr. Chairman, on a point of order. We are debating a motion and I do not think the witness should take part in this debate.

Mr. HORNER (*Acadia*): Surely you will be fair enough to let him answer this.

Mr. PICKERSGILL: He may be allowed to answer it afterwards, but not while we are debating the motion.

Mr. MACDONNELL: I think an unfortunate situation has arisen here. I have listened to Mr. Fisher with interest and it seems to me it is the only way, in dealing with people who want to get along together, that we might enter into it. If it is being suggested that we carry this discussion right through the day and perhaps reach a conclusion without these documents being in the hands of everybody, I would vote for Mr. Pickergill's motion. That is not the situation, however. We have only one half hour to three quarters of an hour left this morning and I suggest that we have the man here who is briefed, and we should continue. The information is not going to run away between now and the time we meet again. There is no question as to these figures Mr. Fisher himself is going to use. I suggest it would be sensible to go ahead with this examination during the half hour we have left.

Mr. PICKERSGILL: I made the motion; I did not speak on it.

Mr. JONES: You have already spoken to this motion. I would like to say something, Mr. Chairman.

Mr. PICKERSGILL: I have not spoken on the motion.

Mr. JONES: You moved the motion.

Mr. PICKERSGILL: Well, of course, if the members of the majority party are going to do all the talking, that is fine.

Some Hon. MEMBER: Cry baby.

Mr. JONES: Mr. Pickersgill has already moved this motion and I think we ought, as members of this committee, to make our views known. I do not think there has been any unfairness to the member from Bonavista-Twillingate in respect of this motion. It would be awkward to this committee if a motion should be moved at this time because, if you will recall the reason the witness is here today, and the reason that he set aside his plans and came back, was because of the request of the Liberal members. Now, after he has disrupted his plans, in view of the fact that the members had full knowledge of this yesterday I think we should continue with Mr. Gilbert now.

Mr. PICKERSGILL: We did not know that he was coming back. That is not true.

Mr. MARTIN (*Essex East*): I did not know that Mr. Gilbert was coming back this morning.

Mr. JONES: You would know if you had been at the meeting yesterday afternoon.

Mr. MARTIN (*Essex East*): I was at the meeting during the afternoon.

Mr. CARON: This was decided at 5.30 yesterday.

Mr. MARTIN (*Essex East*): I did not leave until five to five yesterday.

Mr. JONES: Members of the Liberal party could have been present when this decision was made. It is my opinion that when a committee is meeting with a quorum it is entitled to make decisions.

Mr. Chairman, as I said, it was known to the Liberal members, and was even suggested by a Liberal member that the witness come back here today.

Mr. BENIDICKSON: It was suggested that we would not be finished with Mr. Gilbert yesterday. Mr. McIlraith made it very clear that it would be very awkward for him to continue his examination of Mr. Gilbert this morning.

The CHAIRMAN: Oh, now—

Mr. JONES: That may be your recollection of what Mr. McIlraith said, but nevertheless, every member of this committee will recall that it was on a Liberal member's suggestion that the plans of the witness, Mr. Gilbert, were disrupted by having him brought back today. I do feel that in fairness to him, having asked him to come back today, we should proceed with this examination.

Mr. JONES: I am quite in accord with the views of Mr. Macdonnell. No one wants to be unfair to anybody in this committee or in any other committee of the House of Commons, or in the House of Commons itself. We are trying to facilitate all the members of the House of Commons in order that we may discuss this and other matters adequately. If the suggestion of Mr. Macdonnell is followed, and I think it is a perfectly reasonable one, we could get along with our consideration, and I, for that reason, would vote against this motion. We should get on with the business.

Mr. PICKERSGILL: If the members are all going to be allowed to speak, I think I should be allowed to speak to my own motion, now that we have heard all the members of the majority party in succession.

I was not in the committee yesterday afternoon for the very good reason that the committee met at the same time as the estimates of the Department of Citizenship and Immigration were being considered in the House of Commons. If that is not an adequate reason for my not being here, I do not know what is.

Mr. McIlraith was here. He spoke to me at 10 o'clock last night. He said the witness was to be heard this morning at a time when it was absolutely impossible for him to be here. It is quite true that we want to examine this witness further, but this was about the most awkward time that the examination of this witness could have been arranged for, from our point of view as a party. We want this witness to be heard but we feel that the parliament of Canada is more important than the convenience of a particular witness, particularly when that witness and his organization are very much concerned about the legislation before us.

I come back to the fundamental point, sir. If the witness is being examined by one or two people who have had an opportunity to examine this document for an hour or two as well as a number of other members who have had this document in their possession since the 4th of May, it provides a spendid opportunity for most misleading views to be given to the public in respect of what this whole document contains; and until every member of this committee has had an opportunity to see this document, which Mr. Gilbert could have made available to every member of the House of Commons between May 4 and this date if he had seen fit to do so, I do not think we should examine on it. I do not know whether Mr. Gilbert made any effort to see any member of the Liberal party after the 4th of May at all, but that is his own business. I am not criticizing, but I am saying that he did not make this document available to all the members of the House of Commons and, since he did not do that, it seems to me that we are not asking anything unreasonable for the witness by asking to defer the examination of him at this time. I would not mind if he was examined in respect of other things such as the bill itself, for example. I would like to ask him a number of questions in respect of the bill, which is what we are here for. I do not think he should be examined at this time until we have all had a reasonable opportunity to read this document and to study it, following which I think he should be available for examination.

Mr. BENIDICKSON: I would like to say a word or two with respect to this motion. I regret the necessity of doing so, but I would like the committee to see the hardship that this is imposing because, like Mr. Fisher, I was up at 5 o'clock this morning in connection with this brief. I feel that we should have the opportunity of studying it. Yesterday we had five hours of sitting. It is true that this brief was given to me yesterday afternoon, but it was not possible for me to have a look at it any earlier. I sat in the House of Commons last night waiting for my turn, and you will see from *Hansard* that I took my turn in the debate. I was anxious to do so in connection with the estimates of the branch of Indian affairs. I spoke at almost ten o'clock. I found it impossible subsequently to do any research in respect of this document. I felt that it was, as Mr. Fisher said, significant to follow-up some of the figures of page 6 of this brief which indicate the increase in failures in retailing there, and the increases of the liabilities related to these figures. I have checked out, with the availability of the library being opened over night, some figures that I have, which I have not been able to re-check as yet.

I find from my sources that sales of retail departmental and independent stores in 1951 were 10.6 billion and in 1959, 16.1 billion with the independent portion of that in 1951, 7.9 billion and in 1959, 12.8 billion. That indicates that the proportion of the total of all retail sales accorded to independent stores rose 79 per cent. This is, I think, Mr. Chairman, significant, and I feel that—

The CHAIRMAN: You are not discussing the motion.

Mr. BENIDICKSON: I am saying that we should accept the motion because, like Mr. Fisher, I could not verify my figures in the time that has been available

to me, and I do not think that this witness, with all due respect to Mr. Gilbert, could properly reply to this type of information.

Mr. BALDWIN: Mr. Chairman, will Mr. Pickersgill amend his motion?

The CHAIRMAN: I think we have had ample discussion in this regard. I am ashamed of this committee, and I am going to put the motion to the question.

Mr. PICKERSGILL: Is this closure?

Mr. CARON: According to the rules, Mr. Chairman, anyone rising on a question of privilege has the right to do so. Every member of this committee, as in the House of Commons, has the right to speak on a motion, and I do not think you have the right to stop any member from doing so.

Mr. MARTIN (*Essex East*): Mr. Chairman, I would like to take a strong exception to your statement. I know that you are endeavouring to do your best.

Some Hon. MEMBER: Is the honourable member speaking on a point of order?

Mr. MARTIN (*Essex East*): I am speaking on a point of order.

Mr. Chairman, you are entitled to do your utmost to keep order, but I do say that you are not going to facilitate our proceedings, which obviously are going to be extended, if you persist in making remarks such as you have just made, when you said you are ashamed of this committee.

The CHAIRMAN: I am.

Mr. MARTIN (*Essex East*): You are one member of this committee in a different position than anyone else, in that you are perhaps called upon to exercise a more neutral position than any individual member of the committee. When you say you are ashamed of this committee, you are giving expression, if I may say with respect, to a partisan point of view. Why are you ashamed? The members of this committee have taken a particular position, which they are entitled to take. You may not like it but you have no right to use that characterization, any more than I would to have made the same observation. I could say to you right now that I noticed just before you made that statement that you spoke to the Minister of Justice who indicated to you by a signal that we should roll on. The Minister of Justice is not a member of this committee.

Mr. FULTON: Mr. Chairman—

Mr. MARTIN (*Essex East*): The Minister of Justice is not a member of this committee. He is here by courtesy, and he has no right to suggest to the Chairman or to the members of this committee how they shall conduct their proceedings.

Mr. FULTON: Mr. Chairman, may I speak on that remark?

Mr. MARTIN (*Essex East*): Just a minute.

The CHAIRMAN: You are wrong, Mr. Martin.

Mr. MARTIN (*Essex East*): Just a minute.

The CHAIRMAN: You are wrong when you infer that the minister suggested that we should roll on.

Mr. MARTIN (*Essex East*): I saw the minister go like this.

The CHAIRMAN: I tell you that you are wrong.

Mr. MARTIN (*Essex East*): You may say that I am wrong, but I saw the Minister use his left hand to make a motion like this.

The CHAIRMAN: Are you challenging the truth of my statement?

Mr. MARTIN (*Essex East*): You are challenging my statement, and I will put my statement against yours any time.

The CHAIRMAN: Are you challenging my statement?

Mr. MARTIN (*Essex East*): I say the Minister of Justice should occupy a position of benevolent presence.

Mr. BALDWIN: I would suggest, Mr. Chairman, an amendment which might solve this difficulty. I wonder if Mr. Pickersgill would accept this amendment. It is an amendment that would seem to express the wishes of those who are opposed to proceeding on certain matters.

The motion would read: Mr. Gilbert's examination in respect of the matters contained in this brief should be deferred until after the material is furnished. Now, that is a different motion than what Mr. Pickersgill made.

Mr. PICKERSGILL: That is my motion.

Mr. BALDWIN: I do not think so. I thought your motion was that we ought not to proceed with the examination of him at all.

Mr. PICKERSGILL: Oh, no, only with respect to this part.

The CHAIRMAN: I will read the motion. "I move that there be no questions on the memorandum of May 4 to the Tory caucus until the document is in the hands of all members of the committee".

Mr. PICKERSGILL: That is all my motion is.

Mr. CARON: This motion does not preclude any other questioning.

Mr. FULTON: Mr. Chairman, since I have been accused of something, may I have the opportunity of saying a word in this regard?

Mr. MARTIN (*Essex East*): Only by leave.

Mr. PICKERSGILL: On this point, in respect of the Minister of Justice, I would like to say just a word or two.

I agree that the Minister of Justice should be accorded this courtesy but I cannot do so without recalling that I was in the position of the Minister of Justice on one occasion, and he was in the position that I find myself in now, and he refused to accord me the same courtesy.

Mr. HORNER (*Acadia*): Are you refusing him this courtesy?

Mr. PICKERSGILL: No, I agree. I want to show you the difference between a Liberal and a Tory.

Some Hon. MEMBER: We have seen that here today.

Mr. HOWARD: I did not know there was any difference.

Mr. FULTON: I would like to say that Mr. Martin is quite incorrect in the conclusion that he is drawing. I do not recall actually whether or not I used my left hand at the particular moment that he refers to, but I assure the committee there was no discussion between the chairman and myself, directly or indirectly, as to whether the motion should be taken or whether things should roll along.

My recollection is entirely different to what Mr. Pickersgill has said in respect of what happened a number of years ago in a committee.

In respect to Mr. Pickersgill's comments, I objected at that time to the minister being a member of a committee under those circumstances, in view of his capacity at that time. That was my objection.

I have endeavoured to attend here, at your invitation, and to take no position that would in any sense be an attempt to indicate what the committee should do or how it should conduct its business.

Mr. PICKERSGILL: I rise on a point of privilege at this point.

The minister's statement, I am sure, is just as a result of faulty recollection because I have the greatest respect for the minister's regard for the truth, but it is not in accord with the facts. I would ask the privilege of being allowed at our next meeting to bring the record of that committee meeting, to establish that point.

Mr. WOOLLIAMS: Surely something that happened four years ago is irrelevant and immaterial to what we are here to discuss?

Mr. PICKERSGILL: A question of privilege is always in order. I am asking that this matter of veracity be straightened up in a civilized way.

Mr. AIKEN: I would like to get back to the motion.

There were two Liberal members speaking on this subject, and I was quite glad to have the motion put, but I think we should put this back into focus. The document that Mr. Gilbert presented, and the one we are discussing, was never presented as a brief to this committee. It is not a brief at all. It was an additional document that was available. It certainly was not hidden and I would think it is the sort of document that could be used for examination of a witness. There are surely dozens of other types of briefs that have been presented to different groups. We have heard of briefs presented to the Liberal caucus and to CCF groups, that have not been asked to be presented.

The document which was presented to the Conservative caucus was mentioned yesterday and it was agreed that we would produce it. It is available if a member wants to examine on it now. I would say it is no more than that, but we surely are not discussing a brief that was presented to this committee. This is merely additional evidence that was made available, and is being made available. Surely we cannot say that the brief was presented to the whole committee. It never was presented to the committee.

Mr. BENIDICKSON: I would like to rise, and this is the first opportunity I have had, on a point of privilege. I am referring to the remarks of the Chairman when he said he was ashamed of this committee. I do not know whether that was an all-inclusive statement or whether he was directing his attention to a part of this committee. I am not going to say that with respect to the Chairman, but I am going to say simply that I am very disappointed in the Chairman,—and was, all yesterday afternoon. I know for a fact because,—and it was not known that I overheard it,—I did overhear an arrangement being made between the Chairman and the witness which was contrary to the information that was given in public by the witness as to his availability, and that it was made known at the time we adjourned yesterday morning, that the witness could change his plans with respect to leaving this city yesterday afternoon. The Chairman knew that it would be possible for the witness to appear before us today. Twice yesterday afternoon I asked the Chairman to indicate this to the committee, and to take us into his confidence and give us the information that I knew he had. He refused to do that until after 5 o'clock. If the Chairman had not deceived some members of the committee to the extent he did by that attempt at concealment and lack of frankness with the committee, I can assure the Chairman that he would not have had perhaps as much difficulty as he has been encountering. I repeat that I am disappointed in the Chairman. I am not going to say that I am ashamed of him.

The CHAIRMAN: Mr. Benidickson, that is a ridiculous statement that you are making, and I will ask Mr. Gilbert to confirm, or indicate if what you say is true.

Mr. BENIDICKSON: Will you let me cross-examine Mr. Gilbert?

The CHAIRMAN: Yes.

Some Hon. MEMBER: Lets not get into this.

Mr. HORNER (*Acadia*): On a question of privilege, Mr. Pickersgill would not let Mr. Gilbert answer some charges made by Mr. Fisher, and this is the same thing.

I would like to speak to this matter.

Mr. FISHER: I did not make a charge.

Mr. HORNER (*Acadia*): Mr. Pickersgill referred twice to the fact that he had to be in the House of Commons while the estimates of the Citizenship and Immigration Department were being considered, and also that he would

like to have been in this committee as well. I would like to call the committee's attention to the fact that the consideration of the said estimates was supposed to take place a day earlier than it did, but it did not take place at the request or by an agreement made between the minister in charge in the House of Commons and the member from Bonavista-Twillingate. They held this consideration over one day because of the request made by Mr. Pickersgill. If this committee had to sit the same day that the consideration of the Citizenship and Immigration estimates took place in the House of Commons, then it is perhaps partly Mr. Pickersgill's own fault.

As far as this motion is concerned, certain documents have been published and made available to the members of this committee and I am referring to the one that was tabled at the request of Mr. McIlraith. No one else has seen it, that I know of, except the Minister of Justice and his department. I think that certainly if we are going to ask for every document that has been filed, or has been published, then those two should be made available to the members of the House of Commons so that we can properly examine these witnesses when they come before the committee.

Mr. PICKERSGILL: I would just like to say a word in respect of Mr. Horner's question of privilege. I wonder if I could suggest to the members of this committee that we take up a collection in order to buy Mr. Horner a copy of the rules of the House of Commons.

Mr. JONES: Mr. Chairman, I would like to move an amendment to the motion.

I think the motion itself is bad because it attempts to fetter the right of individual members of this committee to ask all the questions they would like to at this time. I think that is bad in principle. I think however we should remember that this committee is trying to get to the bottom of this information, on this particular legislation, and the submissions that have been made by Mr. Gilbert.

I would move an amendment to this motion, deleting what has been said by Mr. Pickersgill, and reading in this way: that Mr. Gilbert at the request of this committee report again, if the committee so decides, to give further testimony.

Now, it may be said that this will cause inconvenience to Mr. Gilbert, and maybe it will; but this is an important matter and I think this committee has the right to ask him to come back here, in view of the interest which has been taken in this matter. Surely he will be able to make arrangements, if the committee so decides, to come back at a convenient time to these proceedings.

Mr. BALDWIN: I would second Mr. Jones' amended motion.

The CHAIRMAN: We have a motion now which will have to be dealt with first.

Some Hon. MEMBER: You should deal with the amendment first.

The CHAIRMAN: What is your amendment?

Mr. JONES: It is that Mr. Gilbert be required to return to give evidence before this committee at such time as the committee may decide in the course of its deliberations.

Mr. PICKERSGILL: I would like to ask the Chairman how much of my motion was struck out because, if it was struck out in its entirety, this is not an amendment.

Mr. JONES: I suggest that everything be deleted after the word "move".

Mr. PICKERSGILL: Perhaps we should take up a collection to buy a book of rules for Mr. Jones, too.

Mr. MARTIN (*Essex East*): I agree on the point of order, that that is hardly an amendment. I would like to hear Mr. Fisher continue his questioning and therefore I am against a motion which prevents Mr. Fisher from doing so.

Mr. CARON: Mr. Fisher is willing to wait.

Some Hon. MEMBER: Put the question.

Mr. CARON: There is no motion. This amendment is completely negative so it cannot be an amendment. The rules do not permit a negative amendment. It is completely negative.

Mr. JONES: It does not make any difference to me. I do not wish to waste the time of this committee wrangling about an item like this; whether it is a motion or an amendment.

The CHAIRMAN: To simplify the problem I am going to put the motion.

An Hon. MEMBER: Would you read it again?

The CHAIRMAN: The motion is: "I move there be no questions on the memorandum of May 4, to the Tory caucus, until the document is in the hands of all members of the committee".

All those in favour?

Those contrary?

I will cast a vote then. The motion is defeated.

Mr. JONES: I move that Mr. Gilbert be requested to return to give further testimony to this committee at such time as the committee may decide.

Mr. BALDWIN: I would second that.

Mr. MARTIN (*Essex East*): Was that a tie vote, Mr. Chairman?

The CHAIRMAN: Yes.

Mr. HOWARD: I counted eleven to ten, not that I am doubting the clerk's ability.

The CHAIRMAN: This is a new motion, not an amendment?

Mr. JONES: I have put it forward as a new motion.

The CHAIRMAN: I would ask you to read it.

Mr. JONES: I have just finished reading it, Mr. Chairman, but I moved that Mr. Gilbert be requested to return to give further testimony to this committee at such time as the committee may decide.

Mr. MARTIN (*Essex East*): I think that is a good motion.

Mr. BALDWIN: I would second it.

Mr. PICKERSGILL: I will be glad to second that.

Mr. BALDWIN: All right, I will withdraw and let Mr. Pickersgill second it.

The CHAIRMAN: All those in favour? Those against?

I declare the motion carried.

Mr. FISHER: Is it okay to go ahead with the questions?

The CHAIRMAN: Yes, Mr. Fisher.

Mr. FISHER: Mr. Gilbert, would you agree it would be important—in view of the rather radical change in this bill—that the committee be satisfied that there is practical backing in the form of statistics for your contention that small business is in a great deal of trouble, and that there have been many failures as a result of the 1951 legislation?

Mr. GILBERT: I would believe that the committee should be satisfied as to the seriousness of the situation with respect to small business.

Mr. FISHER: Would you agree that this seriousness would be revealed best by some statistical information?

Mr. GILBERT: If it is possible to get the statistical information, it would be helpful. I believe that the testimony of small business people themselves is the important consideration.

Mr. FISHER: Mr. Gilbert, you will agree that the small business, as repre-

sented by your association, is a pressure group? I am not making any invidious comment on it, but our society is filled with pressure groups. It is a pressure group because, according to your own brief, you are here to further the interests of your particular group?

Mr. GILBERT: We are here to further the interests of small business, as an important segment of the economy of Canada; and we speak on behalf of the independent retail trade of this nation.

I am sure your remarks are not going to be appreciated by small business operators. I am going to remind you and Mr. Benidickson—though the figures he gave were incorrect because he was talking about "millions"—the retail trade in Canada last year amounted to over 16 billion—

Mr. BENIDICKSON: That is what I said: "$16.1 billion."

Mr. GILBERT: The lion's share of this business is being transacted by independent business, 95 per cent of whom are classified as small business operators. So they are a gigantic force.

Mr. BENIDICKSON: That is also what I said.

Mr. GILBERT: I am reiterating, for the benefit of Mr. Fisher, the importance of the group. I do not know whether the term "pressure group" was intended—

Mr. FISHER: I have said there was nothing invidious intended.

Mr. GILBERT: —in a derogatory way; but, certainly, we endeavour to represent the needs of industry as truthfully and fairly as possible. In addition, we are speaking, and our delegation yesterday was speaking, on behalf of the distributive industries of Canada.

When you combine retailing, wholesaling and manufacturing—you can do a little more arithmetic on this figure, but according to the 1951 census the distributive industries in Canada employed 32.8 per cent of the payroll of Canada. So, gentlemen, please realize the importance of small business in the economy of Canada.

Mr. FISHER: Mr. Chairman, the witness seems to think I am trying to deny its importance. As the detective on TV tried to do, all I am trying to do is to get to the basis of the thing, the facts. It seems to me it would be important for our considerations to know the facts in terms of the number of failures. This seems to me to be the most relevant of all the figures.

I just want to suggest to you that the figures you have presented to support your contention, according to my reading, are not consistent and do not conform with the only statistics I know are available.

I would point out to members there is an annual report put out by the dominion bureau of statistics entitled "Commercial failures under the provisions of the Bankruptcy and Winding Up Acts." Included in the figures contained therein are the commercial failures by major industries, by provinces, and according to the size of liabilities. This includes the manufacturing, construction trade, and service, and includes the total for Canada and by provinces. It goes further than this and breaks the failures down under the liabilities: whether they are under $5,000, whether they are between $5,000 and $25,000, between $25,000 and $50,000, between $50,000 and $100,000, and over $100,000.

I think that this statistical source which is available in this detail for 1955 on—and it is available much further back, to 1923—that with this information on the breakdown by liabilities and by trade, we have a source which will indicate whether there is a parlous state in small business.

I want to put this point, that I cannot follow your arguments statistically from this annual report, that small business is in as parlous a state as you indicate. This, as you declare, may not be relevant, if small business people themselves are convinced. Then, statistics may be irrelevant. But you yourself

have produced the statistics and in your schedule E, on page 6 of the brief, you have been prepared to argue. You have these statistics that show that in 1945 the number of failures was 26 and liabilities were only $250,000. In 1959 the figures jumped to 907 failures and liabilities of $25,948,000. This is very impressive to anyone who does not look at these other statistics.

I want to repeat to you, we need to be shown where you get your figures, because they certainly do not conform to the D.B.S. figures, and to me they show a pattern that the D.B.S. figures do not reveal. If the committee wants me to indicate some of the discrepancies, I will be only too glad to.

Mr. GILBERT: I believe we are all searching for facts and figures. At times they are difficult to get, in a statistical way, particularly in Canada. In your search for facts and figures, I think I am correct in saying that the figures from the D.B.S. to which you are referring are estimates, estimated.

Mr. FISHER: These commercial failures are those registered under the provisions of the Bankruptcy and Winding Up Acts.

Mr. GILBERT: They are not estimates?

Mr. FISHER: No, they are not estimates.

Mr. GILBERT: In the matter of the source of the figures that we have used from 1945 to 1957, we requested this information from D.B.S. office in the city of Toronto who, in turn, to complete the facts and figures on the situation, made reference to Dun and Bradstreet, who produced the actual figures; and those are the figures we stand on as contained in the appendix.

Mr. FISHER: You have already indicated your figures in the appendix are taken partly from Dun and Bradstreet and partly the dominion bureau of statistics?

Mr. GILBERT: Yes, it is a combination of both.

Mr. FISHER: Let me illustrate to you the nature of the discrepancy. If you take appendix E and the 1959 number of failures, 907, and total liabilities of $25,948,000—that is directly from the D.B.S. figures?

Mr. GILBERT: Yes.

Mr. FISHER: Let us take 1955, when you have 673 failures and liabilities of $15 million.

Mr. GILBERT: Mr. Fisher,—

Mr. FISHER: Would you wait till I get the 1959 figures and read them to you?

The figures actually given under the trade section—which includes general stores, grocery stores, confectionery stores, meat stores, food stores, general merchandise, automotive products, filling stations, clothing, shoes, hardware and building materials, furniture, appliances and radios, fuel, drugs, jewellery, and a number of other miscellaneous trades—the figures for 1955, given by the dominion bureau of statistics are higher than you have here. There are 878.

Mr. BALDWIN: Does this booklet define what you mean by "business failures"? How wide is that term? I want it for my information as well as the witness's.

Mr. FISHER: I might point out the figure in the corresponding D.B.S. revised series in 1956, if I could read the note under revision, it might be clear to you:

> A major revision in the compilation and the presentation of commercial failures statistics has been effected and the data contained in this report are not comparable with those in earlier publications. In order to maintain some continuity, the revision was extended back to January, 1955, but data prior to that date cannot be compared directly

with the revised series. Differences, together with suggestions as to means of linking the old and the revised series at the total level, are outlined below.

It goes on—

Mr. McINTOSH: Is the trend the same? Is that the pattern?

Mr. FISHER: I am arguing the trend indicated by the statistics presented by Mr. Gilbert does not show up. There is an increase in business and an increase in the number of failures, but not nearly as startling an indication as he thinks is appropriate.

Mr. HORNER (*Acadia*): You are using the bankruptcy—

Mr. FISHER: Those figures for commercial failures, which are the only figures available.

Mr. WOOLLIAMS: You might have business failures and statistics on bankruptcy. They are two different things. Some people, when their business fails, cannot even afford the $500 to afford a trustee in bankruptcy. That may be. I can see the Minister of Justice agreeing with me, so perhaps he has had some experience of this.

Mr. FULTON: I am sorry.

Mr. PICKERSGILL: Was he ever that hard up?

The CHAIRMAN: Careful, Mr. Woolliams.

Mr. WOOLLIAMS: Coming back to the subject, that is the danger of using those figures.

Mr. FISHER: Let me give an example here. According to these figures they have, in 1955 there are 673 failures with liabilities of $15 million. According to the D.B.S. figure for trade, in 1955, the total liabilities were $27.9 million, and the total number of failures was 772—

The CHAIRMAN: No.

Mr. FISHER: Yes, 772, according to the D.B.S. figures.

The CHAIRMAN: You gave us 878 a minute ago.

Mr. FISHER: I was reading from the 1955 figures, which are the unrevised ones, and now I am reading from the 1956 revised series. My point is one I made earlier, that I can find no ground for comparison between the D.B.S. figures and the figures presented here, which show this startling figure for 1945 of 26 failures and liabilities of $250,000. Then, all of a sudden, we have in 1959, just 14 years later, the fantastic total of 907 failures and liabilities of $25,948,000.

Mr. WOOLLIAMS: Is that your point, that small business is doing well in Canada; because I have listened to you people in the House of Commons when you plead for the little businessman? Is that your point, the one you are making at the present time?

Mr. FISHER: I am not under cross-examination.

Mr. WOOLLIAMS: I thought you were giving the evidence. I did not know you were cross-examining, but I thought you were giving evidence.

Mr. FISHER: I am always glad to take lessons from the ever-present lawyer, who is always reminding us that he is a lawyer. I have not had the opportunity of as great an education as Mr. Woolliams.

I would like to tell the Chairman that I can only say these statistics do not show the difficulties that small businesses are under, according to the other parts of the presentation.

The CHAIRMAN: You have not proven that in any way, because you stated that in 1955—sure, these figures are in variance, because they are a little higher. But what are your figures in 1959?

Mr. PICKERSGILL: I wonder, Mr. Chairman, who is the witness here.

The CHAIRMAN: Thank you.

Mr. FISHER: In 1959—

Mr. WOOLLIAMS: I think you had better go to law school.

Mr. FISHER: In 1959 the retail merchants have given 907 failures and liabilities of $25,948,000. I am not quarreling with that, but there is not this statistical change they are arguing from their statistics. The difference in 1955 is a total of over $10 million in liabilities, and over 150 in terms of failures. There has not been a remarkable increase in the number of business failures, according to the D.B.S. statistics, and yet Mr. Gilbert's statistics indicate there has been a remarkable increase since 1951. That is my point.

Mr. GILBERT: Mr. Chairman, from the position taken by Mr. Fisher, and in view of the fact we are discussing the period from 1951 to 1959, I would suggest that from those remarks the committee must assume that the position of small business is even in a more perilous position than we have indicated in our statement.

Mr. PICKERSGILL: There is a question I would like to put to the witness—

Mr. MCINTOSH: I would like to ask a question.

The CHAIRMAN: Mr. Pickersgill?

Mr. PICKERSGILL: The question I would like to ask the witness—and I wanted to ask him earlier, but I did not want to interrupt Mr. Fisher on this: the witness told us how many people he represented here, and how important that was as an interest in the community. I think we would like a little statistical data, and maybe the witness cannot provide it right now, but as he is coming back, could he tell us what the total budget is of the distributive trades advisory committee; how that budget is raised; and who contributes to it? I ask that so that we will know precisely who it is we are dealing with in this committee.

Mr. BENIDICKSON: Might I lay the foundation for, perhaps, a subsequent examination of the witness? Mr. Gilbert is doubtless well aware of the dominion bureau of statistics annual publications entitled "Retail Trade". The last annual report I have—and I have had a matter of only a very short time in which to put my hands on it—is the report of 1958 which, as far as I can find out, was only received at the library on April 19, 1960, and, presumably, is the last available.

In those statistics they divide their calculations into independent retail stores, in all trades and areas, department stores and all known retail trading stores.

In the witness's original brief to this committee he indicated that primarily he was representing—and used the words—"independent businesses." Would his conception of an independent business coincide with the statistical classification such as is used by the D.B.S. when they refer to "independent businesses"?

Mr. GILBERT: Largely, although we do represent categories which are not defined in the figures. For instance, the various types of service establishments may hold membership in the retail merchants associations—banking establishments, and so on, quite a large number of service establishments.

Mr. BALDWIN: I have one supplementary question to Mr. Fisher's. Mr. Gilbert said yesterday that his people and himself spent a lot of time in the field, and went to a lot of clinics and meetings of small merchants all over the country. Did you find from personal conversation and from case histories from these people that the unimpaired working of section 51 was doing quite a lot of damage to small businessmen?

Mr. GILBERT: Yes, very positively.

The CHAIRMAN: Which section?

Mr. BALDWIN: Section 34.

Mr. RYNARD: I wonder if there is any indication in those statistics of the small businesses which have just been forced to close up, and do not go bankrupt? I know, in my own town, of 14 stores which closed up and did not go bankrupt. They were just driven out of business, and I do not think they are being considered at all.

Mr. GILBERT: It is not possible to ascertain that information. There is no statistical record. To our knowledge, we know that your statement applies right across Canada.

Mr. RYNARD: That is a great anomaly because it represents a terrific number of dollars.

Mr. GILBERT: Right. To indicate, I think, possibly, the feeling of the retail trade on section 34, a voluntary survey was undertaken by the McLean-Hunter trade publication in 65 of the principal cities and towns of Canada, asking retailers for their opinion on Section 34, and whether they agreed with the actions of the retail merchants association in their efforts to have the section repealed, or amended. The outcome of that survey is also an appendix, and it indicates 94 per cent—and these are voluntary votes to a trade publication—of the retailers voted for an outright repeal of section 34. Of the balance, I believe it was a percentage of 69 per cent of the remaining 6 per cent, requested that some law be passed to curtail or prohibit loss leader selling. So the outcome was virtually 100 per cent unanimous that some action should be taken by the government to curb loss leader selling.

Mr. HOWARD: What Mr. Gilbert says is not correct, and the question posed to the merchants was not whether they wanted outright repeal of section 34, but whether they wanted to return to the manufacturers' enforced prices system, which permits them to enforce prices but not to repeal section 34.

The CHAIRMAN: We have to adjourn now, Mr. Howard, and I would like to advise the committee that you will receive notice that on Tuesday, June 21, at 9.30, a group consisting of the Canadian electrical manufacturers' association, the B.C. forest products, the fisheries council, and the Canadian metal mining will meet with us. In the afternoon, at 3 o'clock, we will have the Canadian chamber of commerce.

—The committee adjourned.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 3

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

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TUESDAY, JUNE 21, 1960

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WITNESSES:

Representing the Canadian Electrical Manufacturers Association: Mr. Fred R. Hume, Q.C.; Mr. B. Napier Simpson; Mr. Douglas I. W. Bruce; Mr. Fred A. Samis; Mr. T. Admonson; and Mr. Leo Fitzpatrick, Jr.

Representing the Canadian Chamber of Commerce: Mr. Leonard Hynes; Mr. H. Hemens, Q.C.; Mr. C. H. B. Frere and Mr. W. J. Sheridan.

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Hellyer
Horner (*Acadia*)
Howard
Jones
Jung
Leduc
Macdonnell (*Greenwood*)
MacLean (*Winnipeg North Centre*)
MacLellan
Martin (*Essex East*)
McIlraith
McIntosh
More
Morton
Nugent
Pascoe
Pickersgill
Robichaud
Rowe
Rynard
Skoreyko
Slogan
Smith (*Winnipeg North*)
Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams.

Antoine Chassé,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

TUESDAY, June 21, 1960.
(12)

The Standing Committee on Banking and Commerce met at 9.30 a.m. this day. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Allmark, Baldwin, Bell (*Saint John-Albert*), Benidickson, Caron, Cathers, Crestohl, Drysdale, Hales, Hellyer, Horner (*Acadia*), Howard, Jones, Leduc, Macdonnell (*Greenwood*), Martin (*Essex East*), McIlraith, McIntosh, Morton, Nugent, Pickersgill, Skoreyko, Stewart, Thomas, and Woolliams.—(25)

In attendance: Honourable E. Davie Fulton, Minister of Justice. *Representing the Canadian Electrical Manufacturers Association:* Mr. Fred R. Hume, Q.C.; Mr. B. Napier Simpson; Mr. Douglas I. W. Bruce; Mr. Fred A. Samis; Mr. T. Admonson; and Mr. Leo Fitzpatrick, Jr. *Representing the Fisheries Council of Canada:* Mr. Norman Hyland. *Representing Council of the Forest Industries of British Columbia:* Mr. J. R. Nicholson. *Representing the Canadian Metal Mining Association:* Mr. V. C. Wansbrough; and Mr. Harold Mockridge, Q.C. *And also* Mr. J. R. Tolmie, Legal Counsel.

The Committee resumed its consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

Mr. Martin (*Essex East*) raised a point of order respecting the agenda of the Committee. Following discussion, the Chairman indicated that a meeting of the Subcommittee on Agenda and Procedure will be held at 9.30 p.m. today.

Mr. Hume was called and he introduced his colleagues. The witnesses presented the views of the Canadian Electrical Manufacturers Association respecting Bill C-58 and they were questioned thereon.

Mr. Morton moved, seconded by Mr. Drysdale,

That the Committee reconvene in this room at 2.00 p.m. this day. The motion was adopted as follows: Yeas: 11; Nays: 7.

At 11.00 a.m. the Committee adjourned until 2.00 p.m. this day.

AFTERNOON SITTING

(13)

The Committee resumed at 2.00 p.m., the Chairman, Mr. C. A. Cathers, presiding.

Members present: Messrs. Allmark, Baldwin, Bell (*Saint John-Albert*), Benidickson, Campeau, Caron, Cathers, Crestohl, Drysdale, Fisher, Hales, Hellyer, Horner (*Acadia*), Howard, Jones, Jung, Leduc, Macdonnell (*Greenwood*), MacLean (*Winnipeg North Centre*), Martin (*Essex East*), McIlraith, McIntosh, Morton, Nugent, Pascoe, Pickersgill, Rynard, Skoreyko, Thomas and Woolliams. —30.

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In attendance: From Department of Justice: Hon. E. Davie Fulton, Minister of Justice; Mr. T. D. MacDonald, Director, Investigation and Research, Combines Branch. *Representing the Canadian Electrical Manufacturers Association:* Mr. Fred R. Hume, Q.C.; Mr. B. Napier Simpson; Mr. Douglas I. W. Bruce; Mr. Fred A. Samis; Mr. T. Admonson; and Mr. Leo Fitzpatrick, Jr. *Representing the Canadian Chamber of Commerce:* Mr. Leonard Hynes, Vice-Chairman of Executive Council; Mr. H. Hemens, Q.C., Chairman of Committee on Combines; Mr. C. H. B. Frere, Member of Committee on Combines; Mr. W. J. Sheridan, Assistant General Manager; and Mr. W. J. McNally, Manager of Policy Department. *Representing the Fisheries Council of Canada:* Mr. Norman Hyland. *Representing Council of the Forest Industries of British Columbia:* Mr. J. R. Nicholson. *Representing the Canadian Metal Mining Association:* Mr. V. C. Wansbrough; and Mr. Harold Mockridge, Q.C., *And also* Mr. J. R. Tolmie, Legal Counsel.

The Committee discussed its hours of sittings and time of adjournment.

The Committee continued the examination of the representatives of the Canadian Electrical Manufacturers Association respecting Bill C-58.

Mr. Bell (*Saint John-Albert*) moved, seconded by Mr. Woolliams,

That the Committee hear the representatives of the Canadian Chamber of Commerce at three o'clock this day. The said motion was carried on the following division: Yeas: 12; Nays: 6.

The witnesses representing the Canadian Electrical Manufacturers Association were thanked and permitted to retire, subject to recall.

The representatives of the Canadian Chamber of Commerce were called and they presented a brief respecting Bill C-58. The witnesses were questioned on the abovementioned brief and on related matters.

Agreed,—That, following completion of the examination of the Canadian Chamber of Commerce brief, the Committee resume the examination of the representatives of the Canadian Electrical Manufacturers Association.

The Committee thanked the representatives of the Chamber of Commerce for their attendance and assistance. The witnesses were permitted to retire.

The Committee resumed its questioning of the witnesses from the Canadian Electrical Manufacturers Association. They were thanked and permitted to retire.

Agreed,—That the Subcommittee on Agenda and Procedure meet at 9.30 p.m. this day and that the main Committee meet on Wednesday at 9.00 a.m. in executive session and at 2.00 p.m. to hear the representatives of British Columbia Forests Products, the Fisheries Council and of Canadian Metal Mining.

At 6.00 p.m. the Committee adjourned to the call of the Chair.

E. W. Innes,
Acting Clerk of the Committee.

EVIDENCE

TUESDAY, June, 21, 1960.

The CHAIRMAN: Gentlemen, I think we have a quorum.

Mr. MARTIN (*Essex East*): Mr. Chairman, on a point of order. When I got my notice about this meeting I was amazed to learn,—

Mr. DRYSDALE: What is the point of order, Mr. Chairman?

Mr. MARTIN (*Essex East*): —without having been informed in any way, as a member of this committee, that we were to hear this morning from four important, and, I am sure, worthy national organizations.

I had understood—but I am prepared to admit that I could be in error on this point—that we were to have yesterday morning a business meeting in which all the members of the committee would be given an opportunity of discussing the work of the committee, arranging for our future agenda. Whether or not there was such an arrangement, the fact is that a number of us did seek yesterday morning to ascertain where this meeting was going to be held. I know I came to this room; and I went to the railways committee room, only to be informed, finally, that there was no such meeting called. However, as I say, I am willing to admit, in fairness, there may have been some misunderstanding on that particular point. But there could not have been any misunderstanding on the desirability, at the earliest date, of our foregathering for the purpose of arranging an agenda, because I did, on Thursday and on Friday, complain about the way in which the business of this committee was being arranged without consultation with the members of the committee.

Now, it is true that there is a steering committee. As far as I know, that steering committee has only held one meeting. In any event, only one representative from this party was present at that meeting, and because of his other preoccupations it was not intended that he should be our representative on that committee. Our representative on the steering committee is Mr. McIlraith. He informs me that he has not attended any meeting of the steering committee at all; and, to the best of his knowledge, no meeting of the steering committee has been held since the first one, about which the chairman did make general reference.

Whether or not there have been meetings on which we have been represented, the practice—

The CHAIRMAN: What is your point of order, Mr. Martin?

Mr. MARTIN (*Essex East*): I am coming to the business of this meeting. I object to having received notice that certain people are being called when I have not, as a member of this committee, shared in any way in arranging for their being called—and I have been at all the meetings.

I am raising this whole question of our business. What I am saying is this, that any conclusions reached by the steering committee must be submitted to this committee as a whole. Neither the chairman nor the members of the steering committee have the right to make decisions for the members of the committee. We were not told at any time that these groups were going to be called at this time; and I think the first order of business now must be to discuss the business of this committee, whom we are going to call and in what order. I know that a number of us have different kinds of groups and individuals whom we want to see called before this committee; but we should

discuss all of this in an orderly way, and know precisely where we are going, so that we will not be taken advantage of, as I think we are. The business of this committee is not the prerogative of the steering committee and, more particularly, it is not the prerogative of the chairman.

I understand that the Canadian manufacturers association was circulated over a week ago, and advised that it would appear here. Under whose authority was such advice given? Certainly the chairman had no authority; the steering committee had no authority: the only body that can give such authority is this committee, as a whole. And I seriously register an objection to this practice, which I am prepared to say was done by the chairman—if he participated in it unwittingly or unknowingly, without full appreciation of what—

Mr. BELL (*St. John-Albert*): Maybe you should read *Hansard*.

Mr. MARTIN (*Essex East*): In any event, it is a violation of the rights of every member of this committee. The first order of business this morning should be for us to discuss the whole future course of this committee—the order of the representations to be made; whether we should hear from groups before we hear from individuals; whether we should discuss these particular features without, first of all, examining the provisions of the act. All these matters must be decided by the committee as a whole; and I submit that now is the time for us to do so.

Mr. HALES: Mr. Chairman, there may or may not have been a misunderstanding; I am not sure. But, in any event, these witnesses have come here this morning to be heard. This is no place or time for us to be discussing this, and I move that the witnesses be heard.

Mr. MORTON: May I make a comment, too? It is quite true that at one of the meetings last week it was suggested that a meeting of the steering committee should be called, and to have the agenda for future meetings, I believe, presented at a business meeting this week—I am not sure whether it was supposed to be yesterday.

Mr. MCILRAITH: The minutes are not available.

Mr. MORTON: No. But I do recall that last Thursday these matters of witnesses that were to appear before us this morning were submitted to the committee, and the committee, at that time, approved of hearing this group this morning. I feel we should not perhaps iron out our misunderstandings and differences in front of these gentlemen, who are used to seeing things handled in a businesslike manner. Let us get on with hearing them, and we will iron out our differences at a proper business meeting.

Mr. MCILRAITH: When?

Mr. MORTON: I think it should be as soon as possible.

Mr. MCILRAITH: We were told that last Thursday.

Mr. PICKERSGILL: I wonder if we could have a quotation from the minutes, to show us where there was this intimation?

Mr. MORTON: The minutes are not printed. I think there are representatives from the Liberals who were here, and I think they should be honest enough to admit these matters were submitted. I believe that at a previous meeting, when Mr. Martin or somewone raised it, the chairman intimated they had these groups; and some question was raised at that time as to why we had so many for this morning.

I suggest, in all fairness, that we continue with the evidence today; and I will second Mr. Hales' motion.

Mr. PICKERSGILL: I do not think any motion can be entertained until Mr. Martin's point of order has been discussed and disposed of. We cannot have two things before the committee at once.

Mr. CARON: On the point of order, Mr. Chairman. To substantiate what Mr. Martin said, we received only this morning, a brief from the fisheries council of Canada. We have just been handed, at the present time, the brief of the Canadian metal mining association. How can you expect us to be able to go on with a brief that we received only yesterday, and two briefs of today, when we are to hear today those coming in front of the committee? It is practically impossible, and I do not think it should be done that way.

The CHAIRMAN: Mr. Caron, on your point about the briefs: the request was made to these people to have their briefs here two days before. In two cases, one was not here until this morning and one at about nine o'clock last night. Now, I do not think it is a rule that the brief has to be here beforehand. It is just a courtesy these people have extended.

Mr. BELL (*Saint John-Albert*): Hear, hear.

The CHAIRMAN: As far as this meeting on Monday morning is concerned, I do not think you could find one person that says there was a meeting set for Monday morning.

In regard to the people who are here today, the steering committee arranged that we would accept these organizations; and I arranged the dates with them.

Mr. MCILRAITH: But why did you arrange them?

Mr. MARTIN (*Essex East*): Did you discuss it with the committee as a whole?

Mr. DRYSDALE: Yes, last Thursday; and Mr. Caron was at the meeting.

Mr. MACDONNELL: Mr. Chairman, it is clear there is a difference of opinion among us.

I hope we shall have a meeting as soon as it is possible to do so, and that it will cover the points mentioned by Mr. Martin, Mr. Pickersgill, and the others. However, I appeal to this committee that we do not treat these gentlemen, who have come here with some inconvenience to themselves, to a rehash of our own differences, which are unfortunate.

I submit, in the interests of common sense, that we hear these gentlemen at this time.

Mr. MCILRAITH: In the meantime, could we get some undertaking from the committee chairman that he will hold a business meeting?

This whole matter was gone over on Thursday last—and gone over in great detail. There was then a lengthy discussion—which is not recorded and, therefore, I will not argue what it contained—on the subject of the business to come before this committee; and Mr. Macdonnell then made his plea for a business session of the committee, in support of something I had said. However, we still have not had anything from the chairman about the order of business.

The CHAIRMAN: I will give you an undertaking that we will call a meeting of the whole committee to deal with the business.

Mr. MARTIN (*Essex East*): When?

Mr. PICKERSGILL: When members of the committee can attend?

Mr. MARTIN (*Essex East*): Here is the situation now. I appreciate Mr. Macdonnell's suggestion; it is a constructive one, and I want to meet it. However, it is not fair to ask these national bodies to come, and expect that they can be disposed of in one day. It is not possible to do this. The brief should be presented first, and we should be given an opportunity to examine it. We should not feel hurried in this. As it is now, they are going to be kept here unnecessarily, because they all have been convoked to appear on the same day.

Mr. BELL (*Saint John-Albert*): They are going to be kept unnecessarily by your talk.

Mr. MARTIN (*Essex East*): I am trying to get some order in a committee which, so far, has not presented any semblance of that.

What about today? We have an important matter in the house concerning the Income Tax Act. Are we expected to forego our parliamentary responsibilities in order to attend here? All of this indicates how unwise our procedures have been.

I want to be of assistance to the chairman, but I want him to recognize the position in which we have been placed.

The CHAIRMAN: Concerning your point, there are four people attending this meeting this morning, and it was at their own request.

Mr. MARTIN (*Essex East*): But we cannot deal with all of them properly in the time at our disposal.

Mr. LEDUC: If you would set the date that we could have a business meeting, as suggested by Mr. Macdonnell, I think this matter could be settled.

The CHAIRMAN: I read out last Thursday the names of the people who are appearing today, and I was under the impression that was satisfactory.

Mr. LEDUC: I am not complaining about that.

The CHAIRMAN: I sent out the notices. You have a notice of the dates that are arranged, so far as we have them confirmed.

Mr. BENIDICKSON: Mr. Chairman, in connection with both these points, we have not the printed minutes of what was said on Thursday—and I do not recall them precisely. However, in so far as the agenda for today is concerned, we all received this only yesterday; and certainly, we will start with the first on the list; but the committee as a whole has not been taken into your confidence—as I have said on many previous occasions—as to what our timing should be in these matters.

Mr. DRYSDALE: On a point of order, Mr. Chairman; I would like to speak to that.

On June 10, when the banking and commerce committee met as a whole—not as a steering committee, but as a whole—I raised the question as to what was going to be discussed, and we decided at that particular time.

I regret that Mr. Martin was not present at that meeting.

Mr. MARTIN (*Essex East*): When was that?

Mr. DRYSDALE: June 10.

Mr. Caron was present, when they discussed All State Insurance and other matters. It was a properly formed meeting. At that time, we were competent, at a group, to discuss this matter.

Mr. MARTIN (*Essex East*): But, that was a private bill.

Mr. DRYSDALE: This was a decision of the banking and commerce committee as a whole.

You have raised the point that there was no discussion. The discussion was on June 10—and I regret that you were not able to attend.

Mr. MARTIN (*Essex East*): Under the rules of practice, it is not right for the committee to decide an agenda except in reference to a matter in which the committee was called. You are referring to a private bill.

Mr. BELL (*Saint John-Albert*): Gentlemen, it is a beautiful morning, let us get started. Never mind these grouchy old men over to your right.

Mr. MARTIN (*Essex East*): Mr. Chairman, we should have a business meeting.

I would suggest the steering committee meet today, go into this carefully, and then come back to a full meeting tomorrow morning and, at that time, we can discuss the business of this committee.

Mr. DRYSDALE: I note that Mr. Martin has not made a single criticism of the business, as suggested, so far.

Mr. MORTON: Mr. Chairman, let us get on with today's business, and we will have a meeting of the steering committee.

The CHAIRMAN: Is that satisfactory?

Mr. MCILRAITH: Will you call one?

The CHAIRMAN: Yes. Do you want the hour now?

Mr. MCILRAITH: Yes.

The CHAIRMAN: Two o'clock this afternoon. Is that agreeable?

Mr. CARON: For the steering committee.

Mr. MCILRAITH: Where?

Mr. MARTIN (*Essex East*): For the steering committee?

The CHAIRMAN: For the whole committee to conduct the business.

Mr. PICKERSGILL: Mr. Chairman, the suggestion was that the steering committee should meet first.

It is absolutely ridiculous to suggest that the whole committee should try to meet at two o'clock, and dispose of this matter between two and two-thirty.

An Hon. MEMBER: Tomorrow at two.

The CHAIRMAN: We will meet the steering committee tomorrow morning at 9.30.

Mr. CARON: Today.

The CHAIRMAN: All right, I will set the hour of 9.30 tonight, at which time the steering committee will meet. I am setting that hour because we have these witnesses here, and I do not know how long we will have to deal with them. I think 9.30 should be a safe time.

Mr. PICKERSGILL: It is proposed that we should go ahead and deal with these witnesses at the same time, in the banking and commerce committee—and I repeat, in the banking and commerce committee—as the Income Tax Act is being considered in the comittee of the whole of the House of Commons?

Is that the chairman's idea of how the business of parliament should be done?

Mr. BELL (*Saint John-Albert*): Mr. Chairman, I want to say something on that.

The Liberals have been talking about this same thing for a long time, and have spent a considerable amount of time on it this year.

I happen to be one who has sat in opposition since 1953, and there is no reason why the Liberals—they have some intelligent members—cannot divide their strength, the same as we did for a period of 20 years. They should put some men in the house and some down here, so that we can sensibly go ahead, in a forward way, and conduct our business.

Mr. MARTIN (*Essex East*): I would like to remind you what the Prime Minister said.

As far as he was concerned, he said that no member should be impeded from discharging his responsibility in parliament.

Mr. BELL (*Saint John-Albert*): Well, you cannot be a big shot in the house and the committee at the same time.

Mr. MARTIN (*Essex East*): Let your language be more parliamentary, and not so boyish.

Mr. PICKERSGILL: And judicious. With the Minister of Justice sitting in, this is quite an exhibition.

The CHAIRMAN: Well, gentlemen, we have these witnesses here. We have arranged a meeting now for 9.30 tonight. That will be a meeting of the steering committee.

These men have come a long way, to appear before us. They have come on their own time and at their own expense. I think we should proceed with the business before us.

Some Hon. MEMBERS: Agreed.

The CHAIRMAN: First of all, I would like to call on the Canadian electrical manufacturers association. Mr. Hume.

Mr. FRED C. HUME, Q.C. (*Counsel, Canadian Electrical Manufacturers Association*): Mr. Chairman, where would it be convenient for us to sit?

There is a deputation of four or five. Would you have us come up to the front?

The CHAIRMAN: Are you the spokesman?

Mr. HUME: Yes.

The CHAIRMAN: Well, you may sit at the table, and the others can take a chair behind you.

Would you proceed, Mr. Hume.

Gentlemen, Mr. Hume will introduce the deputation.

Mr. HUME: Mr. Chairman and members of the committee; my name is F. R. Hume.

I have the honour this morning to be counsel for the Canadian electrical manufacturers association, and I would like to introduce three or four gentlemen who have come here in the eventuality they may attend this meeting.

First of all, there is Mr. B. Napier Simpson, general manager of the Canadian electrical manufacturers association. Associated with Mr. Simpson, and members of a committee that was formed of the Canadian electrical manufacturers' association to consider combines legislation are, first of all, Mr. Douglas I. W. Bruce, who is assistant secretary and manager of the law department of Canadian Westinghouse Company Limited. Next is Mr. Fred G. Samis, of Montreal, ho is the marketing manager of Northern Electric Company Limited; Mr. T. Edmonson, who is president of Ferranti-Packard Electric Limited; and finally Mr. Leo Fitzpatrick, Jr., who is vice-president and sales manager of Sunbeam Corporation (Canada) Limited.

The size of the deputation is not reflected in the size of the submission. I should like to re-assure you and your committee, sir, that the brief with which we are concerned this morning is a mere eight pages, and that appended to it, and not part, necessarily, of the record—unless you so direct—but for the information only of the members of the committee, are the two previous submissions that we submitted, one in 1958 and one in 1959. The only submission which we propose to present to this committee this morning is the first eight pages, on maybe five or six points; the remainder of what looks to be a formidable document is merely for the convenience of the members of your committee.

Before presenting this brief submission, Mr. Simpson has a brief statement that he wishes to make. I should like to call on Mr. Simpson, who is, as I said, the general manager of the association. He will be the witness for the brief.

Mr. B. NAPIER SIMPSON (*General Manager, Canadian Electric Manufacturers' Association*): Mr. Chairman and gentlemen: we are happy to have the opportunity of appearing before you to present our comments concerning

proposed amendments to the combines legislation contained in bill C-58 and, if possible, to answer your questions. As I, obviously, am not familiar with all phases of the industry in detail, I should like the privilege, in case of questions, of passing them on to one of my delegation.

Mr. Chairman, we have consistently taken exception to this legislation which, in our opinion, is punitive and has created for industry generally an atmosphere of suspicion and fear.

May I comment briefly on the subject matter of section 32 (2) on page 6 of bill C-58, which reads as follows:

> Subject to subsection (3), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:
>
> (a) the exchange of statistics,

Mr. McILRAITH: Is it your intention to read the brief?

Mr. HUME: Mr. Chairman, we are in the committee's hands as to whether we read the brief. This is a brief statement that Mr. Simpson wishes to make before we present our brief.

Mr. McILRAITH: All right.

Mr. HUME: There is nothing before you now; but when Mr. Simpson completes this brief statement—which takes about five minutes—we are in your hands with regard to the brief.

Mr. McILRAITH: That is fine, thank you very much.

Mr. SIMPSON: I was reading subsection (2) of section 32 of bill C-58:

(a) the exchange of statistics,

(b) the defining of product standards,

(c) the exchange of credit information,

(d) definition of trade terms,

(e) cooperation in research and development,

(f) restriction of advertising, or

(g) some other matter not enumerated in subsection (3).

These are of some concern to us, Mr. Chairman, because they effect our business. I should like to read some remarks of Mr. Pearson as quoted in Hansard, May 31, on page 4365, which I believe refer to this section:

> But what is more serious is a new and broad exemption under the bill. Under a provision of the bill a combine relating to certain matters—the minister mentioned what they were last night —such as exchange of statistics, definition of product standards, research and one or two other things, may operate provided it has not lessened or is not likely to lessen competition unduly in respect of the five matters which we both mentioned last night; prices, quantity or quality of production, markets or customers, channels or methods of distribution, and restriction from entering into or expanding in an industry. Therefore under this provision these practices on this condition —I add that—will be permitted. That is a substantial departure from the principles of traditional legislation in this field. If combinations are allowed for these purposes, would other agreements be necessary to eliminate competition with respect to prices or production or markets? There are a great many objective experts, students of this subject, who have studied these matters carefully and who think the answer to that question would be in the negative.

With this, we do not agree. This association was incorporated by direction of the Secretary of State in 1944, and because these things relate to our activities I should like to read the objects as approved by the secretary of state.

> To increase the amount of electrical service to the public and improve the quality of this service; to promote the standardization of electrical products;
>
> to collect information relating to the electrical industry and to disseminate such information to the members of the association and to the public;
>
> Inferring statistical information.
>
> to appear for the members of the association before and to cooperate with legislation committees, governmental departments and agencies and other bodies in regard to matters affecting the industry; and to promote a spirit of cooperation among the members of the association in the attainment of improved production, enlarged distribution and increased efficiency in the use of electrical products.

I should like to tell you that we have in being now—they are free to anybody, and are purchased by many—39 major standards which govern the manufacture of electrical products. These concern the safety of the public, and they effect many savings to the consumer as a result of standardization. This section, therefore, in the end is very necessary. These things have not always in the past been accepted, and I should like to tell you a very practical example of what I am talking about.

May I illustrate with a practical example. Some two years ago, we received a request from the electrical distributors' association to consider the design of standard packaging for wire and cable products. Such standard packaging would enable the distributors to properly warehouse materials conveniently and efficiently, fill orders more quickly, and would have resulted in savings to the user. While the legal counsel for the association stated that this proposed standard packing practice would not offend the combines legislation, some member companies of the wire and cable division, on the advice of their own solicitors, would not participate in this discussion. The ridiculous part of this situation was the gist of the solicitors' statement, which was as follows, "While we see nothing wrong with such an activity, the very fact that you have met and talked may make you open to suspicion, and we suggest that it is the part of discretion not to participate". This convenience, therefore, and the indicated savings to the consumer, went by the board.

To further emphasize the ridiculous atmosphere in which we now live, I quote an incident that only happened last week, after the meeting of one of our sections. The 15 or 16 companies that are in this section, when they got through, one of them turned to another and said, "We are through the business now, boys; let us have lunch"—and the answer he got from one of them, who was a very old friend of his, was, "I am very sorry, John, but our company has forbidden us to be seen having lunch with a competitor". That is a very sorry state of affairs.

I have noted, when an industry has been prosecuted—

Mr. BENIDICKSON: Has this bill anything to do with correcting that situation?

Mr. SIMPSON: The legislation has, sir.

Mr. BENIDICKSON: Having lunch with a competitor?

Mr. SIMPSON: It is the inference. Excuse me; may I go on now, sir, with your permission?

The CHAIRMAN: Yes.

Mr. SIMPSON: I have noted, when an industry is prosecuted, that in bringing down judgment the court almost always has made a statement approximating this, "The economic evidence which you have prepared is not admissible, and I do not necessarily say that the activity in which you were engaged has hurt anyone. I am only concerned merely with the fact that you have met and that you have agreed".

I should like to read from Hansard, page 4342 of May 30. The Minister of Justice, in speaking, said this:

> In this respect, Mr. Speaker, I should like to emphasize that in the particular field of combines legislation—I am here dealing with combines as a technical term as distinguished from mergers and monopolies —we came to the conclusion that what is called the per se rule should be retained and maintained in its full vigour and effect.

It is obviously the intention to retain this rule with which we totally disagree.

This, then, gentlemen, is the reason why representatives of the industry no longer wish to meet together to discuss matters which would undoubtedly effect economies to the general public, because in doing so, they are tarred with the brush of suspicion, and are operating in an atmosphere of fear.

I would like now to supplement our brief on resale price maintenance legislation, and in so doing I would like to quote Mr. Peters at page 4416 of Hansard for June 1, 1960, where he said as follows:

> In fact, Mr. Speaker, it can be demonstrated that these proposals will effectively eliminate the ban on resale price maintenance; will provide no effective protection, either short or long term, for the small dealer; will open the door to discriminatory practices and strengthen the position of the large distributor who controls private brands, and will place in the hands of the manufacturer a degree of control over the final price of his product that is denied to other groups in the economy.

This statement, as our brief will demonstrate, has no basis in fact. Actually the facts are that this existing legislation has done nothing more than to transfer the right to price goods from the manufacturer to the large retailer, and only that.

Section 34, in our opinion, is unnecessary. There are approximately 60 manufacturers of appliances in this country, all having greater capacity to produce than can presently be used, and all striving for their share of the available market.

In addition 30 per cent of that market approximately is taken up by imports, and as these imports are end quantities from large production runs in the United States, in many cases, they set a very low yardstick of price which must be met.

How then would it be possible for the manufacturer under such circumstances to charge the consumer more than the competitive price which he must meet to stay in business?

Gentlemen, I can assure you that these prices are extremely low, as indicated by the 1958 profit rate for the industry, in terms of the sales dollar of only 3.1 cents. This rate we have endured for some years.

That covers my remarks, gentlemen.

Mr. MARTIN (*Essex East*): You said that because of the existing legislation of parliament, and also because of the act of 1958 that the industry had appeared complex, and that they found it difficult to meet in order to discuss common problems.

I think you will agree that that fact is apart altogether from certain combines in being or about to come into being, and that the industry does

meet. You would not want to give the impression that we have become so totalitarian in Canada that the various sections of the industry—in your own industry—did not meet to discuss common matters?

Mr. SIMPSON: We have to meet to discuss standards and the exchange of statistics. That is part of the control of our business, and we cannot carry on business without it.

Mr. MARTIN (*Essex East*): Yes.

Mr. SIMPSON: But there are several companies against whom various prosecutions have been taken, which are very charry about allowing some of their staff to attend meetings. It is not a healthy atmosphere in which we have to live.

Mr. BENIDICKSON: Are there certain ones which do not attend the meetings of the Canadian electrical manufacturers association on that ground?

Mr. SIMPSON: There are none such that I know of.

Mr. BENIDICKSON: On a matter of privilege, might I say that the witness was perfectly correct in making the statement. I think he was about to remark, when I intervened, with respect to part V, that he would include the proposal that the industry might meet to exchange information about statistics, and standards and so on, and I want to apologize.

Mr. SIMPSON: Thank you.

Mr. HUME: In view of the remarks that I heard this morning when I was sitting at the back of this room it would appear that some of the members received this brief somewhat later than they would have liked. Might I say that we got it to you as quickly as was humanly possible, but I appreciate the fact that some members may not have had an opportunity to review the five or six points in our brief. Therefore might I suggest that Mr. Simpson be permitted to read it, or do you wish to take it into the record as read?

Mr. MARTIN (*Essex East*): Please read it. We have not seen it until this morning.

Mr. MCILRAITH: The brief is dated June 21.

Mr. SIMPSON: Yes, it was sent on Friday, and it was delivered to your chairman. But with your permission, I shall now read it.

Mr. BELL (*Saint John-Albert*): On a question of privilege, might I say that I do not mind taking these continual jibes from Mr. Martin, provided he makes them with a smile on his face; but I am not happy about it when he has a grouch on, and I am not going to stand for it.

I have not seen this brief as yet, but I want to say that I think this organization should be congratulated on having done such a fine job at the last minute, in getting things ready. It was only a few days ago when they learned that this committee was going to be set up, and they had only a few days, I suppose, from their reading of Hansard to do a most excellent job in getting their brief ready for us in, you might say, a few minutes before this hearing.

Mr. PICKERSGILL: I think we should thank Mr. Bell for facilitating the work of the committee.

Mr. CRESTOHL: We would like to have more time. We do not like to be rushed out here.

Mr. SIMPSON: May I now proceed to read my brief?

Mr. MARTIN (*Essex East*): This must be like your appearing before a meeting of your board of directors?

Mr. SIMPSON: The Canadian Electrical Manufacturers Association is pleased to have a further opportunity of discussing the combines legislation and particularly bill C-58. We have attempted to maintain a consistent position from the time when the Minister of Justice first requested our views, which were

forwarded to him on November 27th, 1958. At that time, our brief was concerned with the principles which we felt should apply in determining suitable combines legislation for Canada. The principal theme of that brief was that there should be a reconsideration of the public interest and that amendments which the minister at that time contemplated introducing should reflect such reconsideration.

After the introduction of bill C-59 in 1959, we were again asked to submit our views on the basis of the amendments specifically proposed in that bill and this we did by a brief which was sent to the minister on October 26th, 1959.

We regret that bill C-58 gives no recognition to our view that the whole underlying philosophy requires re-examination. As submitted in our 1958 brief, affirming our belief that combines legislation is necessary and desirable, it is our recommendation that section 411 of the Criminal Code and the corresponding provisions of the Combines Investigation Act be not altered except by the addition of a provision which requires, in specific terms the court trying a case under either of these statutes to determine *as a question of fact* whether the conspiracy, combination, agreement or arrangement complained of is "undue" or "to the detriment or against the interest of the public"; and to acquit in cases where the court finds as a fact that the conspiracy, combination, agreement or arrangement was not "undue" or "to the detriment or against the interest of the public". It appears that the contrary is to be the case, since the Bill uses language which seeks carefully to preserve existing jurisprudence which (in so far as such jurisprudence attempts to define in price fixing agreements what is "undue" or "to the detriment or against the interest of the public") is unsatisfactory. We do not believe that Canada will ever have a combines law which is satisfactory until this problem is faced.

With this general statement, we would now like to proceed to examine some specific matters, which we feel will improve bill C-58. (The section references hereafter are to sections of the Act and the sections of bill C-58 are shown in brackets below.)

1. *Section 29—Reduction or Removal of Customs Duties*

(Section 11)

Since the removal of customs duties by executive action in the circumstances contemplated by this section would be a harsh remedy, we do not feel that it ought to be contemplated in these circumstances unless a court has determined that an offence has been committed. Therefore, we suggest that the words "from or as a result of an inquiry under the provisions of this act, or" in the first and second lines of the section, should be deleted.

2. *Section 31 (2)—Prohibition Order Without Conviction*

(Section 12)

Our objection to this section is confined to the fact that it permits a prohibition order to be obtained when "a person has done" any act or thing which may be an offence under part V. There is no limit in time contained in the section and it seems to us that, having regard to actions that may have been taken, particularly in connection with mergers, that it is inequitable to give a court the power to undo actions and inconvenience persons without subjecting them to the normal process of investigation and trial. So far as present and future actions are concerned, the procedure contemplated by this section may well serve to prevent complications before positive action is taken but with respect to the past, there appears to us to be no justification for this extraordinary remedy.

Our recommendation therefore is that the underlined words "has done" be deleted in the subsection.

3. *Section 32 (3)—Exceptions to the Defences Contained in Section 32 (Section 13)*

We think the word "unduly" should be inserted in the last but one line of the section between the word "restrict" and the words "any person". We believe that the omission here is probably unintentional, since it is well known that in many agreements whereby one business buys out another (and we are assuming there are no factors affecting the public interest in such agreement) it is usual and normal to have restrictive covenants. The section as now written would appear to prevent even reasonable acquisitions of this kind.

4. *Section 33—Mergers and Monopolies*

(Section 13)

Bill C-59 of 1959, contained the following words:—"Subsection (1) shall not be construed or applied so as to limit or impair any right or interest derived under the Patent Act, or under any other act of the parliament of Canada." We believe these words should be added to this section to make it clear that section 33 is not intending to impair in any way rights derived from patents.

5. *Section 33A (b) and (c)—Illegal Trade Practices*

(Section 13)

In our brief to the minister of October 26th, 1959, we said:—"While still affirming that paragraphs (b) and (c) have a place where the manufacturer pursues a policy *solely* for the purpose of eliminating a competitor but outside the context of the combines law, we note that the word "tendency" has been added . . . . . It is not clear what the addition of this word accomplishes but it can only have a meaning which pre-judges some future situation which may or may not arise. We think it unfortunate for the hapless trader who happens to be caught in the words of this paragraph that his fate may be determined by an opinion as to circumstances which may never arise. Theoretical possibilities should not govern a matter so serious as the laws which affect economic policy."

We therefore again urge that the words "or tendency" be removed from these subsections.

6. *Section 33B—Promotional Allowances*

(Section 13)

This section contains a new principle in the bill. For this reason we feel it is desirable to give the business community further opportunity to study its effect. It is impossible for us to say at this time whether the objective which the section seeks to achieve is desirable or not. We have some difficulty in applying the definitions of proportionate terms contained in subsection (3). Some of the advertising practices of our members, such as the cooperative advertising arrangements so well known and so universally used in the sale of appliances, may well be affected. We urge further study of this problem before final action is taken since legislation designed to correct unfair trade practices in the grocery trade may cause hardships in other industries.

7. *Section 41A—The Jurisdiction of the Exchequer Court*

(Section 19)

We have no objection to the suggestion contained in this section that the exchequer court be treated as an alternative forum for the trial of most of the offences created by the Combines Investigation Act, but we feel that the forum to be chosen should in all cases be with the consent of the accused. We cannot understand why an exception is made in the case of proceedings under subsection (2) of section 31. Further, the provisions of subsection (3) of section 41A, which refer to "proceedings under part V" only, appear effectively to prevent an appeal in the case of proceedings under subsection (2) of section 31, for which there would appear to be no just reason. We urge that this section be so worded that the forum chosen be with the consent of the accused in all cases and that in all cases the right of appeal is clearly and unequivocably given.

8. *Section 34—Resale Price Maintenance*

(Section 14)

With respect to resale price maintenance the basic position of CEMA remains unchanged. We believe that a manufacturer should be permitted, if he wishes to do so, to exercise sufficient control over the selling prices of his trademarked products to protect retailers handling his line from loss-leader attacks and other unfair trade practices. The repeal of section 34 would clearly establish his right to do this.

When a manufacturer is successful in interesting some hundreds or thousands of retailers in displaying and selling his product, he has created for himself at heavy expense a very valuable asset. He has a strong interest in maintaining this asset.

At the same time he wants maximum sales volume to get the lowest possible manufacturing costs. He is competing vigorously with other manufacturers of the same type of product, both domestic and foreign, and with many other products and services, and wants his product made available to the public at an attractive price. He is thoroughly familiar with all the intricacies of the distribution process. This knowledge, and the need to resolve these conflicting interests on a day-to-day basis places him in a better position than anyone else to judge where efficient and aggressive retailing ends and unfair trade practices begin. This is why we have consistently urged repeal of the existing legislation.

The amendments now under discussion do not restore a manufacturer the right to practice resale price maintenance. They will, however, bring a measure of relief to small retailers and the government is to be commended for its honesty and courage in providing the help the amendments will afford.

It has been suggested in the debate in the house that price cutting is a device that is useful to small retailers to combat the merchandising and advertising power of their large competitors. As a matter of fact, most of the loss leading in the past 8½ years has been done by large retailers who are regular advertisers and have an annual sales volume of over 1,000,000. Under section 34 manufacturers have not been permitted to extend any protection to small retailers against loss leading by the large accounts. At the same time retailers large enough to have their own private brands have been completely free to practise resale price maintenance.

The proposed amendments will have little or no effect on prices overall. Retailers who have been selling certain items at cost or below have had to cover their losses on loss-leader items with higher-than-normal markups on other products. While it is true that under the new amendments the selling prices of the loss leaders can be expected to increase to a point where they

provide efficient retailers with enough margin to cover their operating expenses and make a reasonable return on their investment other products and services sold by the same dealers will no longer have to subsidize the loss leader items.

Since World Warr II productivity has increased at a rapid rate in the appliance manufacturing industry. Although wages have more than doubled, manufacturers' suggested retail prices have actually been reduced in many instances. Ten years ago the average Canadian worker had to work about 7 days to earn enough to buy a floor polisher at its suggested retail price of $59.50. Today the same manufacturer's suggested retail price of $51.00 represents only 3½ days' pay for the same worker.

Real and lasting gains for the consumer can and will come only from increased productivity in the manufacture and distribution of products, and not from loss leading and other unfair trade practices.

For the assistance of the members of this committee, we are pleased to attach a copy of our submission on combines legislation to the Minister of Justice, dated November 27th, 1958, and a copy of our submission on bill C-59 to the Minister of Justice, dated October 26th, 1959.

All of which is

Respectfully submitted,

B. Napier Simpson,
General Manager.

Canadian Electrical Manufacturers Association
126 Davenport Road (at Belmont)
Toronto 5, Canada

November 27th, 1958.

The Honourable Edmund Davie Fulton,
Minister of Justice,
Ottawa, Canada.

Dear Mr. Fulton:

As a result of the discussion in your office at which our solicitor, Mr. F. R. Hume, Q.C., was present, we are submitting our views on Combines Legislation and its effect on commercial policy.

The Canadian Electrical Manufacturers Association counts among its members the principal firms in that line of endeavour in Canada. Its output in 1957 amounted to $1,222,000,000.00. It represents one of Canada's largest industries, having in that year employed 81,200 persons and paid out wages in the amount of $321,000,000.00.

The contents of this submission were prepared after due consideration by a committee appointed by the Board, composed of both legal and commercial representatives. We have attempted to approach the matter constructively and in the hope that our comments will be of some assistance.

Respectfully submitted,

Napier Simpson,
General Manager

SUBMISSION ON COMBINES LEGISLATION

To

The Honourable EDMUND DAVIE FULTON

Minister of Justice

By

The Canadian Electrical Manufacturers Association

23388-2—2½

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THE ELECTRICAL MANUFACTURING INDUSTRY AND THE PUBLIC INTEREST

I

THE NEED FOR A CONSTITUTIONAL CHANGE

Perhaps the question most frequently asked by a businessman when combines legislation is discussed is why such legislation is criminal law. Therefore, in taking advantage of the opportunity offered to express our views, it is perhaps appropriate that we preface our remarks with a reference to the constitutional problem.

It is appreciated that any suggestion of constitutional change in Canada raises difficult political and technical questions but we feel that if the subject matter of combines legislation is to be removed from criminal law, some constitutional amendment is necessary; and it ought to be the long term objective, if it cannot be a short term objective, of the federal government to bring this about. The experience of past governments under the Board of Commerce Act and under the Dominion Trade and Industry Commission Act points up the difficulties inherent in the use of the Trade and Commerce power of the British North America Act. We assume that any further attempt along those lines will meet the same fate in the absence of a constitutional change.

It is, however, desirable that the federal government play an important part in the trade and commerce of Canada. The attempts made by the former governments are an indication of their good faith and their concern with the placing of the combines legislation under the aegis of the criminal law.

While in the short term there may be divergent views between government and the business community as to what constitutes public interest, in the long term their interests coincide. It is true to say that what is in the interests of business in general, is in the interests of the country. If, therefore, this stigma of the criminal law could be removed from the dealings between the government and industry in the important matters contemplated by the combines legislation, the parties could approach the problems in a spirit of co-operation rather than as antagonists in a potential criminal suit.

The other effect of such a constitutional change would be that in cases where some form of action against private industry appeared necessary in the public interest, it could be carried out under the aegis of civil law. This fact alone would remove much of the bitterness felt by the business community. But more important would be the fact that remedies could be provided which are more flexible, and therefore more truly serve the public interest.

We would welcome any attempt by the federal government to gain the agreement of the provinces (if such agreement is necessary) to bring about a constitutional change which would permit it to use some of the experiments which have been tried in the past but which have been frustrated by judicial decision.

II

THE PUBLIC INTEREST

"The public interest", no matter how defined, is and must be a care of government. Therefore, it must be the core of any submission seeking legislation or the repeal or amendment of legislation. Like all generalities, the term defies exact definition and, perhaps, we shall never achieve one better than that of Jeremy Bentham—"the greatest good for the greatest number". Such

a phrase rolls off the lips with ease but, like many clinches, it needs close examination and further definition before it can be accepted at its face value.

What is "the greatest good"? And what classes of persons constitute "the greatest number"? Matters of public interest are quite different in an economy based on agriculture (as in Canada in 1889 when the predecessor of the present combines legislation was first enacted) than they are in an economy in which the livelyhoods of the greatest number of people depend on industry (as in Canada to-day). It is urgent that the public interest be considered in the light of the times; that the interests of all segments of the public be weighed; and that a compromise be reached which is as nearly as anything human can be in the "public interest". This is true of every public question but it is particularly true of those questions which, by their nature, call for some encroachment by government on the freedom of its subjects. The combines legislation represents such an encroachment on the freedom of contract. It ought not to encroach one bit further than the public interest requires and it ought not to be capable of extension by judicial interpretation one bit further than Parliament intends. The law, as it stands today, implies that the public interest requires free and unfettered competition. We do not believe that such an over simplification of the facts of competition, as the existing jurisprudence propounds, operates in the public interest.

Therefore, we suggest that the first step in an inquiry into the needs of Canada for combines legislation is an objective and complete reappraisal of the public interest—the needs of the people of Canada which will ensure a steady and increasing development of the country with reasonable prosperity for its citizens. You will have much evidence and many points of view at your disposal in considering this question. We believe the answer will be found in policies and in legislation which encourage industry and particularly secondary manufacturing industry, as the greatest single creator of jobs, the largest single payer of wages and the biggest single tax payer in Canada, to make reasonable profits and so to improve and expand.

III

SECTION 411 OF THE CRIMINAL CODE AND CORRESPONDING PROVISIONS OF THE COMBINES INVESTIGATION ACT

(a) *Present Effect of 411 Et Al*

The litigation resulting from the existing legislation (and its predecessors) which has, with a few exceptions, been confined to "price fixing" agreements, declares clearly that the public interest is served when competition is preserved unfettered and that the public interest is transgressed whenever an agreement is entered into which could have the effect of preventing or lessening competition whatever its actual effect.

It is pointless now to retread the ground of legislative intention. You will have heard that story ad nauseam; but it is in point to inquire whether the intention of the existing legislation, as found by the courts, now expresses a desirable policy for Canada. In our view it does not. In so saying we do not want to be understood to mean that we would like to see a return to common law rules in their entirety. On the contrary, we recognize the possibility of cartel practices which could be detrimental to the public interest—the suppression of invention, the encouragement of inefficiency, the prohibition of entry into the trade, the restriction of products permitted to reach the market, the elimination of choice of product, the arbitrary division of markets by producers and so forth. But the existence of competition is a FACT. It either exists in a given situation or it does not and the FACT of competition is to be

deduced like all facts from a consideration of all available evidence. Likewise, the results which flow from the existence or absence of competition are FACTS capable of deduction in the same way. It is unrealistic to deny the existence of competition and the results flowing therefrom by the application of a judicial formula of interpretation. The subject matter is too important to the public interest to be treated in so narrow a fashion.

(b) *What is Competition?*

The striking irony to the businessman who has been convicted of an offence under the existing legislation is to be told that his fate was determined because competition might have been eliminated or suppressed, when in fact competition continued to exist in large measure. The difficulty is in defining what we mean by "competition". Like so many words of common usage, it perhaps defies exact definition. Certain it is that the courts have never made clear what they understand by the term and have left it that competition is the end of the existing legislation; and that it is a "good thing". Competition is not a philosophic principle or a desirable end in itself but it is certainly a fact of business life. The person to ask about competition is, surely, the businessman who lives with it and benefits from it. He will not be able to define it in succinct terms but he will be able to describe how it affects him. Competition should not be regarded as an all-pervading moral principle governing business relations, but as the practical attempt of a producer to sell his merchandise against the merchandise of other producers. It is a factural situation resulting from the price, the design, the function, the quality of the product, as well as the reputation of the producer. Surely the desirable end of combines legislation is that the public should have at its disposal an ever-increasing abundance of products and a choice of products incorporating the latest technological advances at reasonable prices having regard to the labour and material content and the need of the manufacturer for a reasonable profit. Such a situation will produce an economic climate that provides a general prosperity and the ability to purchase. The standard of living enjoyed by Canadians to-day testifies that such a condition has in large measure been achieved by competitive private industry. No longer are the automobile and refrigerator a mark of means. Such things are the result of competition—the competition of the businessman who is determined to get a share of the purchaser's dollar by offering a product within his reach and by disposing of it by hard selling.

When we speak of competition, let us not confuse ends and means nor confine ourselves to one element only of a complex structure.

(c) *Price Competition*

Probably because by far the largest part of the enforcement activity has been in the area of "price fixing" agreements, price competition has come to be regarded as the hallmark of competition itself. We think it unfortunate that such "price fixing" cases have set the standards for the interpretation of this legislation. Though price is only one of several or many terms and conditions in any business transaction, it has the greatest impact on the mind; it is to the point and self-explanatory; it is immediate while other terms and conditions are more or less contingent. From the enforcement point of view, the existence of such agreements is relatively easier to determine and has become more so as judicial interpretation has become more rigid. But, of all the possible matters upon which agreement between competitors might be reached, we regard pricing arrangements as the least offensive. The sameness of price frequently emerges for competitive products whether brought about by arrangement or by free and unfettered competition.

We do not regard price competition as a matter about which the law ought to be concerned at all, except in cases having an effect on the public interest. In to-day's competitive business climate such cases must be extremely rare because, if those factors which ought to be the principal indicators of competition—quality of product, choice of product, style, service, freedom to compete in the market and so forth—are not allowed to become the subject of agreement, sameness of price will neither add to nor detract from competition.

Price is, after all, always a compensating factor in the economics of competition. If the price level is too high (i.e. it results in an unreasonable profit), whether that price level is due to agreement among producers or otherwise, other producers are attracked who cannot afford to remain out of such a fruitful market and by their entry automatically regulate price levels; on the other hand, if the price level is too low, existing producers are discouraged from expanding and improving their product lines and new producers are discouraged from entering the market because they see no opportunity for reasonable profit.

Price, then, is important. It is important to the purchaser because it affects his pocketbook immediately, but it is also important to the manufacturer because it is an important element in determining the first line in his profit and loss statement. Modern manufacturing is complex; there are so many factors which are beyond the control of the producer (and will always be beyond his control) that his problem is a constant attempt to reduce the unknowns to a minimum, having in mind that he is always required to commit himself to large expenditures far in advance of the time when he can expect his returns to commence.

The fact that the producer cannot predict with certainty whether his product will be acceptable to the market or, even if it is acceptable, how much of his product the market will absorb, points up the importance of price realization to the producer when he makes his plans.

The need for adequate price realization is common to all producers; and considering all the unknowns that he has to assess, is one capable of relative stability. We feel that it is better to have a legal climate which permits a producer to consult his own interests in this regard, having due regard for the public interest, than to have a legal climate which leads to price wars and general price instability, which result in uncertainty of profit and consequently an unwillingness to expand and a depressing effect on job security.

The price problem also relates to the public interest in profits. We live in a capitalist society which depends on profits for its advances. It is unfortunate that business is becoming more and more reluctant to speak of its profits with pride. It must never be forgotten that it is from profits that are purchased the tools of production which create jobs. To the extent that an uncertain price situation leads to the elimination of a fair profit, it is not in the public interest. You will not find a producer who can tell of any good arising out of a price war. While it is difficult to explain to the consumer only interested in "bargain" prices, the fact is that he is the long term loser. Any legislation dealing with economic matters ought to have regard to long term and not short term advantages.

In short, we feel that careful consideration ought to be given to the price problem with a view to determining whether or not the existing law places unreasonable (i.e. beyond the public interest) restraints on the freedom of persons to consult their mutual interests in this respect.

(d) *Discrimination Against Manufacturers*

The interpretation put on the legislation by the courts discriminates against manufacturers. There are large and important segments of the economy which are controlled by service industries and it appears to be accepted that it is not

objectionable for such industries to set common rates or fees. The Canadian Bankers' Association determines the fees to be charged by banks; real estate boards determine rates of commission for member firms; the trust companies' association sets tariffs for trust company fees; every county bar association has its tariff of fees; the medical profession sets fee standards for its members. These instances in themselves indicate that there is nothing per se improper in "price fixing" arrangements. There appears to be no reason to assume that bankers, realtors, trust company officers, lawyers and doctors have a higher standard of public responsibility than business managers.

(e) *Recommendation*

Affirming our belief that combines legislation is necessary and desirable, it is our recommendation that Section 411 of the Criminal Code and the corresponding provisions of the Combines Investigation Act be not altered except by the addition of a provision which requires, in specific terms the court trying a case under either of these statutes to determine *as a question of fact* whether the conspiracy, combination, agreement or arrangement complained of is "undue" or "to the detriment or against the interest of the public"; and to acquit in cases where the court finds as a fact that the conspiracy, combination, agreement or arrangement was not "undue" or "to the detriment or against the interest of the public". It would be even more desirable if the offences covered by the existing legislation could be consolidated in one statute; and if other words could be found to express the intention which the expressions "undue" and "to the detriment or against the interest of the public" are meant to convey. In this way a clean break with the past could be achieved and there would be less likelihood that the courts would draw on old cases to shed light on "the intention of the legislature".

Consideration might also be given to impowering the court to impose an injunction on the parties in cases where they may be found to be in breach of the law without any further penalty being necessary.

The only possible objection to this suggestion (unless there be persons in this day and age who honestly believe that the common law rules are best under all circumstances) will come from the courts and the enforcement agency. These are not the directions from which policy ought to be decided.

The courts have said that they are not equipped to deal with economic questions. The MacQuarrie report sympathizes with them. It appears to have escaped their notice that in deciding as they have to date, they have in fact accepted one theory of the effects of combination to the exclusion of all others. The policy of our law has long been that every proper cause shall be heard and brought to a conclusion and it does not appear to us that it is for the courts to say what factual situations are within their scope and what are not; indeed, they are frequently called upon to make findings of fact in difficult and highly technical situations. Fact finding in technical cases is always difficult, but the process is always the same; the Judge's duty is clear that he must find his facts on the basis of evidence presented in the courtroom.

Even less should the difficulties of the enforcement agency be the determining factor; it is its duty to carry out the policy of the legislation, however difficult.

IV

SECTION 412 OF THE CRIMINAL CODE

(a) *Meaning of the Legislation*

Our complaint with Section 411 has been that the interpretation was "wrong"; it might be that Section 412 would be a great deal clearer if there had been some judicial interpretation.

Since the courts have not had an opportunity to pass on the meaning of Section 412, all interested parties are prone to put a meaning upon it which bests fits their operations and their prejudices. The confusion revolves around the questions suggested in the section—"what is discrimination?" and "who are competitors?" The enforcement agency, quite naturally, chooses an interpretation which is relatively easy to apply and which seems to have a good deal of support in economic text books. Such interpretation amounts to this, that every seller of goods ought to publish a scale of prices with discounts based only on quantity and quality which are available to all comers. Such an interpretation ignores many factors which are important to the businessman albeit in some instances intangible, such as the integrity, the financial worth, the selling ability of the person with whom he deals. Such factors can be of little interest to the enforcement agency because they are subjective from the point of view of the businessman. The businessman, however, cannot ignore them and, therefore, his views as to what constitutes discrimination will frequently be found to be diametrically opposed to those of the enforcement agency. The businessman does not regard it as discrimination to deal with A on better terms than he deals with B, even though A and B are conducting their business in the same area, when the requirements of his distribution system satisfies him that A is worth more than B, and therefore will give him a better return.

If the view held by the enforcement agency were to prevail, it would provide a serious brake on the producer's ability to settle his distribution problem in his own interest and as he sees fit. It is implied, in what has been said, that the provisions of Section 412 are of particular interest to manufacturers of consumer goods selling such goods through the distribution trade. Their interest is to move their goods and they must always be free to use their judgment as to the best manner of achieving their objective. Such manufacturers sell to many kinds of people but they do not regard them as being alike, and they are never in fact alike either in economic strength, quality of service, ability to sell, or ability to compete with one another.

The report of the Director of Investigation and Research into certain discriminatory pricing practices in the grocery trade has been studied by us. We find his report difficult to accept as a practical working tool. It appears to us that it places too great an emphasis on the remarks of economic theorists; and the document leaves the reader with a sense of frustration because it never comes to grips with the practical problem of the trader who has to sell his merchandise day by day. It propounds a view of price discrimination which merely suggests another obstacle to the businessman in the use of his best judgment in a competitive situation. Economic theory in this field, we suggest, is of little help in the practical problem of making a decision when a manufacturer's largest account calls to advise that his principal competitor is prepared to do business and grant an extra 2% discount. Anyone examining the sales transactions going on daily in Canada could from one point of view say that discrimination is rife and from another point of view say that competition is rife, according to where his prejudices lie.

(b) *Recommendation*

We see no good purpose in Section 412 and recommend its repeal insofar as the matters dealt with in paragraph (a) of subsection (1) and subsections (2) and (3) are concerned. There remains the problem of the matters dealt with in paragraph (b) and (c) of subsection (1). We believe that sanctions ought to be imposed on a manufacturer who pursues commercial policies *solely* for the purpose of injuring others but that it ought to be dealt with elsewhere than in the context of combines legislation.

V

SECTION 34 OF THE COMBINES INVESTIGATION ACT

(a) *Resale Price Maintenance*

While all aspects of combines legislation have an important impact on manufacturers, perhaps the problems of resale price maintenance touch more people than any other, whether manufacturer, distributor, retailer or consumer.

Resale price maintenance is also unique in that here is a case where a government appointed committee made a recommendation; that recommendation was acted upon (amid a good deal of controversy); and we can now look back on seven years of experience and assess the results.

The problem of resale price maintenance is compounded by the dramatically opposed desires of, on the one hand, the consumer to get the cheapest possible price (by which he means first cost) and, on the other hand, the distributor and retailer to sell at prices which enable him to make a reasonable profit while bearing the costs of promotion and services, and of the manufacturer to ensure the satisfactory distribution of his products.

Where does the public interest lie in this conflict? The MacQuarrie Committee and the government gave their vote in favour of the consumer's view; and apparently overruled every plea and objection of the distributor and the manufacturer. The whole tenor of their recommendation points to the consideration of only one question in reaching this decision—how does the purchaser get the cheapest price?

We do not think the public interest can be resolved in this argument on so narrow a base. Surely the public interest ought to be directed to the question—how does the purchaser get the best value with the least inconvenience to the community as a whole? Consideration of this question requires a decent concern for the rights of the distributor, retailer and the manufacturer as well as the consumer. You will, no doubt, have received representations from the distributive trades. Suffice it to say here on their behalf that we have studied the proceedings of a meeting which the Retail Merchants Association held with members of the government early in September and we concur in their recommendations.

But it is often asked—what concern is it to be manufacturer as to who sells his merchandise or how it is sold provided he gets his price? We shall attempt to outline the manufacturers' problems.

(b) *The Distribution Problem*

Agreement will be found among all manufacturers and particularly those of nationally sold branded merchandise that their sales objectives are best reached by having a great many outlets of all type and sizes. Expressed as an equation, exposure plus sales effort equals sales. When a manufacturer has control over the prices at which his products are sold to the public, his smaller outlets are not subject to the predatory price cutting of the larger and, therefore, are able to continue to purchase and sell his merchandise. The manufacturer grants discounts to meet the needs of his outlets as he sees them. If the margin allowed an outlet is not sufficient, that outlet ceases to be a point of exposure and sale of his products. In the past, a manufacturer was able to provide pricing schedules which were sufficient to encourage all types of outlet; but the effects of Section 34 have substantially made that impossible now.

Since 1952 we have seen the growth of retailing monopolies in the larger markets. These have been aided by the use of daily newspaper advertising which affects distribution far beyond the geographical limits of the advertiser's physical ability to serve. The result has been that more and more

merchandise in the consumer goods field is reaching the public through fewer and fewer hands and the manufacturer is thereby precluded from "covering" the market with outlets which his experience proves is the best way to move his goods; smaller outlets stop purchasing or promoting his goods because they cannot complete with the prices advertised by the larger outlets.

(c) *The Promotion of New Products*

The lifeblood of the consumer products industry has been the development of new products. Such products do not just come on to the market and immediately gain acceptance. They have to be sold. The manufacturer who has developed a new product requires a distribution system which he can call on to assist in the promotion of the new product. He will only have such assistance if he can gain the cooperation of many retailers; such retailers will only lend their time, money and effort to the promotion if they can continue to see a reasonable return. The inability of the manufacturer to control his method of distribution has effectively resulted in the withdrawal of such support in large measure.

(d) *The problem of "Branded" Goods*

The greatest damage has been done to branded lines. It is easy to see why this is so. Names like General Electric, Westinghouse, Frigidaire and Sunbeam, to name only a few, have by their careful promotion and, what is more important, careful attention to quality, become synonymous in the public's mind with good value. It would be pointless to advertise "bargain" prices on unknown or little known merchandise. Therefore, the branded line manufacturer is faced with:

(1) having his products used as loss leaders by persons primarily interested in the sale of other merchandise with consequent damage to those who would promote the manufacturer's products in good faith;

(2) putting up with large retailing monopolies which in the major appliance field are more interested in a profit on the "paper" (where they can make a substantial return) than in making a profit in the selling and servicing of an appliance to a satisfied customer;

(3) protecting his reputation by providing for the servicing of his products, which is no longer being provided adequately by his outlets because of the unsatisfactory prices realized on sales; and

(4) taking all the risks of manufacture, distribution and servicing of complex technical products at a profit margin which is unsatisfactory to him and to his outlets.

The large retail department store provides an example of the manner in which the manufacturer's inability to control his resale prices results in his losing favour with his important outlets. Such organizations, with their ample resources, are able to have their own branded lines manufactured and thereby to control prices. Before the passage of Section 34 the department stores used their own lines to offer to the public merchandise which, generally speaking, sold at prices less than nationally sold branded lines, but did not promote their own lines to the prejudice of others. Now, because the effects of advertising have made it impossible for them to sell nationally sold branded merchandise at a reasonable profit, they are vigorously promoting their own lines at controlled prices. The loss of confidence by any of the large department stores in any producer's product is a serious matter in Canada because of the major influence these large outlets have on sales.

(e) *The Problem of Competition*

One of the principal arguments of the MacQuarrie Committee against resale price maintenance was that it leads to a lessening of competition. Such a view could only be held by a person misinformed as to the facts of the consumer goods industry.

There is no branch of trade more highly competitive than the consumer durable goods industry. This is so whether you look at choice of product or range of price and it was so long before Section 34 was passed. The number of manufacturers in the field and the extent of the public's tastes render the elimination of competition impossible. Even if the price of comparable products were the same (which is not so and never was so) the number of competitive factors which are at work at all times assures the "shopper" the opportunity of a "bargain" without the aid of Section 34.

(f) *The Problem of Service*

The MacQuarrie Committee made light of this. They felt a purchaser should be able to purchase goods with or without service. This view flies in the face of the facts concerning major durable consumer goods. No matter by whom or how well made, service is going to be required. This is a matter of experience, not of opinion, and if service is not immediately available at reasonable cost, the reputation of the manufacturer (not his outlet) is at stake. It is unrealistic to expect that complex technical devices will be perfect at all times and under every form of use. Thus, no manufacturer can contemplate putting such a product on the market without making proper provision for service. That portion of the distribution outlet's margin which ought to be reserved for service has disappeared through erosion by predatory pricing tactics which Section 34 has permitted and encouraged.

(g) *Recommendation*

Section 34 seems to us to have suffered from a lack of sober consideration at the time it was passed. The MacQuarrie Committee was urged to submit an interim report on this subject as a aid to government policy.

We have no hesitation in recommending the repeal of Section 34 in its entirety. We are unable to suggest any substitute because in this particular area we feel the ordinary rules of the law of contract will sufficiently serve public interest.

VI

THE RESTRICTIVE TRADE PRACTICES COMMISSION

(a) *Modus Operandi*

When the Combines Investigation Act was last amended in 1952 and this Commission was set up, there was some hope in the business community that it might prove a useful vehicle for the examination of the public interest in matters of trade and commerce. Indeed, the words of Section 19, on a common sense reading, seemed clear when they provided that the report of the Commission "shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies". This language was apparently included to give effect to view of the MacQuarrie (p. 38) that "for the determination of legislative and executive poplicy, wider considerations of public interest including tests of efficiency are possible. It is contemplated that the board which we proposed will be in a position to bring these considerations to bear on monopoly situations and practices".

However, our study of such reports as the Restrictive Trade Practices Commission has issued since its inception leads to the conclusion that the Commission regards itself as bound by the court decisions and, therefore, not required to make any inquiries into effects. Had the Commission decided, as its modus operandi, that it had a duty to inquire into effects, it might have acted as a proper buffer between the parties under investigation and the courts in that its recommendations to the Minister would presumably have only encouraged court action in those cases where the public interest could be demonstrated to have suffered or the parties shall have refused to adopt remedial measures.

(b) *Recommendation*

If the present system of administration is to continue, we recommend that the duties of the Commission be made clear and that its duties be other than those merely of a step in the long and tiresome path from the beginning of an investigation to the court hearing.

It should be made clear that we do not seek a regulatory body in the sense of one impowered to fix "rates"; competitive business does not permit of such inflexibility. While its establishment depends a great deal on the constitutional problem in Canada, what we have in mind is rather a body of a consultative nature which could examine practices and set standards of business conduct, and which would be impowered to issue "cease and desist" orders to ensure the abandonment of practices which were not in the public interest.

Respectfully submitted,

General Manager.

CANADIAN ELECTRICAL MANUFACTURERS ASSOCIATION
126 Davenport Road
Toronto, 5 Canada

Telephone Walnut 3-1139

October 26th, 1959.

The Honourable Edmund Davie Fulton,
Minister of Justice,
Ottawa, Canada.

Dear Mr. Fulton:

We are grateful for the opportunity extended in your letter of August 13th, 1959 to the Electrical Manufacturing Industry to express its views concerning the proposed amendments to the Combines Investigation Act contained in Bill C-59.

This Industry stands fourth among the manufacturing industries in Canada, is broadly based, and highly competitive as a result of both domestic and off-shore competition. For many years our earnings, as a percentage of the sales dollar, have equalled only one half of the average earnings of all Canadian manufacturing.

In making the enclosed submission which supplements that of November 27th, 1958, we have attempted to be constructive but find it necessary to state that we are deeply concerned with the inferences contained in the proposed amendments.

Firstly, there is no justification for the departure in this statute from one of the cardinal principles of Common Law—namely, that a person is innocent until proven guilty.

Secondly, we believe that to constitute an offence it must be established in court that an alleged monopoly, combined or merger, has or is likely to operate in a manner detrimental to the public interest as broadly conceived; and not as narrowly interpreted by the courts.

Thirdly, while the rewording of Section 34 indicates the possibility of some relief, it requires clarification and that the meaning of the phrase "inference unfavourable" and the word "persistently" be properly defined.

Fourthly, we believe that the Restrictive Trade Practices Commission should be required to perform its prescribed function as laid down by law and in doing so examine each case on its merits—notwithstanding previous court decisions.

All these matters are covered in greater detail in this submission. If it meets with your wishes we would be glad to discuss the contents verbally. An acceptable date could be Thursday, November 5th, or as you suggest.

Respectfully submitted,

B. Napier Simpson,
General Manager.

CANADIAN ELECTRICAL MANUFACTURERS ASSOCIATION

SUBMISSION

ON

BILL C-59

TO

THE HONOURABLE EDMUND DAVIE FULTON

MINISTER OF JUSTICE

OCTOBER 26TH, 1959

SUBMISSION ON BILL C-59

I—Our Philosophy

This submission is supplementary to our Submission on Combines Legislation dated November 27, 1958. Our views on the direction that combines legislation should take, as expressed in that brief, have not changed. It was therefore with regret that we have noted that Bill C-59 continues the association of the combines law with the law of conspiracy; that, far from being an aid to the Canadian businessman in his quest to improve himself and therefore the Canadian economy, it has set out to declare arbitrarily that certain practices, irrespective of their effect on the public, are offences per se—a position far beyond that held by the existing law. The proposed Bill therefore actually places more emphasis on the enforcement of the legislation than in giving consideration to the welfare of Canadian business and the furthering of the Canadian economy.

What is it that the law is to achieve? At present, it dictates that "competition" is in the public interest and must be preserved. With that we agree—and we are sure that every responsible businessman in the country will also concur. But is a statute that concerns itself with policying day-to-day market decisions a law which will ensure competition? The problem seems to lie in the definition of competition. Bill C-59 continues the notion that "competition" is the drama which unfolds as a number of competitors, each situated in a vacuum, try to best one another in the game of business. Such a view in our mind is unrealistic for it is concerned only with *short term* competition. But competition serves us not at all unless it is *long term,* that is, unless it contributes to a dynamic economy where new products replace old products in volume and at reasonable prices having regard for the labour and material content and the need of the manufacturers to make a reasonable profit; where the diesel locomotive can replace the steam locomotive for the benefit of all; where, as one economist has said, there is "creative destruction." Any law which affects economic policy as the combines law does should direct its concern towards this—long term competition. It should take a positive and not a negative approach to the problems of competition and the public interest.

As we said in our previous submission, the whole basis ought to be re-examined. We do not believe any good will come from adding patches to a law which in our view requires complete revision based upon a new approach.

II—General Comments on the Bill

(a) The Statutory Defences

In the several places in Part V of the Bill, it is said that "it is a defence if the accused establishes....." These words do two things which cause us concern.

Firstly, they write into the combines law the concept that there are some trading practices which are illegal per se, i.e. irrespective of their effect. While the jurisprudence which glosses the law relating to price fixing agreements at present adds up to that, in no other aspects of the combines law has the per se doctrine been given effect in Canada.

In our previous submission we deplored the rigidity of interpretation touching price fixing agreements and recommended that it be made clear to the tribunal charged with trying such cases that it be required to examine the question of public detriment as a fact.

Holding that view, we see no good reason for determining in advance through the medium of the criminal law that any business agreement or arrangement is necessarily contrary to the public interest. Businessmen, under capitalism, act primarily in their own interest with a view to profit. Until the system is abrogated, and unless their actions can be demonstrated to do harm to the public interest, the law ought not to hamper their actions.

Secondly, the defences, especially in the conspiracy section, are so framed that they cover all the situations which if undue, could conceivably be offences. And thus the shift of onus (surely an extreme position in criminal law) imposes on the accused an intolerable burden. For he will be denied the right to show in these situations whether the circumstances in which he finds himself were undue or not. If this is the objective desired, it could more easily be stated that "everyone who conspires to fix or enhance prices is guilty of an offence"—and so forth.

We cannot conceive that any of the businessmen who were asked to submit suggestions for the improvement of the Combines Law made such suggestion. As stated previously the emphasis would appear to be on enforcement rather than in giving due consideration to possible impact on the economy.

(b) Resale Price Maintenance

In our previous submission, we recommended the repeal of Section 34, as serving no useful purpose and as indirectly hampering the producer of goods in the solution of his distribution problems. We have not changed our view, through we feel that the additions made to the section offer some relief to the small dealer. However, we draw your attention to the following matters of draftsmanship:

1. We are concerned about the manner in which a court may deal with the expression "no inference unfavourable" and think that the apparent intent would better be achieved if after the words "where ..... it is proved etc." a positive statement were made to the effect that "it is not an offence under this section if the persons charged had reason to believe and did believe, etc."
2. We would hope that the draftsman will be able to find a word which makes clear the meaning intended to be conveyed by the use of the word "persistently."

(c) The Commission's Report—Section 19

It is noted that Section 19 of the Act has been greatly expanded as regards the number of words used, but it is not clear that the words used place the duty on the Commission truly to examine "effects" and in doing so ignore the interpretation by the courts. We made mention of this in our previous submission, and our views have not changed, that the Restrictive Trade Practices Commission fails to perform its prescribed function unless its findings clearly show the areas in which public interest has been harmed even in cases where under the existing law the courts would not receive evidence and the evidence, if presented in court might lead to a conviction.

(d) The Provision Relating to the Removal of Customs Duties—Section 29

We are aware that the Governor-in-Council has the right under the Customs Tariff Act to reduce tariff under certain circumstances. In the light of this power there is perhaps reason to wonder why the question of removal of customs duties is dealt with in the combines law.

The amended portion has changed the tense from present to past and this raises the implication that the Governor-in-Council may act *at any time* even though a combination has long since ceased to exist. We think that if this

change is to be proceeded with, the power of the Governor-in-Council to act in these circumstances should be limited in time.

(e) *Section 22—Bill C-59*

Having expressed the view which we have throughout this submission and our previous submission, we would be inconsistent if we did not state our objection to Section 22 of Bill C-59 which retains in force the jurisprudence affecting Section 411 of the Criminal Code. Since it has been obvious for many years that the interpretation placed by the courts on the word "unduly" in price fixing arrangements goes far beyond what appears to have been intended from the reading of the debates at the time of passage, it seems improper to permit an opportunity for parliamentary review to go by and not correct what in our opinion has been a "wrong" interpretation. We, therefore, feel that no attempt should be made to retain this jurisprudence.

III—Important Aspects of Bill C-59

The purpose of this part of our submission is to deal more specifically with the problem of mergers, monopolies and combines which constitute the heart of the combines law, but before dealing with these matters specifically, it is interesting to note how diametrically opposed are the policy implicit in Bill C-59 and the views which the Royal Commission on Canada's Economic Prospects appear to support. On page 248 of the Royal Commission's Report, dated November 28th, 1957, appears the following:

> It would seem logical to us that industry should be encouraged to organize itself as efficiently as possible to serve the relatively small market in this country. We have said that one of the problems facing the industry is the excessive division of the market, which has aggravated the problem of scale for each of the firms involved. A reduction in the number of firms in many industries, with production concentrated in fewer but more specialized plants, could lead to lower costs of production and hence to lower prices for the consumer. A number of manufacturers have suggested that they would welcome developments along these lines, but they believe that a reduction in the number of Canadian producers of any important product might expose those who remain to prosecution under the Combines Investigation Act. Whether or not such would be the case is difficult for us to judge, but it is a view which is fairly widely held. In the circumstances, we suggest that the Restrictive Trade Practices Commission, in judging whether or not any concentration of production in fewer hands is in the public interest, should give considerable weight to the importance of secondary industry achieving the maximum possible economies of scale. Moreover, if the combines legislation as presently drafted stands in the way of a desirable concentration of production, then consideration should be given to some modification in the Act.
>
> We are fully in accord with the principle that monopolies and cartels should be effectively policed, but it is a relevant consideration that few secondary industries anywhere in the world are exposed to such severe import competition as that experienced by Canadian industry. This import competition provides some safeguard against exploitation by domestic monopolies or cartels.

It will appear from this submission, as we hope it appeared in our previous submission, that the philosophy expressed by the Royal Commission more nearly approaches the kind of philosophy which we feel ought to pervade the combines law and its enforcement. Having said that, we now proceed to deal with particular sections.

(a) The Provisions Relating to Mergers—Paragraph (e) of Section 2 and Section 33

Whereas under the existing law a combine is defined, inter alia, as a merger "which has operated or is likely to operate to the detriment or against the interest of the public" it is now defined as the acquisition by one party of any control over another party whereby "competition" is or is likely to be substantially lessened.

It is true that there are two forms of statutory defence available with the merging parties in the position of having to justify their actions in a narrow range. The effect of the definition and the defences, read together, is that merging is per se contrary to the public interest. Why is it necessary to remove the test of public detriment which is available in the existing law? What evidence of mergers in Canada have there been which have harmed the public interest, so as to render merging obviously and per se offensive? Such prejudgment of economic and business situations makes pointless the injunction to the Restrictive Trade Practices Commission to find "whether or not the participants.....have acted with calculated disregard for the interests of the public."

When one comes to consider the defences, the enforcement agency holds all the trumps. Nothing will be simpler to establish than that a merger has occurred—a fact which will be a matter of public record. If competition is affected the merging parties have no opportunity for justifying their actions, unless they come squarely within the defences. The defences, themselves, are framed so as hardly to admit of proof. How can one show that *all* the economies have been passed on to the public? Who would merge for this purpose? We are led to the conclusion that merging is not to be permitted (unless one of the merging parties would have had to cease business), even though, in fact, a merger will result in a situation where no substantial competition remains and yet it is desirable both from the point of view of the parties and the public.

Our recommendation would be for a section on merger not very different from that already in the Combines Investigation Act which in essence would be the definition set forth in paragraph (e) of Section 2, with the words "which has operated or is likely to operate to the detriment or against the interests of the public" included. Such a section would not require the defences set forth in Section 33 at all.

(b) Provisions Relating to Monopoly—Paragraph (f) of Section 2 and Section 33

While the merger problem is one that arises comparatively rarely, the problem of monopoly is one which is ever present. There are not many companies in Canada which can regard themselves as overall monopolies, but a great many companies are or are likely to be monopolies in relation to a particular product or group of products, i.e. "a species of business."

The definition of monopoly lists five sets of circumstances, in addition to a catch-all, under which monopoly is deemed to exist. In some of them the word "unduly" is used; in others it is inexplicably omitted. As an example, the definition could be interpreted so that a monopoly could not raise its prices whatever the circumstances. We believe that the use of the word "enhance" causes confusion. Because of its use in the Criminal Code it is assumed that it has a connotation of conspiracy. This belief is not supported by the dictionary, which appears to indicate that its meaning is simply "raise." Surely the intention must be that there must not be an unreasonable or undue raising of prices.

The same objection may be made with respect to the items "limiting production" and "limiting entry into a trade or industry." The questions to be decided in these cases are business questions. A producer will expand or limit

his production according to the needs of his market. Likewise, it would be unrealistic to expect a producer not to take legitimate steps to retain and improve his market whether by providing better service, better products or a public taste which requires capital expenditures beyond the ability or the risk of those who would like to share in the market. Such steps are likely to discourage others from invading, or further invading, his market.

We recommend that language be used in this section in dealing with the circumstances contemplated by sub-paragraphs (i), (ii) and (iii), which make it clear that reasonable conduct in this area is not a monopoly which will attract the penalty provided in Section 33.

(c) Provisions Relating to Combinations—Section 32

The main burden of combines law is contained in the provisions of Section 32. While at first blush the setting forth of statutory defences would appear to give something to an accused person which was not available to him in the past, nevertheless the way in which the section is framed raises doubts in our mind that the defences constitute an improvement. As we have mentioned earlier, they have the effect of establishing that certain courses of action are per se illegal whatever the effects might be. This result amounts to a pre-judging of situations with no opportunity afforded the accused person to show the merit of his actions.

We have no objection to the manner in which sub-section 1 is framed but we reassert that it would better serve the public interest if it were made clear to the fact finding tribunal that, whether any of the proscribed actions have been done unduly, is a question of fact.

In view of what we have said it follows that (shift of onus apart) we do not believe that items (i) to (v) constitute an improvement. We do not, however, object to the creation of a list of practices such as are indicated in items (vi) to (xi) which may be regarded as practices which are not offences under sub-section 1. We feel it would be better to frame sub-section 2 so that it makes it clear that it is not an offence to participate in a combination which relates only to the matters set out in items (vi) to (xi). We do not suggest that this list is exhaustive.

The effect of the rearrangement which we suggest herein would not raise the implication of per se offences but would clearly set forth areas of activity which are not deemed harmful.

If what we have suggested above is accomplished, the reason for paragraph (*b*) of Section 2 ceases to exist. Its deletion would be most desirable in any event since its use in conjunction with the provisions of paragraph (*a*) as now written create a situation which is almost impossible of proof. It is generally true in legal proof that there is nothing more difficult to prove than a negative and we do not see how any accused under any circumstances could establish that a combination "has not operated and is not likely to operate to the specific detriment" of someone.

Our general assessment of Section 32 is that by the creation of per se offences the proposed amendment is less satisfactory in the public interest than the existing law and the manner in which it is accomplished is unfair to persons who might be charged under sub-section 1.

(d) Provisions Relating to Discrimination—Section 33A

In our previous submission on the combines law we expressed the view that which is now paragraph (*a*) of sub-section 1, sub-sections 2 and 3 served no useful purpose because the section deals with problems of competition and the making of market decisions in circumstances where time is of the essence. We have not changed our views on this subject.

While still affirming that paragraphs (*b*) and (*c*) have a place where the manufacturer pursues a policy *solely* for the purpose of eliminating a competitor but outside the context of the combines law, we note that the word "tendency" has been added to paragraph (*b*). It is not clear what the addition of this word accomplishes but it can only have a meaning which pre-judges some future situation which may or may not arise. We think it unfortunate for the hapless trader who happens to be caught in the words of this paragraph that his fate may be determined by an opinion as to circumstances which may never arise. Theoretical possibilities should not govern a matter so serious as the laws which affect economic policy.

We also note the shift of onus in sub-section 2 from the Crown to the accused which, as has been said before, is contrary to the tradition of our criminal law.

All of which is

Respectfully submitted,

B. NAPIER SIMPSON
General Manager

B. Napier Simpson
ad

Thank you very much, sir.

The CHAIRMAN: Thank you very much, Mr. Simpson.

Mr. PICKERSGILL: May I ask one general question. Would it be a fair summary of the brief to say that, apart from the proposed amendments to section 34, you really think it would be better not to have this bill but to stay with the present law?

Mr. DRYSDALE: You have the brief before you.

Mr. SIMPSON: May I ask Mr. Bruce to answer that question.

Mr. DOUGLAS I. W. BRUCE, (*Assistant Secretary and Manager of the Law Department of the Canadian Westinghouse Company Limited*): No, I do not think that is a fair way to put it.

Mr. MARTIN (*Essex West*): Would you modify it except in respect of the resale price maintenance.

Mr. BRUCE: We would like to see retail price maintenance.

Mr. PICKERSGILL: Apart from the suggested amendments to section 34—which I understand you regard as second best and would like repealed—as second best you think you could accept this; but in so far as the rest of the bill is concerned you would like to have the present law.

Mr. BRUCE: No.

Mr. PICKERSGILL: Could you indicate succinctly what parts you do want.

Mr. BRUCE: I think the amendment to subsection 2 of section 32 would be very valuable to the industry in doing away with the fear which the association has in some areas. Also it will permit important exchanges. I do not think it goes far enough. I think that this predetermines that all agreements are bad simply because this law has got tied up in law of conspiracy. We think that every agreement should be looked at on its merits.

Mr. BALDWIN: Mr. Chairman, on page 3 of the brief, in section 2, there is a statement with regard to the prohibition order without conviction. In the brief you say that it is inequitable to give a court the power to undo actions and inconvenience persons without subjecting them to the normal process of investigation and trial.

Is that not a reversal of the stand which you took and which appears to be contained in the brief which you presented, along with a letter of

November 27, 1958, which came to us with this other brief. On page 2 of that brief—this is the brief affixed as a memorandum to the letter of November 27, 1958—you say this:

> —It is true to say that what is in the interests of business in general, is in the interests of the country. If, therefore, this stigma of the criminal law could be removed from the dealings between the government and industry in the important matters contemplated by the combines legislation, the parties could approach the problems in a spirit of co-operation rather than as antagonists in a potential criminal suit.

Then the next paragraph:

> The other effect of such a constitutional change would be that in cases where some form of action against private industry appeared necessary in the public interest, it could be carried out under the aegis of civil law.

Does it not appear that there is some inconsistency with what you say today and your views expressed in this brief of November 27, 1958?

Mr. BRUCE: I do not think so. At the time we submitted this brief we were asked to give our general views on the combines legislation; we did that. The only thing we are criticizing in subsection 2 now is only in so far as it might deal with the situation when you have a merger which might have happened ten years ago. All the shares have been exchanged and new interests have come into the thing, and suddenly by virtue of this prohibition order the whole thing can be undone. We think when something is raised that it would be better to go through the normal procedure. On the other hand, if action is contemplated perhaps it is advantageous to have an injunction procedure.

Mr. BALDWIN: You are not opposed in principle to obtaining a prohibition order without there first being a conviction?

Mr. BRUCE: I thought our brief was fairly clear on that point.

Mr. BALDWIN: You say "without subjecting them to the normal processes of investigation and trial".

Mr. BRUCE: Yes, but the only investigation we make is what has been done, if you like. We mention there is no time limit as to when this could take place.

Mr. BALDWIN: You have no objection to going back some distance in time, but not too far.

Mr. BRUCE: We do not think it should be for any past action. If you have any experience in these matters you know that a great many people will be upset. There may be shares in an estate where the situation has to be unravelled.

Mr. BALDWIN: I there has been an offence within the meaning of the act then, according to your brief as I understand it, there would have to be a conviction before there would be an order of prohibition.

Mr. BRUCE: Yes. In the case of something which now is stale we think this is better. There is more of a sifting process in the investigation than there might be in the trial.

Mr. BALDWIN: You refer to the question of the jurisdiction of the Exchequer Court, and you suggest there should be a consent by the accused. This has been suggested elsewhere. Is that on the ground of the expense involved and that the accused must come to the court rather than the court go to the accused.

Mr. BRUCE: Yes. The Exchequer Court primarily in fact does sit across Canada; but there always are interlocutory matters in these things and it would mean that people would have to come to Ottawa frequently.

Mr. BALDWIN: I meant to bring that out that the Exchequer Court does hold sittings in all parts of Canada.

Mr. BRUCE: I think, for instance, it would be cheaper for me to be tried in British Columbia if I am from British Columbia.

Mr. BALDWIN: If there were a clause contained in this particular section which provided that the jurisdiction of the Exchequer Court would be limited to cases where the trial would be held in the province in which the accused resides, would that have any effect on your thinking?

Mr. BRUCE: They would have to make extensive changes in the rules; they would have to hear all the proceedings in the province. We do not want the Ottawa lawyers to get all the business.

Mr. DRYSDALE: Mr. Bruce, I was interested in the first page of the brief dealing with the matter of public interest and your treatment of section 411 of the code. Have you given any consideration to defining the scope of public interest and applying it to that particular section?

Mr. BRUCE: That is a difficult question. We very strongly feel that this legislation does not take into account the actual practical situations which the businessman—quite apart from the manufacturer in whom we primarily are interested—has to face. We think it has grown up over the years based on the feeling that if you have a tariff protecting a businessman, that that businessman will take advantage of the situation; there may be cases of that. We think that.

Mr. JONES: When you say "this legislation," you mean the combines legislation, in general?

Mr. BRUCE: The combines legislation as a whole. I think the philosophy that ties the market decisions a businessman has to make from day to day to the law of conspiracy is not giving the businessman a fair shake.

Mr. DRYSDALE: How do you feel, in a specific illustration, your treatment of it as a question of fact would cure the present difficulty, as you see it?

Mr. BRUCE: Well, it would force the court to examine the actual effect of an agreement, rather than to say, "You met, you agreed together, you represent 80 per cent of the industry and, therefore, the rules of the law on conspiracy say it is a crime which is committed."

Mr. DRYSDALE: Do you think the standard should be that the courts should examine to see whether there has been, for example, an overall economy to the public?

Mr. BRUCE: Yes, and I know you are faced with difficulties when you say this. All the judges say it, politicians say it—that this is an impossible task for a court. I do not think it is: courts have to find facts all the time. I admit it would be a difficult task, but I do not see why the businessman should not have the effect of his crime examined as closely as any other criminal.

Mr. MARTIN (*Essex East*): You say it would be the same as the assessment of damages?

Mr. BRUCE: The finding of a fact. Well, ultimately, it would be the assessment of damages.

Mr. MARTIN (*Essex East*): I was trying to help you.

Mr. DRYSDALE: The reason I asked about this definition of public interest was that I believe under the Restrictive Trade Practices Act of the U.K. they made an effort to define that.

Mr. BRUCE: In England they set up statutory standards by which the courts have to judge the agreement.

Mr. DRYSDALE: But you feel, under those circumstances, it will be better to have the court be the judge, clear of any suggestions, as they have in the U.K.?

Mr. BRUCE: I do not know that I have thought that right through. At the moment I would say, yes, because we have no other vehicle.

Mr. DRYSDALE: I was trying to follow your reasoning. If you have not any criteria upon which the court could direct their mind as to whether the various matters are in the public interest, then I have a little difficulty, in my own mind, seeing how this advances you on a question of fact.

Mr. BRUCE: Maybe you do have to have some statutory standards.

Mr. DRYSDALE: But you have not considered that point?

Mr. BRUCE: No, because we deemed our task today to be to criticize bill C-58. We have made these general suggestions. It is obvious this recommendation would take more effort than is contemplated by these amendments at this time.

Mr. HOWARD: Mr. Chairman, I would like to ask questions based on comments of Mr. Bruce and also those of Mr. Simpson with respect to the changes to section 32—those provisions which would allow companies to make agreements or combinations with respect to the defining of product standards, the exchange of statistics, and so on.

It would seem to me, if two or more companies desire to engage in, say, a price-fixing or price-enhancing arrangement, that it might be possible to engage in this sort of arrangement under these proposed provisions, specifically under the exchange of statistics part, by following the so-called price leadership approach which, as everyone agrees, is pretty difficult—

Mr. BRUCE: Firstly, your suggestion is that businessmen are going to be dishonest.

Mr. HOWARD: No, I did not complete what I had started to say.

Mr. BRUCE: Secondly, I have never heard that following a price was against the law of this country.

Mr. HOWARD: That is precisely what I am getting at—that under a price leadership approach, it is possible to affix enhanced prices, without fear of detection.

Mr. BRUCE: What do you mean by "without fear of detection"?

I resent the implication.

Mr. HOWARD: There is no implication; I am merely saying that this sort of thing could exist.

The question I am getting at is this: if this subsection 2 were to remain in here, and those sorts of arrangements could be entered into on these and other matters that are not set out in subsection 3, would it be agreeable for your organizations, and the companies that are represented therein, to file or table all such documents, agreements, memoranda, minutes of meetings, letters and so on, relating to these arrangements with, say the director of research and investigation, or some other body, for reviewing?

Mr. BRUCE: Do you mean to say, if we set up some organization to exchange statistics on the procedures of this organization?

Mr. HOWARD: Supposing your association—

Mr. BRUCE: Supposing we use the industry—supposing we use CEMA; it exchanges some statistics now, on a confidential basis?

Mr. HOWARD: Supposing that through CEMA, either through some of its member companies, or all of them, depending on what field they want to engage in, there was an agreement or arrangement entered into that related the defining of product standards and a definition of trade terms, just for argument's sake then, would you be agreeable that such agreements or arrange-

ments with respect to this or any other matters, for that matter, should be tabled or filed with the director of research and investigation, for examination—or some other public body, to review the effect of this possible agreement?

Mr. BRUCE: Mr. Simpson will answer your question.

Mr. SIMPSON: This would be completely unnecessary.

There is no meeting of any subsection of the association held on which one of my staff does not sit.

These minutes are not for general circulation, or made public; but a copy comes across my desk, which is examined meticulously and, if there is any doubt, which there has not been at all, I would immediately refer it to our solicitor to see that the activity was legal. But, we must, in the innterests of the public, sit down on standardizations and statistics, and pool research.

This is another thing which I did not mention before. No companies in Canada are heeled with sufficient dough—the millions of dollars necessary—for the necessary research on this. It could be done if they could pool this sort of engineering approach to things but, so far as statistics and standardization go, we do collect statistics. They are sent in to me under the heading "confidential"; I add them up, and, say, total sales were so much—

Mr. HUME: You have not answered his question.

Would you have any objection to making an extra copy of these, and sending them down to Ottawa; that is the substance of your question?

Mr. SIMPSON: In the first place, I would object, because these meetings that I am talking about are some 200 or 300 per year. Our committee rooms are always busy. In fact, sometimes I have to get out of my own office to make a third one for them. And I am sure Mr. MacDonald would not be very pleased if every second day there landed on his desk a copy of the minutes of CEMA, most of which he would not be interested in at all. I think it is something that is just out of the question.

Mr. HOWARD: I took it that the answer was no, in any event.

Mr. BALDWIN: Is that not covered by section 9? Section 9 of the existing act seems to make provision for the production—requiring the return of documents and a report in any such case.

Mr. HELLYER: Mr. Chairman, I have a few general questions, and one or two specific ones. But, as a matter of philosophy, starting out at the beginning of the brief, where at least it is raised, would it be fair to say, Mr. Bruce, that the CEMA believes in the private enterprise system?

Mr. BRUCE: Definitely.

Mr. HELLYER: Is it not true, then, that historically, at least, part and parcel of the private enterprise system has been price competition?

Mr. BRUCE: Yes, I agree.

Mr. HELLYER: You would agree with that?

Mr. BRUCE: Yes.

Mr. HELLYER: Then if the Canadian electrical manufacturers' association believes that some form of price standardization—if I may use that word—is necessary, would the Canadian electrical manufacturers' association agree to having their prices set by a public body?

Mr. BRUCE: Those are your words, not mine.

Mr. HELLYER: I am asking the question, Mr. Bruce.

Mr. BRUCE: Well, it is a leading question; and if I may just turn it around, I never said, and we do not maintain, that all agreements are necessarily related to price. Price is the end result of all competition. But what we are saying is, that even if there were a price agreement in a certain case, it ought to be examined as a fact, and not the mere fact of agreement be damning.

Mr. HELLYER: You are objecting to the fact that you do not have the power to set the prices at which your goods can be sold retail?

Mr. BRUCE: Yes, we take that position on resale price maintenance.

Mr. HELLYER: Is it not true that under the—

Mr. SIMPSON: Individually.

Mr. BRUCE: Individually, yes.

Mr. HELLYER: Individually?

Mr. BRUCE: Yes.

Mr. HELLYER: Is it not true that from the standard of philosophy, at least, you are either going to try and maintain an economy where prices obey the law of supply and demand, and fluctuate in the market, or you are going to have to obey the system where you have complete state regulation and prices are set by the state?

Mr. BRUCE: I do not agree with that.

Mr. HELLYER: Is this not a possibility?

Mr. BRUCE: I think there is perhaps too much philosophy being talked, and not enough practical business.

Mr. HELLYER: Frankly, I think it is a matter of principle, rather than practical monkey business, which sometimes—

Mr. BRUCE: Just a minute.

Mr. HELLYER: Mr. Chairman, I am going to ask a couple more questions. Can you tell us why, during the days when re-sale price maintenance was in effect, unbranded items of equal quality sold more cheaply than identical branded items?

Mr. BRUCE: I am not trying to duck your question, Mr. Hellyer, but I am not a commercial man. We have someone here who we consider an expert on re-sale price maintenance, and perhaps I could ask him to answer your question. His name is Mr. Fitzpatrick.

The CHAIRMAN: Mr. Fitzpatrick, would you answer that question?

Mr. F. L. FITZPATRICK (*Vice President and General Sales Manager of the Sunbeam Corporation, (Canada) Limited*): Would you ask the question again, please.

Mr. HELLYER: Yes. Can you tell us why, before re-sale price maintenance was eliminated, unbranded items of equal quality sold more cheaply than branded items?

Mr. FITZPATRICK: Did you say "before re-sale price maintenance was created"?

Mr. HELLYER: Yes, before re-sale price maintenance was eliminated, and that is the period I am more familiar with as a result of my experience.

Mr. FITZPATRICK: If I understand your question correctly you are discussing the atmosphere after re-sale price maintenance was discontinued.

Mr. HELLYER: No, I am discussing the situation before it was eliminated and when there was re-sale price maintenance.

Mr. FITZPATRICK: I would answer your question as carefully as I can by saying that quality appliances, as such, sold at higher prices than others whether they were branded or not.

Mr. HELLYER: I could mention a specific case, but I will not at this time. I have been in the retail business for 10 years and I know, for instance, that manufacturers would cut thousands of dresses from the same material, of the same quality and pattern and put their branded name on a certain proportion of them, and another name on the remainder. Those dresses that bore their brand

name would be disposed of largely by small retailers and would be subject to re-sale price maintenance. Let us assume that the manufacturer set the price in respect of those dresses at $19.95. The other dresses which were unbranded were sold by larger distributors under another brand name at a price of $17.95, or $16.95. The two products were identical. They were cut by the same knife, from the same material, and to the same pattern. This resulted in the large distributor selling the branded item having an advantage over the smaller retailer. In the event that a small retailer objected and cut his price to meet the price of the large retailer, he would lose his franchise. Can you tell me how, with re-sale price maintenance, a small retailer can be protected from that type of practice?

The CHAIRMAN: Gentlemen of the committee, I would think, in view of the fact that we are now dealing with electrical equipment, a question directed to this witness in respect of the ribbon business or the dress business is an unfair question.

Mr. HELLYER: I hesitated to use a specific example, Mr. Chairman, but I will now.

While in a Toronto department store I was looking at a television set, and the individual who was trying to sell me the set told me that the chassis and the entire set was identical to a certain branded product in all respects except for the cabinet and the name on it. The difference in price between this set, being offered, and the branded product, which was identical, was very substantial. Therefore I feel this situation is parallel to that situation in respect of other lines of products, and perhaps to even a greater extent, and being parallel I feel that the question should be answered.

Mr. SIMPSON: Through you Mr. Chairman, I would say to Mr. Hellyer that he is confounding an error himself by stating that he has accepted the cock and bull story that this television set was the same as that made by a reputable manufacturer and sold under another name for more money. I would ask you why you did not go to that manufacturer and ask him if the set was identical to another set sold under a different label. You are accepting second-hand information and repeating it in this room before 100 people, and I can assure you that your information is a complete fabrication.

Mr. HELLYER: I am pleased that you asked that question because, subsequently, I went to the factory and examined the television chassis coming off the production line and found that they were exactly the same.

Some Hon. MEMBER: How would you know that?

Mr. SIMPSON: Yes, how would you know that?

Mr. HELLYER: The sets were coming off the production line and going into separate boxes, and being handled on the basis of where they were destined to go.

Mr. SIMPSON: I happen to be an engineer and I would not know if the sets were the same.

Mr. PICKERSGILL: Mr. Chairman, I think the question that was put by the witness illustrates clearly some of the difficulties involved. I do not have the advantage of Mr. Hellyer, who is an engineer, an electrical engineer. I am just an ordinary consumer, and when you ask me, or when a manufacturer, or the representative of a manufacturer says, when I go into a shop, when I have every confidence—and there are some honest retailers, I might point out to the representatives of the manufacturers—and I am told that two things are identical, am I to be expected, as an ordinary member of the public, to write to the Canadian General Electric Company or to the Westinghouse Company and ask them whether it is true or not, before I make my purchase?

That is really a rather extraordinary proposition.

Mr. WOOLLIAMS: Mr. Chairman, that was not the point, at all.

Mr. BRUCE: I would like to take a crack at Mr. Hellyer, if I may. He is suggesting that resale price maintenance—and this is as I read the debate in the house; that was the suggestion that came from him—that resale price maintenance was for the benefit of the small dealer. But he is overlooking the fact that in the case of electrical and durable goods, whether they be small, or getting into the size of refrigerators—that these are products, for which, no matter how well they are made, there is going to be service required.

Therefore the only way a manufacturer can protect the small dealer is to have a measure of resale price maintenance, because the large dealer can always advertise and force the small dealer to sell at a lower price.

Mr. HELLYER: What you are saying is that only by enforcing your retail price can you require distribution in a certain amount, and also provide service. Is that correct?

Mr. BRUCE: Yes; we not only require it, we want it. Because, if a product fails, it is not the dealer whose reputation suffers; it is the manufacturer.

Mr. HELLYER: What you are arguing is that the purchaser has an individual choice between service competition and price competition.

Mr. BRUCE: This has been said a great deal, and it is a specious argument. No one buys a refrigerator without the thought of service. Ask any people who have dealt with the bankrupt discount houses in Toronto. We get many complaints.

Mr. HELLYER: On page 8 of your brief you give an example of a reduction in price of a floor polisher, and you say that ten years ago the average Canadian worker had to work about seven days to earn enough to buy a floor polisher. I wonder if the witness could tell us how much of that decrease took place since the resale price maintenance was abolished?

Mr. BRUCE: I think it all has taken place since then, since ten years ago; practically, we are speaking of 1952. I think it all has taken place since then, but a lot has happened; manufacturers have not been sitting still; they have been involved in learning to make things cheaper.

Mr. BENIDICKSON: Would it be true to say, however, that the mark-up at retail of electrical appliances, including floor polishers, has been considerably reduced from what it was before 1952?

Mr. HUME: I would point out that this is the suggested retail price and not necessarily the selling price. This suggested retail price competes with somebody else who may have reduced the price of floor polishers.

Mr. BENIDICKSON: But is it not a fact that the percentage mark-up also has been reduced as well as the manufacturer's suggested retail price?

Mr. FITZPATRICK: Generally speaking, there has been a slight reduction in trade discounts. I am speaking generally of the traffic appliance industry.

Mr. BENIDICKSON: There has been a reduction in the trade discount?

Mr. FITZPATRICK: A very slight reduction.

Mr. BENIDICKSON: When I think in terms of discount, it means there is a standard price and then you discount for volume. I am not speaking the same language as you.

Mr. FITZPATRICK: No. I am not speaking of volume, I am speaking of the basic structure of a price sheet.

Mr. CARON: Is there a difference in price for those who buy in a small quantity and those who buy in a large quantity?

Mr. FITZPATRICK: This may or may not depend on the manufacturer. So far as Sunbeam is concerned, we have one price out of the house, whether the chosen wholesale distributor buys one or five thousand.

Mr. BENIDICKSON: Is that typical of the industry?

Mr. FITZPATRICK: There are many segments of the industry of appliances. We are on a particular plateau. We do have competition on that plateau. There are many different qualities of appliances.

Mr. BENIDICKSON: It is a good product, we all know; but you are a member of this association which is presenting the brief. Do you not have knowledge of their trade practices when you speak before this committee?

Mr. FITZPATRICK: This is one of my major functions as an officer of the Sunbeam corporation; that is to be aware of the trade practices of our competitors.

Mr. BENIDICKSON: Do the others not provide to a wholesaler, who is a big buyer, prices different than for one who buys one article from the manufacturer.

Mr. FITZPATRICK: I can think of some who do.

Mr. MORTON: Mr. Chairman, as it is now nearly 11 o'clock I move we adjourn until 2 o'clock and reconvene to hear the witness.

Mr. CARON: I object. We have some other meetings and it is practically impossible for us to be here at 2 o'clock. On the notice the time was given as 3 o'clock and we should stick to it.

Mr. BENIDICKSON: The notice which we received through the post office said 3 o'clock.

The CHAIRMAN: That is another meeting. The motion is that we adjourn now until 2 o'clock at which time we will continue to hear these witnesses, and then go on at 3 o'clock to hear the witnesses who had an appointment for that hour.

Mr. BENIDICKSON: The notice said we had four delegations to be received today and that we would meet at 9:30 and at 3 o'clock. I think we should stick to the formal announcement.

Mr. MORTON: It said that at 3 o'clock we would have the Canadian chamber of commerce and at 9:30 the four which we have now.

Mr. WOOLLIAMS: I will second the motion.

The CHAIRMAN: All those in favour of the motion?

Contrary?

I declare the motion carried.

We will adjourn until 2 o'clock.

AFTERNOON SESSION

The CHAIRMAN: Gentlemen, we have a quorum.

Mr. MARTIN (*Essex East*): Mr. Chairman, could we fix now the hour of closing, because we have a very important matter in the House. We have to have some idea. I suggest to you it is fantastic for us to meet at this time. Some of us have not even had lunch yet.

The CHAIRMAN: The Chamber of Commerce is coming at 3 o'clock, by appointment, and the suggestion is that we will hear them—

Mr. MARTIN (*Essex East*): An appointment made by the chairman of this committee.

The CHAIRMAN: Correct.

Mr. BELL (*Saint John-Albert*): Is this going on the record? Are we in committee?

Mr. MARTIN (*Essex East*): Certainly.

The CHAIRMAN: Then we will adjourn the group that are here until, I suggest 8 o'clock tonight.

Mr. MARTIN (*Essex East*): We cannot sit tonight; it is fantastic.

The CHAIRMAN: Well, they are here.

Mr. MARTIN (*Essex East*): But you brought them here; and we did not.

Mr. MORTON: Let us just get the record straight. On Thursday these groups were mentioned as coming here, and it was decided then by the committee that we should hear them. Let us at least be fair about it.

Mr. HOWARD: It was not decided by the Committee, and it was not at the meeting on Thursday.

Mr. DRYSDALE: They are capable of objecting any time, Mr. Chairman.

Mr. MARTIN (*Essex East*): Yes, and we are objecting now.

Mr. MCILRAITH: That is the part of the record which was not recorded, because the reporter was dismissed improperly when the proceedings were not finished.

Mr. MORTON: Mr. Chairman—

Mr. MCILRAITH: I want to be heard. That point was dealt with, and in some heated discussion which followed the chairman of the committee disclosed, for the first time, these four were coming. After that disclosure, and in the heat of a lot of argument, then and up to the point just before the close of Thursday's meeting, the committee decided to let them go ahead. The chairman said he simply could not notify them at this late stage not to come.

Mr. CRESTOHL: It was also pointed out then that it was doubtful we would have time to hear all these gentlemen.

Mr. WOOLLIAMS: Mr. Chairman, every time we have committee meetings we seem to spend so much time arguing back and forward. Let us make motions and decisions, and then get on with the job. At this rate we will not be home until Christmas. They have complained about this and about that. If we get on with the job, we will get the job done.

Mr. MCILRAITH: Could we agree to have motions for hours of sittings of the committee, properly put to the committee, and not at one minute to eleven, when members who have business in the House of Commons are trying to get in there to attend to their proper duties?

Mr. MARTIN: (*Essex East*): I suggest we adjourn at 4 o'clock; and we cannot possibly discharge our other responsibilities and sit here all the time.

Mr. BELL (*Saint John-Albert*): I move we go ahead, in the way it was planned earlier, and when four o'clock comes we could see the progress we have made and make a decision of the entire commttee.

Mr. WOOLLIAMS: I second that motion.

The CHAIRMAN: All those in favour?

Mr MARTIN (*Essex East*): There is no sense in putting the motion.

Mr BELL (*Saint John-Albert*): You put the motion.

Mr. MARTIN (*Essex East*): Everything is railroaded, of course. The opposition has no rights in this committee; it is terrible.

The CHAIRMAN: I believe the last question was from Mr Hellyer, and Mr. Morton indicated that he wished to direct certain questions.

Mr. MORTON: Mr. Chairman, there are two questions I would like to ask. The first one is: one of the main criticisms of the amendment has been that the amendments will so weaken the act that, in effect, the practice of resale maintance will be reintroduced. I was wondering if Mr. Simpson would like to comment on that. I think in his brief he is pretty definite it will not.

Mr. SIMPSON: We have stated in our brief it would not, but, as I am not expert in that particular field, I would ask Mr. Fitzpatrick if he would like to comment.

Mr. FITZPATRICK: From my experience, I doubt very much if there is any possibility of using this current bill, if it became law, to reinforce price maintance, in any sense of the word.

Mr. MARTIN (*Essex East*): Why do you say that?

Mr. FITZPATRICK: Basically, because it still remains completely illegal, as best we can interpret the law as it stands and as it might be changed.

Mr. MORTON: The other question brings up the matter where the act now gives the alternative of going to the Exchequer Court for dealing with certain aspects of the combines legislation. I was wondering, Mr. Simpson, if perhaps Mr. Bruce would be the one to answer that question if he felt—in this indication, of bringing some of these matters to the Exchequer Court rather than to the Supreme Court, that usually deals with criminal matters—would we not get, in the long run, a very stable jurisprudence, if we furthered that trend and had the combines legislation dealt with by a branch of the Exchequer Court?

Mr. BRUCE: I would think that would be a likely possibility. I still would not like to force people to come here unless the rules of the Exchequer Court met the convenience of the accused person, to the degree that the provincial courts do. There is also the problem that in the provincial courts appeals can be on questions of fact, whereas an appeal from the Exchequer Court to the Supreme Court of Canada, basically, is an appeal on a question of law, which may be another problem.

Mr. MORTON: I was thinking more in terms, perhaps, of a special section of the Exchequer Court dealing with the businessman's problems this way; and, perhaps, you would get more expeditious hearing of some of these problems, and you would have judges who, in time, would become more competent to deal with such things, as to the effect they would have on the public good, and that sort of thing. Whereas now you could hardly expect our judges, who are busy on so many matters, to become proficient on the effects of economic problems.

Mr. BRUCE: Certainly, speaking as a lawyer, I think that would be very desirable.

Mr. BALDWIN: I have a supplementary point. The suggestion was made there was a distinction between an appeal from the Exchequer Court and an appeal from the superior court of a province. But in section 19, which purports to aid section 41 (*a*) (3) it says:

> —the judgment of the Exchequer Court in any prosecution of proceedings under part V of this act shall be deemed to be the judgment of a court of appeal and an appeal therefrom lies to the Supreme Court of Canada—

That would put it in the same position, would it not?

Mr. BRUCE: But we are faced with the question of leave to appeal.

Mr. HUME: If you have proceedings heard in the Supreme Court of a province you have the opportunity of going from there to the court of appeal of that province; and from there to the Supreme Court of Canada. Whereas, with this amendment, you start off in the court of appeal. Actually, this in itself is not objectionable, but there is that distinction which Mr. Bruce makes, that you are sort of starting off in the court of appeal, your next step being the Supreme Court of Canada.

Mr. BALDWIN: Apart from that, in all other respects, he will receive the same treatment in the Supreme Court of Canada, if it was an Exchequer Court judgment, as you have from your appeal court in a province.

Mr. CRESTOHL: That is on a question of mixed law and fact, and a question of law; and on that you have to get leave.

Mr. MCILRAITH: I want to ask Mr. Simpson some questions. He made reference this morning to suggested prices. Could he tell the committee, from his experience, to what extent suggested prices paid on articles are, in fact, maintained by retailers, carried out by them?

Mr. SIMPSON: You are referring now to section 34, I presume?

Mr. MCILRAITH: Yes.

Mr. SIMPSON: I do not think there was ever actually a time when a manufacturer, even through a subsidiary, had the right to state the prices at which his goods would be sold retail—actually, where he did enforce prices. I say that because he always had to take care of his dealers' reputation through advertising allowances, and what have you. While he has named a price, as you know, in business today many small dealers get into difficulties, and if the bank came half way through the month and said, "Your overdraft is too large and you will have to cut it down by the end of the month," there was only one way to do it, and that was to sell goods at a price at which the public would buy. I do not think, in those circumstances, a manufacturer would cut his dealer off. He recognizes this is a business problem, and is something that has to be done.

Mr. MCILRAITH: That is not quite my point. However, let me clear up a preliminary matter. You were speaking about manufacturers, and that is a pretty wide term.

Did you intend to cover all manufacturers, or just manufacturers in the electrical end of it?

Mr. SIMPSON: Well, I think we are only authorized to speak for electrical manufacturers, as far as this association is concerned. However, this legislation obviously has regard for all manufacturers. As a matter of fact, although we are the most outstanding industry, because the public has greater knowledge of our appliances, there are other things than the electrical industry that would be affected.

Mr. MCILRAITH: I wanted to clear that up because, earlier this morning, objection was taken to a question being put to you, on the grounds you could only speak for the electrical manufacturers and not for the dress manufacturers. Your answer seems to embrace all manufacturers and, with deference, I am wondering what your knowledge concerning other manufacturers is.

Mr. SIMPSON: I think the same applies to this as any other legislation and/or government legislation which is brought down. It applies to "Canadian" as a whole, and business as a whole; and must govern all Canadian business.

We are speaking only for the industry of which we have knowledge, but this must apply to all other manufacturers.

Mr. MCILRAITH: That is correct.

Mr. SIMPSON: It is general legislation.

Mr. MCILRAITH: The point I would like to get clarified is this. The term "suggested prices" is not made an offence under 34.

Mr. SIMPSON: That is so.

Mr. MCILRAITH: And we have other references, at an earlier sitting, where reference was made to suggested prices. I wonder what, in your experience in the manufacturing industry, had been the extent to which retailers would tend to follow suggested prices.

Do they tend to follow it, or do they tend to disregard it?

Mr. HUME: Mr. Samis can answer that question for you.

Mr. SAMIS: Mr. Chairman, assuming that we are going beyond the field of appliances to all electrical goods that are sold through middlemen, I think I can say, with a fair degree of assurance, that at the present time between 60 per cent and 75 per cent of the electrical manufactured goods in Canada are being sold at prices that are suggested by the manufacturers.

Mr. HELLYER: Could we have the comparable figures before the resale price maintenance ban came into effect.

Mr. SAMIS: No, I could not.

Mr. MCILRAITH: You said that 60 or 70 per cent of the goods are sold at suggested prices; what percentage comes from the manufacturers with suggested prices attached?

Mr. SAMIS: Virtually, all of them.

Mr. MCILRAITH: Thank you.

Now, if I might turn to another point, I would like to come back to page 6 of the bill, and deal with the bottom part of the page where the six enumerated classes of combinations are listed as exceptions.

Dealing with that point, you made your position quite clear as to the general subject matter. However, there is something bothering me, and I want a little more clarification, if I can get it, concerning this.

In regard to these enumerated items, from A to G in subclause 2 of section 32, how is that going to work out, in practice, for the commercial man in your industry?

Do you think that section, in its present form, will meet the practical situation confronting the industry generally, in coming together in any one of the enumerated purposes?

Mr. SIMPSON: My opinion of that, Mr. McIlraith, is that it will be of material help. It is necessary that we collaborate in certain things, and this is for the good of the public. This is in the realm of safety, in engineering products, standardization, and what have you. This is similar to any other government legislation or customs arrangement—or whatever you might have—and a great deal depends on its administration. If it is administered in the manner in which we hope it would be, we would have considerable latitude in the exchange of statistics which are necessary, and in the production of standards and in pool research as a matter of economy—and I am talking about economy to the public and its welfare, and not to the industry.

I think this would be of material help. However, it is like many other regulations and legislation; it depends on the administration of it. If it is administered in the way we hope it is, and if the words mean what they say, this would be of material help to us.

Mr. MCILRAITH: I want to narrow my question a bit. Assuming, for our purposes at the moment, that A to G are beneficial to the public—and we are not questioning whether they are beneficial or not beneficial—but, assuming they are, I am concerned with the somewhat narrower question, which is this: for instance, a great many of the electrical manufacturers are subsidiary companies. Now, when you start pooling your resources for research, how practical is that? Have you not another related problem in there with parent companies?

Mr. SIMPSON: Let me say this: there are many of them which are subsidiaries of other companies. However, contrary to public belief, their policy is not dictated by these parent companies. They act as Canadian companies in themselves. They have tremendous capital investment here; they employ a tremendous number of people, and they buy a great deal of goods here, and pay enormous wages. There would be much more research done on their own hook here, in spite of the fact, as you say, they can call on their parent companies. Anything over the present situation would be an advantage because, at the present time, sufficient funds in Canada for industrial research—and it costs

many millions of dollars for proper research—are not available. This is a means which would very well start it off because, if I remember correctly, not only our present government, but the previous one also, made continuous statements to the effect that there was insufficient research going on in Canada.

Mr. McILRAITH: There was a tax benefit conferred for that purpose in the tax legislation a few years ago.

Mr. SIMPSON: It is my opinion this would be an improvement.

Mr. McILRAITH: I want to pursue this a bit further. There was some questioning of you this morning on the question of disclosing minutes of meetings, and so on; I am concerned with the practicality of this subclause in this way—and this morning you spoke about the fear of industry in getting together, and gave some rather picturesque examples which may or may not be good examples.

Mr. SIMPSON: Well, they were true examples anyway.

Mr. McILRAITH: And it was clear what you were trying to get at; you were trying to show the dangers of people in the industry—the fact that they may be suspected of being in an illegal combine. Assuming they are getting together for one of the purposes enumerated in this subclause, are you not still going to be hampered a bit by that reservation in their minds that they may be extending—that they may be thought to be extending beyond this legal aspect of the combines into another field?

Mr. SIMPSON: No, Mr. McIlraith, for this reason: because of this atmosphere, some of them—not all—have not wished to participate.

Do not forget that I made the statement our own legal counsel had ruled these activities to be perfectly legal, and we believe they are.

I have something like 40 subcommittees—not technical committees—attached to the various divisions and sections within this association. There would be one for transformer manufacturers, one for refrigerators, one for switch gear, one for panel boards, and what have you.

These meetings number some—speaking approximately—300 a year. There are voluminous minutes taken at all of them. We have an association representative sitting in them to ensure the fact that they are in order. They are tabled there at the office.

The director of combines has the power to go in and investigate them any time he wants to, and in one case they went through everything. I do not see any chance whatsoever of anything going wrong, for the simple reason that they do not want to do it themselves. They never have. It would not be allowed, anyway. It would be an impossible task—we are only one industry—for the director of combines to have the minutes of these meetings thrust down his throat. He would get about three every day from us alone.

Mr. McILRAITH: I want to make it clear. I perhaps was not sufficiently clear in putting my question. I do not fall in with this suggestion at all, that you disclose these minutes, and I was trying to draw that distinction in framing my question. I am opposed to that.

Mr. SIMPSON: I am sorry; I misunderstood.

Mr. McILRAITH: What I am concerned with is this: now you have the director come in if, for some reason, he thinks he should go in, at his own volition or at the request of other people. I have made the suggestion that the actual agreements under this subclause should be registered, or drawn to his attention at the start—not the minutes of the meeting; but the actual agreement—so he would have knowledge of what was going on, knowledge that there was such an organization in existence.

Had you thought about that particular point at all?

Mr. SIMPSON: Yes, we had given some thought to it; but again I say that it is one of those things which is unnecessary. What possible interest, for example, could the government, or the director of combines, or what have you, have in the fact that, let us say, the line materials section decided that because of assistance to distributors, and merchandising, they had a standard packaging procedure? It would have nothing to do with prices; it is a convenience for packaging, and so on—and that is all.

Mr. MCILRAITH: But their interest would lie in another field: it would lie in the fact that Westinghouse, General Electric and Sunbeam had decided to combine together for the purpose of—

Mr. SIMPSON: Standardization.

Mr. MCILRAITH: Standardization.

Mr. SIMPSON: The defining of product standards.

Mr. MCILRAITH: Yes, they would be interested in that fact. I think that is very much the concern of the government. Remember that the legislation now in existence starts from the premise that combines are illegal. Having now made an exception in certain combines, I thought it was very much in the interest of the department administering the act that they know that you are going to combine for a specific purpose.

Mr. HUME: Excuse me, Mr. Chairman, if I may just say a word. Surely, Mr. McIlraith's statement that combines are illegal is not so. Only certain combines are illegal. They can, I submit, agree now to produce a product standard that is not in any sense illegal, and that is going on today.

Mr. MCILRAITH: Perhaps I used the word "illegal" improperly, that combines are illegal.

Mr. HUME: Some combines are illegal.

Mr. MCIRAITH: Many combines are illegal, and there is this very wide concept of combines by companies, for certain purposes, being illegal. It is something that is of real concern to the commercial world. It requires real attention. I was trying to get started from that base. These are exceptions, enumerated in the act for the first time—some of them probably unnecessarily enumerated, it is true; but, none the less, enumerated.

Having been enumerated in the act, did not you back into another difficulty—these companies—of creating more of an atmosphere of suspicion?

Mr. HUME: It may be some assurance to a timid member to read in subsection (*b*) that he may with impunity combine to produce a standard, whereas before he may have had some doubt. His solicitor, also being somewhat timid, may have said, "I think what you are going to do is all right; but you had better not do it anyway". Surely there is now created a definition which will strengthen the timid member, who might say, "Now I may do these things without any fear".

Mr. MCILRAITH: That answers my point. I questioned the necessity of many of the reasons for this enumeration. But I also see, with deference, that it is causing another difficulty and you may be back in that other difficulty later.

I want to turn, then, to another point. You made it pretty clear in your reference to the customs section that you thought it had gone a bit too far, in that it no longer is a matter of a conviction by the court, a finding by the court, and tariff action in the future; and then you went on in certain of the other sections dealing with the prohibitions.

You went on, also to make a reference to the fact of the mergers—peremptory action being taken after prosecution, and so on. What I am coming to now is, bearing in mind your views on these subjects and your attitude towards what the procedure should be in the courts, so there would be definite findings

of fact when we come to the application of section 34 of the existing legislation and the amendment in this bill—

Mr. MARTIN (*Essex East*): What is it in the old section?

Mr. MCILRAITH: Section 34, page 8 in the bill. Under section 34 certain practices are prohibited by statute. On that point you made your position clear, about that section as it presently exists in the existing legislation. I think you made it quite clear that you did not like it, but it is there.

Coming to the amending bill, you made some reference to loss-leaders. In the present bill there is not in so many words, anywhere, a prohibition against loss-leaders, as such. I think I am right in that. There is no prohibition against loss-leaders, as such, anywhere in the bill. But you seem to draw, then, from something else that I could not follow, and you thought that is the situation with respect to loss-leaders. I want to ask you: how does this bill before us better the situation of the industry, in so far as it pertains to loss-leaders, bearing in mind your views on loss-leaders?

Mr. HUME: That is a leading question.

Mr. MCILRAITH: Yes, it is a leading question.

Mr. SIMPSON: Let us have it from the man who knows. Mr. Fitzpatrick is in business commercially and he has to deal with this in the public market. Therefore, he must have some opinion on it.

Mr. MCILRAITH: It is relating the bill to the subject, that I am concerned with—not loss-leaders.

Mr. FITZPATRICK: The legal aspect of it?

Mr. SIMPSON: If it is the legal aspect of it, Mr. Bruce will speak to that.

Mr. BRUCE: May I just take one example. I pick (*b*) at the top of page 9:

(*b*) that the other person—

These are reasons for—

Mr. BALDWIN: Not drawing an unfavourable inference?

Mr. BRUCE: Not drawing an unfavourable inference:

(*b*) that the other person was making a practice of using articles supplied by the person charged not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles;

It may be that under the existing law a manufacturer can take action against the dealer who is doing just this. This we regard as a very unfair selling practice. You have to remember that electrical appliances are not, generally, in this country sold by electrical appliance stores. They are sold in stores that carry a great many appliances, and in many cases they are sold along with furniture. The situation that arises is that a dealer who is concerned with his overall profit would take some small appliance, and the General Electric kettle is a good example of this, and one which I would say has been completely ruined as a result of being used as a loss-leader, and he would sell it at a price, which, if he were making his living out of selling appliances exclusively, would put him out of business. This dealer will make his profit on furniture which he is selling at a 70, 80 or 90 per cent markup. This is the kind of thing that makes it crystal clear that we should be able to say to that dealer; "if you do not treat our products fairly we do not have to sell them to you".

Mr. MCILRAITH: I would like to just pursue this subject a little bit further.

This section does not set that out specifically.

Mr. BRUCE: I would say it is fairly specifically set out.

Mr. MCILRAITH: The section rather comes at it indirectly, as I read it. I am speaking of clause 14 at the bottom of page 8.

What I am suggesting is that all you must do now is believe that the person on whose report you are depending had reasonable cause to believe that this thing you have described in paragraph (*b*) was being done before you cut them off.

Mr. BRUCE: I might just—

Mr. HUME: Let Mr. McIlraith finish his question.

Mr. MCILRAITH: I would just like to finish.

Mr. BRUCE: I am sorry, Mr. McIlraith, I thought you were finished.

Mr. MCILRAITH: I just wanted to clarify this point. What I am getting at is that in this paragraph it is not stated that the court must find that this retailer, and let us call him that, was doing this thing that you regard as being an unfair practice as described in pargraph (*b*). That finding of fact is not necessary at all. This paragraph merely means that you, as a manufacturer—

Mr. BRUCE: Has reasonable cause to believe.

Mr. MCILRAITH: It means that you as a manufacturer and the other retailer, who had an axe to grind or who wanted to put this man out of business, or for some other reason, had reasonable cause to believe that this was happening. There is no need for an investigation of the fact at all. This is the point I am trying to get at.

Mr. BRUCE: I do understand what you mean.

Mr. MCILRAITH: You follow me to that point. Now I want to ask you about another point.

In the other case you seem to want, and I think quite properly, the courts to be the body who determines these questions of fact. You seem to be operating on another principle. You seem to want to make the neighbourhood retailer—you could use a lot of terms—the informer or the policeman and court. In other words, you are putting yourselves and the retailers, on whom you rely, and presumably who would be reputable retailers, in the position of being the court in this matter. Why do you prefer that decision as opposed to having the courts deal with this?

Mr. BRUCE: I think you have to remember first that when a market decision has to be made, you cannot have a sort of a royal commission type of inquiry as to whether the decision he is going to make at this moment, which is usually in a flash of time, is a right one.

I think in these circumstances he sees the dealer who he thinks is misrepresenting his products, or not doing a selling job.

Mr. MCILRAITH: Assuming he is direct contravention at one of these subparagraphs?

Mr. BRUCE: Yes. He makes up his mind on presumably the facts which he can gather. They may not be facts which would be acceptable as evidence in court.

Mr. MCILRAITH: And he cuts off the supply?

Mr. BRUCE: Let us talk about this cutting off of the supply. The impression that Mr. Hellyer made this morning, and the impression you are attempting to make now is this; the manufacturer sits around trying to think of ways and means of cutting off his sources of selling. This is not the case.

Mr. MCILRAITH: I am not guilty of thinking any such thing.

Mr. BRUCE: A manufacturer is interested in having selling outlets which would promote his products.

Mr. McILRAITH: The point I want to get clear is this: you have spoken about manufacturers having to come to this business decision quickly, and that is quite an important point. Now, why do you want this poor devil of a retailer to have the same right of going to the courts and having the court make the decision?

Mr. BRUCE: He has the right to go to the courts.

Mr. McILRAITH: No, he has not—not until someone lays a charge against him for cutting the retailer off.

Mr. BRUCE: The retailer can lay such a charge, and this has been done.

Mr. McILRAITH: No, the dealer cannot in some provinces without undertaking to pay all the costs.

Mr. HUME: Mr. McIlraith, I wonder, so I can understand your question, if you are not starting off on the premise, as I read this section and I know you will correct me if I am wrong, that all an accused person has to do is satisfy the court that he acted reasonably and therefore it is not just the reasonableness of what the informer does. The court must be satisfied that he acted reasonably. In other words you are taking a reasonable man who is, on the basis of our law, a reasonable person. It is surely true that if you satisfy the court that the man acted reasonably, the court must assume that you are a reasonable man and that some capricious man would not so satisfy the court.

Mr. McILRAITH: That is not quite my position. I do not think the legislation takes quite that position, as I read it. The legislation approaches the subject, in my view, in an indirect and confusing way. If I may use the word "devious" in its proper context, not meaning anything offensive by it at all, I should say that the legislation approaches this problem in a devious way, and not in a way which one would like to see the problem approached.

Mr. SIMPSON: A direct way, Mr. McIlraith, would be as we have suggested, by repealing this section, because the market place will take care of the problem and overcome it by competition and by importation.

Mr. McILRAITH: You have made your point on that subject very clear and I follow your reasoning in that regard. Having made that point very clear, Mr. Simpson, I regard it as inconsistent with the fact that you are as favourable as you are to this section.

Mr. SIMPSON: We say this, Mr. McIlraith, because a half a loaf is better than no bread at all. Anything is an improvement over what we have now. This poor retailer that you are talking about is still able to apply to the director of combines saying that he has been unfairly treated, and asking them to have a look at the situation.

Mr. McILRAITH: I would like to clear up that point. Where and how does he have the right to involve the director of combines in respect of a simple sale like we have been discussing, where there is no question of combine?

Mr. SIMPSON: Is the director of combines not responsible for the administration of this act, and the restrictive trade practices commission?

Mr. McILRAITH: Yes, but he cannot hire counsel now. Did you notice that change in the bill?

Mr. SIMPSON: He does not need one.

Mr. HUME: I do not subscribe to that view.

Mr. BRUCE: Mr. McIlraith, there is one other point I would like to mention. We have taken and do take the same position as the retail merchants association in regard to this question of re-sale price maintenance. But let us not kid ourselves; this is much more a problem of the small businessman than it is the manufacturer.

Mr. McILRAITH: That is my point precisely.

Mr. BRUCE: It is important to the manufacturer who insists on proper practice, but it is of much more importance to the small businessman. If you do not have this, then you are going to have more and more large concentration.

Mr. MCILRAITH: I would like to ask Mr. Bruce a question. You are working all the time with this kind of law. I find it very complicated and difficult. I do not hesitate to make that confession at all. Why do you not want this subject approached directly and dealt with directly? Why do you want this most confusing piece of legislation?

Mr. BRUCE: I think we have made it quite clear that we would be happy to see section 34 repealed. This at least makes it clear that there are some practices on which you can move with a reasonable chance of not breaking the law.

Mr. MCILRAITH: These practices which are enumerated and which the manufacturers find offensive practices, if I can call them that, you do not wish to deal with directly, making them clearly offensive practices and treated as such. Why do you take that position?

Mr. BRUCE: As a matter of fact I thought that did not go through, but Mr. Hume has suggested that it did.

Mr. HUME: This is the bill, sir, and we are just trying to be as helpful and constructive as we can in respect of it. It may be that one or other of us have worded it in a different way, but we are trying to deal with the bill which is before this committee.

Mr. MCILRAITH: That is what I wanted to have you address yourself to.

Mr. BRUCE: This should never have been brought in in the first place.

Mr. BALDWIN: I would like to ask a supplementary question on that point. Is it not a fact that you do believe that it is the supplier who takes the responsibility for cutting off the supplies and who must be prepared to go into court and establish that he had reasonable grounds for doing so, and who is faced with possible prosecution instigated by the retailer?

Mr. HUME: That is my interpretation of the section.

Mr. BRUCE: That is what we have to do now, and we are doing it now.

The CHAIRMAN: There are a lot of people lined up to ask questions, and you are asking a great many, Mr. McIlraith.

Mr. MCILRAITH: I would like to clear up one more point. Now, will you please address yourself to clause 17-4 of the bill, where it appears that the crown may institute proceedings either by way of information or by way of prosecution. I take it that the information is concerned with the injunction proceedings or the prohibitory proceedings. But what we are concerned with in there is your substituting a civil remedy in place of a criminal remedy at the discretion of the attorney general in certain cases. I took it that the legislation was clear that the prohibitory or mondatory provisions were supplementary to the criminal proceedings. That is set out, I think, in one of the judgments of Chief Justice McRuer, that the basis was criminal, that the act preserved the criminal aspect, and that any prohibitory orders were merely supplementary or additional thereto.

This, in my view, raises the question of whether or not civil proceedings may be substituted for criminal proceedings. Have you had occasion specifically to address yourself to that point or to that problem?

Mr. BRUCE: No, we have not.

Mr. HUME: I think that you will find the brief is silent on that point. The point you raised has been considered, but there was nobody on the committee who wanted to express an opinion, so we have no opinion on that score.

Mr. BRUCE: There has been some attempt to create a civil type of thing, but it is not very effective in Canada yet because of the constitutional aspects.

Mr. MCILRAITH: That is my point. There is a long, involved argument having to do with the constitution, and I shall not develop it fully.

Mr. HUME: We considered that point, but we have nothing to say about it at the moment.

The CHAIRMAN: Now, Mr. Crestohl.

Mr. CRESTOHL: I have two points, one arising out of Mr. Simpson's remarks. and the other arising out of Mr. Bruce's remarks.

I am looking at clause 32, subclause 2, and paragraphs A, B, C, D and so on.

I understand that your organization would favour the facility of being able to convene in order to discuss such matters as statistics and so on; and if I understood you correctly, you pointed out that this was a great economy to the members of this organization.

Mr. SIMPSON: To the public, I said.

Mr. CRESTOHL: Yes; it would have to be an economy to your organization, and through them in turn it could be an economy to the public.

What has been your experience over the past 20 pears as to the economy that was available from having the benefit of this consultation with one, two or five—I am not speaking in terms of a combine, but in respect to some business. Have you had advantages from such consultation in the past?

Mr. SIMPSON: When you say "we", I think there have been many, and I can think of one as an illustration. The Canadian Electrical Association, which is the utility association, both public as well as private utility, in servicing their apparatus, such as transmission lines and so on, used to have to keep a very large store of different types of installation material, bushings, and insulators, along their lines.

But through their representations—and as a matter of fact through a joint committee of themselves with our own—they have now standardized to certain sizes of insulators which will service them all, with the result that they now have smaller inventories. The inventories have been reduced. They now carry a relatively smaller number of these things to service their stations along the line. This is one type of thing we have experienced.

Mr. CRESTOHL: We can see there is a clear economy brought about through a smaller investment and smaller inventories, and that money would be saved through that operation. But I wonder if you could tell the committee how the savings were passed on to the buying public. The buying public is what we are concerned with most.

Mr. SIMPSON: If I were the Wizard of Oz I could answer your question, but I am not.

Mr. MARTIN (*Essex East*): The Minister of Finance is.

Mr. SIMPSON: We have the situation where several manufacturers at the request of the utilities have standardized their bushings to one form. I have no knowledge, and I never want to have a knowledge, of the commercial policies of many of my members. I have never tried to get information to those people that they should get together to standardize their bushings. They did this at the request of the utilities; but I would have no knowledge of the price that they sold them at, unless it were a published list price.

Mr. HELLYER: Is that a statement or an opinion, that you would have no knowledge of the price?

Mr. SIMPSON: I mean that we would have no knowledge through those meetings on standardization, and I would have no knowledge unless it was contained in a published price list. I would not know. I presume when anything is

standardized that this is a plain fact over a period of years, that it would be reduced, but I could not say how much that it was reduced.

Mr. CRESTOHL: It is very important. From the information we have elicited in this committee, these economies are practised; but do you know of any instance where there was a reduction in the price to the public, or which in fact reached the public?

Mr. SIMPSON: No, I must say that I do not. But I can go further and say that it is strictly against the rules of this organization that any price discussion take place at any meetings. That is why we have somebody at the meetings.

Mr. HUME: I think Mr. Edmonson might be helpful.

Mr. CRESTOHL: I am not saying that if there was any agreement. I am speaking only of any resulting economy that was available to the manufacturers resulting from this cooperation, and which you might have passed on to the public.

Mr. HUME: I think Mr. Edmonson has indicated that he has some information. He is president of the Ferranti-Packard Electric Company, and he can give some information.

Mr. T. EDMONSON (*President, Ferranti-Packard Electric Company*): First of all I would like to say that I happen to be a member of the C.E.A. executive committee, and that I met with them yesterday in Montreal. In our discussion—that was with the Canadian Electrical Association, which is the utility industry of Canada, but manufacturers are members also—and during our meeting yesterday we decided—and this came from the utilities—to ask the CEMA., if they had considered a further study of standardization of service voltages—that is the voltages which you use in your homes—, and if it were decided to bring them up; because they believe it will ultimately reduce the price of domestic production and save money to the consumer in respect to television and other sales.

And now, to answer your last question, we are in industry which is about the most competitive of any industry in the country, and we have standardized at the request of the utilities. Yet our price levels today are at about 1949, whereas we are paying the labour rates of 1960, and the material costs of 1960. The difference has gone ultimately to the consumer.

I think this is to be borne out by the fact that our profits on electrical manufacturings, as we have stated here—that is, our average manufacturer's profit—is the lowest in the country. So I can say, from sad experience, that standardization has not put any more profit into our company, because our prices have been reduced so that there is no profit today.

Mr. CRESTOHL: I had two items to discuss, and this was one of them.

Mr. HUME: I think Mr. Samis has something to add to that last question. This is Mr. Fred Samis.

Mr. FRED G. SAMIS: (*Marketing Manager, Northern Electric Company Limited*): I would like to add something to what Mr. Edmonson has just said. I did not come prepared to give figures on it, but during the last week I did look up those figures, and on wires and cable, the copper element in our wires and cable—comparing the year 1953 with the year 1960 as to price, because copper is the biggest element of cost—we found it was practically the same. Wage levels in that particular segment of our industry are 74 per cent higher and our prices are 17 per cent lower. That difference has gone to the consumer.

Mr. CRESTOHL: That is a very fair answer and one that certainly is helpful in an understanding of why manufacturers are concerned about having the possibility of conducting their affairs in this organized way. As I said before primarily we are interested in seeing a direct benefit of any economy that will be practised in the future to reach the public. Here it has been explained

that the economy does reach the public in this indirect way. There has been a decrease in prices since 1949 and there has been an increase in salaries.

For clarification I would like to address a question to Mr. Bruce. I was impressed by his reference to section 31(2) and his complaint that the insertion of the words "has done" is a bit unfair because it creates an offence today which was not an offence at the time that it was done. You are speaking of a merger of any kind or of a division of distribution of shares.

Mr. BRUCE: At least it went unobserved at that time.

Mr. CRESTOHL: This is at page 5. Those are the new words put in the act.

Mr. BRUCE: Yes.

Mr. CRESTOHL: In a case where someone is about to or is likely to do that we can understand that there should be a prohibition, but not, as you properly have said, something that a person has done in the past. I wonder if you take from that that the words "has done" tend to create an offence for something that was not an offence at the time it was done. Assume that ten years ago there was a combine or an association which was not then considered to be a combine and the shares were distributed, exchanged, and so forth, and now if we allow the insertion of the words "has done", then the government would have the right to dissolve such a combine after ten years at which time it had been legal, permissible, and profitable to certain people. Is that the understanding you have of those words?

Mr. BRUCE: Not quite. I did not mean to imply that I thought that was making something an offence in a retroactive sense. What I was objecting to was the procedure would be that while something may not have been an offence at the time it was done, there would now be an attempt to unravel it several years after it was completed.

Mr. CRESTOHL: I am thinking of the words "do such acts or things as may be necessary to dissolve the merger or monopoly". I am now suggesting that if something was done ten years ago, which was a legal and permissible merger, or something which did take place at that time and shares were exchanged, bought and sold, and then if I read the section correctly the government now would be permitted to dissolve the merger which existed ten years ago because that is the time the person "has done".

Mr. BRUCE: I was thinking of the inconvenience of this procedure where something has been done a long time ago, and the use of this procedure, rather than going through the full investigation which would sift what has been done a little more carefully than I think an injunction type of procedure would do.

Mr. CRESTOHL: I may be wrong, but I think I understand that a merger which was legal might be declared under the legislation today to be illegal.

Mr. BRUCE: Not here. This would not make it so, I am quite sure.

Mr. BELL (*Saint John-Albert*): Suppose a merger takes place three or four years from now, after this legislation goes into effect. Would you not think it fair that we could go to the courts for a dissolution of the whole thing going back two or three years?

Mr. BRUCE: If you have the words "has done" in there I would think it would be fair, but our point is it ought to be reserved for something in contemplation. Suppose General Electric and Westinghouse merged and ten years from now it was decided this was improper, a number of people who had nothing to do with the actual agreement of merger would suffer.

Mr. BELL (*Saint John-Albert*): I think we are putting a different meaning on the future.

Mr. HUME: It may be helpful to point out that the new definition only makes a merger illegal if the court decide it is detrimental to the public. With the

words "has done" it could be challenged years from now. I think we state there should be a time limit. I do not think we go further than that. We would like to have it deleted, but this is the point we make.

Mr. DRYSDALE: How would you date the time limit?

Mr. HUME: We would like to have the words "has done" deleted.

Mr. DRYSDALE: If the words "has done" were left in, how would you suggest a time limit?

Mr. HUME: I would not like to suggest any time limit at all. I cannot go beyond what the brief has said. If you are raising this new thought, I think we would have to have a look at it.

Mr. DRYSDALE: The alternative is that if the words "has done" are left in you suggest that you want some sort of a time limit, and I asked if you have given any consideration to it.

Mr. HUME: The recommendation clearly is stated. We want it out and one of the reasons is this problem of the time limit. I may have misstated it in a way which confused you. It is because of the time problem that we recommend these words should go out. If it should stay in, we have not yet directed our attention to that.

Mr. BELL (*Saint John-Albert*): It is 3 o'clock and we have agreed to hear the chamber of commerce. I think we should consider what is going to take place in respect of the CEMA group and whether they should be brought back. This certainly has been very interesting, but I do think we are going over some points now.

Mr. MARTIN (*Essex East*): That is inevitable, under our form of interrogation. Unless you let someone interrogate without limit of time and also permit interruptions on the points you cannot avoid this.

Mr. BELL (*Saint John-Albert*): I agree with Mr. Martin in that respect.

Mr. BALDWIN: It is a combine.

Mr. MARTIN (*Essex East*): It would be better in this way than to have members recognized by the chair. If someone has a question on a particular point he should be allowed to intervene. Otherwise, you cannot avoid duplication. I do not think we should finish this brief until we all have had an opportunity to examine on it.

Mr. DRYSDALE: The question is whether to go ahead with the next delegation.

Mr. MARTIN (*Essex East*): It is not fair either to the people who are here nor to those who are waiting.

The CHAIRMAN: The situation is they are here and we are agreed to hear the Canadian chamber of commerce at 3 o'clock, and my suggestion was that we hear them now, and—

Mr. JONES: Yes, I agree with that.

The CHAIRMAN: —and go along until a later hour, and see how we get along with them. Then we might be able to have—

Mr. MARTIN (*Essex East*): This is the most infantile procedure one could conceive. Here we are, investigating one of the most important measures that has come before parliament, and we are expected to give this the scrutiny and care which it deserves. We have now some very responsible witnesses before us, who have a very important point of view. They have made certain statements about their own position, and I am sure they have made them seriously; and every member of this committee who wants to do so ought to have a chance of examining them. If we are going to go through the motion of having people present briefs, accept them, and not fairly study what they propose, all well

and good. But if we are going to do a serious job, I suggest the procedure which the chairman has just mentioned is not one calculated to bring about the thorough inquiry which I am sure all of us want to see brought about.

Mr. WOOLLIAMS: Now Mr. Martin is being so critical as to what the procedure is, I wonder if he would care to set out what procedure he would want to adopt?

Mr. MARTIN (*Essex East*): Certainly.

Mr. DRYSDALE: Not at length!

Mr. MARTIN (*Essex East*): I am glad to accept Mr. Wolliams's suggestion, and I know he is a constructive-minded man—

Mr. WOOLLIAMS: The offer I made to Pickersgill stands with you too, Paul.

Mr. MARTIN (*Essex East*): I would let this committee do what they are going to do tomorrow morning—to sit down in an orderly way and ascertain how many people want to make representations—No. 1. Then ascertain how many other groups individual members want to suggest should come and give evidence; and how many individuals. Then we should allocate our time accordingly.

But I see that we have four important national bodies, busy men, expecting we can deal with briefs that have engaged their attention and their long experience in the course of time we have taken thus far, when some of us have not had an opportunity, including Mr. Woolliams, of putting some very important question.

That is what I would do; that has always been the practice; and I am suggesting now, with regard to the particular situation, that we go on and exhaust this particular group who are before us.

Mr. DRYSDALE: They look exhausted already.

Mr. MARTIN: I admit I have fallen into an error in the us of my terms. But having done that, we could then go on to the next group. It is unfortunate we have to inconvenience people, but unless we could take them simultaneously, there is no other way open to us.

Mr. JONES: It does not seem to me that the suggestions Mr. Martin has just made contribute anything new to what we have already dealt with in this matter of procedure. What he has now suggested is that a time table be established, and that we hear the various people in accordance with that time table.

Mr. MARTIN (*Essex East*): I never suggested a time table—take somebody at 3 o'clock, another at 3.12, and yet another at 3.22. I suggest we act as adults, and make an exhaustive inquiry on each particular proposal. That is all.

Mr. JONES: This may be an interesting talking point, but let us get down to the facts of the situation.

Mr. MARTIN (*Essex East*): Well, those are the facts.

Mr. JONES: As I understood the suggestion of Mr. Martin, it was to the effect that we should find out who wants to bring representatives, and then set forth times at which we could hear them—

Mr. MARTIN (*Essex East*): "Days."

Mr. JONES: That is what he said. That is what the chairman has been doing, in my opinion—and, I think, in the opinion of the other members of the committee. The suggestion that he has made certainly would not take into account any extended examination that any particular group might want to make of any particular persons who come to represent certain bodies before us—

Mr. MARTIN (*Essex East*): I would like to—

Mr. JONES: Excuse me, let me finish. I did not interrupt you.

Mr. MARTIN (*Essex East*): I am sorry.

Mr. JONES: We would run into the same situation in those circumstances, if one particular group was examined at greater length than was originally suggested; and we would have to defer or recall them. We would be in the same situation, no matter which way we did it.

The CHAIRMAN: We are back to exactly where we were last Thursday morning. According to Mr. Martin, nothing the chairman or the steering committee has done is correct.

Mr. MARTIN (*Essex East*): So far, that is the case.

The CHAIRMAN: I do not think that if the Lord himself were here he could satisfy him in his demands.

Mr. MARTIN (*Essex East*): It would depend which lord.

Mr. CRESTOHL: Do you place yourself on the same level, Mr. Chairman?

The CHAIRMAN: I said "if he were."

Mr. CARON: Mr. Chairman, to call those important bodies—the Canadian electrical manufacturers association, The B.C. forestry products, the fisheries council, and the Canadian metal mining and Canadian chamber of commerce—for the same date was not certainly very thoroughly considered by the committee or the chair.

The CHAIRMAN: I explained this morning that they made the request to come.

Mr. CARON: You could have told them—

The CHAIRMAN: They knew the length of time of these meetings. It was their choice. Am I, as chairman, going to say to them, "You are not to come"?

Mr. MCILRAITH: No, but you could have followed the practice which has been followed over the years.

Mr. MARTIN (*Essex East*): You should follow the suggestion of the committee.

Mr. MORTON: Mr. Chairman, we have already wasted ten minutes of the valuable time of many people, and I suggest we go ahead on the procedure we suggested, and call the C.M.A. at 3 o'clock, unless it can be demonstrated there are only two or three more questions to be asked of these gentlemen. But if the committee wants unlimited time to deal with these gentlemen, I think we should follow our procedure; and, learning from this experience, you could judge times in the future a little better. But I would hate to go on as we did the other day, wrangling to no purpose. We have already wasted twelve minutes.

Mr. MARTIN (*Essex East*): Let us go on. These men are experienced men in this field, and let us go on with them.

Mr. BELL (*Saint John-Albert*): Mr. Chairman, I move we hear the Canadian Chamber of Commerce, as agreed by this committee, at 3 o'clock.

Mr. WOOLLIAMS: I second that.

Mr. CRESTOHL: I point out, Mr. Chairman, this business of "I move" and "I second" has the fullest effect of a steamroller, because you know you have a majority here.

Mr. DRYSDALE: You had a majority this morning.

Mr. CRESTOHL: It is a very autocratic way way of doing things. I do not think our colleagues should exploit that, because it would be prejudicial.

Mr. BELL (*St. John-Albert*): Mr. McIlraith said a few minutes ago that he wanted to have motions on everything.

Mr. MCILRAITH: I said I wanted to have them recorded.

Mr. BELL (*St. John-Albert*): All right, record them then.

The CHAIRMAN: You have heard the motion, gentlemen, moved and seconded. All in favour—

Mr. MARTIN (*Essex East*): Mr. Chairman, I want to—

The CHAIRMAN: Hold your hands up, those in favour.

Mr. HELLYER: Are motions no longer debatable?

The CHAIRMAN: Against?

Mr. MARTIN (*Essex East*): Democracy in action!

Motion agreed to.

Mr. MARTIN (*Essex East*): Mr. Chairman, if you do not mind: since we have taken this decision, and we are now to be denied the opportunity, for the foreseeable future of finding out further particulars about this brief—which I think is a very important one—when are we going to have an opportunity of examining these gentlemen again?

The CHAIRMAN: That will be decided by the steering committee.

Mr. MARTIN (*Essex East*): That is an innovation.

The CHAIRMAN: We had a suggestion we should go on until 4 o'clock, and that then we would decide. I think we should carry on on that basis.

Mr. HUME: Mr. Chairman, may I consider that those of us who have been here—and we are very delighted to come back again and assist the committee—may I assume, therefore, that you are through with us for today, and that we would make a new appointment, because some of these gentlemen have to get away?

The CHAIRMAN: I would suggest you wait until 4 o'clock, if you will, and see how we get along with the other organizations.

Mr. HUME: Do just what you wish, sir.

The CHAIRMAN: That was the wish of the committee.

Mr. MARTIN (*Essex East*): If you want to take my advice, I would suggest that you take the first train out of town, because you are just going to be waiting around here.

The CHAIRMAN: Probably after listening to you today—

Mr. MARTIN (*Essex East*): Mr. Chairman, I would like you to recognize that although you are an individual, as chairman of this committee you are not entitled to your own personal views.

If you want the confidence of this committee, you will kindly keep your personal views to yourself.

Mr. JONES: That is one thing you might do as well. You have characterized the chairman as being infantile.

Mr. MARTIN (*Essex East*): No; I characterized you as being infantile.

The CHAIRMAN: Will the Chamber of Commerce representatives please come forward.

Gentlemen, we have with us this afternoon the Canadian Chamber of Commerce.

Mr. Hynes will introduce the other members, and lead off the discussion.

Mr. LEONARD HYNES (*Vice-Chairman, Executive Council, Canadian Chamber of Commerce*): Mr. Chairman and gentlemen; I am Leonard Hynes, and vice-chairman of the executive council of the Canadian chamber of commerce.

I have with me, in our delegation, Mr. H. J. Hemens, Q.C., chairman of the committee on combines legislation for the Canadian chamber; Mr. C. H. B. Frere, a member of that committee; Mr. W. J. Sheridan, assistant general manager of the Canadian chamber of commerce, and Mr. W. J. McNally, manager of the policy department of the Canadian chamber of commerce.

Mr. Hemens will speak to the brief, supported by Mr. Frere.

Matters of general policy, concerning the Canadian chamber of commerce, I will endeavour to deal with myself, supported by Mr. Sheridan and Mr. McNally.

Before calling on Mr. Hemens, I would like to say this.

The executive council of the Canadian chamber of commerce expresses its appreciation of the opportunity of presenting its views with respect to Bill C-58, an Act to Amend the Combines Investigation Act and the Criminal Code. It believes that the referral to committee of this important legislation was extremely valuable. It is to be hoped that the following observations will be helpful in developing a useful and practical piece of legislation.

The Canadian chamber of commerce is the voluntary federation of more than 750 boards of trade and chambers of commerce in all parts of Canada. These boards and chambers are established to promote the civic, commercial, industrial and agricultural progress of the communities and districts in which they operate. Seventy-five per cent of these boards and chambers serve areas of less than 5,000 population. Membership in the Canadian chamber of commerce includes representatives of businesses large and small throughout Canada.

This brief is submitted by the executive council of the Canadian chamber of commerce, which is the body appointed by the national board of directors, the governing body of the chamber, to carry on the ordinary business of the chamber during the interim between meetings of the board.

The executive council recognizes and appreciates the fact that Bill C-58 was introduced with the announced intention that parliament should be asked to enact legislation setting forth in clear terms the rules of general application in these areas, so that persons engaged in business may know the rules which society believes should govern it. The views expressed herein are aimed at furthering this essential end.

I would like at this time to call on Mr. Hemens to deal with specific items.

Mr. CRESTOHL: On a point of clarification: is this an organization of retailers, merchants and manufacturers, or is it combined?

Mr. HYNES: Combined.

Mr. H. J. HEMENS, Q.C., (*Chairman of the committee on combines legislation, Canadian Chamber of Commerce*): Mr. Chairman, I take it that the committee will not want us to read our brief?

Mr. MARTIN (*Essex East*): I think so, because we have not had a chance to read it.

Mr. HEMENS: I will then commence where Mr. Hynes concluded.

The chamber believes that a free enterprise system, depending on individual incentive spurred on by competition, is the system that will yield the highest possible material standard of living and the greatest possible degree of political, economic and social freedom for the individual. The chamber also believes that the preservation of the competitive system requires the enforcement, by a central authority, of certain essential rules.

It is with the above principles in mind, and considering the spirit in which Bill-58 was introduced by the government, which is that legislation must be fully workable and practicable and must be completely in touch with the movement of the times and that the effect and intention of legislation must be clear, that the following proposals in respect of Bill C-58 are offered for consideration.

Clause 1 of Bill C-58:

Subclause (2) of Clause 1 of Bill C-58 provides for the definition of "merger" and "monopoly". In providing for these new definitions and repealing the present paragraph (e) of section 2 of the Combines Investigation Act, it appears that the following wording which forms part of the present paragraph (e) of section 2 was inadvertently left out of the proposed amendment, to wit: "but this paragraph shall not be construed or implied so as to limit or impair any right or interest derived under the Patent Act or under any other statute of Canada;". It would appear that the omission of this wording was inadvertent since no reference is made to such omission in the explanatory notes to the bill and since provision is made for problems arising from abuse of patents in section 30 of the Combines Investigation Act. We urge that the foregoing wording, or wording to similar effect, be restored to the act.

Clause 9 of Bill C-58:

It is suggested that the words "a finding" which appear in the first and fourth lines on page 4 of Bill C-58 should be replaced by the words "an expression of the commission's view as to". It would appear that it is not the function of the commission to make "findings" and that the use of that term may, in the eyes of the public, be prejudicial to the person in respect of whom the report is made. Furthermore, the word "finding" seems normally to refer to matters of fact, whereas the proposed subsection deals, in part at least, with matters of opinion.

It is suggested also that the word "unduly" should be inserted before the word "restricted" and before the words "to restrict" in the eighth and ninth lines on page 4 of Bill C-58. This suggestion is offered since it is undue restriction which is the offence under the act.

Clause 11 of Bill C-58:

It is recommended that the words "from or as a result of an inquiry under the provisions of this act, or" which appear in lines 28 and 29 on page 4 of Bill C-58 should be deleted. It is believed that the power set out in section 29 of the act to eliminate or to reduce customs duties should not be exercised in the absence of a conviction in a court of law.

Clause 12 of Bill C-58:

It is suggested that there should be deleted from the proposed subsection (2) of section 31 the words underlined in lines 24, 27, 29, 30, 31, 32 and 33 on page 5 of the bill. It should not in criminal matters be possible to conclude that an offence "has been completed" (as set forth in the explanatory notes to Bill C-58) unless and until the offender has been charged, tried and convicted. An order for dissolution of a merger or monopoly prior to conviction and consequent determination that it is illegal would constitute a gross invasion of private rights.

Clause 13 of Bill C-58:

Clause 13 of Bill C-58 proposes the repeal of sections 32 and 33 of the Combines Investigation Act and the substitution therefor of proposed Sections 31A, 32, 33, 33A, 33B and 33C.

With respect to subsection (3) of the proposed section 32 it is recommended that for purposes of clarity the word "unduly" be inserted before the word "restricted" and before the words "to restrict" in the fifth line on page 7 of Bill C-58. It would seem that the word "unduly" which appears in line 43 on page 6 of Bill C-58 may have been intended to apply to the last three

lines of the proposed subsection (3). If this were so, it is not clear that the subsection would be interpreted to include the word "unduly" in respect of the last three lines, and in such event, the normal reasonable restrictive covenant of common law frequently invoked in respect of the sale of small businesses might be outlawed.

With respect to the proposed section 33A it is noted that the words "or tendency" have been inserted both in paragraph (b) (line 25 on page 7 of the bill) and in paragraph (c) (line 30 on page 7 of the Bill) of sub-section 1. It is suggested that these words should be deleted since they are vague and uncertain and subject to interpretation so as to found a conviction on a possibility as opposed to an actuality or even a probability.

The proposed section 33B is entirely new. Its purpose is indicated as the prevention of discrimination between different types of trade customers based on promotional allowances. A brief study of this proposed new section indicates that it may raise problems of interpretation and its full impact is not clear. It is recommended that this proposed section 33B be withdrawn for the present to allow further opportunity of study as to the full implications and a further opportunity after such study to make representations thereon.

Clause 19 of Bill C-58:

It is recommended that subsection (3) of the proposed section 41A should be amended to provide for a right to appeal from the judgment of the Exchequer Court in respect of proceedings under section 31 of the Combines Investigation Act as amended, as well as under Part V of the act. Since, as presently proposed, it appears that the government may in certain cases proceed in the Exchequer Court under either section 31 (2) or under sections 32 or 33 (as the case may be) and since in the latter event there is provision for an appeal from any judgment, there would seem to be no reason why the right of appeal should not exist with respect to proceedings under section 31.

It is further recommended that subsection (4) of the proposed section 41A should be amended to provide for the necessity of the consent of the person or persons concerned in respect of proceedings under sub-section (2) of the proposed section 31 of the act. The unilateral right of the government to decide to proceed in the Exchequer Court may cause prejudice and heavy expense to the unfortunate defendant, particularly the defendant resident in British Columbia or in the eastern Maritime Provinces.

General Comments

Since one of the objectives of Bill C-58 is clarification, it is recommended that a provision be inserted in the bill indicating clearly that the Combines Investigation Act is designed for the protection of the Canadian public and is not applicable to contracts, agreements or arrangements which relate only to export trade or commerce.

Furthermore, while it is believed that the legal right of the court to provide for a fine in lieu of the punishment provisions of the proposed new sections 32, 33, 33A and 33B exists in view of the provisions of the Interpretation Act and of the Criminal Code, it is recommended that for the sake of clarity and consistency, particularly in the light of the wording of proposed section 31A of the act and sections 34 and 39 of the act which provide for the alternative of a fine, the same alternative provision be provided throughout.

There are several places in Bill C-58 where provision is made for action based upon a suggestion that an offence is "about to be committed". Such references are found in clause 2 of the bill amending section 7 of the act; clause 3 of the bill amending section 8 of the act; clause 6 of the bill amending section 15 of the act; clause 12 of the bill amending section 31 of the act.

It is suggested that the above cited words should be deleted where they appear since it is not clear what can be the criterion of "about to commit an offence" and it is conceivable that heavy expenses may be incurred by anyone accused under the above cited sections with little or no evidence of any offence.

May I, Mr. Chairman, make a few remarks based upon this brief. We appreciate very much the fact that the government, in introducing this bill, has apparently intended as one of its principal objectives clarification in the interests, particularly, of the business world. We should say that we have addressed ourselves, as requested, particularly to the provisions of the amending bill; and the fact that we do not criticize any of the existing provisions of combines legislation is not, I hope, to be deemed to be an approval of all combines legislation.

With respect to the omission of reference to the Patent Act and any other statute of Canada, it is suggested, after further thought, that this deletion might be returned to the act as subsection (2) of section 33.

We referred, with respect to clause 9 of bill C-58, to the use of the words "a finding". I have checked with the Shorter Oxford English dictionary and, in order not to appear to discriminate, with Webster's New Collegiate dictionary, and I find that the definition supports our statement in the brief; that is, that a finding is the result of a judicial inquiry, the result of a judicial examination or inquiry, a court's decision, et cetera. This, we suggest, is sufficient reason, since the restrictive trades practices commission is not a court, to substitute for the words "a finding" the words we suggest, or something similar, "an expression of the commission's view as to".

With respect to clause 11 of bill C-58, where we have proposed the deletion of the words "from or as a result of an inquiry under the provisions of this act, or", we point out that any action with respect to tariffs based upon the results of an inquiry is effected without any conviction of the person involved. And, of course, secondly—and possibly far more importantly—there is no right of appeal from the results of such an inquiry. This seems to be treating the businessman rather more severely than the other type of criminal.

Mr. WOOLLIAMS: What do you mean by that expression, "businessmen and other types of criminals"?

Mr. HEMENS: I would rather leave that for interpretation.

Mr. MARTIN (*Essex East*): I am sure, in fairness to you, you did not mean to say exactly that. Most businessmen are not criminals and I think you would be the first to recognize that.

Mr. HEMENS: Thank you very much Mr. Martin.

With respect to clause 12 of bill C-58 which deals with section 31 we have proposed the deletion principally of the words "has done". If, however, such action seems to this committee to be inappropriate we suggest at least that there should be some limitation in time on the power of the court to go back.

Mr. DRYSDALE: Having made that suggestion how do you propose to do that?

Mr. HEMENS: There are several ways of doing it. The one that occurred to me, and I cannot say "to us as the chamber of commerce", but to me, is simply to add "has within the past X days, months or years done".

With respect to clause 13, and particularly the previous section 33(*a*), we have taken some objection to the use of the words "or tendency".

Again I have had reference to the shorter Oxford English dictionary and to the Webster's new collegiate dictionary, and I find that they tend to support —tend to support is probably improper—they seem to support our suggestion that "tendency" is akin to possibility, rather than probability or actuality.

With respect to our suggestion that section 33(*b*) be withdrawn for further consideration and representation, we have several reasons in this regard. The

first reason is that the Canadian chamber of commerce is another democratic organization. These proposals of the chamber of commerce and this new legislation are submitted to chambers across the country for the expression of their views. It has, of course, been impossible to submit section 33(*b*), so we cannot truly say that we know what is the opinion of our members.

Secondly, in the report on discriminatory price practices of grocery trade at pages 188 and 189, I seem to discern some suggestion that possibly section 33 (b) is not necessary. Possibly it is covered by section 412 of the criminal code which will become section 32 of the act.

Thirdly, the wording, I suggest to you, is not at all clear. It is proposed that "allowance" means discount, rebate, price concession, not applied directly to the selling price. It seems to us that it may be rather difficult to interpret exactly what is meant by that definition. It appears that this clause is intended primarily to deal with the problems in the grocery trade. To have it deal with industry across Canada is rather like using a meat chopper where maybe one should use a scalpel.

With respect to the problem of penalties and to the suggestion that the amending bill and the act as a whole would be consistent in providing for alternatives everywhere or nowhere, I point to the intended object, as I understand it, of the government, and that is to achieve clarification, not necessarily, I take it, to achieve clarification for lawyers, but to achieve clarification for the businessmen. Businessmen, I find, tend to believe what is written, and in some places it is written that they go to jail.

Mr. CRESTOHL: Or go to their owners first.

Mr. HEMENS: A very good thought Mr. Crestohl, but that may be against our power to make suggestions of that nature.

In concluding these remarks, Mr. Chairman, I would like to commend to the committee and in fact to the Canadian public, to whose detriment or against whose interest we are required under legislation not to act, the following words of the Minister of Justice found at page 4342 of Hansard:

> I do suggest, however, it is an essential fact for us to realize that the Canadian economy depends in very large measure upon the success of the Canadian business and the welfare of the Canadian worker depends to a very large extent, as does the ability of the Canadian government to meet its responsibilities, upon the welfare of Canadian business.

Thank you.

Mr. BALDWIN: I would like to ask a question in connection with the proposal, or the situation as regards the bill.

I am wondering if there has not been some misapprehension in regard to clause 19 of the amendment. Is it not a fact that clause 19 does not purport to create the right of the appeal, but simply provides for the procedure which will be followed in the case of an appeal under part V of the act, or that such appeal shall be treated in the same way as an appeal from the court of appeal under part 18 of the criminal code? Dealing with the point that you raised about the situation where there has been an order of prohibition or dissolution made under clause 31 of the proposed amendment, the fact is, as I understand it, that in such a case there may be no appeal from such an order, is that right?

Mr. HEMENS: That is my understanding, sir.

Mr. BALDWIN: Assuming that you have in mind a judgment or an order of the Exchequer Court, is there not a right of appeal from the Exchequer Court under the pertinent provisions of the Exchequer Court Act?

Mr. MARTIN (*Essex East*): To the Supreme Court of Canada.

Mr. BALDWIN: To the Supreme Court of Canada. Mind you, the Exchequer Court does deal largely in questions of money, but there is, as I understand it, with the leave of a judge of the Supreme Court of Canada, the right to appeal where matters are involved not exceeding $500 in amount. Would that not cover the case where there had been an order of dissolution made by a judge of the Exchequer Court under section 31? If you wanted to appeal could you not go to the Supreme Court of Canada and get an order of the judge of that court permitting, or giving leave to do so?

Mr. HEMENS: We suggest, sir, that there is at least considerable doubt that that is so.

First of all, here you have later legislation which at least seems to indicate that here is a right of appeal, and that right of appeal is in respect of certain provisions in the act. Is it not with respect to others, that possibly no right of appeal exists?

The second point is—and I am not an expert in these things, but I have discussed this with a number of rather more capable lawyers, and they seem to have the same view that I have—that it is at least extremely doubtful that, as the act now stands, there is any right of appeal in respect of matters under section 31 (2) of the previous act.

Mr. BALDWIN: You agree that you should have the right of appeal but it does not exist, and what you would like is clarification to make sure that it does actually exist?

Mr. HEMENS: Correct, sir.

Mr. MARTIN (*Essex East*): If the institution of the action did not take place, or was not thrown into the Exchequer Court, would there not then be an appeal under this clause of the new legislation, to the Exchequer Court itself?

Mr. HEMENS: I would not think so, sir.

Mr. WOOLLIAMS: It would be to the court of appeal in the various provinces.

Mr. HEMENS: Yes, sir,

Mr. BALDWIN: You would then be before the supreme court of the province. You would go to the court of appeal in the province under this legislation?

Mr. WOOLLIAMS: And from there to the supreme court.

Mr. CRESTOHL: Does the chamber of commerce take an interest in all forms of business including service business?

Mr. HEMENS: Yes.

Mr. CRESTOHL: Have you found anywhere in this act that a service business could be blocked from entering into a combine?

Mr. HEMENS: There is one or possibly two types. There are possibly two types of service businesses which might be affected under section 32 (1). I say two; I am probably being conservative, in the non-political sense.

Mr. CRESTOHL: Is that in the old act?

Mr. HEMENS: In the provisions of the new act, Mr. Crestohl, where we speak of storage, laundry, transportation, insurance; those are the only cases we know of.

Mr. CRESTOHL: Considering laundries and dry cleaners, I cannot find anything in this legislation that could prevent a large association of laundries forming a combine and fixing prices for the services which they are providing, and whether as a chamber of commerce you have examined that phase? I know that I did, but I would like to have your point of view.

Mr. HEMENS: To the extent that the proposed definition of business in clause I (1)(aa) of the bill is concerned?

Mr. CRESTOHL: Yes, I looked at it very carefully as well as at the word "article."

Mr. HEMENS: Yes.

Mr. CRESTOHL: "Article" means any article or commodity that may be the subject of trade or commerce; while business means the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing or dealing in articles.

Perhaps I am just canvassing for opinions or arguments that I may use on the floor of the house, and perhaps I would like to draw that to the attention of the minister. I do not think that these businesses can be prevented from forming a combine under this act.

Mr. HEMENS: Are you asking me to give a legal opinion as to the interpretation of the act? As a chamber of commerce we cannot give legal opinions.

Mr. WOLLIAMS: Might I ask a question of a general nature, as to how they arrived at these recommendations?

Mr. CRESTOHL: Mr. Chairman, I am not quite through yet. Your reference to the act is not as clear as it should be, but you apparently did make a very thorough study. I wondered if you had formed any opinion as to the loose terms that are used, such as substantial, likely to, unduly, likely to lessen, unduly, again, and likely to lessen.

Mr. HEMENS: Many of these terms are to be found in the existing act, and we did not address ourselves to the existing act, as I indicated to you a little earlier.

Mr. CRESTOHL: Were you surprised by this? Many of them are very new.

Mr. HEMENS: The word "unduly" is an old word.

Mr. CRESTOHL: And "likely to lesson competition."

Mr. HEMENS: "Likely" has appeared for years in section 412, and I would say that we did not particularly address ourselves to it.

Mr. CRESTOHL: But that does not answer the question as to whether or not it is a definite term that one can understand and from which he can draw conclusions.

Mr. HEMENS: I can only give you a personal opinion, and it is not a definite term.

Mr. CRESTOHL: Yes, and it would puzzle the average businessman, would it not?

Mr. HEMENS: It puzzles, me, I am sure.

Mr. CRESTOHL: And it would certainly puzzle the average businessman.

Now, would you be good enough to look at page 6, at the old section 32 (2), and particularly paragraph (*g*). Perhaps I had better read the whole thing so that we may understand it. It reads as follows:

> 32(2) Subject to subsection (3), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:
>
> (*a*) the exchange of statistics,
>
> (*b*) the defining of product standards,
>
> (*c*) the exchange of credit information,
>
> (*d*) definition of trade terms,
>
> (*e*) co-operation in research and development,
>
> (*f*) restriction of advertising, or
>
> (*g*) some other matter not enumerated in subsection (3).

Could you possibly tell the committee what you understand that to mean? Does it mean anything, or is it understandable?

Mr. HEMENS: First of all, may I preface my remarks on this by stating that it is at least my opinion that the matters covered in here are covered for the purpose of clarification, and are not, in fact, new law. If that is so, I would take paragraph (g) to mean that there are certain aspects of business cooperation—it cannot specify them all, because probably it would constitute an endless list—which are equally to be clarified under the act.

Mr. CRESTOHL: But would you really understand this as meaning anything?

Mr. HEMENS: I do not know whether I should express an opinion.

Mr. CRESTOHL: You are free to do so.

Mr. MARTIN (*Essex East*): It would be your opinion, anyway.

Mr. BALDWIN: Possibly he means that mention of the one would mean exclusion of the others, and that if you mention one, then you automatically exclude all the others unless you put in language like paragraph (*g*).

Mr. HEMENS: That was my opinion.

Mr. WOOLLIAMS: Just before we get into any question as to the legal recommendations made by the executive council of the Canadian chamber of commerce, I note in their preamble that they represent more than 750 boards of trade and chambers of commerce in all parts of Canada, made up of businessmen in various industries. And I wondered if the witness would mind advising us just how the executive council arrived at these recommendations. They are pretty legalistic in their language. Were there any communications made with the various boards of trade and the various chambers of commerce in that regard? Could you give us some colour along that line?

Mr. HYNES: Perhaps I had better give you a little history. Members of this committee will recall that an earlier bill was introduced last year, and that the chamber of commerce established a special subcommittee to study it.

We sent out briefs to the boards of trade and chambers of commerce across the country so that they might have them as the basis for their discussions; and at the annual meeting of the chamber, which took place in Toronto last October—by that time the legislation had been withdrawn, so no action was taken with respect to the submission of a brief. But there were certain policy statements made there which we adopted.

With this new bill which has come out, there has been no opportunity to deal with it in the same way, because there has not been time available. But we did get an expression of opinion in order to prepare our brief, and we made a particular point, just as an indication, to try to clarify the chamber's attitude on resale price maintenance; but we could not get any opinion. We got a split vote all across the country on that point. Therefore the brief in that respect is silent.

Mr. WOOLLIAMS: Who forms the executive council?

Mr. HYNES: The executive council is composed of the chairman, and the vice-chairman, who are elected by the annual meeting. Voting delegates are representatives of each board of trade or chamber of commerce and each board or chamber has one vote. For example, Ottawa has the same vote as Kamloops, or Kelowna, or what have you.

The remaining members, largely for the purpose of convenience in conducting business, and since the chamber has its headquarters in Montreal, are largely businessmen in Montreal; but we do try to draw on other people in special cases in order to get a broad view of the board and chamber minds in between annual meetings, and to review the actions of the executive council in action such as this. I might say that what we are saying here today was already sent to the boards of trade and chambers of commerce across the

country, but we have had no opinion coming in as to how they think. It has been more like a vote of silence rather than one of commendation. But we feel that if they did not agree with us, we would have heard about it.

Mr. WOOLLIAMS: Was the brief made up by legal talent, or from legal counsel in the chamber of commerce?

Mr. HYNES: In this particular case we did not have to hire legal talent, because we had it available from the various members of the chamber.

Mr. MARTIN (*Essex East*): You have a lot of experienced legal men with you, Mr. Hynes.

Mr. HYNES: Yes, both Mr. Hemens and Mr. Frere are lawyers by profession.

Mr. HOWARD: Perhaps part of this has been cleared up. I notice the lack of reference to the proposed changes in sections 32 and 34 in your brief. I intended asking about that, but you have answered in respect of section 34. I understood you to say there was divided opinion on the resale price maintenance question—nothing conclusive.

Mr. HYNES: Yes.

Mr. HOWARD: I also wonder if you have had the same sort of experience in respect of the proposal to change section 32.

Mr. HYNES: We have not had time.

Mr. HEMENS: This is the old section 411. We have made a proposal in respect of subsection 3 of section 32. That was the only way in which it occurred to us that further clarification at least was desirable.

Mr. HOWARD: Would I be correct in assuming that apart from the word "unduly" the chamber of commerce is in accord with the proposal to amend section 32.

Mr. HEMENS: Subject to the reservation I made. Section 411 is existing legislation and we have not tried to express criticism of it at this time.

Mr. HOWARD: Might I ask one other question for my own clarification as to how this might be put into effect? I am referring to page 7 of your brief under the heading general comments. This is in the first paragraph thereof where you suggest, as I read it, that the provisions of the Combines Investigation Act should not apply to any arrangements between business in Canada where they relate to the export trade. This is what I take from it.

Mr. HEMENS: First of all I should express the view that we believe the Combines Investigation Act does not apply to export trade. What we have suggested is that the interest of businessmen in Canada it be stated clearly that it does not so apply. In an earlier submission on bill C-59 we proposed one or two suggestions which we thought might have helped to achieve it. For example, we proposed that the word "public" be defined as meaning the public of Canada. This does not mean we think from a legal point of view the public means anything but the public of Canada, but we consider that this is a clarifying bill and it occurred to us that this might be an interesting thing to introduce. We have not gone any further in suggestions.

Mr. HOWARD: That is in so far as the export trade is concerned.

Mr. HEMENS: I am sorry. It is drawn to my attention we have suggested a new section. I have it here:

> Nothing in this act shall be considered to apply to any contract, agreement or arrangement which relates only to export trade or commerce.

We had proposed that in a previous submission to the minister.

Mr. HELLYER: On that point could you give us any indication of the philosophy or working principles where it would be beneficial to industries to have this exclusion.

Mr. HEMENS: I think the position here is that export competition is becoming tougher and tougher. As a principle we in Canada have seen the desirability of marketing wheat through a cooperative operation. There is a law in the United States which allows people to combine together to export tonnage of various commodities. If we hamstring our own people in respect of making arrangements to export we may be doing more harm than good, and with no advantage to Canada.

Mr. HELLYER: It is on the basis that foreign competition is so extreme.

Mr. HEMENS: In many cases the only way you may be able to get into a market is to make an arrangement with two or three other people, maybe Germany or France, to share a portion of the Brazilian market, for example.

Mr. HOWARD: I understand it exists at the moment that there is cooperation generally through an organization or association to have a common selling price, regardless of which producer produces the commodity being exported.

Mr. HEMENS: I do not know any Canadian company doing this. I do know there are provisions in the laws of other countries which allow this to be done. I think the presumption at the moment by Canadian business is that they are not restricted in making that kind of arrangement in respect of exporting. We think it might be well to clarify that by stating it here.

Mr. HOWARD: This is an organization which has not yet been before the committee, but I noticed in one of the briefs that it is suggested such an arrangement does exist in the fisheries industry.

Mr. HEMENS: That may be.

Mr. LEDUC: It does exist in the pulp and paper industry in respect of newsprint.

Mr. HEMENS: In so far as export markets are concerned, they are quite different from domestic markets. In respect of export, it may be in the best interests of Canada to permit things we are not prepared to permit within domestic confines.

Mr. LEDUC: Exactly.

Mr. MACDONNELL: I would like to hear a little more in connection with the first paragraph on page 4 of the brief dealing with page 4 of the bill. I will read it:

> It is suggested also that the word "unduly" should be inserted before the word "restricted" and before the words "to restrict" in the 8th and 9th lines on page 4 of bill C-58. This suggestion is offered since it is undue restriction which is the offence under the act.

What I am anxious to know is although the word "unduly" occurs in line 6, when you get down to lines 8 and 9, there might be no such limitation to the use of the word "restricted" or "restrict". Could I ask also if the witness would say a general word in respect of the word "unduly". To me that is a key word in this whole act. I wonder whether or not the witnesses feel there are other places where the word "unduly" should be used for purposes of clarification.

Mr. HEMENS: With regard to the first part of the question, we have proposed the word "unduly" at that point because we think it is not clear it will be read into it from the sixth line. This is similar to the situation in respect of subsection 3 of proposed section 32 where also we have proposed the word "unduly" be entered. In respect of the second part of your question, personally I do not recall any other provisions in which we would like to suggest the insertion of the word "unduly" apart from section 32 (3). If we have overlooked anything we would certainly be glad to remedy that.

Mr. DRYSDALE: At page 7, section 33, I wonder if you have any comments to make on that section which deals with the person who knowingly assists in the formation or merger of a monopoly. Do you consider mens rea is an ingredient of "knowingly", or is it of such a nature that the mens rea is unnecessary.

Mr. HEMENS: First of all, I should confess that I am not a criminal lawyer, so I am not to be considered as an expert in it.

Mr. DRYSDALE: It was in the Combines Act before.

Mr. MARTIN (*Essex East*): But it is not in the code now.

Mr. DRYSDALE: Pardon?

Mr. MARTIN (*Essex East*): Section 411 is transferred now to this act.

Mr. DRYSDALE: It was in the Combines Act before.

Mr. MARTIN (*Essex East*): I know. As long as it is in the criminal code, surely the *mens rea* does apply?

Mr. DRYSDALE: I do not think it is that clear, Mr. Martin. I was just asking if they gave any special consideration to that particular problem.

Mr. HEMENS: My best answer is that we have not given any consideration to that.

Mr. MARTIN (*Essex East*): You have had a long experience as a lawyer in connection with the Combines Act?

Mr. HEMENS: Purely from studying and corporation application.

Mr. MARTIN (*Essex East*): Yes. This submission represents the entirety of any objection you may have to the existing legislation, as opposed to the amendments?

Mr. HEMENS: No, sir. This is in no aspect a criticism of the existing legislation, and applies only, or principally to bill C-58.

Mr. MARTIN (*Essex East*): Do you wish to comment on your statement on page 2, in the third paragraph, where you say:

> The Chamber also believes that the preservation of the competitive system requires the enforcement by a central authority of certain essential rules.

Might I help you and say, do you have in mind there that you were as a body reluctant to see the enforcement of whatever measures in the amendment are addressed to the resale price maintenance—that you would want to see whatever enforcement in that connection was provided for, should be provided for by the government? Is that what you meant by that sentence which I have quoted?

Mr. WOOLLIAMS: I do not want to interrupt Mr. Martin, Mr. Chairman, but the previous witnesses have said they thought they might get a decision at about 4 o'clock; and they were wondering whether they could take their train. I am sorry, Mr. Martin, but they have just spoken to me.

Mr. MARTIN (*Essex East*): I do not blame them.

Mr. MORTON: How many more want to ask questions of these witnesses, Mr. Chairman?

Mr. JONES: Perhaps they might indicate?

Mr. MARTIN (*Essex East*): Before we do that we have to decide whether we are going to sit much longer today; and I would not think that was possible.

Mr. MORTON: It might be we would be able to judge our time better after we have finished with this group.

Mr. MCILRAITH: Is the inference that there is the possibility of clearing up the four groups today?

Mr. MARTIN (*Essex East*): There is not a chance in the world of doing that.

Mr. MORTON: Let us explore it, and not take a negative point of view.

The CHAIRMAN: Has anybody, beside Mr. Martin, any questions to ask of these witnesses?

Mr. HOWARD: I have one short one.

Mr. HORNER (*Acadia*): I have one.

Mr. MCILRAITH: What train would the other group take?

Mr. MARTIN (*Essex East*): The 4.30.

Mr. MORTON: I think they are willing to sit tonight, in order to complete that group.

Mr. MARTIN (*Essex East*): We cannot sit tonight.

Mr. SIMPSON: We have changed our flight to a later one this evening, so we are ready and available to you. We would like to get cleaned up today, at some time, if possible.

The CHAIRMAN: I would like to get you cleaned up today; and I would think so.

Mr. DRYSDALE: I think we could sit until six o'clock.

Mr. MARTIN (*Essex East*): We cannot.

Mr. DRYSDALE: Why not?

Mr. MARTIN (*Essex East*): Because we have other engagements.

Mr. DRYSDALE: If you have others, you go to them.

Mr. MARTIN (*Essex East*): But I am interested in this measure.

Mr. DRYSDALE: Well, if you are interested in it, you should stay.

The CHAIRMAN: Gentlemen, I will suggest, if it is agreeable, that we hear the three questions; then adjourn to hear the previous witnesses, and carry on until six o'clock.

Mr. HOWARD: There is one point that is not clear in my mind now. We had initially—or I should say "you had initially arranged that there would be four organizations appear this morning. That is, the Canadian Electrical Manufacturers Association—I am dealing with the thought of cleaning up or, as Mr. Martin puts it "exhausting these gentlemen today"; or whether we should also consider the fisheries council, and what I understood was classified as the B.C. forestry products, which I find is something else now, and the metal mining association. Are those other three included in the thought of completion today?

The CHAIRMAN: That is right.

Mr. MARTIN (*Essex East*): That is a mockery.

Mr. MCILRAITH: That is a complete mockery of the whole proceedings. Surely, national bodies like that are entitled to a proper hearing when they come here?

The CHAIRMAN: I remind you it was their request.

Mr. MCILRAITH: I remind you that was not dealt with by this committee in a proper way—

The CHAIRMAN: We have heard that too.

Mr. MCILRAITH: And these national bodies—

The CHAIRMAN: We have heard all that.

Mr. MCILRAITH: You are going to hear some more now. All these national bodies are entitled to submit briefs and their point of view and, surely, we have a responsibility to deal adequately with them. It is an important subject, as it applies to all the economy of this country. And this is no way to conduct it at all.

The CHAIRMAN: I would suggest—

Mr. MCILRAITH: Surely—if I could finish—if we have two organizations here, very substantial organizations, who have been started on their evidence and have been barely heard, surely we could work out some reasonable way of disposing of their evidence, if we can, in order to let them go?

These others, we have to keep them sitting here, and they have been sitting here since 9.30 this morning, without a hope of our getting at them and without the prospect of doing the job properly.

Mr. DRYSDALE: If it had been straight committee work we could have been through with them. There was a lot of sidetracking done by Mr. Martin and yourself.

Mr. MCILRAITH: I have attended more than double the number of committees of anyone else in this room for a great number of years. I have never seen such violation of the practice followed by committees over that many years as there has been in this. The standard of conduct that has been applied here today is unfair to the organizations, to the legislation and to the members. Surely, we can take the organizations one at a time and arrive at some orderly way of disposing of the two who have launched on their evidence; and then have the other three organizations released from the necessity of sitting here for the rest of the day, and bring them back at some appropriate hour to be fixed by all the committee?

Mr. MORTON: Could I suggest we complete the witnesses we have started today? I feel, the way this has gone, it would be unfair to the other organizations to start them today; and we should make arrangements to hear them tomorrow.

Mr. MARTIN (*Essex East*): We cannot do that.

Mr. MORTON: There are some from British Columbia.

Mr. MARTIN (*Essex East*): I know, but we did not bring them here—the committee did not bring them here. I think we ought to finish the witnesses we have begun today; but we are going to have a business meeting tomorrow at 9.30, we have agreed. That will require some careful consideration, then. After we have done that we will be in a position to tell the others when we think they can be called. But it is not possible for us to do that now. I would simply suggest that if anyone will look at the minutes of the committee that last looked into the Combines Act they will find it took well over 50 days for the committee to do its work then. It is a very important act. We cannot rush through this thing, if we want to do it thoroughly. It seems most unfortunate that we have to deal with the Chamber of Commerce in the cursory way in which we seemingly are going to do it. They have made some very important representations, and we should be able to examine them. So have the electrical people, and so will others.

Mr. WOOLLIAMS: The witnesses are here and we have to take a practical approach. Let us proceed with the two groups we have now and then make the decision; but let us be practical in our decision. Some of these people are from British Columbia, and they cannot sit around for weeks, waiting for decisions. Let us complete the group we have here, and get on with the job.

Mr. MCILRAITH: Do you want to keep the other three groups here?

Mr. WOOLLIAMS: I do not know how long the rest are going to be, but we have only a few questions to ask, apparently. Let us get them asked and answered, and then let the other group come back. That seems to be a practical move.

Mr. MARTIN (*Essex East*): I think this is the practice we have already made.

It is clear that we are not dealing with anything, except the two groups which have come before this committee. We should not lead the other witnesses to believe that they will be called tonight or tomorrow. We will have to decide that.

Mr. WOOLLIAMS: But it may be that everybody will run out of questions, and the other group could then come on. I do not think we can come to that conclusion.

Mr. MARTIN (*Essex East*): Mr. Chairman, may I come back now to the questions which I was asking when you interrupted me. I am sorry; in fairness to you, it was Mr. Drysdale.

Mr. DRYSDALE: It was Mr. Woolliams. I do not deserve the credit for this.

Mr. MARTIN (*Essex East*): I had been questioning you about the sentence to be found at the end of the third paragraph on page 2, in which it says:

> The chamber believes that a free enterprise system, depending on individual incentive spurred on by competition, is a system that will yield the highest possible material standard of living and the greatest possible degree of political, economic and social freedom for the individual. The chamber also believes that the preservation of the competitive system requires the enforcement, by a central authority, of certain essential rules.

I wanted to know from you whether or not you were directing your remarks at the amendment with regard to the present proposed enforcement of resale price maintenance which, in large measure, leaves the enforcement not to official authority but to the private sector.

Mr. HEMENS: No sir. This is a general statement taken from the policy declarations on freedom of enterprise of the Canadian chamber.

Mr. MARTIN (*Essex East*): Do you believe the private sector ought to be given power to enforce action against resale price maintenance, or do you believe it ought to be done by public law?

Mr. HEMENS: I am here as a representative of the Canadian chamber of commerce, and I think it has been stated that their views are indefinite on this; they are unable to get a single view.

Mr. MARTIN (*Essex East*): Then you did not have that particularly in mind when you submitted this brief?

Mr. HEMENS: No.

Mr. MARTIN (*Essex East*): Now, on page 3 of your brief, you speak of clause 1 of the bill, and you mention that certain words were inadvertently left out of the proposed amendment of section 2; and then you give the words:

> But this paragraph shall not be construed or implied so as to limit or impair any right or interest derived under the Patent Act or under any other statute of Canada.

Why do you say that these words were inadvertently left out?

Mr. HEMENS: It is purely an expression of opinion. They were included, as I recall it, in Bill C-59, do not appear in Bill C-58, and there is no explanatory marginal note. Therefore, I assume it is purely inadvertent.

Mr. MARTIN (*Essex East*): Well, I am informed the minister will be speaking to that, so it would not be fair to press you for what he intended. I just wanted to find out whether or not you did have any information that would warrant what I think must be the literal interpretation of your submission. I am sure you would agree, in any event, in a matter of this sort, assuming proof of a conspiracy of a combination against a public interest that there must be sanction.

Mr. HEMENS: I believe that is covered by section 30 of the existing act, which is not affected by the legislation.

Mr. MARTIN (*Essex East*): But you would have to provide for the non-exclusion of any benefits under the Patent Act, which would be too severe a form of sanction.

Mr. HEMENS: I suggest to you, Mr. Martin, that the Patent Act provides of itself for a monopoly, and the moment you get a patent, you are guilty of an offence under the Combines Investigation Act. This does not make sense.

Mr. MARTIN (*Essex East*): I see. Well, I think that is a fair comment.

We will have to look to the minister, when he comes, for the reasons for this.

The CHAIRMAN: Mr. Horner.

Mr. MARTIN (*Essex East*): Mr. Chairman, I am not through yet.

Have you discussed this matter with the minister?

Mr. HEMENS: No.

Mr. MARTIN (*Essex East*): You do not believe that there is a more effective way of letting the Canadian business community know that the measure does not cover export trade, other than by mentioning it in the act?

Dr. Rynard has been telling us all along that we lawyers make everything more complicated. Acting on his suggestion, why would you want to incorporate that in the act when there might be a more effective way of bringing it to the attention of the business world?

Mr. HEMENS: I would be happy to have a more effective way. I am looking for clarification for the businessmen.

Mr. MARTIN (*Essex East*): Now, clause 11, Bill C-58, to provide that certain words be withdrawn. You propose the words:

> From or as a result of an inquiry under the provisions of this act, or be deleted, so that it would read:
>
> Whenever, as a result of a judgment of the Supreme Court

etc.?

Mr. HEMENS: Correct.

Mr. MARTIN (*Essex East*): But do you not think—and I just ask you this for clarification—that those words should be left in, particularly when they are governed by later words:

> At the expense of the public.

Having in mind the purpose of this legislation; having in mind, as you say yourself in your brief, that the dominant concern must be the public interest, that the governor in council should have the power of providing for this kind of a sanction?

Mr. HEMENS: I think we believe that the governor in council should, based, however, on a conviction of the person involved. In dealing particularly with those words, you have no conviction; you have a hearing. Furthermore, if I might add, you have no right of appeal from this inquiry under the provisions of this act.

Mr. MARTIN (*Essex East*): I must say that you touch a sensitive note when you urge that the full process of the law be observed in the determination of rights or inflicting punishment. However, is there not a distinction to be made here? First of all, a tariff or a duty is imposed in the first instance as a result of a recommendation of the executive to parliament, and that is not the same kind of right that attaches to the individual in terms of freedom of association and so on. Here is a right, in the first place, given by parliament, through executive action; and what this section provides is where, as a result

of an inquiry under the provisions of this act, it appears there is a combination, and so on, against the public interest, that the proposed action here has some justification.

Mr. HEMENS: I suggest to you, Mr. Martin, that your tariff is imposed originally for commercial or other governmental reasons. The reason you propose to take it away here is for neither of those, but for punitive reasons—and I think that is an improper use of tariff powers.

Mr. MARTIN (*Essex East*): That is what I wanted you to bring out. I think it is very important.

What is your view about the use of the Exchequer Court as a court of initiation?

Mr. HEMENS: Provided it is with the consent of the accused or the other party, we have no objection to it; and we even suggest it may be desirable as providing a possible central court, with experienced men in these cases, which might facilitate proceedings.

Mr. MARTIN (*Essex East*): Have you given consideration that heretofore the Exchequer Court has not been regarded as a judiciary forum for measures that seek to enforce what is regarded as a crime, and that to extend the facilities of the Exchequer Court for the purpose of dealing with what has been a crime, section 411 of the Criminal Code, and is, in effect, easing, or diminishing the opprobrium that normally would be attached to a prosecution and to a resulting conviction under the Combines Act?

Mr. HEMENS: I can only give a personal opinion. I do not believe so.

Mr. HORNER (*Acadia*): You stated, I think, that your association had no fixed views on actually maintaining or reinstating resale price maintenance. Would you say that the amendments to section 34, found in section 14 of the bill, are going to reinstate resale price maintenance, in effect?

Mr. HEMENS: I am informed that we have no official view on that section whatsoever.

Mr. HORNER (*Acadia*): You have no official view?

Mr. HELLYER: Well and carefully put!

Mr. HORNER (*Acadia*): What is your opinion, as a lawyer who has had a great deal of experience with the Combines Act?

Mr. HEMENS: You want my personal opinion?

Mr. HORNER (*Acadia*): Yes.

Mr. HEMENS: My personal opinion is that it does not re-establish resale price maintenance.

Mr. MCINTOSH: Following up the statement that the witness has no official view, might I ask this question, Mr. Chairman? The Canadian chamber of commerce is a national organization. You say here that they represent more than 750 boards of trade and chambers of commerce in all parts of Canada.

Are there certain boards and certain chambers that you do not represent?

Mr. HYNES: This changes from time to time, sir, as to the activity. I have been, for the last couple of years, the chairman of the membership committee, so I see these slips going over my desk every day as to who have paid their fees, and who have not. As you know, in some communities—even in some constituencies— people are more active at one time than they are at another.

Mr. MCINTOSH: Then perhaps I should direct my question to the chairman. If they represent the boards and chambers across Canada, why is not the board of Metropolitan Toronto coming here? Have they a different viewpoint from the national chamber of commerce?

Mr. HYNES: They could have; but not necessarily.

Mr. MARTIN (*Essex East*): Toronto is generally meek in regard to these national organizations.

Mr. HYNES: Taking no part, and having been born in Toronto, I should say they probably are meek.

Mr. W. J. SHERIDAN (*Assistant General Manager, Canadian Chamber of Commerce*): May I say, Mr. Chairman, that each of the representative boards of trade and chambers of commerce are completely autonomous. If they wish to, and receive permission from this committee to have their own hearing, they have their rights.

Mr. FISHER: Mr. Chairman, I have just one question arising out of the reply of the witness to Mr. Horner. In preparation for coming here, did you try to arrive at a position on the alteration of section 34?

Mr. HYNES: Yes. I think we mentioned earlier, while you were out of the room, that we had a plebiscite of the boards and chambers of commerce across the country last fall on the subject—and, I think, one earlier, about a year ago—but we were unable to arrive at a conclusion.

Mr. FISHER: Thank you; that is fine.

Mr. MCILRAITH: Mr. Hemens, in your preliminary remarks in presenting your brief, you referred to having addressed your brief to a certain subject matter, as requested. As requested by whom?

Mr. HEMENS: I think, speaking for myself, as requested by the executive council of the chamber of commerce.

Mr. MCILRAITH: What I am getting at is this: there was no request to you from the government to deal with this bill specifically, as such; say, after it was introduced—the present bill now before the committee?

Mr. HEMENS: I do not believe there was.

Mr. MCILRAITH: Dealing with the question of the change in the law, in introducing the jurisdiction to the Exchequer Court to deal with these matters: under the legislation as it now exists, the civil, or mandatory, or prohibitory proceedings. Have you considered that point at all, or have you given it they are viewed in that light.

There is a somewhat technical argument arising under clause 17 (4), that the new bill sets up civil proceedings as an alternative to criminal proceedings. Have you considered that point at all, or have you given it any consideration in your council?

Mr. HEMENS: No, sir, I had not; my committee had not.

Mr. MCILRAITH: I was out for a few minutes; but there is a point with reference to section 34 that bothers me. I heard you say that you had no views on 34. What is concerning me is this: in your brief, on page 2, near the bottom, you speak of this, that this legislation must be fully workable and practicable. You have not considered the amendments to 34 suggested in this bill, from the point of view of their workability. That is the large problem involved there, where it is the belief of the supplier, based on the reasonable belief of the person who informed him, that certain things had been done.

I take it you have not considered that point?

Mr. HEMENS: No, sir, we have not.

Mr. MCILRAITH: Now, coming to an earlier part of the bill, the bottom of page 6 of the bill: dealing with this subclause(2) of the new 32, where certain combinations are enumerated, and they will not be offences under the legislation, to what extent do you consider the enumerated types of combines there extend the present law?

Have you considered that point?

Mr. HEMENS: I have considered it personally. I do not know whether my committee has. But I think our view was that this does not, in fact, extend the law; but clarifies the law for business people.

Mr. MCILRAITH: Including the one on credit information?

Mr. HEMENS: Including the one on credit information.

Mr. MCILRAITH: Assuming for the moment that the enumeration of these combines which are now here—it is made clear that they are not prohibited. Assuming that is desirable, for the moment, and on that premise: do you consider the method of setting this out by enumerating them makes the law more workable and practicable?

Mr. HEMENS: I would rather restrict myself to saying that I think it makes it clearer for the average businessman.

Mr. MCILRAITH: Have you considered whether or not it makes illegal certain types of combinations that may not have been considered illegal, because of the enumeration of these items (*a*) to (*g*)—because they are not included?

Mr. HEMENS: Subject to what may be the interpretation of subsection (3), I do not think it does—because of subsection (*g*).

Mr. MCILRAITH: What I am concerned with is this: I thought that if this method was going to be used, and these things were going to be provided for in the act, it could have been done in a clearer and better way; and I wondered whether you had examined that from that point of view? I am speaking quite narrowly now.

Mr. HEMENS: I would say that we have not examined it from that narrow point of view.

Mr. MCILRAITH: Have you considered the situation that where corporations will be operating in combination—we will say, for the defining of product standards, or one of the purposes as set out here—there is going to be difficulty in knowing how far we can go under that section, because the agreement to set up the combine has not been included?

Mr. HEMENS: Mr. McIlraith, if I understand you correctly, the authorities have agreed simply to define product standards.

Mr. MCILRAITH: Yes, and are working now—

Mr. HEMENS: I conceive of no problem.

Mr. MCILRAITH: You conceive of no problem?

Mr. HEMENS: That is correct.

Mr. MCILRAITH: You are familiar, I take it, with United Kingdom legislation which involves a very different principle altogether?

Mr. HEMENS: Yes.

Mr. MCILRAITH: That does provide for registration?

Mr. HEMENS: I understand, very generally.

Mr. MCILRAITH: Yes, but it involves a different principle altogether, but does provide registration.

What I am concerned with is, that this new sub-clause 2, in addition to achieving any objective which may be set out, may tend to confuse the situation rather than clarify it because you have no method of registration of these agreements, getting clearance of them before you start your operation under the sub-clause.

Mr. HEMENS: Should it not be a principle, however, that unless what you do is illegal, it is legal?

Mr. MCILRAITH: Yes, I quite agree with that, but there is a great deal of confusion in this legislation. You see, we have made, under this act, a great number of things that are prohibitive by the act, that are further restrained by

the operation of the law. We have dealt with the curious principle of having mandatory orders and prohibitive orders. It is a very curious thing, but I suspect it will be argued in the courts one of these days. It is the operation of the law that prohibits that, and we still provide that, notwithstanding that, the attorney general may go and have a formal order of the court issued declaring something which is declared by law to be illegal, legal again.

Mr. HEMENS: This has been the practice in the United States for years; so far as I know, and while it is extraordinary, it is not the extraordinaryness limited to one country.

Mr. MCILRAITH: When we are dealing with crime we do not permit the courts to issue a prohibitory order against the crime of murder, for instance. We adopt the principle that we are adopting in this case.

Mr. HEMENS: We do have a mandatory order to keep the peace.

Mr. MCILRAITH: No, we do not have a civil mandatory order.

Mr. HEMENS: No, not civil, no.

Mr. MCILRAITH: What I am getting at is that this law was always viewed as something within the competence of parliament because it was a matter of criminal jurisdiction. Viewing it in that light, having regard to sub-clause 2 of section 32 is causing some possible confusion.

Mr. DRYSDALE: Are you giving evidence Mr. McIlraith?

Mr. MCILRAITH: It has been set up to achieve a purpose, and I think it is clear that you regard it as desirable. I wondered if you considered that it achieved that purpose in its present form?

Mr. HEMENS: Without exhausting the possible number of forms, we rather feel that it tended to clarify it.

Mr. MCILRAITH: Thank you very much.

Mr. BALDWIN: In respect to a point raised by Mr. McIlraith, I gained the impression he suggested that under the present law the confusion is a condition precedent to obtaining a prohibitory order.

Mr. MCILRAITH: No, no.

Mr. BALDWIN: You did not intend to convey that meaning?

Mr. MCILRAITH: No.

Mr. BALDWIN: Subsection 2 of section 31 presently gives that right.

Mr. MCILRAITH: Yes.

Mr. BALDWIN: That is fine.

Mr. FISHER: If my questions are repetitive, Mr. Chairman, you can close them off.

The CHAIRMAN: As a matter of fact,—and I have said that I am not a lawyer earlier,—I think we are getting into repetition in respect of practically all these questions. That is my feeling, but I would like an expression from the committee.

Mr. MORTON: Let Mr. Fisher go ahead.

Mr. FISHER: I have had to be in the house and perhaps have missed the discussion of these subjects, but there are a couple of points which came up in your brief which I would like to discuss, particularly in view of this one recommendation that the combines act provisions should not apply to export trade and commerce. I appreciate that you have probably touched on this subject, but I am interested in your views in relation to something like the pulp and paper industry. I could pick out certain mills in my part of the country where almost all their trade is export. As a matter of fact, pulp is the largest export commodity, as well as paper. How would you suggest this amendment be worded so that there would be protection on the export side

and yet some protection for the people who are supplying wood, in order that we would be able to get prosecutions and convictions such as we had in the eastern Canadian pulpwood case?

The CHAIRMAN: Mr. Fisher, that subject was covered earlier.

Mr. FISHER: Then I will turn to another subject. I hope it was covered satisfactorily.

The CHAIRMAN: The subject will likely come up at a later time, and you will be able to read this evidence before then.

Mr. FISHER: On page 2 of your brief you say:

> The Chamber believes that a free enterprise system, depending on individual incentive spurred on by competition, is the system that will yield the highest possible material standard of living and the greatest possible degree of political, economic and social freedom for the individual. The Chamber also believes that the preservation of the competitive system requires the enforcement, by a central authority, of certain essential rules.

I would like to ask you a general question. As representatives of the chamber of commerce is there any tendency for the competitive system to lead to larger and larger units?

Mr. HYNES: I think the only thing in this country that is leading to larger and larger units is the advent of socialism.

Mr. FISHER: You mean to say we are responsible for Canadian General Electric and the E.P. Taylor Argus Corporation

Mr. HYNES: No, they are not the large corporations in the country. Who is responsible for the hydro power at provincial levels?

Mr. MARTIN (*Essex East*): Do not ask that, because the Conservatives will say that they are.

Mr. FISHER: I have a serious point I would like to discuss, Mr. Chairman. I would like to know if the chamber has ever considered that any limit should be set on the bigness of corporation size. I ask this question quite seriously because the Minister of Justice in introducing this bill in the House of Commons gave the indication that he had already had two particular briefs in respect of bigness, and it seems to be of general concern to all political parties. I wonder if the chamber of commerce has given consideration to this.

Mr. HYNES: If I could answer that question I would say that the chamber of commerce is concerned with the efficient use of our resources, and in our opinion size is not necessarily related to efficiency.

Mr. FISHER: Do you think that the market in itself will keep the proper relationship as to size? Is it not possible that you may reach the stage where big monolisms will tend to force out the small people?

Mr. HYNES: The only people over which the parliament of Canada has control in respect of legislation are those people who are resident in Canada. At the present time that amounts to about 17 million people. There are far larger countries in other parts of the world who are much more advanced in the trade and commerce world than Canadian people. If the Canadian people wish to hamstring themselves in their ability to fight against the rest of the world, this is the privilege of the Canadian parliament.

Mr. FISHER: I asked those questions, Mr. Chairman, because of a statement that was made last week by the vice president of the Imperial Chemical Company who pointed with scorn at the small size of our corporations. I was just wondering whether this is one of the fundamental problems that the chamber of commerce might be giving the public advice about.

Mr. DRYSDALE: It would depend on the individual industry.

Mr. HYNES: We are interested in efficiency. In some areas big is efficient, and in other areas small is efficient.

Mr. SHERIDAN: The public interest must be an overriding fact.

Mr. MCILRAITH: I have one very short question. I wanted to ask this question when you were dealing with the customs section some time ago. In your experience as an executive of the chamber of commerce, are you aware of section 29 of the existing legislation being used in respect of the customs tariff?

Mr. HYNES: I am not aware that it has been used. I understand that its use is contemplated. Mr. McIlraith, I might say that I have had no personal experience to that extent.

Mr. MCILRAITH: Has it been used much in the last number of years?

Mr. HYNES: That would depend on what you means by "use", Mr. McIlraith.

Mr. MCILRAITH: Has the customs tariff been taken off any goods to let them into Canada under the authority of section 29 of the existing Combines Investigation Act?

Mr. HYNES: The simple answer I think is no, not that I know of. The authority to use the power may result in other actions under the power to do that.

Mr. MARTIN (*Essex East*): There is no doubt that the chamber of commerce supports the philosophy behind the combines legislation?

Mr. HYNES: That is right. If you are going to play a game you must have some rules.

Mr. MARTIN (*Essex East*): Would you agree that our combines legislation is not as severe as that in most other countries of the free world, particularly the United States?

Mr. HYNES: I do not think the chamber of commerce has a view in that regard at all. If you want to get around to personal opinions I could continue for some time about it.

Mr. MARTIN (*Essex East*): I put the question because I think it is obvious that we would all agree that our legislation is not as severe as that legislation in the United States.

Mr. HYNES: I think that is probably right; but Mr. Fisher made some mention earlier today, on some comments that appeared in the Toronto papers within the last few days about combines legislation, of which I have some personal knowledge, and some of the good things that have been done in the way of developing resources and technical facilities, and where other countries can be stopped by arbitrary limitations of the type Mr. Fisher was speaking about, and that size in itself was bad.

This I think is one of the things the minister may be trying to get in his exceptions, of having people joined together for the purpose of research and development, for example.

I do not personally think it is necessarily the best way to do this thing, but I can see what he is hitting at. Canada as a country is not doing as much research in industry as the United States, the United Kingdom, or Germany, on a per capita basis.

Mr. BENIDICKSON: Does the witness know if there is a tax deduction in those countries for that type of research?

Mr. HYNES: No. There is different legislation, and we have a minor amount. We can write-off equipment used in research at a quicker rate. But in general we are not doing it.

There are many reasons why we are not, and one of the most important ones may come up to size. If you are concerned about the use of your own time, and if you are an individual businessman who is trying to run your own store, you will have very little time for research. But when you get to a certain amount of size, you hire a man who makes it his business to carry on research. But if we have legislation which works against the big individual unit to sponsor research, we do not limit the possibility of our doing research on industrial management, or in part on taxation, or on other incentives of research.

Mr. McILRAITH: How much success have you had with the committees set up under the National Research Council on research?

Mr. HYNES: I personally have not had it.

Mr. McILRAITH: As a chamber of commerce, have you had to do with that subject?

Mr. FRERE: These are set up as industrial types of committees. We are a horizontal type of organization rather than a vertical one.

Mr. McILRAITH: The chamber as such would have nothing to do with that type of committee, although your individual members would?

Mr. FRERE: Yes.

Mr. BALDWIN: Is it not a fact that in the United States there is more latitude constitutionally for them to do it, and that here is much wider power in so far as combines and anti-trust legislation is concerned?

Mr. HYNES: I do not think I am qualified to answer that question.

Mr. FISHER: In an economy where branch plant subsidiaries are very important, do we not get all the advantages of United States research without really having need for it?

Mr. HYNES: At a price, yes, with the employment of our university graduates in the United States.

Mr. FISHER: You have heard of the Canadian pulp and paper association, and the pulp and paper research institute?

Mr. HYNES: Yes.

Mr. FISHER: Is that not because we are an industry on such a scale in Canada that it can take care of its own research program?

Mr. HYNES: Yes.

Mr. FISHER: Or having regulations under this particular act to develop it?

Mr. HYNES: No.

Mr. MARTIN (*Essex East*): But the government did assist them.

Mr. FISHER: Yes. That is a Canadian tradition.

Mr. HYNES: I did not suggest that our people are not willing to do some of these things. What I spoke of was what restricts them from doing it.

Mr. HELLYER: Is it not a fact that the ownership of many Canadian companies being predominantly overseas that it would affect the amount of research being done here?

Mr. HYNES: I think it undoubtedly has up to the present time; but no matter how you develop it, there is always the fact that this is one case where small size is not necessarily efficient.

Mr. DRYSDALE: In view of section 29 never having been enforced, do you think it is a section which could be enforced practically?

Mr. HYNES: I am afraid that it possibly is, and I suggest the need for discreet power in the absence of conviction, or without the right of appeal.

Mr. DRYSDALE: I suppose if four or five companies were convicted of a certain offence, still there are other companies in other parts of Canada; and what would be the way to enforce it? Would you then have to prosecute the innocent along with the guilty?

Mr. HYNES: That would not be a big problem, although I do not know what the answer to it is.

Mr. MCILRAITH: When you speak of "without appeal" do you mean an appeal to the tariff board or an appeal to the courts?

Mr. HEMENS: No. Where you proceeed to the tariff board, you do so as the result of an inquiry without (1) a conviction, and (2) without an appeal.

Mr. MCILRAITH: When you speak of "without an appeal", what do you have in mind appealing to? To what body would you appeal, or would it be to the tariff board?

Mr. HEMENS: No. My suggestion is to appeal to the courts.

Mr. MCILRAITH: That would be an appeal against executive action of the government.

Mr. HEMENS: I suggest you must have a conviction first, and if you have a conviction, then you should have an appeal.

Mr. MCILRAITH: You could have another remedy, but if you were not willing to pursue that, could you not make an appeal to the tariff board against the action being taken? They do have appeal procedure. Have you considered it?

Mr. HEMENS: If it were a question of appealing following an inquiry, then it could very well be a question of the desirability or the undesirability of appealing the action, and not of whether or not you had been convicted of an offence.

Mr. MCILRAITH: I suggest that is the very point, and it was a question of the desirability or undesirability of tariff action, because the clause concludes with the words about it giving the benefit of reasonable competition. That is the alleged purpose of the clause being in the bill. And I suggest that if you do not get the first remedy you are asking for, that is, this action, and the only authority to take that action is after conviction, then your next best bet is to appeal against the action of the executive to the tariff board.

Mr. HEMENS: The problem there is how do you appeal an opinion, because it is an opinion of the governor in council.

Mr. MCILRAITH: But the governor in council takes action then.

Mr. WOOLLIAMS: But you can always go to the source that expressed that opinion. I am inclined to agree with the chamber of commerce.

Mr. MCILRAITH: You mean that the governor in council can direct that such an article be admitted into Canada free of duty?

Mr. MARTIN (*Essex East*): Do you wish to agree, Mr. Woolliams?

Mr. MCILRAITH: And when they take executive action you may well provide for an appeal to the tariff board, if you do not get the other changes you are asking for?

Mr. HEMENS: I would rather have the first, and if not the first, then any second will do.

Mr. MCILRAITH: The practice and the whole function of the tariff board has to do with making certain adjustments with a view to reasonable competition and other related benefits.

Mr. MARTIN (*Essex East*): Did Mr. Woolliams say that he agreed with the chamber of commerce or with Mr. McIlraith?

Mr. MORTON: We are not examining Mr. Wolliams.

Mr. MARTIN (*Essex East*): If he did, I would be inclined to agree with the persons who disagree with Mr. Woolliams.

The CHAIRMAN: Gentlemen, are we not finished?

Some Hon. MEMBERS: Yes.

Mr. HORNER (*Acadia*): We just have been generalizing for this past half hour.

Mr. MARTIN (*Essex East*): A very important generalization.

The CHAIRMAN: I remember we decided or agreed that we would hear about three witnesses and then—

Mr. MARTIN (*Essex East*): Three?

The CHAIRMAN: Yes. Three had their hands up.

Mr. DRYSDALE: You mean three members?

The CHAIRMAN: Yes; three members.

Is it in order to thank the chamber of commerce for coming here today and giving us their time.

Mr. BENIDICKSON: Mr. Chairman, I was busy with the Income Tax Act in the house as everybody knows. Am I precluded from asking questions now?

Mr. HORNER (*Acadia*): Anybody could have come in late. Mr. Fisher came in late and asked two questions which were repeated because he came late.

Mr MARTIN (*Essex East*): That is the penalty you pay for holding committee meetings while parliament is sitting.

Mr. WOOLLIAMS: Of course that has been going on for 23 years.

Mr. MARTIN (*Essex East*): Mr Benidickson certainly should be given an opportunity to ask his questions.

The CHAIRMAN: Have you something, Mr. Benidickson?

Mr. BENIDICKSON: I do not know whether or not the committee has reached a decision which sort of would wipe out the opportunity I would normally expect for a question on my part.

Mr. MARTIN (*Essex East*): You have that opportunity.

Mr. BENIDICKSON: I would have liked to have been here for the testimony of the manufacturers in the appliance field.

The CHAIRMAN: They are coming back.

Mr. BENIDICKSON: I think I still am losing out because I was in the house.

Mr. JONES: We will bring them back as fast as they will go.

Mr. BENIDICKSON: I am very pleased.

The CHAIRMAN: Then will you hold your question until then?

Mr. BENIDICKSON: Then, in respect of the chamber of commerce, are people like Eatons, Simpsons and these other people my wife buys from—Loblaws—and so on—all members of your association?

Mr. WOOLLIAMS: Mr. Chairman, I would like to move a vote of thanks to the chamber of commerce for their brief and their appearance here this afternoon.

Some Hon. MEMBERS: Hear, hear.

Mr. HORNER (*Acadia*): I second the motion.

Mr. MARTIN (*Essex East*): We are going on until 6 o'clock and will adjourn at 6 o'clock.

Mr. DRYSDALE: Until 8 o'clock.

Mr. MARTIN (*Essex East*): No.

The CHAIRMAN: The committee said we would decide when we get through.

Mr. HYNES: Thank you, Mr. Chairman. It was a very enjoyable afternoon.

The CHAIRMAN: I am glad you enjoyed it. Now, Mr. Simpson, and Mr. Hume, are you rested now?

Mr. HUME: Well, we are available for any help we can give the committee, sir.

Mr. MARTIN (*Essex East*): The committee certainly needs it.

The CHAIRMAN: Mr. Benidickson.

Mr. BENIDICKSON: Well, Mr. Chairman, I get a chance now, I guess. I thought I was cut off very shortly. I am sure the representatives of this industry have read, as I have, last week's edition of the *Financial Post* of June 18. There was a headline based on consultation with dealers in the appliance industry. They said that the market was chaotic and something had to be done. I suppose perhaps this committee may have a role to play. This was a long article. As I read it I saw nothing in it that related to the effects on a resale maintenance application of our law of 1951—I saw nothing in it. It all dealt with complaints from retailers or people at a lower level against manufacturers, saying that they had in effect, in wanting a wide distribution which we all can understand, given so much privilege and discounts and benefits to the big dealers that the small fellow who is so much discussed in this committee had no chance to stay in business. In the article in the *Financial Post* of June 18, they say that they fear that retail outlets would be manufacturer controlled, though not necessarily owned. We have here a representative of the manufacturing trade. I am just a consumer. I want to remind myself of the consumer's interest. This however, is something in between. The trade says that the manufacturer is not fair in that his distribution is benefitting the large scale distributor such as Eatons and the discount houses and all those people. I think we are very fortunate to have in front of us a representative of the manufacturers. I would like to know what percentage of their trade goes to the departmental stores, the big advertisers, the discount houses, and so on, and to what extent their output goes to what is called in the brief which we have heard last week from the retail merchants association, the so called independent merchant? What is the percentage from the manufacturer's output that goes to the independent as defined last week, and what percentage goes to discount houses and to departmental stores and otherwise in the electrical appliance field.

Mr. HUME: Mr. Fitzpatrick might be able to help.

Mr. FITZPATRICK: I am not sure how much it is in the electric appliance industry. I can make a few comments or observations about our own company first and then secondly the rest of the industry.

Mr. BENIDICKSON: You are back at Sunbeam?

Mr. FITZPATRICK: I am at Sunbeam, yes. The article referred to has many ramifications. There are some who have commented about it and suggested that because of the grave degree of chaos in the retail markets, that some manufacturers have found they have been left with no recourse except to rid themselves of or otherwise cater to the big dealers, the major reason being the law that we are burdened with—namely, the no price maintenance restriction has left us in a completely unbearable position, where bigness becomes bigger. Some have taken the line of least resistance and have gone directly to the biggest, and they have rested their case. In those instances I would say that approximately 100 per cent of the volume is going through big retails.

Mr. BENIDICKSON: We had a definition last week of the independent small dealer. If we could keep that definition, in your distribution how much goes to an independent dealer?

Mr. FITZPATRICK: I still answer for the manufacturers whom I just described, who found themselves to be completely helpless and as a result did what came naturally, supporting those providing the greatest volume. These particular large discount houses you refer to have the unfortunate ability of being able to completely monopolize the market. We have submitted certain statistics to the government, in confidence, to bear this out.

Mr. BENIDICKSON: I am sympathetic to your view, but we want facts. You say the government have them, but other people have not.

Mr. FITZPATRICK: These are clear cut, very definite facts. I think you are asking generally, what has happened to the small retailer? These are the clearest facts you will ever find presented. We pack a guarantee with our appliances. We have those cards returned to the factory by the consumer. A certain percentage return is observed over a long period of time, and we know how to calculate the end result.

In a particular market I choose to leave nameless, in 1951, two of the major retailers, and the retailers we priced at that stage of the game, shared 9.6 per cent of the particular trading area I refer to. At that time 138 retailers in that particular market were handling and selling the appliances. We traced the course progressively through 1952 to 1958. I will spare all the in-between figures, but in 1957 those same two retailers monopolized our business through a lack of price maintenance, which permitted them to loss leader up to the hilt, and they accounted for 70 per cent of our business in this major trading area in Canada.

At the same time the number of retailers involved in selling Sunbeam was 64, as compared to 138 back in 1951. If you wish to trace that and determine what percentage of our business is going to the small retailer, this is the best background I can give you to suggest the deterioration of the marketing empire we struggled for years to develop and which, in a five or six-year period, was completely destroyed. I say the reason for it has been lack of price maintenance.

Mr. BENIDICKSON: Have you some figures there as to your volume in 1951, as a manufacturer, in the total output; and will you give it to us, as compared to the last available year?

Mr. FITZPATRICK: No. 1: If I did have it I do not believe I would table it. No. 2: the economic picture has changed so drastically I do not think it would be ample evidence to suggest the volume figures. I suggest, however, the volume has declined.

Mr. BENIDICKSON: Shall we not have some figures in so far as profit is concerned—in so far as capital investment is concerned in Sunbeam, comparing 1951 to 1959?

The CHAIRMAN: I do not think that question is in order. He is a member of an association; he is here as part of an association; and you are asking his individual company.

Mr. FISHER: On the point of order, Mr. Chairman, he has just given us individual statistics.

The CHAIRMAN: But he has refused to give the figures that Mr. Benidickson pressed for.

Mr. BENIDICKSON: I did not press him.

The CHAIRMAN: Well, you asked for them.

Mr. BENIDICKSON: When anybody appears before a parliamentary committee it is like a court of law. Everything should be presented. I did not press him, I am making that clear, about certain figures that he glided over earlier.

But, if this committee, in its judgement, decide that they require the information, I suggest to all who are here that we are competent to get that information, just as in a court of inquiry or anything else.

Now, I do not want to press the question with respect to Sunbeam, but I will press it with respect to the industry at large, in so far as progression of profit, a progression of sales, in so far as 1951 and the present day is concerned.

I do not want to be unfair or embarrassing to the present witness, who represents one company, but I want to assert that at a later date in the committee hearings, I will reserve my rights to ask even in connection with an individual company their reports in connection with earnings and profits.

The consumer, Mr. Chairman, is interested in this.

Mr. McILRAITH: Mr. Chairman, there is a predicament into which we are falling. You see, the witness is making an argument when he was being asked about a question of fact. Then he, of necessity, bolsters his argument with certain statistical information he chooses to disclose—and quite properly so; I am not criticizing him—but does not disclose the rest of the relevant information. That is the kind of predicament into which we fall in this subject. It is a pretty tough one for the committee to follow. It is a problem, and a very real one.

Mr. HUME: Mr. Chairman, as counsel for this association, I am sorry to hear my friend, Mr. McIlraith, say the witness was giving an argument.

Mr. Benidickson asked him a straight question as to the percentage of goods sold through dealers, large and small, and I thought what Mr. Fitzpatrick was doing was giving him statistics in answer to his question. I do not recall that he was giving an argument but, I would hope sir, that this committee would not embarrass Mr. Fitzpatrick by requiring him to disclose anything that is confidential company information. As you know, they represent competitive companies, and have trade secrets.

I can assure the committee that anything they want we would be delighted to give them, but I would hope it would be given in confidence.

Mr. McILRAITH: I want to make myself clear. The witness was attributing the whole reason for a certain condition to the statistics he had given. Now, in order to determine whether that is a fact or not, it is obviously necessary to know certain other things about the company which, properly, could be kept confidential. That is what I meant when I said it was his opinion.

For instance, after getting all the statistics of that company, and examining the whole thing, it is quite possible we could come to the conclusion that this was only one of the factors of which he complained. However, there may have been other substantial factors contributing to it. That is what I meant when I said opinion rather than fact.

Mr. BALDWIN: Mr. Chairman, this was brought out in cross-examination. If it had been part of the general statement, it would be different. I think if we are going to have these witnesses come and help us, we must extend to them the courtesy of not cross-examining them on subject matters which they do not see fit to disclose, because they have real justification for not doing so. Otherwise, we will dry up the source of our information.

Mr. McILRAITH: I do not ask to have the information disclosed; I pointed out the predicament in which the committee finds itself.

Mr. BENIDICKSON: I perhaps introduced this question which, apparently, is embarrassing. As I understand it, these people have asked to come before us.

The CHAIRMAN: No. This association has come before us. He is not giving evidence concerning his company. You asked him a question that led him

into answering it, in his particular case but I think that as a member of an association, he should not—any individual company should not have to answer what their profits were.

Mr. BENIDICKSON: I want to be as careful and considerate as I can, during the conduct of this committee, in that respect. I do not want to make it more difficult for a company that has come before us, vis-a-vis a company that we might have to subpoena to come before us in order to get the facts of industry I want that very clearly understood.

What we are dealing with here is a representative brief from the association at large. I do not want to especially—although I reserve my rights, of course— probe. At the moment I have no desire to ask as to the profits of Sunbeam as against somebody else. I respect the individual, private enterprise in that regard.

Much as I am concerned about that, we have purchasers unlimited—16 million or 18 million—who are involved in the discussions of this committee, who are purchasers of these goods; and I think we were set up as a committee to inquire, in order to make sure that the consumer was getting a break.

Mr. HUME: Mr. Benidickson, we have the profit figures at large, or an estimate, if that is what you want. Mr. Simpson, I think, can perhaps answer you in a word.

Mr. BENIDICKSON: I suggested the industry as a whole. He gave some figure as to profit based on sales, 3.2.

Mr. HUME: Three decimal point one.

Mr. BENIDICKSON: That is not a tremendous figure. There are other elements of discussion as to proper profit beyond that of a percentage based on total sales. There is also a relevant figure based on invested capital, and some other things. I am sure that this industry has statistics and has examined all these things, even if they do not go to lunch together.

I just thought this was a proper course to pursue, Mr. Chairman. I do not care about the Sunbeam Company. I do not think the Sunbeam Company is on the stock exchange: it is not a company that reports to the public at large.

Mr. JONES: Mr. Chairman, I wonder if the question could be asked? He has forgotten what he wants to ask now.

Mr. SIMPSON: May I say this, Mr. Chairman: I object to the use of these individual company names. These gentlemen I have brought down here are part of an industry committee, and they were asked to answer the criticism of bill C-58 on the basis of an industry.

This is completely wrong, this type of inquiry, and I disagree with it completely. As a matter of fact, if you want over-all profit figures—and I talk from memory—the over-all industry profit on the sales dollar in 1951, previous to this legislation, was 4.6 cents; in the last four years it has been 2.6, 2.9, 3.2 and 3.1 cents on the dollar. And the average of all Canadian manufacturing, as taken by the Canadian manufacturers' association, is 5.2—twice as much.

Mr. BENIDICKSON: With all respect to you, you say you take that off the top of your hat, from memory.

Mr. HORNER (*Acadia*): Pretty well done, too!

Mr. BENIDICKSON: I want you to give to this committee, in deference to the committee, representing all elements in the economy, the consumer and the manufacturer—I think you might, on refraction, bring that to us in a form that we would accept. Not that we do not accept what you say; but you yourself said it was from memory.

Let us bring it into focus.

Mr. SIMPSON: Mr. Chairman, could we get back to questions in respect to our brief?

Mr. MCILRAITH: I would like to ask a question to clarify this. The committee members have the right to ask any questions they like.

Mr. MARTIN (*Essex East*): Before Mr. McIlraith continues, do you not think that the fact that we are all on edge now is the reason for—

Mr. JONES: Let us get on with our questions about this brief.

Mr. MARTIN (*Essex East*): Just a minute. The fact that we have been here all day is about the best advertisement of how we feel. We have been here all day and I am sure that, apart from myself, no one has understood what has been going on here for the last hour.

Mr. WOOLLIAMS: Mr. Chairman, we appreciate that Mr. Martin has some inside information.

Mr. MCILRAITH: I would like to ask a question of Mr. Simpson. He gave us, from his experience, several figures, which will appear in the record, in relation to the sales dollar.

Mr. SIMPSON: That is normal on the continent.

Mr. MCILRAITH: You gave us figures for certain years starting with 1951. It seemed to me that you related those to the resale price maintenance legislation only. Is it not fair to assume that part of that decline in 1958 would be due to the general recession in business?

Mr. HUME: There are many things involved.

Mr. SIMPSON: There are many factors involved. I would not say what it is due to.

I wish to deny, sir, that I attributed this decline altogether to the resale price maintenance legislation. I made no such statement. I said this has happened since 1951.

Mr. MCILRAITH: Could we agree that if there is a reduction, as your figures would indicate, that a proper assumption in respect of the sales dollar would be that there were many factors contributing to it, probably one of those factors may have been the resale price maintenance legislation?

Mr. SIMPSON: That is possible.

Mr. MCILRAITH: That is the point I wished to make.

Mr. SIMPSON: I think that is a fair summation, yes. There could be many factors.

Mr. MCILRAITH: And one factor could be the general business recession in 1958?

Mr. SIMPSON: Yes, it could be.

Mr. BENIDICKSON: In your presentation, have you not mentioned several times that there was a possible effect on prices resulting from competition from imports?

Mr. SIMPSON: Very definitely.

Mr. BENIDICKSON: There are some of us that do not want to think, and you may regard this in the future, that you are coming here with the suggestion that if there are any unfortunate circumstances in your industry or any other industry, that it all comes from the 1951 legislation.

Mr. SIMPSON: Excuse me, Mr. Chairman, through you I would say that there was no such statement made here. What I stated here was this: this legislation was not required for the simple reason that there are 60 companies in Canada manufacturing major appliances. There are many more in addition manufacturing electrical houseware goods, such as Mr. Fitzpatrick's company. All of them are struggling for part of the consumer dollar. There are so many

of them that they have a productivity capacity of producing about twice what this market will take. In addition to that, 30 per cent of this market is taken up by imports which come here at very low prices. They therefore have to meet very, very low competitive prices in order to stay in business.

I did not say that section 34 was responsible for this. I said that it was not needed because the competitive factor is so strong that it controls itself.

Mr. McILRAITH: I am glad that you clarified that, Mr. Simpson, because I had the impression that you were going further than anyone would wish to go, by blaming all the ills of industry on section 34. I am quite pleased that you clarified that point.

Mr. BENIDICKSON: You have come here, Mr. Simpson, representing the industries, and I am sure that despite the apparent position that you take, in that you do not have lunch together sometimes, you must have certain consultations at the manufacturing level in a matter of this kind. Surely you have some information as to the average markup. We are all here concerned with the consumers. What would be the normal markup by the representatives of your industry before you advance your product to the next source of supply, which might be wholesale or retail?

Mr. SIMPSON: Mr. Benidickson, we do not have discussions, as to prices and discounts within the association, among any companies.

Mr. BENIDICKSON: From your widespread knowledge you perhaps have a general idea as to what the manufacturer feels is necessary as an advance on his cost before he prices or sells the manufactured article to the next consuming level?

Mr. SIMPSON: As manager of the association, I do not have any such knowledge, but perhaps Mr. Bruce has.

Mr. BRUCE: First of all, I want you to appreciate that I am not in the commercial end of the business. However, I anticipated that this question might be asked. My answer relates only to my own company.

Mr. BENIDICKSON: What company is that?

Mr. BRUCE: The Canadian Westinghouse. By our policy, major appliances are sold by discount, not by markup.

Mr. BENIDICKSON: What do you mean by that?

Mr. BRUCE: We have a price which is presumably the selling price.

Mr. BENIDICKSON: Are you referring to the consumer's price?

Mr. BRUCE: I am referring to the consumer's price, and from that, the dealer or the distributor receives a discount.

Mr. BENIDICKSON: I think that is awful.

Mr. BRUCE: I am not going to justify the policy. As I explained, I am not a commercial man myself and we have, in my opinion—

Mr. JONES: I do not think these comments are called for. The witnesses are here to answer questions and not to defend their policies.

Mr. BRUCE: We have a number of available people who consider it a good policy. Anyway, to get to the answer to your question, Mr. Benidickson, in our company the average is about—and it varies by product volume—it is about 27 per cent.

Mr. McINTOSH: Mr. Bruce, I would like to ask you a supplementary question. You say you have a policy of discount. You are trying to say that there is a certain markup required with which to carry on business and to cover overhead and certain legitimate profits?

Mr. BRUCE: Yes.

Mr. McINTOSH: And you believe the retailer should have it?

Mr. BRUCE: Yes.

Mr. McINTOSH: And it would cover service and everything else?

Mr. BRUCE: That is right.

Mr. McINTOSH: What was the term used by another member of this committee?

Mr. BRUCE: He said that he thought that our policy was stupid, or words to that effect.

Mr. BENIDICKSON: I said you were fixing the price for the ultimate consumer.

Mr. BRUCE: We cannot very well set the price that the ultimate consumer pays. This law makes it very clear.

Mr. BENIDICKSON: But your discount gives us that theoretical figure which the manufacturer sets for the article.

Mr. McINTOSH: You maintain that when you have maintained that policy, the manufacturer, the retailer, and the wholesaler will make a legitimate profit comparable to some that the witnesses have mentioned, a five per cent profit, as far as the manufacturer is concerned in Canada?

Mr. BRUCE: That is right.

Mr. McINTOSH: But in your case the rate has dropped to two and three per cent in the last four or five years, which is not sufficient for you to carry on, and you can invest your money—the money of your company—in stocks and bonds and make more money than you can as an industry, employing Canadian labour. Would you say that?

Mr. BRUCE: That is right, if we could liquidate our holdings.

Mr. WOOLLIAMS: How many people does the industry as a whole employ?

Mr. SIMPSON: I checked the figures for 1956 and there were 86,000 and some odd; while now it is down to 75,000.

Mr. McINTOSH: Perhaps I should refer you to what Mr. Fitzpatrick said, but in analysing the result, I wondered what you found over the last three or four years. Did you take into consideration that your net profit was down because of loss of volume, if such was the case, and because of imports of inferior products coming in from other countries?

Mr. BRUCE: I would not like to tackle that question myself, because I just do not know enough about it.

Mr. FITZPATRICK: As far as imports are concerned, we have not, in the electrical appliance business, been seriously hurt as yet. In the electric shaver business there was the beginning of a flow which caused some concern but for some reason or other seems to have been blocked out. I think there has been a change in some of the comments I made. I commented on the destruction of dealer organization. This was interrepted as a loss or profit inside our company. What concerns us is our dedicated purpose to increase the number of retail outlets. The opposite has been happening. I know why.

Mr. McINTOSH: Did your volume increase or decline over this period?

Mr. FITZPATRICK: I do not think the fact is fair in relation to the problem. There is a basic economic theory that the lower the price the greater the value. This continues perhaps until the merchandizing monopoly sets in and those few who are responsible for the tremendous value because of low prices begin to tell the story of monopoly. Perhaps you are left with a minimum dealer structure and are faced with the problem that some day you might hope that you will gain control of the limited section responsible for the entire merchandizing outlets.

Mr. BENIDICKSON: I want to be as considerate and understanding as I can of your industry. However, we all have a great deal of concern about the consumers. Reference is made back to 1951 and the suggestion that the memorandum which was presented in 1951 may have had an effect upon the producers of certain articles which was unfair to them. I am not asking, at the moment, whether or not it is unfair to the consumers, but I think in presenting evidence we should have from an industry of this consequence some statistical information such as we considered a moment or so ago as to the difference between 1951 and the present in respect of the number of units produced and the net profit made by the people making the articles in the industry in relation to capital invested and something that would bring us up to date as to whether or not these people are really suffering. Then we have to go to the small merchant who is complaining; but we are examining here at this stage the manufacturer of electrical appliances. I think we have to have, as a proper enquiry a statistical report from the industry. I do not want names of the individual companies; but we should have, on the whole, a report that is honest from the people who come before us as to what their net profits were in 1951, what they were in the last reported year, and to what extent any change—any variations percentagewise—refer to the type of legislation we are discussing here. I think this industry could examine this and come back with statistics of this kind.

Mr. HUME: Mr. Chairman, in answer to Mr. Benidickson I am instructed—and Mr. Simpson will correct me if I am instructed in error— that the association has no such statistics from the manufacturers. If D.B.S. has that information we will attempt, I think in order to be as helpful as we can, to get it. If the chairman indicates to us how we can be helpful and indicates what you want we will do the best we can, but this is an association which, by reason of the present law, has kept right a way from the market details and market profits of those particular companies. It is none of the concern of the association —and my association with it goes back over ten years, odd—and I think Mr. Simpson agrees that we do not have that evidence.

Mr. BENIDICKSON: You are giving evidence here. Will you, to the extent of the knowledge you have, indicate—

Mr. JONES: Mr. Chairman, on a point of order. Should not we be asking the witnesses questions and not making statements? Mr. Benidickson has had about 25 minutes, mostly making statements. Could we not get on to the questions while we have these gentlemen here? They can read our statements in Hansard at some other time. Let us ask questions so we can get most value out of their presence here.

Mr. BENIDICKSON: Is it posible for the gentlemen who are before us, with the knowledge that they have—

Mr. MCINTOSH: We know they have the knowledge.

Mr. BENIDICKSON: —to indicate to us whether or not, overall, without detail, they can assert that the profits of the industry which they represent have declined; and if they have declined, to what extent since 1951 and to the date of the presentation of the evidence to us on behalf of this industry—to date?

Mr. BRUCE: I gave the deterioration in profit rate on the basis of the overall industry returns; on the same basis as the Canadian manufacturers association get it. I have told you that it had deteriorated from 4.6 cents on the sales dollar.

Mr. BENIDICKSON: That was based on sales volume. I meant net profit to the firms that are represented by your industry, who come before us today?

Mr. BRUCE: All industry returns on the North American continent, both in Canada and the United States, Mr. Benidickson, today, are given in terms of the sales dollar. This is the best way of presenting it, sizing it up and determining where you stand.

Mr. BENIDICKSON: Then will the witness give to me the total in 1951, in the industry for which he spoke, and compared with the total volume that he says is now 3.2 as against 4.7? Could he give us the gross upon which the calculations were made in either 1951 or at the present time? Can the witness give us that?

Mr. BRUCE: These gross figures are available in the D.B.S. statistics. I do not have them with me. I think the volume in the industry in 1951 would be about $600 million. Last year it was $1,200,000,000, or some such figure. But those are D.B.S. figures that are available from the D.B.S. I am not talking now from memory, and I do not have them with me.

Mr. BENIDICKSON: You suggest the gross volume was perhaps double in 1959 what it was in 1951, and you say that the net profit to the manufacturers on a sales dollar declined from 4.6—

Mr. BRUCE: 4.6 to 3.1 last year.

Mr. BENIDICKSON: But they got a profit without new investment in capital?

Mr. BRUCE: Oh no.

Mr. HUME: No.

Mr. BRUCE: There have been tremendous plants put up all over the country during this era.

Mr. BENIDICKSON: I think you are right.

Mr. HELLYER: I have questions on the matter of service which was raised earlier. There is a supposition that one of the reasons for resale price maintenance is to guarantee a minimal service, so that any person can go back to the retailer from whom he obtained this article and obtain a certain minimal service in respect to it. In the evidence earlier, I see the witness indicated business does not stand still, but goes forward. I would like an indication as to whether the gentlemen from the association think it not possible that due to the increased complexity of much of this equipment and the changes in technology, it is not impossible for many small retailers to have an adequate service capacity, and if this cannot better be served to the public through specialized service organizations which can afford the personnel and the spare parts necessary to give adequate service, and that, in this case, would it not be equally advantageous to the public when selling a product, to allow this to be done by specialized organizations?

Mr. FITZPATRICK: The problem of service is a grave one, not necessarily with us, but for the industry in total.

There is a very high degree of independent service stations. There is a high degree of that developing. We subscribe to certain independent service stations who service traffic appliances, not only our own appliances, but others. I am not suggesting this relieves the dealer of all his costs involved in handling that from a service standpoint. He must be there and be ready to receive the appliance back, or go to pick it up. These independent service stations may not be in his own back yard; or in his own town. The service station is involved in the cost of handling; and it is finally returned to the customer.

These are time consuming problems, and considerable expense is involved.

Mr. HELLYER: I appreciate that, but do you think it is possible that this evolution to specialized service stations, as you call them, may provide a greater service at lower cost to the customer than would be possible if you tried to have it done on a more diversified basis?

Mr. FITZPATRICK: I would say yes.

Mr. FISHER: I just wanted to ask Mr. Fitzpatrick if you did, in effect, present the information which you gave us, in germ, to either the minister or to his parliamentary secretary at some time?

Mr. FITZPATRICK: Yes. Actually, the information I have used today, has been presented.

Mr. FISHER: Can you tell me to whom it was presented?

Mr. FITZPATRICK: To the minister.

Mr. FISHER: I wanted to ask the gentleman who is representing the association whether any other members of the association, such as Sunbeam, acting individually, as far as you know, have presented a similar type of thing to the minister?

Mr. SIMPSON: I have no such knowledge, and I did not have until half a second ago when Mr. Fitzpatrick said he had.

Mr. FISHER: I had understood from the minister that representations had been received largely from merchants rather than from manufacturers. I had the impression he did not have any from the manufacturers, and I wanted to get some idea of the scale. Is the minister here?

Mr. DRYSDALE: No; he just left.

The CHAIRMAN: No, he is not here.

Mr. MORTON: He has been here all afternoon.

Mr. FISHER: The question that comes to my mind—and I do not want to recover the tracks that Mr. Benidickson was following—but we have heard a very strong argument, of a statistical basis, presented by only one distributor, and it throws awry, in my analysis of it, how severe the change and alteration is.

Does Mr. Fitzpatrick know of any statistical pattern we could examine in order to determine the substantiation for his figures in a general way?

Mr. FITZPATRICK: I do not know of any way you could do it. It has been extremely desirable to obtain as much evidence as possible that is factual, and there are few companies who have used guarantee cards as a basis to determine where products are, and to study the marketing process. The fact we had them, we feel, has proved to be invaluable under the present circumstances, because it points out what is happening to our dealer structure, which has disintegrated in the face of this problem.

Mr. FISHER: You did not consider presenting your particular analysis to any of the other firms that were, perhaps, in this association with you, to see whether they could give substantiating evidence.

Mr. FITZPATRICK: Believe me, there are several in our industry who are more seriously hurt by this problem than others. I suggest to you that certain products are worthy of being loss leaders; they are well enough established by trade name, well enough known, to be useful to the dealer who wishes to take advantage. Therefore, there are many in the industry who are not the slightest bit concerned.

Some one asked about the consumer a short time ago. The end concern is that the product that is perhaps best value, top quality, is the one selling for perhaps an extremely low price today; and the one that is of least value is selling at a higher price, in many cases. The dealer-clerk involved—someone

discussed him this morning—is selling you off of the good value in order to convince you, in some unsound way, that this lesser quality is worth more price. This happens very often. I think it was suggested this morning that the dealer-clerk should be a reliable somebody in whom we have a certain amount of trust; but the almighty dollar begins to take over.

Mr. FISHER: You used the phrase loss leadering in a very general way in your statement, Mr. Fitzpatrick. Did I understand you to say that these discount houses loss leader right across the board—or does this additional information you have just given us indicate that they specialize in a few lines, and particularly in the electrical line, and then make it up on other lines?

Mr. FITZPATRICK: The loss leader that we refer to specializes in certain—they all have their own approach. The law has licensed them to use as many gimmicks as they can to fool the public—and I say this very advisedly—so they have certain devices of taking advantage of the present law.

They take a line that is well known, such as Sunbeam, and use it consistently. In this instance we may continue to get value on that particular market. The situation we dislike most is where they use it sporadically; they will use it this week, forget it for perhaps months, and damage the entire dealer structure—even the dealer house on whom we are depending. The practice varies a great deal—

Mr. FISHER: Have you a definition of a loss leader, in the sense that you use it?

Mr. FITZPATRICK: I do not think anyone has a definition of a loss leader. I do not think you really want me to try to define it. You will know, even from a study of this present bill, that it suggests very strongly a loss leader is a matter of opinion.

Mr. BENIDICKSON: A judge that does not know anything about commerce, perhaps?

Mr. FISHER: May I continue with one more question. Is it fair for me to ask you: does Sunbeam give volume discounts?

Mr. FITZPATRICK: It possibly is not fair for you to ask. We do not give volume discounts: I answered that question this morning.

Mr. MCILRAITH: He refused to give that answer.

Mr. HUME: No, he answered it this morning.

Mr. MCILRAITH: The question I want to ask is this: I presume in the electrical manufacturing industry, as in any other, at times, due to some vicissitude of the market, at any given moment you may get over-production in a particular line?

Mr. FITZPATRICK: Yes, that is so.

Mr. MCILRAITH: If their own facilities are over-stocked. In those circumstances, when you have a discount dealer come in to the manufacturer and make an offer for all this stock, which may be due to a momentary or temporary over-production of a particular line, the industry, the manufacturer would sell that, would he not?

Mr. FITZPATRICK: If you wish me to try to answer that, unfortunately I can only answer for Sunbeam, and I would tell you what we do in a circumstance such as that.

Mr. MCILRAITH: What would you do?

Mr. FITZPATRICK: In a circumstance such as that we would do it the painful way. Frankly, Sunbeam has been noted for good trade policy. In a situation of over-stocking, or, let us assume there is a seasonal problem, we would have to go about it most realistically in order to earn and continue to get the trade

support. In short, we would have to launch an official price reduction, which means, in effect, every wholesalers' stock across the country must be adjusted to the lower level. This is a painful process; but this is the price we will pay to retain good distributor relations.

Mr. McILRAITH: I wonder if Mr. Simpson could answer this question; wheher he knows of any manufacturer who would sell under these circumstances?

Mr. FITZPATRICK: I think I could make a general reply.

It is quite well known that during some advertising schemes some manufacturers will do that. In my estimation if they are careful there is absolutely nothing that is illegal about it.

Mr. McILRAITH: But there are some who will do that.

Mr. HELLYER: Mr. Fitzpatrick, if you feel you have the authority under the law to enforce trade practices which would prevent your customers from using your products as loss leaders, would you interpret that authority? In other words, at what per cent markup would you consider that they were using your products as loss leaders? What percentage below your suggested retail selling price would you consider that they had violated this principle of loss leadering?

Mr. FITZPATRICK: About the best way I am going to be able to answer this question is in a somewhat roundabout way, because the direct question is a very difficult one.

But I would say generally that if we had bill C-58 as law I believe we could do a far better job of convincing dealers in general that Sunbeam is a worthy line to handle, to stock regularly, and to sell on a regular basis. I believe we could counsel with certain dealers. The atmosphere we have currently is one that the sharp operators enjoy tremendously. They have been licensed by the government to go and practise any shady merchandising deal that they wish to. Since they are licensed we are helpless to go and counsel with them. They simply laugh at us and tell us that we can do nothing about it. We recognize the fact that what they are doing is not in the public interest and we have at least placed this fact on the record. Loss leadering is not a good thing in the public interest. That is what I believe this bill will accomplish if it becomes law. We can then counsel with certain dealers who have been faced with a serious problem. We can go out and counsel with them and effect a better atmosphere for many dealers to work in.

Mr. HELLYER: When you say you counsel with them now, you mean that you will permit two dealers in the same neighbourhood to sell your product at different prices?

Mr. FITZPATRICK: Yes, sir.

Mr. HELLYER: You would then try to convince them of a certain price to sell at?

Mr. FITZPATRICK: I think it would be ridiculous to continue the practice of selling them at this particular level.

Mr. HELLYER: But you would not withdraw the supply from the merchants because it was sold at some marginal discount below your suggested retail price?

Mr. FITZPATRICK: Every one of these dealers, no matter how they are operating today, until there is reason for them to change will continue operations as they are now. We suggest that there should be organizations which have warehouses, have dealer clerks, if you will, and they can be trained to the benefit of themselves and the manufacturers. This is our objective, which we put forward, and which we feel would be absolutely of benefit right through the market. This is the atmosphere under which we would prefer to work.

Mr. BENIDICKSON: Mr. Chairman, does the witness say that in so far as his company is concerned, the Sunbeam Corporation, which produces a well-known favourable product—

Mr. FITZPATRICK: Or it was.

Mr. BENIDICKSON: You are saying that your sales policy is such that if the T. Eaton Company wanted a thousand units you would not sell to the T. Eaton Company those thousand units at a unit price less than you would sell ten to perhaps the small merchant in Kenora?

Mr. FITZPATRICK: I believe I have answered the question, yes.

Mr. HUME: Answer it again.

Mr. FITZPATRICK: We have a policy that every distributor, if you will, who handles our merchandising is doing so by contract. He therefore is entitled to the prices in our distributor price list, if you will, whether he buys one or buys 500 or 5,000. He pays the same unit price. There are from time to time special activities that we are engaged in, but we still basically handle these situations on the same basis. There may be a quantity challenge offered to all to whom we sell direct.

Mr. BENIDICKSON: When you say "quantity challenge" you mean that you suggest to a buyer that if he will buy a thousand, he will get a certain price?

Mr. FITZPATRICK: I should not have even mentioned it, but this is a situation that may arise in a close-out sale where a particular product is being discontinued.

Mr. BENIDICKSON: It applies only under those circumstances?

Mr. FITZPATRICK: Yes.

Mr. MCILRAITH: You mentioned that a person could buy a product in the price list regardless of quantity. Is there a distributor price and a retailer's price? Is there a difference in the categories? In other words, would the T. Eaton Company be in the same category in the price list as the very small retail merchant in Kenora?

Mr. FITZPATRICK: We have a wholesale distributor price list. That wholesale distributor price list contains a distributor cost column. There is a suggested, and I am being careful when I say "suggested", dealer cost column and a suggested retail cost column.

Mr. MCILRAITH: So that the man in Kenora might come under a different price than the other man?

Mr. FITZPATRICK: That is right.

Mr. MCILRAITH: So there would be a difference?

Mr. FITZPATRICK: Oh, very definitely there could be, yes.

Mr. BENIDICKSON: All right, we have to get down to cases. In respect of the Sunbeam output, you say that normally you would sell a Sunbeam product to Eatons, if they bought 1,000 units, at the same price they would be sold to a dealer, let us say, in Kenora, who might only order ten units.

What percentage of Sunbeam production is marketed under a special brand name for Eatons or other non—what we called last week—non-independent dealers?

Mr. FITZPATRICK: We do not manufacture stencilled lines, if that is what you are asking me.

Mr. BENIDICKSON: You never produced a product in so far as Sunbeam is concerned that has not got the Sunbeam label on it?

Mr. FITZPATRICK: Over the past nine years, I will admit that the temptation has been tremendous, but we have yet to do it.

Mr. BENIDICKSON: But we have many other representatives of this industry before us today, and the complaints of the smaller merchants are that in so far as some other manufacturers are concerned, they do put out these private brands, which account for a very large amount of their volume of business, and that this law is responsible for some chaos in the market. How can we pursue that, Mr. Chairman?

Mr. WOOLLIAMS: It looks as if we had explored this matter fairly well, and it is now two minutes to six, so I propose a vote of thanks to the organization for presenting a very intelligent brief, and I am sure that you gentlemen will join with me.

Mr. MARTIN (*Essex East*): I would like to join with Mr. Woolliams in expressing to Mr. Simpson and his colleagues our consolations, and I do hope that the vigor of our controversy did not in any way suggest to their minds that the technique of parliamentary committees is not an efficient one.

We have had our misunderstandings today, but I would want you to know that it is only because we have a common desire, in spite of our differences, to get at the truth, that we have been somewhat dynamic this afternoon.

Mr. WOOLLIAMS: There is something in the evidence today when somebody was talking about dresses, and somebody else mentioned ribbons. I can well understand how one would get mixed up, because it is so hard these days to tell the difference between dresses and ribbons.

Mr. HUME: We share Mr. Martin's interest in striving to get at the truth. It has been a great privilege to appear here.

The CHAIRMAN: Thank you very much.

Mr. DRYSDALE: I move that we adjourn until 8 o'clock tonight.

Mr. HELLYER: I move that he be thrown into the river instead. Do not be ridiculous. This has been enough. We have been sitting here until we have got bunions, and are all touchy.

Mr. DRYSDALE: I have listened patiently for several hours, and my point is that two briefs which we intended to hear today are to be given by people from British Columbia. One is from the council of the forest industry, and the other is from the fisheries council of Canada.

The reason I suggested that we might be able to hear them tonight is the fact that in the fisheries brief the main substance has to do with trade discounts in the export industry, and in the forest industry brief, their main point has to do with the export industry. Also another matter of concern is the council of the forest industries of British Columbia. The main point they are making too is a discussion of the export industry and one or two minor suggestions which I think previously have been dealt with. I thought the committee, in consideration of the great distance these gentlemen have come for this particular hearing, might perhaps go out of its way to sit here tonight. I make the point that many of these questions have been canvassed perhaps very thoroughly this afternoon.

Mr. MARTIN (*Essex East*): Mr. Drysdale, may I say that I can understand how you would want to put that forward. These gentlemen come from British Columbia. That is understandable. However, we have had a very long day. I do not believe it is possible for us to continue and do good work sitting here hour after hour, particularly in this room. I hope we can get another room because it has been unbearable here this afternoon. I do not think it is possible for us to do good work, and Mr. McIlraith tells me these gentlemen who come from British Columbia are prepared to stay. That would help us; but if they were not I would think we would simply have to say we cannot meet tonight.

We have the judges' bill in the house tonight at 8 o'clock and some of us should be there for that. On top of that I do not think the committee can do good work sitting these long hours.

Mr. HORNER (*Acadia*): These gentlemen are here. I certainly do not want to sit tonight unless it is necessary. If we do not sit tonight I suggest we deal with them first thing tomorrow morning after our business meeting.

Mr. MCILRAITH: It seems to me that here we have these three organizations from British Columbia. They have been kept here all day like the rest of us sitting listening. It seems to me that better progress ultimately would be made both in their interests and in our interests if we were to hold our steering committee meeting tonight, our business meeting first thing in the morning, and then hear them later in the day. I think we would be further ahead by Thursday if we adopt that procedure.

Mr. Chairman, I would like to make the suggestion that you consider asking one of these spokesmen of these organizations if they would care to make any observations as to when it would be agreeable to them to come back, in the light of all that has been said. They may have views which would be helpful to us; they may not, but if they express themselves it might be helpful.

Mr. WOOLLIAMS: It would be impossible to meet tomorrow at 9:30 as there are caucus meetings.

Mr. HORNER (*Acadia*): I will second Mr. Drysdale's motion.

Mr. BENIDICKSON: We will have to tell the Prime Minister about what is going on here.

The CHAIRMAN: I would like to hear from the witnesses what is their wish on this thing? Have you anything to say which might clarify the situation?

Mr. J. N. HYLAND (*Vice President of Sales, British Columbia Packers Limited*): I am from British Columbia and Mr. Nicholson also. We would be available at any time tomorrow.

Mr. MARTIN (*Essex East*): Thank you very much.

The CHAIRMAN: Now the Canadian metal. Are they still here?

Mr. MOCKRIDGE: Our delegate has left. He has left and is returning tomorrow. I do not know at exactly what time, but I am sure that he would be available later in the day.

Mr. WOOLLIAMS: Mr. Chairman, there is one thing about this business meeting: we should really be positive on the hour of that. We do not want to waste another hour with our good friends, wondering when we are going to have our business meeting.

The CHAIRMAN: Could we not hold that business meeting tonight?

Mr. MCILRAITH: You have to have the steering committee meeting first.

Mr. DRYSDALE: Mr. Chairman, as a member of the committee I am getting tired of the fact we have to make concessions to the people opposite. They have the choice of either being in the House or in the committee.

Mr. MCILRAITH: We also have the commitment from the Prime Minister, when he gave an unequivocal commitment, but this has not been honoured.

Mr. DRYSDALE: Much of the time they do not want to attend the committees, then when it comes to something of importance that requires our consideration, they say they are of more value in the House. I think it is desirable to carry on and have some degree of continuity. I am agreeable to having an adjournment until tomorrow afternoon at 2 o'clock; but whether you meet at 10 or 10.30 tomorrow morning, why not have the steering committee meet tonight?

Mr. MCILRAITH: Let us meet tonight.

Mr. DRYSDALE: I would withdraw my other resolution, and suggest we sit at 2 o'clock tomorrow. Seconded?

Mr. HORNER (*Acadia*): When is the business meeting?

Mr. DRYSDALE: At 10 o'clock tonight.

The CHAIRMAN: We are a little too fast on this—

Mr. WOOLLIAMS: The chairman has a speech to make on this.

The CHAIRMAN: You are eliminating the steering committee meeting.

Mr. DRYSDALE: At 10 o'clock tonight, and you can talk till midnight, if you like.

The CHAIRMAN: This is at 9.30. What about this meeting in the morning, because we have the caucus in the morning?

Mr. DRYSDALE: That is off.

The CHAIRMAN: It is off?

Mr. HORNER (*Acadia*): We cannot meet in the morning.

Mr. FISHER: We are willing to waive caucus meetings for something which is so important.

Mr. MCILRAITH: If you get the committee business meeting through—I think you could do it fairly quickly—in the morning, I think you would save all this time.

The CHAIRMAN: I doubt it. We have a caucus in the morning at 9.30. You have one—

Mr. MORTON: Let us meet at 9 o'clock.

Mr. MCILRAITH: Ours is at 10 o'clock.

The CHAIRMAN: We start earlier than you.

Mr. MORTON: Let us meet at 9 o'clock.

The CHAIRMAN: 9 o'clock tomorrow morning?

Mr. WOOLLIAMS: Is that all the committee members, because I want to be at this business meeting?

Mr. MORTON: Yes, that is right.

The CHAIRMAN: Wait a minute now. The steering committee is meeting tonight—

Mr. MCILRAITH: At 9.30

The CHAIRMAN: Mr. Benidickson, did you hear that?

Mr. BENIDICKSON: I am not on it.

The CHAIRMAN: I looked past you, Mr. McIlraith. The business meeting is tomorrow at 9 o'clock.

Mr. DRYSDALE: Where?

The CHAIRMAN: And the meeting for the witnesses is at 2 o'clock. Is that agreed?

Agreed to.

Mr. JONES: Let us have a unanimous vote on that.

Mr. DRYSDALE: Will Mr. McIlraith tell the Hon. Paul Martin, so that he will not come tomorrow morning and say that he does not know?

Mr. MACDONNELL: Where is that 9 o'clock meeting?

Mr. DRYSDALE: Here, at 9 o'clock tomorrow morning.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament
1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 4

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

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WEDNESDAY, JUNE 22, 1960

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WITNESSES:

From the Fisheries Council of Canada: Mr. G. O'Brien, President; and Mr. J. N. Hyland, Director; *from the Council of Forest Industries of British Columbia*: Mr. J. R. Nicholson, President; and Mr. J. R. Tolmie, Legal Counsel; *from the Canadian Metal Mining Association*: Mr. V. C. Wansbrough, Executive Director; and Mr. H. C. F. Mockridge.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23400-5—1

STANDING COMMITTEE
ON
BANKING AND COMMERCE

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Vice-Chairman: E. Morissette, Esq., M.P.

and Messrs.

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Allmark
Asselin
Baldwin
Bell (*Saint John-Albert*)
Benidickson
Bigg
Brassard (*Chicoutimi*)
Broome
Campeau
Cardin
Caron
Cathers
Creaghan
Crestohl
Drysdale
Fisher
Hales
Hanbidge
Hellyer
Horner (*Acadia*)
Howard
Jones
Jung
Leduc
Macdonnell (*Greenwood*)
MacLean (*Winnipeg North Centre*)
MacLellan
Martin (*Essex East*)
McIlraith
McIntosh
More
Morton
Nugent
Pascoe
Pickersgill
Robichaud
Rowe
Rynard
Skoreyko
Slogan
Smith (*Winnipeg North*)
Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams.

Antoine Chassé,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

WEDNESDAY, June 22, 1960.
(14)

The Standing Committee on Banking and Commerce met at 9.13 a.m. this day. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Aiken, Baldwin, Benidickson, Bigg, Cathers, Drysdale, Fisher, Horner (*Acadia*), Howard, Jones, Macdonnell (*Greenwood*), Martin (*Essex East*), McIlraith, Morton, Tardif and Woolliams.—16.

In attendance: The Honourable E. D. Fulton, Minister of Justice.

The Chairman read to the Committee a report from the Subcommittee on Agenda and Procedure outlining decisions taken at a meeting held at 9.30 p.m., Tuesday, June 21st.

The report included the following decisions:

1. That the Committee in future attempt to confine its meetings to Tuesdays and Thursdays at 9.30 a.m. and 3.00 p.m. and on Fridays at 9.30 a.m.
2. That the Committee hear representations at 2.00 p.m. this afternoon from the B.C. Forest Products delegation and representatives of the Fisheries Council and the Canadian Metal Mining Association.
3. That, on Thursday, June 23rd, the Canadian Manufacturers Association and the Automotive Retailers Association will be heard.
4. That, on Tuesday, June 28th, the Board of Trade—Metropolitan Toronto, and the Cooperative Union of Canada will be heard.
5. That, on Thursday, June 30th, Professor L. A. Skeoch of Queen's University will be heard.
6. That, on Tuesday, July 5th, Professors English and Rosenbluth of Carleton University and Queen's University respectively will be heard.
7. That, approximately ten minutes prior to the adjournment of morning meetings, the Chairman draw to the attention of Members the necessity of completing questioning.
8. That Members be requested to stand when questioning witnesses.

On the motion of Mr. Martin (*Essex East*), seconded by Mr. Woolliams, the report of the Subcommittee on Agenda and Procedure was adopted, with one dissenting vote.

Members discussed the possibility of extending invitations to other national bodies to express their views on the legislation before the Committee.

The Chairman advised that it is essential for him to be in Toronto this afternoon and that the Vice-Chairman is also unavailable it will be necessary to elect an Acting Chairman.

On the motion of Mr. Baldwin, seconded by Mr. Drysdale, Mr. Morton was elected as Acting Chairman for this afternoon's meeting.

At 9.45 a.m. the Committee adjourned to meet again at 2.00 p.m. this day.

23400-5—1½

AFTERNOON SITTING

(15)

The Committee reconvened at 2.15 p.m. The Acting Chairman, Mr. Morton, presided.

Members present: Messrs. Aiken, Baldwin, Bigg, Drysdale, Fisher, Hales, Hanbidge, Horner (*Acadia*), Howard, Jones, Macdonnell (*Greenwood*), McIlraith, McIntosh, Morton, Nugent, Pascoe, Pickersgill, Skoreyko, Smith (*Winnipeg North*), Thomas and Woolliams.—21.

In attendance: The Honourable E. D. Fulton, Minister of Justice; *From the Fisheries Council of Canada:* Mr. G. O'Brien, President, and Mr. J. N. Hyland, Director. *From the Council of the Forest Industries of British Columbia:* Mr. J. R. Nicholson, President; and Mr. J. R. Tolmie, Legal Counsel. *From the Canadian Metal Mining Association:* Mr. V. C. Wansbrough, Executive Director, and Mr. H. C. F. Mockridge, Legal Counsel.

Messrs. O'Brien and Hyland were called and Mr. Hyland presented a brief, copies of which had been previously distributed to Members of the Committee, requesting more favourable consideration of the export industries in the framing of the Combines Legislation.

Following the reading of the brief, Mr. Hyland expressed support for the brief to be presented by the Council of the Forest Industries.

Mr. Hyland was questioned and introduced two suggested amendments to the Combines Act.

Messrs. Hyland and O'Brien were thanked and retired.

Messrs. Nicholson and Tolmie were called, and following their introduction Mr. Nicholson read a brief and expressed his views on the industries' export position with relation to the Combines Act. At the same time he supported the representations received from the Fisheries Council of Canada and suggested certain amendments to Bill C-58.

Agreed, To print as an appendix to the record of this day's proceedings the brief received from the Council of Forest Industries of British Columbia. (*See Appendix A*).

Messrs. Wansbrough and Mockridge were called and Mr. Wansbrough read the general part of a brief on behalf of the Canadian Metal Mining Association.

Mr. Mockridge read the remainder of the brief relating to specific parts of Bill C-58 and suggesting certain amendments.

Following the questioning of Messrs. Nicholson, Wansbrough and Mockridge the Committee adjourned at 6.00 p.m. to meet again at 9.30 a.m., Thursday, June 23, 1960.

J. E. O'Connor,
Acting Clerk of the Committee.

EVIDENCE

WEDNESDAY, June 22, 1960.

The CHAIRMAN: Gentlemen, we have a quorum.

The steering committee, consisting of Messrs. McIlraith, Morton, Fisher, Baldwin and myself, met last night. I do not have the recommendations typed out and I will give them more or less from memory. I believe it was a little after 10 o'clock when we finished it. It was suggested that we hold our future meetings three days a week, Tuesday, Thursday and Friday. The meeting on Tuesday to be at 9.30 in the morning and 3 o'clock in the afternoon; Thursday at 9.30 and 3 o'clock and Friday at 9.30.

Mr. MCILRAITH: Except today.

The CHAIRMAN: I am coming to that.

Mr. MARTIN (*Essex East*): Do you wish us to comment point by point? I think, for instance, that meeting at 3 o'clock generally is satisfactory, and I think that generally the hours are good; but I do not think when a certain measure is on in the house that we should be sitting. I do not think we should have sat yesterday in the afternoon. We missed a very important debate. Many of us wanted to and had a duty to take part in that debate.

Generally, I think we should meet at 3 o'clock, but it should be understood that if substantial numbers of members of the committee feel they cannot be here we should not sit.

The CHAIRMAN: How will that work? For example, yesterday we had the electrical manufacturers and the others. A date had been given when they would appear. When a date is given to a delegation are you going, on that day, to say "we cannot see you"?

Mr. MARTIN (*Essex East*): But we are parliament. I think the public would expect to sit in their engagements to the exigencies of parliamentary obligation; it cannot be any other way. For us to try to accommodate them beyond that I do not think is possible. I believe this is essential, and I am not raising this by way of political comment at the moment. I would like to recall what the Prime Minister said in the house last year. True, he modified it the other day. He said that he felt no member in a committee should in any way be precluded from the discharge of his parliamentary obligation because of committee sittings.

I think we could work this thing out; but I think it ought to be understood that that is the situation. Let me give an example. Supposing Health and Welfare is on tomorrow: I think it will be understood that I should be in the house—not that I am indispensable to this committee; but if I am pursuing an interest in a particular matter, is it fair that we should sit? I have given an example of my own case. I know that is a bad thing to have done; but it is an illustration. I think it would work out, if we just had this sort of understanding.

Mr. MACDONNELL: Mr. Chairman, may I make one comment. After all, we just cannot foresee everything. Cannot we have an understanding that if a real emergency comes up, the steering committee can decide and let us know what to do. Instead of, for example, an afternoon meeting, we might have an evening meeting. If we are going to try to foresee everything, we will be here for hours.

Mr. MCILRAITH: Mr. Chairman, may I make a suggestion. If we had the chairman go through, point by point, what the steering committee has decided, then we can discuss it.

Mr. WOOLLIAMS: A very good idea, Mr. Chairman.

The CHAIRMAN: With regard to this afternoon, there are the three associations that are here; B.C. forest products, the fisheries council of Canada, and the Canadian metal mining association. We suggest that we meet at 2:00 o'clock with them today.

Then the next thing is the program. The confirmed engagements that we have at the present time are these: tomorrow morning we meet with the Canadian manufacturers' association, and the automotive retailers' association will be here also. Those two associations are the only ones that we have for tomorrow.

Mr. JONES: Is that the correct name, Mr. Chairman—the automotive retailers' association?

The CHAIRMAN: The automotive retailers' association is what I have here.

Mr. JONES: The point is, that some people have received communications from automotive retailers who distinguished themselves from this particular group.

The CHAIRMAN: There are many organizations under that title of "automotive" that would be confusing. Then we jump to Tuesday, June 28: that is the board of trade, at 9:30.

Mr. MCILRAITH: The Board of Trade of Toronto?

The CHAIRMAN: The Board of Trade of Toronto; thank you. Then at 3:00 o'clock, the Cooperative Union of Canada. Those are confirmed. There are three requests by professors; one from Carleton university and two from Queen's university, and the thought of the steering committee was that we would hear Professor Skeoch on Thursday morning, June 30, at 9:30; and on Tuesday, July 5, Professors English and Rosenbluth.

Mr. HORNER (*Acadia*): I do not want to object to these professors; but why should we have two professors from one university?

Mr. MCILRAITH: Could we allow the chairman to get out the whole thing, before we discuss it?

Mr. WOOLLIAMS: Do you think all professors think alike, Mr. Horner?

Mr. HORNER (*Acadia*): No; but it is the practical application, after all, in which we are interested, rather than the theory.

Mr. DRYSDALE: I would agree with that.

Mr. MCILRAITH: Is the Canadian Metal Mining Association here?

The CHAIRMAN: It was not too clear last night, when the Canadian Metal Mining Association left, whether or not they were going to be back today to join with these other two. If they are not back today, we are going to suggest that they come with Professor Skeoch on Thursday, June 30, at 3:30.

Mr. MCILRAITH: Nine thirty.

The CHAIRMAN: Nine thirty. Those are the total applications, or requests, that I or the Secretary have received.

Mr. JONES: What is the meeting before the July 5 one that you have?

Mr. DRYSDALE: June 30, Professor Skeoch.

The CHAIRMAN: Tuesday, June 28, the Cooperative Union, at 3:00 o'clock; and the Board of Trade of Toronto at 9:30.

Mr. DRYSDALE: June 30 is the one.

Mr. JONES: I wonder if we could not take the July 5 one back into June.

The CHAIRMAN: As a matter of fact, I had been trying to get them on for Monday, June 27. Actually, one has confirmed; but the steering committee thought that the three of them on a Monday afternoon would be too much.

Mr. JONES: I think that is a good observation.

Mr. MORTON: I hope we may keep the arrangement as it is. I feel that perhaps some of our trouble to date is that we have been trying to cram too much into the time that we have, and that we have underestimated the time that the committee would take in cross-examining some of the witnesses before us.

I think this is a case where caution and slowness would make for more speed. We would find this to be true, because if we crowd too much, we may find in an emergency that someone is running over, and that we do not have space left in which to take care of that emergency situation.

Mr. MCILRAITH: Last night we tried to go into this thing fairly and thoroughly, bearing in mind that certain of these persons had been invited for certain dates, and we tried to reconcile the whole thing into a workable arrangement.

There seemed to be some reason for suspecting that there was an overly large number called, for instance, for yerterday and for certain previous days, and that it was difficult to arrange the hours of sitting—that is, deciding at 11 o'clock when the bell goes, and when half the committee is left, whether or not we should meet at two instead of three; and we came up, among the five of us, with something which we thought might take care of this difficulty, bearing in mind that invitations had been sent out. So we fixed dates of sittings so there would be no sittings on Mondays and Wednesdays, and no afternoon sitting on Friday afternoon, unless something was unfinished on Friday morning; and we fixed the hour of sitting at 9:30.

Mr. HORNER (*Acadia*): That was just to facilitate T. to T. boys.

Mr. MCILRAITH: Might I be heard? I was at the steering committee and we did give some consideration to that, and I think we are entitled to a hearing on it. That is why we fixed the hours of 9:30 and 3:00 o'clock as a recommendation to this committee for its consideration, because it would overcome that difficulty.

And then we tried to select the days. Monday is always a day of private legislation in the house. We tried to stay off Monday sittings, and we tried to get something that was reasonably workable. And when it came down to fixing the particular organizations to come on particular days, we tried to leave the chairman in the position where he would not have to countermand invitations that he had confirmed, or that sort of thing.

I think the whole thing is in a reasonably workable form. I do not know if anyone on the steering committee would suggest that it is perfect, from any point of view, but it is an attempt to meet the whole problem reasonably. It should do so, provided things go well, and provided there are no more applications to be heard.

Mr. MARTIN (*Essex East*): Well, there are, of course.

Mr. MCILRAITH: So that on July 5th, at the conclusion of that meeting, when we have heard all the ones who have presented an indication of their desire to be here, we can then set out a precise program, from then on, to dispose of any new applications to be heard, that have come in, and that would bring us into the situation where you could then immediately bring the minister and the director of the Combines Act, on whatever date we finish the other witnesses.

Mr. JONES: Mr. Chairman, in order that this discussion might be limited, was it intimated at the steering committee, or was it with the intention that one party move and another party second the motion that we adopt this procedure?

The CHAIRMAN: If I might answer the one who suggested throwing this into July: I have confirmed to Professor English an appointment on Monday afternoon.

Mr. DRYSDALE: What date?

The CHAIRMAN: That is next Monday.

Mr. DRYSDALE: The 27th?

The CHAIRMAN: Yes, the 27th. However, I have to phone him and change that. But if the committee think well of it, would it be wise to have him on Monday, as has been arranged? Then one of the other professors—I think it was Rosenblugh, requested Wednesday, June 29, in the afternoon. Then we could have the two of them—Rosenblugh and Skeoch—probably on the one afternoon. That would finish us on Wednesday, June 29.

Mr. MARTIN (*Essex East*): Mr. Chairman, I do not think we have exhausted the number of people who have asked to come and whom we are going to ask to come.

The CHAIRMAN: We are now dealing with the ones we have already requests from.

Mr. HOWARD: I understood what you initially read out was a schedule of appearances. I tried to jot it down and, perhaps, I made some errors.

The CHAIRMAN: This is exactly the same as what you have right up to date, except the professors.

Mr. HOWARD: But this was the agreement of the steering committee, as to the way in which we should proceed. Now you suggest you make alterations to what the steering committee is recommending.

The CHAIRMAN: I am just pointing out that we had this confirmation, which I will have to change. It was just a suggestion to the steering committee, really.

Mr. HOWARD: My point is that if the steering committee went over all this in detail—and they are able to do it far easier than the larger committee—I do not think it is correct for any member of the steering committee to inject additional thoughts into it at this stage.

The CHAIRMAN: There was a request to try to get all the witnesses finished this month.

Mr. MARTIN (*Essex East*): Mr. Chairman, I think Mr. Howard's suggestion is right. For myself, I would accept the recommendations of the steering committee up to date.

Mr. WOOLLIAMS: Would you like to make that a motion, Mr. Martin?

Mr. MARTIN (*Essex East*): Let us see if we can settle it without motions. I think we ought to take into account, however, that we are going to have to anticipate other national bodies coming, because some are not aware the committee is sitting. In fact, this morning I had a call from Quebec City, wanting to know if a group could come from there; and they are going to write to me. In addition to that, we ought to consider: are there some national bodies we should ask to come, ourselves?

The CHAIRMAN: That is the next point of issue.

Mr. MARTIN (*Essex East*): In addition to that, have we asked the Canadian Congress of Labour and the Federation of Agriculture to come; and Professor Monpetit of Montreal has asked to come.

If the Canadian Congress of Labour and the Federation of Agriculture have not—these being important national bodies, representing the consuming public, in one sense, and having other interests—should not we ask them to come? Should not there perhaps be other employee and industrial organizations invited?

Mr. MCILRAITH: Could I add one thing? I think it is fair to the committee to add this. Unfortunately, because of the lateness of the hour, there is no written record, but I think I am stating this correctly—and I would like the other committee members to check me, if I am wrong—The committee came

down to the date of Tuesday, July 5, merely with all the ones who have now asked to be heard dealt with. Then I think there was a supplementary matter, that other persons to be invited by the committee, or other requests to be heard, are still to be dealt with by the steering committee and then by this committee.

Mr. DRYSDALE: Mr. Chairman, on the basis of what Mr. Martin has suggested, that other national bodies be called, in my opinion the hours and the days set are inadequate. I think they are excellent, as far as the items that we have to date; but if we are going to hear several more national bodies, I would suggest that the committee give consideration also to Mondays and Wednesdays, and also to sitting in the evenings.

The second point I should like to make is that I think the three university professors should be called together, because I feel that there is a sort of—I have to be careful with this wording—abstract feeling in the analysis that they have on matters such as combines legislation. I do not mean that in a derogatory sense—I would hasten to emphasize that—but they tend to be largely economists, and from one report I have seen, it seems to be largely a quotation of what other economists have said; and they seem to miss that practical connection with the actual day to day problems of business.

I would feel, because of the nature of their background, that the studies and reports will tend to be on that particular basis. I feel it would speed matters up to hear all of them at one time.

The CHAIRMAN: I had the same thought, Mr. Drysdale. I had the three of them to come on Monday afternoon; but you heard the criticism of that action. So the steering committee decided last night to split them up.

Mr. DRYSDALE: I disagree with that recommendation.

The CHAIRMAN: I agree with your thought, though, that we will have to sit on these other days. For example, we have nobody tomorrow—

Mr. MACDONNELL: Have you got to finish by July 5?

Mr. MARTIN (*Essex East*): No. Why July 5? We are going to be here all summer.

Mr. HORNER (*Acadia*): You are going to have about three or four meetings with the minister, going through the bill, after July 5.

Mr. MCILRAITH: More than that.

Mr. HORNER (*Acadia*): More than that, Mr. McIlraith suggests; so it will be well into August, comparing the amount we have done with the amount coming.

Mr. TARDIF: With all the sittings that are proposed, I would not agree to sitting on Sunday morning, even if it became necessary.

The CHAIRMAN: I might say this. This is not a suggestion of the steering committee; but it is my own. Would it be advisable to start in with the minister and the departmental officials, on going through the bill, before we have heard all the witnesses?

Mr. HORNER (*Acadia*): No.

Some Hon. MEMBERS: No.

Mr. MARTIN (*Essex East*): I would move, Mr. Chairman, that the recommendation of the steering committee as proposed by you be accepted; and then we could see, after that, how the situation stands.

Mr. WOOLLIAMS: I second that.

Mr. FISHER: May I speak to the motion, Mr. Chairman?

The CHAIRMAN: Well—

Mr. JONES: Of course he can.

Mr. FISHER: We had a relatively amicable meeting last night.

The CHAIRMAN: They are always that way.

Mr. FISHER: I would not say we always have.

The CHAIRMAN: I mean, the steering committee meeting.

Mr. FISHER: I do not think anybody on the committee is completely satisfied with the arrangements that were outlined; that is, in so far as their own commitments are concerned. But we did come to the agreement that in view of the tendency of the committee to bog down slightly—if I may put it that way—we would hope the other members would accept the report and see if we cannot move along according to this pattern.

Mr. MACDONNELL: That is what was just moved and seconded.

Mr. FISHER: I am suggesting the members of the steering committee support this motion of the rest of the members.

The CHAIRMAN: You have heard the motion, gentlemen, by Mr. Martin. All in favour? Contrary?

Motion agreed to.

Mr. MARTIN (*Essex East*): I would suggest, in the meantime, that the steering committee give consideration to when we examine the officials, invitations to the Canadian congress of labour, and the federation of agriculture.

Mr. BALDWIN: Mr. Chairman, may I bring up a point?

The CHAIRMAN: Just a minute. The congress of labour?

Mr. MARTIN (*Essex East*): The Canadian congress of labour, and the federation of agriculture.

Mr. FISHER: Mr. Chairman, I should like to speak against that suggestion that the committee go out and invite anybody. I feel that the initiative has to be taken by the groups who want to appear. I think it would be unfair to the groups who have appeared, to solicit views.

I would hope that the particular groups Mr. Martin wants, would come; I would hope there would be representation, as you know, Mr. Chairman, from the Canadian bar association. But I have very grave doubts about the committee, as a committee, soliciting views.

Mr. AIKEN: Mr. Chairman, I agree with Mr. Fisher. I think it is general knowledge that we are sitting: I think sufficient has come out in the press. Most of these agencies who are interested have representatives here in Ottawa. I do not think we should go one step further. After we have heard the people we plan to hear, we should try to limit this to people who are going to add something to what has already been said.

I am afraid very shortly we are going to be rehashing over and over again what has already been said. When these people have asked to come, I think we should hear them. But before we hear anyone else, I think we should consider whether they have a different viewpoint from the one someone else had.

Mr. BALDWIN: I quite agree with that, Mr. Chairman. When we brought this up last night, there is no question, when you examine the briefs submitted, that there is a repetition of the same trend of argument. It does not mean that they are not allowed to express it; but obviously our examination will be strictly limited, for those reasons.

This was also brought up last night, in order that we might stop at an agreed upon time: I think it was agreed tentatively that the chairman, if we are quitting at 11:00 o'clock, at about 10 minutes to 11:00 should point out that in about five or 10 minutes' time anyone conducting his examination should bring his observations to a conclusion, in time to stop at that hour.

Mr. MCILRAITH: That is right.

The CHAIRMAN: That is the next thing on the list to bring up.

Mr. BALDWIN: I am sorry.

The CHAIRMAN: At 10 minutes to 11:00 I will announce that we are going to adjourn at 11:00 o'clock. Then we can make our plans, so we will not be in a rush.

There was one other thing suggested by the steering committee, in order to make these meetings a little more orderly. I am not pointing my finger at anybody. That came, not from one of our fellows, Mr. Martin—

Mr. MARTIN (*Essex East*): Are you thinking of yourself, Mr. Chairman?

The CHAIRMAN: The suggestion was that members of the committee, when they are speaking to the witness, will stand. Probably, in whatever room we are in—I hope we get back into the railway committee room—we will have a little better ventilation than we have in here. Is that agreeable?

Agreed.

Mr. BALDWIN: We have adopted the dove of peace as our symbol!

Mr. MARTIN (*Essex East*): I would suggest a slight modification to that. I think this business of having to go 'round the table, each person directing his attention to the chair and asking for leave, perhaps is equitable; but I do not think it is conducive to good examination. I think that when one member of the committee is examining, he ought to be able to go on for a reasonable length of time, because sometimes you cannot get good examination unless you are able to repeat your questions to the witness in order to elicit a point of view. We had good examples of that yesterday.

Then I think, if some member of the committee feels he has a question directly touching the questions that are being asked, he should be allowed to intervene, with the permission of the person putting the questions. In that way I think we would get a much more effective method of examining. I think the lawyers would agree with what I am saying.

Mr. DRYSDALE: Just supplementing what Mr. Martin has said, Mr. Chairman: because there are a large number of lawyers on the committee, I think it would facilitate matters if there were not so many leading questions asked. I think it is possible, as a matter of self-discipline—and I think it is necessary —that committees should ask what are established as questions. Since most of the questions are directed to lawyers, I think we should discourage that procedure, at least for the lawyers on the committee, and make the questions direct, rather than making a statement of the individual person's viewpoint, rather than a question.

Mr. WOOLLIAMS: This is the first time I have heard that these statements were leading questions; but I would endorse what Mr. Martin says, for this reason: supposing Mr. Martin is examining a witness—or Mr. Jones—he may have a trend of thought, and it may take nine or 10 questions to complete the point. Then several members may want to ask supplementary questions to cover the situation—whereas, if you went from A, B, C, and D, you would get 25 thoughts in two minutes.

The CHAIRMAN: I agree with the spirit of Mr. Martin's suggestion. But frankly, in reality, what usually happens is this: some individuals get hold of the ball and keep on asking questions, and there are 10 other fellows sitting back here awaiting their turn. That is the reason why I have more or less tried to spread it. Old fair-play Cathers!

Mr. JONES: You have certainly done a very good job, Mr. Chairman. In that regard, I think the point is this, and it is one that can be carried forward if all members will exercise a reasonable degree of appreciation of their fellow members on the committee. That is, that, as you have done already, you allow a person to follow out his line of reasoning. If somebody else wishes to interject a question, then can we not, as committee members,

ask the member who is following his line of reasoning through, to yield to the member who wants to put in a supplementary question? Then he gets back on—

The CHAIRMAN: That is Mr. Martin's idea.

Mr. JONES: No, not quite. If that were done, the questioning of those who might, as you suggest, want to carry the ball themselves for quite a long time, would be facilitated.

Mr. MARTIN (*Essex East*): That is exactly what I had in mind. If I did not say that, what you have just said is exactly what I had in mind.

The CHAIRMAN: Mr. McIlraith, is there anything I have missed in the recommendations of the steering committee?

Mr. MCILRAITH: No, it is covered.

The CHAIRMAN: There was one other thing that we discussed.

Mr. JONES: Mr. Chairman, the difference between what I said and the suggestion that Mr. Martin made is that it does depend on the person, therefore, who is asking the series of questions whether he will, in fact, yield; because there are certain times when you have a line of questioning, you want to elicit something, and you do not want interruption.

Mr. MARTIN (*Essex East*): That is exactly what I said.

The CHAIRMAN: Good morning, Mr Minister. You should have come earlier this morning.

Mr. JONES: Motion to adjourn.

Mr. DRYSDALE: I move we adjourn, Mr. Chairman.

The CHAIRMAN: Just a minute. There is one thing I would like to clear up. I am very glad the minister has come in at this point.

Mr. McIlraith and I did discuss this matter briefly yesterday. I was not sure of my ground on this point; but I am referring to the time I called Mr. Benidickson to order on asking questions of a man who was here representing Sunbeam, when he asked him directly what were the profits and the financial standing of his company.

I feel that the committee was wrong in that, because he came here as a member of an association: he was not here representing his company. I do not think we should ask for financial statements or anything pertaining to that from an individual company who is here as a member of an association. Am I right, or wrong, in that?

Mr. MCILRAITH: There is just this about it, Mr. Chairman. The Sunbeam representative— what is his name?

The CHAIRMAN: Fitzpatrick.

Mr. MCILRAITH: He led himself right into this, because he used certain statistics of his own company in support of his statement. When he uses those, they are, of necessity, only part of the statistics that have a bearing on the statement. Then you are into that difficulty, as I see it, that is a practical difficulty the committee has to meet as it arises.

Hon. E. D. FULTON (*Minister of Justice*): I thought I might make a suggestion there, that if a man starts to give statistics, somebody should stop him and say "You realize that if you start giving statistics, we may want more to compare them with?"—and so on. I think they should be told, "Are you prepared, after you start them, to go on giving statistics: or, if you are not, can the committee decide at this point what statistics it will hear from you, and what it will be prepared to avoid?"

I would think that at the time an individual starts giving statistics of a company he should be warned,—cautioned,—that he cannot just be

too selective about what he gives, because I quite appreciate your position there. I think he should be cautioned.

Mr. McILRAITH: The man was led into the difficulty, himself. It was not in answer to a question that he gave the statistics in the first instance; he volunteered them, in support of his argument. But, as I see it, that is a practical difficulty that has to be met pretty well from day to day with the witness. I do not think we can lay down a hard and fast rule. It is the kind of problem that confronts the tariff board constantly.

The CHAIRMAN: There is one thing, gentlemen, and it is that I have to be in Toronto at 2:00 o'clock this afternoon.

Mr. MARTIN (*Essex East*): We sympathize with you.

Mr. HOWARD: Tell Mr. Martin that he would gladly take your place.

The CHAIRMAN: Mr. Martin threatened to have me fired yesterday, and it led up to this, that I am getting out of town.

Mr. MARTIN (*Essex East*): You are still not free from that possibility.

The CHAIRMAN: Well, I would like to have nominations for somebody to act. Incidentally, our deputy chairman is away. So, may I entertain nominations?

Mr. MARTIN (*Essex East*): I nominate Mr. Woolliams.

Mr. BALDWIN: I nominate Mr. Morton.

Mr. DRYSDALE: I second the nomination.

The CHAIRMAN: That is fine. Good luck.

Mr. BALDWIN: I would not like to deprive Mr. Woolliams of his usual opportunity of cross-examining the witnesses.

Mr. FISHER: I move we adjourn.

AFTERNOON SESSION

WEDNESDAY, June 22, 1960,
2:00 p.m.

The ACTING CHAIRMAN: Gentlemen, we now have a quorum. I am sorry that we have had to wait. We have competition for members for this committee. First of all I want to express regret that Mr. Cathers, our chairman, could not be here this afternoon; but he will be back tomorrow. He had to go to Toronto on a rush call. The minister was here a moment ago. He will be available later on, but he has had to meet a delegation from the Chinese community. He is down in room 16, if we need him urgently.

I understand the arrangement was that we should take the fisheries council first, and I will call on Mr. J. N. Hyland, director of the council, and Mr. Gordon O'Brien, the manager.

I wish to welcome you to our committee, and will let you go ahead and present your brief now, Mr. Hyland.

Mr. J. N. HYLAND (*Director, Fisheries Council of Canada*): Thank you, Mr. Chairman. I am Norman Hyland from Vancouver, British Columbia, and this is Mr. Gordon O'Brien accompanying me, who is the manager of the fisheries council of Canada, which is a federation of regional associations which are located in each of the fish producing areas of Canada. Associated with the council in this presentation is the fisheries association of British Columbia, which has a particular interest in the subject with which I am going to deal.

Mr. Chairman, with your permission and that of the committee, I would like now to read my brief.

Mr. Chairman and members of the committee, I am grateful for the opportunity to appear before this committee as the representative of the Fisheries

Council of Canada of which organization I am a past president and at the present time am a member of its board of directors. In addition to appearing in this capacity I also represent the fisheries association of B.C. and act as chairman of the export sales committee of that regional group.

Both the fisheries council of Canada and the fisheries association of B.C. strongly support the recommendation of other important export industries that the realities of competitive export marketing should be recognized in Bill C-58. If it is necessary or desirable for Canadian export industries to reach group decisions and policies covering export marketing, such activities should be clearly exempted from the provisions of the Combines Investigation Act.

Canada is an important fishing nation and the catching, processing and marketing of our various species of fish contributes importantly to the economic life of many Canadian communities. In many areas it is the predominant source of revenue.

An important feature of this great national industry is that approximately two-thirds of its annual production is exported to markets outside of Canada. The fisheries of British Columbia, with which I am most familiar, provide no exception to this national pattern. Since the inception of the canned salmon industry in British Columbia in 1870 the industry has always depended on export marketing to absorb 50 per cent or more of its annual production. Up until the outbreak of World War II between 60 and 65% of each year's pack was sold in export markets.

During World War II canned salmon was regarded as an important food commodity. It was in particular demand for the beleaguered population of Great Britain and for six pack years—1941 to 1946 inclusive—7,600,000 cases or 80 per cent. of the total production was diverted from the normal market channels. The remaining 20 per cent. was rationed to the domestic market at prices set by wartime price and trade board regulations. Like many other vital supply industries in wartime, the canned salmon industry of British Columbia was regimented to operate as a unit.

In August 1947 wartime price and trade board regulations on canned salmon were removed and the companies in the industry resumed responsibility for the pricing and distribution of canned salmon. The task of the British Columbia canned salmon industry in adjusting to the difficult post-war market conditions was not an easy one. Available export markets were few and uncertain. The traditional commonwealth markets were short of dollars and maintained strict license quotas or complete prohibitions on canned salmon imports.

The salmon canners of British Columbia have a continuing responsibility to purchase, to process and to market the annual catch of British Columbia's salmon.

At this point Mr. Chairman, I would just like to emphasize that aspect of it with regard to our industry. What it means to the fishermen is that they have no market problems here whatever. They have an assured outlet for every pound of salmon they produced of a canning or saleable quality. We take all the salmon they are able to produce. The discharge of this responsibility depends very largely on successful performance in the export field. For several reasons our industry has found that an industry approach to export marketing rather than an individual canner approach has enabled the canned salmon industry to compete successfully in export markets with the other canned salmon producing nations. I would enumerate these important reasons as follows:

(1) Canned salmon enjoys sufficient demand in the major markets of the world to qualify as a commodity of world trade and to have a world market price based on world supply and demand.

(2) Canada is one of four countries of supply, the other three being Japan, U.S.A. and Russia. The production of these countries in most

instances has an equal or greater influence on world price structure than the Canadian production. The Japanese suppliers are organized into an effective export cartel. There is a "one desk" sales organization and prices are set to secure for Japan the share of total world demand which is required to move the annual pack. As there is virtually no domestic market for Japanese salmon it is nearly all destined for export markets. Russian canned salmon prices are named by a state trading agency.

With reference to the Japanese export cartel, and I am departing from my brief at this point, Mr. Chairman, I would like to read to the committee a letter which came into our office last year. It is from a Japanese trading company. It is dated the 2nd of July, 1959. The heading is: "Cartel's Unofficial Announcement of Opening Prices for 1959 Pack Japanese Salmon".

> At a meeting held today of canned salmon exporters, Japan Canned Salmon Sales Company (The "Cartel") has made unofficial announcement of the opening prices for 1959 pack Japanese canned salmon as per a list enclosed herewith.
>
> Please understand that the above announcement is not official and the new prices are still subject to slight alteration depending upon the opening prices to be fixed by Canadian and U.S.A. salmon industries. Nevertheless we have every reason to believe that at least the first sale to U.K. as well as to other markets such as Australia, Belgium, Holland, etc. will be made at these prices—probably from mid-July through August.
>
> Please take note also that we are not allowed to make firm offers pending the final official decision of sales scheme by the Cartel, expected within a few weeks.
>
> As soon as we are in a position to make offers, we will communicate with you.

That is the end of the letter. There is attached to it a very complete sales list giving the C.I.F. prices to main United Kingdom ports and F.O.B. Japanese port prices for markets other than the United Kingdom. I read this to the committee to indicate the type of competition which we must face in the successful marketing of our product of British Columbia.

> (3) These circumstances make it imperative that Canadian salmon canners arrange to provide the same stability and uniformity of export prices that is available from competing sources of supply. This is as important to the buyer as to the seller. British importers, our largest overseas customers, commit themselves to large purchases from each season's pack with the understanding that the price named for that year's pack will be stable and that they may expect an orderly flow of salmon to the market which they serve.
>
> (4) While it was and is highly desirable that the British Columbia salmon canners employ an organized and uniform approach to export marketing, the conclusive influence on price structure is total world supply in relation to total world demand. These factors cannot be ignored whether they tend to increase the price or decrease it.
>
> (5) My experience in the marketing of canned salmon leads to the conclusion that the domestic price of any commodity which is exported in material quantity cannot be isolated from the world price. This is true whether the commodity is fish, lumber, pulp, copper, aluminum or newsprint. In this connection it should be emphasized that the factors of world supply and demand can work to reduce domestic prices as well as increase them. For example, during the period 1947

to 1953 when canned salmon was experiencing many obstacles in the export market, domestic canned salmon prices increased only 11.9 percent as contrasted with an increase of 41.6 percent in the combined food commodity index.

I believe that the practice of the canned salmon industry in making important decisions on export marketing on a group basis has been fully justified by the results achieved. The record of the British Columbia salmon canners in the competitive field of export marketing has stood the test of experience. Under very difficult circumstances, access to important markets has been retained or expanded. Industry planning has never lost sight of the fact that the availability of export markets is of great importance to the industry. Consequently, today, Canadian canned salmon enjoys as secure a position in world trade as at anytime in the history of the industry. It is my sincere conviction that such a position is very much in the national interest.

We are constantly reminded, frequently from high government sources, that Canada is an important trading nation. We are also reminded that in recent years our unfavourable trade balance should be a source of concern to all Canadians. It is emphasized by economists and government trade officials that Canada must expand its export trade and that every encouragement should and will be given to Canadian industry to realize this objective.

One of the most recent statements on this subject was by the Prime Minister in speaking to a delegation of the Canadian Chamber of Commerce. Mr. Diefenbaker re-emphasized the importance of export trade to the Canadian economy and stated that no obstacles would be placed before Canadian export industries in their efforts to achieve the highest possible export revenue from the sale of our commodities outside of Canada.

In addition to the accepted responsibility of creating the maximum export revenue, our industry is under continual pressure to pay higher prices to fishermen for raw material and higher wages and wage benefits to our employees. To be able to meet these demands, even partially, I feel that we must secure the best possible price for the goods which we sell in export markets. I am sure that the method we have employed to realize this objective is effective. It has produced satisfactory relations with our export customers and has been in the best interests of the industry and of the Canadian economy.

The salmon industry has consistently worked and planned to retain Canada's position as a reliable and satisfactory supplier of canned salmon. We cannot do this if our activities in export marketing are to be suspect and subject to government legislation because of their possible effect on domestic prices. The effect of export demand on domestic price structure is inescapable and, therefore, I submit that there is absolutely nothing to be gained by restricting the activities of exporters to achieve orderly marketing and uniform pricing in the export field. Such a move would be to the detriment of the industry and to the economy of Canada.

We live in a competitive commercial world and there are many indications that the degree of competition will intensify. The standard of living enjoyed by 17,500,000 Canadians is the envy of many other nations. This standard has been largely developed and supported by the strength of our export industries. It is my sincere conviction that it would be a serious error to handicap Canadian exporters by imposing restrictions on their marketing activities, the successful prosecution of which is so important to all Canadians.

Mr. DRYSDALE: Mr. Chairman, I wonder if I might first ask a couple of brief questions of Mr. Hyland?

The ACTING CHAIRMAN: I would interject at this point and remind you that at the steering committee and at the business committee it was suggested that members who are asking questions should stand so that we can keep a little better order.

Thank you. Have you anything further, Mr. Hyland, that you wish to say?

Mr. HYLAND: I would just like to make one remark.

Since arriving in Ottawa I have had the opportunity of reading a brief to be presented later by the Council of the forest industry of British Columbia. As an industry of British Columbia enjoying or at least participating in the same export marketing regulations we feel we have a great deal in common with the forestry industry. Having read their brief I would just like to endorse and support the recommendations that they have outlined in their brief, which the committee will be hearing a little later.

Mr. DRYSDALE: Mr. Hyland, the first thing I would like to ask you is why do you as the fisheries counsel have so much interest in the question of the Combines Investigation Act under export trade? Has your interest something to do with the matter of combine prosecutions? I would also ask you at the same time when you are commenting on that question, if you would indicate whether or not you have any specific recommendations dealing with the export trade because it is, I think, a matter of invaluable assistance to the committee if we can have specific suggestions which we may possibly incorporate in the legislation. Perhaps you could answer those questions for me.

Mr. HYLAND: To answer your first question, sir as to whether there have been any prosecutions under the act because of any activities in export marketing I would say that to my knowledge there have not been any, but our industry has been investigated, and we are in receipt of a statement of evidence and allegations from the director of investigation which alleges that our activities in export marketing have had an influence on domestic prices. Therefore we are in violation of the act. It is for that reason that we are particularly concerned about the question.

Mr. DRYSDALE: The attitude at the present appears to be, then, that it is not a matter of how small a part of your market is domestic trade; it is sufficient to give the combines branch authority to investigate the whole business including the export aspect which is outside of your field. Is that what you are saying, in essence?

Mr. HYLAND: The reason for the original investigation, as I understand it, arose at the fisherman level. It was an investigation of the means whereby we buy fish from fishermen and the price at which we buy it. This was objected to by a group of fishermen. The combines investigation branch initiated an investigation and subsequently expanded it to cover the whole area of the market, of the product sales, and of the purchase of the raw fish.

Mr. DRYSDALE: In essence then the combines investigation branch's jurisdiction, although perhaps as you have stated 65 per cent of your market might be export and therefore outside of the jurisdiction of the Combines Investigation Act, that balance was sufficient to give the combines branch jurisdiction to investigate, shall we say, 100 per cent of your activities?

Mr. HYLAND: I am not clear as to what the basis of the allegation was, but it was clearly stated that our activities in export marketing, and the fact that we did arrive at common policies, common prices for our export quantities of canned salmon, had the effect of enhancing domestic prices and therefore we were in violation of the act.

Mr. DRYSDALE: Would you just direct your mind back to one of my original questions. Do you have any specific recommendations as to amendments to the act in connection with exports?

Mr. HYLAND: Yes, we have a suggestion in that regard. I would like to present it to you. It is a very simple one.

Mr. DRYSDALE: That is good.

Mr. FISHER: Could you read it slowly so we can follow it?

Mr. HYLAND: I have some copies here, Mr. Chairman, if you would like me to distribute them.

Mr. DRYSDALE: Perhaps Mr. Hyland could read this for the record in any event, Mr. Chairman.

Mr. HYLAND: Our suggestion is that an amendment be made to section 2 by inserting it as paragraph (*dd*).

Mr. BALDWIN: Are you referring to section 2 of the existing Combines Investigation Act, before this amendment by this proposed amendment?

Mr. HYLAND: Yes, by inserting there a definition of "export trade".

Mr. MCILRAITH: Where is that section 2?

Mr. HYLAND: Yes, that is section 2 of the act.

Mr. NUGENT: The heading at the top of your suggested amendments is: "amendments to bill C-58 suggested by the fisheries council of Canada and the fisheries association of British Columbia."

The ACTING CHAIRMAN: I understand that it does not refer to the bill before us, but refers to the regular act.

Mr. BALDWIN: It is chapter 314 of the revised statutes.

Mr. HYLAND: The suggestion is that the definition of "export trade" be made by inserting the following terms:

> (*dd*) "Export trade" means trade in articles manufactured, produced, processed, transported or sold for consumption or use without Canada.

Then we suggest inserting after section 44 the heading "Part VIII" followed by section 45. This act does not relate to export trade.

That is our suggestion, Mr. Chairman.

Mr. FISHER: I have a couple of questions I would like to ask if Mr. Drysdale is finished.

Mr. DRYSDALE: I have just one further question to put to Mr. Hyland.

The ACTING CHAIRMAN: Perhaps a questioning member would stand so that we will know when he is finished.

Mr. DRYSDALE: I am sorry, Mr. Chairman.

You mentioned that you had some export marketing difficulties in the post-war years. I was wondering if you received any government financial assistance in connection with your difficulties?

Mr. HYLAND: No, we did not, and to recall those marketing difficulties of the post-war years, I would say they were very severe. Our traditional export markets were virtually closed off to us. We went on buying the salmon catch on the same ratio and to the same volume. We virtually had only the domestic market available to us, plus the orders from the British ministry on food. They bought a portion of our pack under the bulk buying program. During all those years we never had any government assistance of any kind. We solved all our own market problems without any cost to the taxpayer.

There are other industries which had exactly the same problem. I am speaking about canned salmon.

There were other industries which came out of the wartime period who had gone through exactly the same thing. The first one I can recall is the bacon for Britain program. The pork production in Canada was expanded to meet the wartime needs, and following the war the pressure was maintained on government to keep the prices of production at a high level, and at a level which was

artificial in relation to the demands. Seven years after that program an expenditure of, I believe $83 million—there was about 100 million pounds of pork products in storage—was spent in this regard. There was a very serious problem, and we have just gone through another one. In respect of the canned salmon problem, we never presented any problem to the government of that kind. We solved our own problem.

Mr. DRYSDALE: One supplementary question; I hope you are not looking for any government assistance at this particular time, except to allow you to carry on business as you have been doing in essence, except that you want to make sure that you can compete with the world markets on the same basis of cooperation?

Mr. HYLAND: That is the only assistance we are asking for.

Mr. DRYSDALE: It is nice to hear somebody who does not want money from the government.

Mr. FISHER: Is there any analogy between the canning market set-up that you have created and, say, a government board such as the Canadian wheat board? Have you ever thought of this in those terms?

Mr. HYLAND: No, we have not, Mr. Fisher.

Mr. FISHER: Would you say that in fact you have achieved the same kind of market control from your cooperation in the export trade as some organization like the wheat board has?

Mr. HYLAND: Maybe we have, but at a much less cost.

Mr. FISHER: Can you give any indication as to the trend, in so far as the percentage of your products that are going into the export trade in relation to domestic trade?

Mr. HYLAND: Yes, I have some up to date figures for the last five years. These figures are for the last five pack years; 1954, 1955, 1956, 1957 and 1958. The range is from a low of 36 per cent export in 1956 to a high of 58 per cent export in 1958. The average over the five year period is just about 50 per cent.

Mr. FISHER: Has there been any alteration in this trend? Can you see any alteration in the trend for the future that is of significance?

Mr. HYLAND: Yes. With the post-war trade, which has been such, along with our increase in the Canadian population and our increase in purchasing power, there has been an increasing percentage of the production used in Canada.

Mr. FISHER: What about the actual production itself; how does it look for the future? Is there any possibility of expanding production, or are there possibilities that it will decline?

Mr. HYLAND: Mr. Fisher, fish people are by nature optimistic. In the industry if we retain the access to our great river systems, and particularly the Fraser river, we feel that our production can be increased. Our experience in 1958 would indicate that.

Mr. FISHER: In so far as the price relationship between the export market and the domestic market, would I understand from your brief—I do not think you went into this in detail—that the actual world price sets the domestic price?

Mr. HYLAND: It does not set it, but it influences it.

Mr. FISHER: It does influence it.

The problem that comes to my mind in connection with the amendment that you have suggested is that you are not specific in any kind of measure on export trade. I am sure that it has come to the mind of all the members of this committee here that almost every manufacturer or primary producer in this

country has an element of export. If you look at the trade statistics you find there is a proportionate range from a very minute one up to a very large one. Would you suggest that an industry which has perhaps only four or five per cent of its product which is export trade, would be classified as an export trade? If you cannot say that, then can you suggest to us any alternatives in your amendment that will enable us to make a fairer decision than this blanket export trade amendment?

Mr. HYLAND: I think this definition is the clearest one as to what defines what export trade is. Irrespective of what percentage of the production goes into the export trade class, it is still export trade.

Mr. FISHER: Let me conjure up this possibility for you; we had an investigation into a box manufacturer a few years ago. As I understand it, there was a prosecution and a conviction under the act. I know as a result of looking at trade statistics that a certain percentage—it is not large—of the manufactured product in Canada is exported. This would seem to indicate, taking the amendment such as this, that the box manufacturer would be exempted from any prosecution because of such an amendment such as this. The effect of this amendment would tend to undermine perhaps the whole approach of the combines investigation branch. I wonder if you had thought of that situation.

Mr. HYLAND: They would not be exempted in their domestic marketing activities, nor would we.

Mr. FISHER: If the export trade is going to be exempted in respect of an appreciable part of any manufacturer's goods, what are your standards for separating or dividing the two going to be?

Mr. HYLAND: I think this is being done all the time. There are two elements of market; the domestic market, and the export market, and the approach to each of them in most instances is entirely different.

Mr. FISHER: Well, the approach may be different but is there not a relationship between the price on the domestic market and the export market?

Mr. HYLAND: I agree with that, that there cannot help but be a relationship.

Mr. FISHER: And once you have this relationship established in a reliable way in an industry, and then you have an act that says, "This act is not related to the export trade", it introduces a new judgment into the whole matter that I cannot see is practicable.

I do not want to make a statement here that is critical of what you are suggesting; but I wondered if you had thought of extending the definition more, or giving some kind of rough guide or formula in relation to export, in domestic terms, that would be a bit more explicit.

Mr. HYLAND: The next logical step might be, on study, to break down on a percentage basis and qualify. But there is a great range. You must remember that we have a great many industries. Their standards and their scale of production are such that our domestic market just cannot begin to consume their volume of production.

Mr. MACDONNELL: Mr. Chairman, just to elucidate something which Mr. Fisher said, which I am not quite clear about: could the witness tell us exactly how, when more than one exporter joins together, they operate—because Mr. Fisher seems to think that would be confusing. I think that was the word you used.

Mr. FISHER: Yes.

Mr. MACDONNELL: May we learn exactly how it is not confusing? Perhaps the witness could tell us that.

Mr. HYLAND: We have, in our export group, five companies, and when we have completed our annual canned salmon pack, and we know we have eliminated then the conjecture about the size, we know what our supply position

is and we also know the supply position of our competitors, Japan and the United States. We know less about Russia. We then assess the supply and demand factors and come to a group decision as to the price which is required to move our pack into consumption in the following 12 months—because we put up that pack to sell it, and we must be in financial condition to be able to operate in the following year.

Also, the buyers in our principal export market, the United Kingdom, are expecting us to name a price; and when they ask for a price, it is not the price of "A" company, or "B" company, or "C" company: they say, "What is the Canadian price", and they look at the Canadian price in relation to the Japanese price. Our export organization is nothing more or less than a vehicle to arrive at a consensus of what our price should be.

Mr. FISHER: Is it your general observation that this situation of having to compete in the world market, with prices set by other countries, more highly organized, perhaps, even on a government basis—as Russia is—is something that shows no sign of altering or changing, to return to a genuine free market?

Mr. HYLAND: No, we have no indications of that at all.

Mr. FISHER: Have you thought it might be possible to have a definition of export trade extended to the extent of saying, "So long as it does not have injurious or harmful effects upon the domestic market price"?

Mr. HYLAND: There, again, it is a matter of assessing which is the most important.

Mr. FISHER: If you have a regulatory trade commission, with some kind of expert knowledge in the development of a background and a history, they might be in a position to make that judgment, might they not? They are doing it, in other parts of the act.

Mr. HYLAND: One thing of which I am always very much aware, as an individual responsible for the sale of a lot of fish, is that we are not selling anything that anybody has to have. It is well known that the per capita consumption of fishery products in Canada is in the realm of 13 or 14 pounds a year, whereas meat and poultry is more like 150 pounds. And of that 13 or 14 pounds, canned salmon is about 2½ pounds. There are many people who do not eat it at all.

Therefore, we recognize that we have to have a price which will sell the product, and where there is the most public benefit involved, if we are to have a healthy industry. We are recognizing the realities of our export marketing, and we are selling the production. We cannot sell it all in Canada. If we encounter a strong market situation in the export field and we get as much as we can for our product—we have people who have no interest whatever in the Canadian market, who do not service the Canadian market, and if they can get $40 a case for sockeye from Great Britain, they are not going to sell it to anybody in Canada for $35.

Mr. FISHER: In other words, there is a very close relationship between the world price and the domestic price?

Mr. HYLAND: There cannot help but be.

Mr. FISHER: But the world price tends to be set by the export price, as long as there is any kind of export market?

Mr. HYLAND: Yes, as long as the export price is strong, it will bring it up.

Mr. FISHER: Can I take it from what you have said that there is the potential within the Canadian market, in Canadian fish buying tastes, for you to sell almost your complete catch in Canada, if consumption patterns change?

Mr. HYLAND: No. Actually, I am concerned about the trend of canned salmon consumption in Canada. We are not keeping pace with the population

growth as we should, because we know there has been pressure on our price level. We are not selling as much sockeye salmon in Canada to-day as we did four or five years ago.

Mr. FISHER: What are the limits of action, up or down, that you have in so far as the price of the raw material that comes to you is concerned?

Mr. HYLAND: So far there has been no limit upwards, and a very effective fishermen's organization has created a floor.

Mr. FISHER: I have one final question. One of the concerns that I think we all must have in connection with fish export is the difficulties of the fish packers on the east coast on getting into the American market and sustaining it.

Have you any views there, as to how these legislative changes you suggest might affect that?

Mr. HYLAND: Yes; up to the present time in the marketing of fresh and frozen fishery products to the United States from the Atlantic provinces there has not been a similar type of organization. There does exist one for the marketing of salt fish, and Mr. O'Brien is very familiar with the details of that, if any of the members of the committee would like to know about that.

But I feel that only recently—in the last two years—our exports of frozen fish from the Atlantic provinces to the United States have been experiencing increasing competition from Iceland, Norway, Denmark and from other north Atlantic nations, and it would seem to me we are moving toward that direction.

Mr. FISHER: You mean that you are moving toward the direction that you have already reached on the west coast?

Mr. HYLAND: Yes; and some joint action may be required.

Mr. FISHER: We have examples in other fields, such as wheat, and pork—which you mentioned—where in effect we have had government marketing. What are the factors against such a move in your particular field? I think this is relevant to the suggestion.

Mr. HYLAND: The fact is that there is no necessity for it. We have proved that we can do the job, and do it well and efficiently.

Mr. FISHER: Has there been any change in the corporate structure of the canned salmon industry in the last five or six years? Have there been mergers, or sales of organizations into larger groups?

Mr. HYLAND: Nothing of a major nature, Mr. Fisher. There have been one or two—or three, probably—new canners come into the industry in the last five years.

Mr. FISHER: What are the competitive factors that exist between canners in Canada? The whole intention of the legislation is to keep competition in various fields. What is the situation in that regard?

Mr. DRYSDALE: Competition in Canada?

Mr. FISHER: Yes. They are competing with each other, to a certain degree.

Mr. HYLAND: The competition in Canada is confined largely to four companies, or possibly five companies, who have labels in Canadian distribution, and they compete for a respective share of the total Canadian market.

Mr. FISHER: Not of the export market?

Mr. MCILRAITH: Meat competes with you all the time.

Mr. HYLAND: Yes.

Mr. FISHER: But not in the export market?

Mr. HYLAND: No. Well, we do compete in the export market; but not on a price basis.

Mr. FISHER: On a supply basis?

Mr. HYLAND: Yes, and service and quality.

Mr. FISHER: The general argument is that wherever you get cooperative marketing to this extent you tend to so stabilize things that there is a natural tendency to consolidate, to merger: there is a natural tendency towards consolidation. Is there any indication of that at all?

Mr. HYLAND: That has not happened in our industry, no.

Mr. FISHER: You have not any H. R. MacMillan in the salmon industry?

Mr. HYLAND: Oh, yes, we have. It is a good thing for the industry too.

Mr. AIKEN: Mr. Chairman, I have one supplementary question. You mentioned that two new canning industries had recently come into existence. Were they accepted into the fisheries council as members?

Mr. HYLAND: Yes. One of them became a member of our fisheries association of British Columbia; but he resigned. He is not a member now.

Mr. AIKEN: The point of my question is whether or not canneries coming into existence are going to be discriminated against in such a way that they could not join your council, because that is the one thing, I think, that the combines legislation is in effect to prevent.

Mr. HYLAND: No, we have no restrictions of that kind.

Mr. AIKEN: So that your organization would not limit people from going into business and taking the benefits of your council?

Mr. HYLAND: There is one marketing association, the fishermen's cooperative, in British Columbia. They are not members of the fisheries association of B.C. But after we have named our export prices, they phone us up and ask us what they are, and then they carry on the same way.

Mr. AIKEN: Thank you.

The ACTING CHAIRMAN: Mr. Baldwin.

Mr. FISHER: I just want to suggest, Mr. Chairman, before Mr. Baldwin gets going, that I hope the next questioner will ask something that I failed to ask, and that is your views on the final . . .

The ACTING CHAIRMAN: Ask the question.

Mr. FISHER: I am referring to the final section in the Combines Act relating specifically to this fishermen's cooperative. Have you any views on that? Do you know the section I mean?

Mr. BALDWIN: The section passed last year.

Mr. HYLAND: Yes, I am familiar with that, Mr. Fisher. We have no comments on that. I think we all recognize that is in there as a matter of convenience. We could not get the industry under way last year until that was put into the act, and it is recognized now that it is unlikely that the investigation will be completed in time—or, the bearings will be completed in time—for the 1961 season; so I think the precaution is being taken to extend it for another year.

Mr. FISHER: Thank you.

Mr. BALDWIN: I wonder if the witness could say what percentage of the world export market we have in Canada in respect of canned salmon. I was going to suggest three representative years—if that information is available—1948, which is a post-war year; 1951, the Korean period, and 1959.

Mr. HYLAND: I do not have those statistics at my fingertips; but they could be easily secured.

Mr. BALDWIN: Could you go this far: offhand, would you say that we have retained, expanded, or restricted the share of the world export market which we did have?

Mr. HYLAND: I would say that we have probably less today than we used to have.

Mr. BALDWIN: That is in percentage terms.

Mr. HYLAND: Yes.

Mr. BALDWIN: Have you any idea what it would be, in dollars, in 1959?

Mr. HYLAND: No. Our total 1958 production—which was a big one—was 1,908,000 cases, and we exported 1,114,000 cases; and I know that over 600,000 cases were sockeye, our most expensive species. Probably $25 million—I would assume that the average value per case would be over $30 a case, so there was between $30 million and $25 million worth in 1958.

Mr. BALDWIN: That would leave how many cases that were the subject of domestic trade?

Mr. HYLAND: Probably about 800,000 cases.

Mr. BALDWIN: Is that a fairly constant percentage of the number of cases domestically and the number in the export trade?

Mr. HYLAND: Yes, it is: it is fairly constant.

Mr. BALDWIN: It pretty well corresponds to the figures you have just given us, then.

Mr. HYLAND: Our Canadian consumption got up to its highest peak in the 1953-54 period, when we reached about 900,000 cases in the domestic market. Then the consumption has dropped off since that time, and we have not got back to that figure.

Mr. BALDWIN: You could probably give us later, if we wanted it, the percentage—that is, expressed in world trade, and export trade?

Mr. HYLAND: We cannot get reliable figures of Russian exports. They use canned salmon periodically as a consumer product for some trade purpose. It goes into Australia occasionally; it goes into the United Kingdom occasionally; but they do not use it as a regular item of trade. But we hear about it.

Mr. BALDWIN: Without prejudice, would you care to hazard a guess as to what percentage Canadian canned salmon contributes to the world export market?

Mr. HYLAND: I would rather not guess.

Mr. BALDWIN: That is fine.

Mr. HYLAND: I would rather not guess, when we can get the figures and we do not have to guess.

Mr. BALDWIN: I was going to ask you a question on page 5 of your brief, where you say:

> I believe that the practice of the canned salmon industry in making important decisions on export marketing on a group basis has been fully justified by the results achieved.

Possibly, in view of the fact that you said Mr. MacDonald has been interested in your activities, I will not ask the question. I was going to ask you what important decisions you made. Perhaps I will not go into that at this time. I think that possibly you indicated that, in any event.

Mr. HYLAND: It would be quite all right. The important decision we make is what price are we going to ask?

Mr. BALDWIN: That is a two-way street, I suppose: you assess the entire world situation and come to a decision as a group as to what you think the price should be?

Mr. HYLAND: Yes.

Mr. BALDWIN: And if there appears to be, say, an era when there is a comparatively large quantity in excess of the consumption, you find you may have to depress the price in order to meet the world competition?

Mr. HYLAND: That is what we had to do in 1958.

Mr. BALDWIN: And, equally, if there is a situation when there is a scarcity in one particular year, I suppose, to compensate, you would increase, and to some extent that increase would be reflected in the domestic market?

Mr. HYLAND: Yes.

Mr. BALDWIN: I have just one more question, Mr. Chairman. You may have answered it in response to Mr. Fisher's question. I am referring to this proposed amendment of yours, section 44. You may have already answered it in your last answer to me.

Do you think, or have you considered it possible that such an amendment could have with it a proviso such as—I am not asking you to accept my words —"this act does not relate to export trade, provided, however, that this shall not be the case should it in any way affect the domestic market"? Do you think it is practical that any such proviso could be attached to an outright exception such as you have made here?

Mr. HYLAND: I do not think it is practical.

Mr. WOOLLIAMS: I have a supplementary question, Mr. Chairman. This is following along the percentages that Mr. Baldwin and Mr. Fisher asked for.

If, for example, your export trade was 85 per cent and your domestic market was 15 per cent, and that you were merging—companies getting together and combining so that they could be more effective in the export trade, would it not have an effect and a reaction on the domestic market price? In other words, the very effect of the Combines Act would be destroyed, as far as the domestic market is concerned?

Mr. HYLAND: I believe that effect is present, whether there is any effort to combine or to collaborate in the export field. If you have a strong enough market situation for any product in the export field, the domestic price level is going to be affected, it does not matter what you do.

Mr. WOOLLIAMS: I did not mean my question to be critical. But, in other words, you would exempt the whole trade, whether it is domestic or export? The practical approach...

Mr. HYLAND: No, I would not say that. I think the essential difference here is that prices are not set by people sitting down and deciding what they are going to sell. They are set, or influenced, by a combination of many factors, many of them outside our control. What we are really doing, in naming a price, is assessing all these factors.

Mr. NUGENT: One of those factors in assessing the price you would be able to get on the export market would be largely determined in view of the percentage of the Canadian market, as is the whole product?

You would be able to determine much more accurately what price you could get on the Canadian market, and therefore your expectation of what price you could sell at in Canada is going to have an influence on your export price, is it not?

Mr. HYLAND: That is true.

Mr. BALDWIN: I had finished, Mr. Chairman; but I was going to ask if the witness would be good enough to file, as an appendix possibly to these proceedings, the information I had asked for.

I had asked for the amount of Canadian export trade, in terms of world trade, both in percentages and in dollars, for the years 1948, 1951 and 1959—or is 1959 too soon?

Mr. HYLAND: Yes, it is.

Mr. BALDWIN: 1958, then.

Mr. HYLAND: We do it on what we call a pack year basis, which runs from July 1 in one year to the end of June the following year. So at the end of this month we are completing what we call our 1959 pack year, and those

figures are not yet available. But our 1958 pack year figures are available, I think. Other government statistics are kept on a calendar year basis. I know exactly what you wish, and I will endeavour to get it.

Mr. WOOLLIAMS: Mr. Chairman, may I be permitted one more follow-up question, and that is all?

The ACTING CHAIRMAN: How long will it take you to get that information, Mr. Hyland?

Mr. HYLAND: I will endeavour to do it within 10 days.

The ACTING CHAIRMAN: Perhaps you would mail it to the committee. Mr. McIntosh.

Mr. MCINTOSH: Mr. Chairman, most of my questions have been answered in answer to supplementary questions that have been asked. One of them that has not been answered was with regard to the initial c.i.f. that you referred to when you read the prices off that letter. What does c.i.f. mean?

Mr. HYLAND: Cost, insurance, freight: that is the landed cost.

Mr. MCINTOSH: On page six of your brief you say this:

> —our industry is under continual pressure to pay higher prices to fisherman for raw material and higher wages and wage benefits to our employees.

How is the price determined by you that you pay to the fishery?

Mr. HYLAND: That is a matter of negotiation with an organized fishermen's group.

Mr. MCINTOSH: Is it compulsory for the fishermen to sell to your association?

Mr. HYLAND: No.

Mr. MCINTOSH: They can sell to any place they wish?

Mr. HYLAND: Yes.

Mr. MCINTOSH: On page 1 you say this:

> If it is necessary or desirable for Canadian export industries to reach group decisions and policies covering export marketing, such activities should be clearly exempted from the provisions of the Combines Investigation Act.

Then on page 6 you say:

> The salmon industry has consistently worked and planned to retain Canada's position as a reliable and satisfactory supplier of canned salmon. We cannot do this if our activities in export marketing are to be suspect and subject to government legislation—

Would you comment on your words "suspect and subject to government legislation" there.

Mr. HYLAND: We are already suspect now. It has been alleged that what we have done in the export field has had a detrimental effect on the Canadian public, and we feel that this is an effective and a successful way of marketing our product, and we do not want to continue doing it under a cloud. Therefore, that is why we are suggesting that the new act should make it clear that activities of this kind are not in contravention of the act.

Mr. MCINTOSH: Then, in answer to Mr. Drysdale's question and Mr. Fisher's question, you proposed this amendment that you have here?

Mr. HYLAND: Yes.

Mr. MCINTOSH: But you have not explained it so that I can understand what you mean by "export trade". Is it the very fact that you are in the

export trade, regardless of whether you export anything or not, why you should be exempt from all clauses under this act?

Mr. HYLAND: No, that is not the intent. The intent is that it is only our activities in export trade, or export marketing, that should be exempt.

Mr. MCINTOSH: Then would you not say, in the second line, where you say, "transported or sold for consumption", that word "or" should read something like "and"—I do not know; because of the very fact that you do sell, to my mind—under this clause—would exempt you, if you sell for the export trade?

Mr. HYLAND: Yes; for that portion, anything which is sold for consumption or use outside of Canada.

Mr. MCINTOSH: To your mind does that clause cover that?

Mr. HYLAND: Yes. The chairman just asked me if there were two separate operations and I would say yes; it is two separate operations.

Mr. MCINTOSH: To my mind it seems to exempt the association from coming under the control of this act.

Mr. HYLAND: That is not the intent.

Mr. MCILRAITH: I do not want to interrupt, but just to clarify. Are you not trying to make it clear that it is the export trade part of your industry that is exempt from the act.

Mr. HYLAND: Yes.

Mr. MCILRAITH: And not the domestic section.

Mr. HYLAND: That is right.

Mr. DRYSDALE: The act only can apply to whatever trade is dealt with in Canada. In other words we only have the physical jurisdiction of Canada.

Mr. MCINTOSH: Have you any tariff protection in the domestic market at the present time?

Mr. HYLAND: Yes. There is a 15 per cent tariff under Canada salmon.

Mr. HALES: If I were an independent packer of fish and not a member of your fisheries council could I export to the U.K.?

Mr. HYLAND: Yes.

Mr. HALES: And there is nothing to stop me.

Mr. HYLAND: That is right.

Mr. PICKERSGILL: I have a question which is directly related. In determining the price you are going to set, which I take it is a target price, I do not suppose you always keep the same price the whole season. In determining your target price do you take any account of the desirability of protecting your Canadian market? I think you suggested you would not want to short the Canadian market in some years in order to make a financial killing in the export market. Do you take that factor into account.

Mr. HYLAND: Yes. I will give you a clear example of that. Last year we had a relatively small production of sockeye salmon which is a kind of salmon which the United Kingdom likes particularly. Whatever part of that production any individual canner had which he wished to sell last fall he could readily have sold at $23 per carton of 48 half pound tins. The United Kingdom buyer would have bought it and paid for it immediately and it would have been shipped; but those packers with Canadian labels who recognize that our market is a long time market, carried salmon right through until today and are getting $23. Obviously the export sale would have been the more profitable sale, but we did not do that.

Mr. MCINTOSH: Is there much difference between the Japanese price and the Canadian price in the export market.

Mr. HYLAND: Yes. There was a considerable difference last year. Last year there was an f.o.b. difference of about $4. Our price was about $23 and theirs was about $19.

Mr. DRYSDALE: Is there any difference in the quality of the fish?

Mr. HYLAND: In our opinion we think ours is a little better.

Mr. MCILRAITH: I would like to clear up one matter. At the top of page 3 you refer to the preliminary investigation—I am sorry; that is wrong. In any event you refer to investigation by the combines director and the report made. Is that report a public document as yet?

Mr. HYLAND: No.

Mr. MCILRAITH: Turning now to your request specifically, you make it quite clear that even though in the export field you combine together you have competition in that field by reason of the fact that there are at least four major suppliers in the world market, so that there is competition in price for that reason.

Mr. HYLAND: Yes.

Mr. MCILRAITH: The reference was made here to the wheat production; likewise there would be competition. It is operated under a monopolistic selling agency. There would be price competition by reason of the fact that there are many wheat selling countries in the world. So competition is provided there.

A little further in your brief you refer to what I may call some general remarks about all export industries. What concerns me is this: had you thought about the situation where an export industry supplied virtually all the world's exports in a particular product and where there is no competition in the world market for its product? Had you addressed yourself to that particular point, is what I am asking.

Mr. HYLAND: I understand you are thinking of an export industry which not only dominates the domestic supply situation but also the world situation. Is that it?

Mr. MCILRAITH: Yes.

Mr. HYLAND: That is a very enviable position to be in.

Mr. MCILRAITH: I know. Had you addressed yourself, however, to that particular point?

Mr. HYLAND: No, I had not.

Mr. MCILRAITH: I follow your brief very easily and clearly when you confine it to the fish export industry, to wheat and certain others which I can think of; but I was a little concerned with the other point where there is a virtual monopoly.

I was thinking of the position of a supplier of raw material to a Canadian industry who also happens to dominate a world export market and has no competition from other exporters of other countries, or very little. I was concerned about the situation there.

Mr. HYLAND: I suppose if we have a Canadian export industry in that situation I would say that is a very happy state of affairs for Canada.

Mr. MCILRAITH: I think I may not be making myself clear. If we have an export industry where the material we are speaking about is a basic raw material used in industry in Canada very heavily, and our exports are the only significant exports on the world market, bearing in mind that the export prices do have a direct influence on the domestic prices, were you attempting to argue your case straight on their behalf or were you trying to confine your case to your export industry and other export industries like yours.

Mr. HYLAND: No. I think the principle can be extended to any export industry.

Mr. McILRAITH: I am questioning you on the use of the word "any". I think you have made an excellent case, if I may say so, for your industry; but when you try to embrace all exporters bearing in mind that there is a tremendous exportation from this country, it seemed to me it raises another point. I want to find out to what extent your council had addressed itself to that particular point because I do not think that ordinarily it would come within the ambit of what you are discussing.

Mr. HYLAND: I am convinced in the accuracy of the principle I have laid down here. I very strongly feel that we must not hamper our export industries in any respect. We are going to throw them into an ocean of international competition and if you are to tie their hands they will have a hard time keeping afloat.

Mr. McILRAITH: I thought I safeguarded myself on that very premise on what you have said so far. I made it clear that I am referring to what is virtually a sole supplier in the world market and there is no one else to take the market from.

Mr. HYLAND: If we have a supply industry in that position and the rest of the world has set a value on the product at, shall we say, $2 a unit, then I would say it is inevitable that Canadian users of that product would have to pay the same price.

Mr. McILRAITH: I find it difficult to follow you in arguing that case, because I do not see where it is germane to your own excellent presentation. A problem of exporters today is the high cost problem. One of the elements of high cost is the basic raw material going into the finished export product. If you have ever appeared before the tariff board you would know that that is one of the points you have to deal with a great deal. If you raise the prices of the domestic raw material going into the manufactured product which you are trying to export—raise it unnecessarily—surely you are hampering the exporter.

Mr. HYLAND: One of the important elements in any price decision is that it must be a price which will sell the commodity.

Mr. McILRAITH: That is quite true; but it still does not address itself to the point I have raised.

Mr. HYLAND: I think everyone who is responsible for making prices also has a responsibility for making sales.

Mr. McILRAITH: That is right; but we come back again to the point where we have a product which is not in abundance in the world. There are some countries in that position and we happen to be one of them.

Mr. HYLAND: I suppose we will get into a field of philosophy there as to what governs the approach to what you might term a monopoly supply situation.

Mr. McILRAITH: The only point I was seeking to get from you—with deference I think you are making your case applicable to export industries generally, where there is very tough competition in world markets.

Mr. HYLAND: You will hear from other export industries and I think they will advance the same thesis.

Mr. McILRAITH: The case of the others who have a very tough competition and very real problems in world markets is similar to yours; but I did want to raise this other problem which will have to be dealt with in at least one case. I think you would have identified it if you had thought about it. I think it is apparent that you have not addressed yourself specifically to that narrow problem—it is a narrow aspect.

You have another type of competition in that part of your product which is sold in the domestic market. You have the competition and the public

wants the protection of the competition provided by the combines legislation. Then in addition to that you have other very strong competition from other food products which could be substituted for yours at any time.

Mr. HYLAND: Yes.

Mr. MCILRAITH: So that you always are subject to competition, and quite strenuous competition, in the domestic market regardless of what competition there may be to you in your export market.

Mr. HYLAND: That is true.

Mr. MCILRAITH: There is one other small point which I would like to clear up. In presenting your brief you said that you had no assistance from government in respect of your difficulties over the years in obtaining and securing your export market. Then you went on to deal with the question of price and certain financial aid that was given to other industries. I take it that it was not your intention to use that phrase in its widest possible meaning "no assistance from government". You meant no financial aid.

Mr. HYLAND: No marketing aid. They did not subsidize us or buy our surplus products.

Mr. MCILRAITH: I am thinking of the very real assistance you got a number of years ago when there was repatriation of loans and so on—ordinary trade assistance.

Mr. HYLAND: Oh, yes. I think there was one such arrangement on that basis.

Mr. MCILRAITH: It was a question of the government trying to get dollars made available. You mentioned that one of your problems in the export market in some years was the exchange difficulty. I take it you were limiting yourself to some kind of this financial assistance from the government.

Mr. HYLAND: What I had specific reference to was that we never called upon the government to subsidize our industry by purchasing any of our surplus or subsidize our price in any way.

Mr. MCILRAITH: Thank you very much.

Mr. HORNER (*Acadia*): I wonder if Mr. Hyland would explain what the fisheries association includes.

Mr. HYLAND: I thought I made it clear that the fisheries council of Canada is a federation of all the regional associations. The fisheries association of British Columbia is the regional association in British Columba and is the association which organizes the export market of Canada salmon.

Mr. HORNER (*Acadia*): But it is the fisheries council of British Columbia which sets the export price level.

Mr. HYLAND: Yes.

Mr. HORNER (*Acadia*): Is there any competition in setting the export price between the four or five large companies or do they all sell at the same price.

Mr. HYLAND: The whole objective of the export fisheries committeee is to arrive at uniform export prices.

Mr. HORNER (*Acadia*): Have you always been able to do it?

Mr. HYLAND: It has been the pattern in the industry in the last sixty years.

Mr. MACDONNELL: And no question has been raised?

Mr. HYLAND: No question has been raised.

Mr. HORNER (*Acadia*): How do these same companies arrive at a price for the Canadian market?

Mr. HYLAND: I do not know whether or not I am in a position to discuss this. Certain allegations have been made against the industry in that regard. Mr. Macdonnell of course, is very aware of them.

The ACTING CHAIRMAN: Is it under investigation now?

Mr. HYLAND: It is not under investigation, but we are still awaiting the outcome of hearings.

The ACTING CHAIRMAN: Perhaps under those circumstances the witness should not be asked to make any statement.

Mr. HORNER (*Acadia*): I am not going to try to draw out information which may be detrimental to you in any investigation. I just wondered if it would not have an effect if they knew at what price company "A" was going to sell its product overseas. They would know for what company "A" sold its product on the Canadian market, and that would pretty well narrow it down. They could say that company "A" would sell its product within two or three cents of such and such.

Mr. HYLAND: Since 1953 I believe we have successfully divorced those two areas of marketing, domestic and export. What the individual companies do in the domestic field is their own prerogative, and there is no exchange of information or opinion in that area.

Mr. HORNER (*Acadia*): I might say I am quite sympathetic to your aims and I do not want it to appear that I am trying to argue against your proposal here. I just wanted to find out how your operation works. The Canadian wheat board has been mentioned. It operates as a pool and whatever profits are obtained towards the end of the year are paid out to the producers. Does your association operate in a similar manner.

Mr. HYLAND: No.

Mr. HORNER (*Acadia*): In some years you may make money and in other years you may make less.

Mr. HYLAND: Yes. The food processing industry historically is by pattern a low margin industry. The profits are not large.

Mr. HORNER (*Acadia*): Do these companies compete for the fish, or is there any real competition in the prices paid to fishermen.

Mr. HYLAND: There is very keen competition at the fishermen level in most operations. That is an essential feature of our industry, that we have great investments for processing plant and boats. We have a marketing organization, but we do not own a pound of raw material. We must buy it competitively from the fishermen.

Mr. HORNER (*Acadia*): If one company does not buy it, their investment is tied up and it is not producing any money.

Mr. HYLAND: Yes.

Mr. HORNER (*Acadia*): You stated there was a 15 per cent tariff on canned salmon coming into Canada?

Mr. HYLAND: Yes.

Mr. HORNER (*Acadia*): Does Canada import any canned salmon at all, even with this tariff?

Mr. HYLAND: Not on a regular scale. Some years ago, under conditions of very short supply, the decision was made to buy, to allow the major marketers of salmon in Canada to import it; and it was done.

Mr. HORNER (*Acadia*): They had a supply?

Mr. HYLAND: Yes.

Mr. HORNER (*Acadia*): Has anybody else imported it?

Mr. HYLAND: Not to my knowledge.

Mr. HORNER (*Acadia*): Does the world price set the Canadian price to a large extent?

Mr. HYLAND: It influences it.

Mr. HORNER (*Acadia*): Is the Canadian price higher than the world price?

Mr. HYLAND: Generally, yes.

Mr. HORNER (*Acadia*): Under this tariff it could be approximately 15 per cent higher?

Mr. HYLAND: Yes.

Mr. FISHER: I have one question. You referred to the purchasing of foreign salmon. Was that salmon the material we have heard about in the house, that was marketed under Canadian labels?

Mr. HYLAND: Yes.

Mr. FISHER: Would you not agree that it is an unfair way to put it on the market? Do you not think it could be argued, if you obtained this particular definition of export trade—that it might be fair to ask for the abolition of the tariff in order to give a protection to the domestic market?

Mr. HYLAND: Well, I am not authorized to answer for our industry on a question of that kind. If you would like my personal opinion, I would be glad to give it.

Mr. FISHER: I would like to have it.

Mr. HYLAND: My personal opinion is, if we had access to the whole North American market. We have the duty of 15 per cent off on the product going into the United States. If we had access to the whole North American market they could open up the Canadian market too, because I think there are enough markets for all of us, if we can get at them.

Mr. FISHER: You mention the American market. Is this because the American supplier would be the first to take advantage of the 15 per cent?

Mr. HYLAND: No, but Canadian producers would have the opportunity of marketing in the United States, which we have not got now.

Mr. FISHER: In the main, the export price tends to determine, to a degree, the domestic price?

Mr. HYLAND: Not to determine it, but to influence it.

Mr. FISHER: To influence it?

Mr. HYLAND: Yes.

Mr. FISHER: Can you not see the efficacy of protecting the domestic consumer if you are going to have this definition, by abolishing the tariff?

Mr. HYLAND: Yes.

Mr. FISHER: This would guarantee protection to the consumer?

Mr. HYLAND: How important is it to protect a consumer who is buying two-and-a-half pounds of something a year?

Mr. FISHER: This is just a choice of the free market.

Mr. PICKERSGILL: I would like to ask the witness—and to come back, really, to the earlier question I asked—if he would concede, if the amendment he has suggested were accepted, it would be possible for the companies without setting the price for export, to exchange information as to the preparation of their pack they intended to be reserved for the domestic market?

Mr. HYLAND: No, our discussions in this export have been confined to prices only.

Mr. PICKERSGILL: To prices only?

Mr. HYLAND: Yes, we have never made any attempt to allocate or to divide—

Mr. PICKERSGILL: —the quantum?

Mr. HYLAND: That is an individual canner's decision, as to how much he wants to export and—

Mr. PICKERSGILL: I am sure the witness appreciates my reason for asking this question is that if information were exchanged about the amount that was to go into the domestic and export market, they would really, in effect, be a combine for the domestic market, without any mention of price?

Mr. HYLAND: Yes.

Mr. PICKERSGILL: I think the witness would probably agree with that?

Mr. HYLAND: Yes, but the situation is there is such intense competition for the domestic market; and each of the canners who participate in it guards its share very jealously. They have a great investment in their label franchise, and they protect it jealously.

Mr. MACDONNELL: A supplementary or parallel question: I am troubled about that point Mr. Pickersgill raised, and I wonder if you have taken legal advice and are satisfied that this amendment you propose does not, in fact, really relate to the export trade. It seems to me this is a very real point Mr. Pickersgill has raised.

Mr. PICKERSGILL: This is the essence of the whole thing.

Mr. MACDONNELL: It might end in some sort of lawsuit or difficulty, unless you are certain that covers it. Surely, what goes on in the external market must have an effect on the market here. I am only raising a question of wording, and I hope you get the result you want—and I think we all do—but I want to be sure you do it.

Mr. NUGENT: I want to get this straight in my own mind. Mr. Hyland made a statement they have, to his satisfaction, apparently, divorced the domestic operation from the export operation. In view of some of the answers you have previously given, I would like to refine this a little further, to see how much divorcement there is. It seems to me your application would depend on a real distinction being made of all those phases of the fish industry that can really be divided. In other words, you have answered my question on prices to be charged in th world markets—your argument is the domestic price is going to reflect the current world price?

Mr. HYLAND: Yes.

Mr. NUGENT: However, in your answer to my question, did you consider the Canadian price, when you are considering what you would charge in the world market, what you could get? The current Canadian price would be a factor in setting your own world price; is this not correct?

Mr. HYLAND: Yes, it would.

Mr. NUGENT: I think you have also given us an illustration of the inference that sellers regard the Canadian domestic market as their most stable and reliable market.

Mr. HYLAND: Yes.

Mr. NUGENT: Each of these firms would probably allocate, for domestic consumption, a certain percentage of its production, which is going to take into account either the market it had for the last year or the market it expects to get this year. Is it not a fact that the domestic price is likely to be the easiest one to compute, as a starting point, so they will say, "A certain percentage of our production, or a certain quantity we are fairly sure of selling at this price."?

Mr. HYLAND: Yes. Based on past sales performance, I know in our case we are able to estimate quite closely what our Canadian requirements are.

Mr. NUGENT: So that in these discussions, then, as to what the world market prices are, when you have indicated you have some information from Japanese cartels of their price, a very important factor for the Canadian producer is the support the Canadian price is going to have.

Mr. HYLAND: I think I could perhaps answer your question by giving an illustration, or an example, of what actually happened, if I may. In 1958, in early September, when it was obvious we were going to have one of the greatest productions of sockeye salmon since 1913—and it was going to present a major marketing problem—the price of that commodity on the export market dropped from $20 to $18.50. It dropped on the domestic market from $20 to $19 within a matter of a couple of weeks. There was an instance where the export market influenced the Canadian market downwards. As the market experience improved over the next twelve months, the export market price improved. The Canadian price structure followed it within four months.

Mr. NUGENT: The point I am getting at is, obviously, these two markets are so related, although your discussion apparently centered around the price the Canadian exporters will charge, or hope to get on the world markets,—whether the domestic price is discussed or not, as such, it is the background to fixing the price.

Mr. HYLAND: I would not admit that at all.

Mr. NUGENT: And your argument is the domestic price is really merely the result of the foreign influence?

Mr. HYLAND: It depends on circumstances in the particular year. Sometimes one will influence the other, and on other occasions the domestic price will influence the export price.

Mr. NUGENT: Since we are dealing with the 60/40 or 50/50 disposal of your products, in most cases the strength of the influence of one or the other may depend on the total size of production for that particular year?

Mr. HYLAND: Yes.

Mr. NUGENT: In view of that, and the fact these are so intertwined, and the fact that because the Canadian is the more stable market, it is more susceptible than any other market to agreement in prices, how can we take your assurance you have effectively divorced the two markets in your combination deal?

Mr. HYLAND: By the application of the provisions of the act. If it is considered we have been violating the act in our domestic marketing, then the act will apply to us.

Mr. NUGENT: Your canners, for example—is there any way in the operation by which you can tell whether it is for the domestic or foreign trade? There is no way of telling until after all these negotiations have been held, after each has announced to the council how much he has available for export?

Mr. HYLAND: We do not announce quantities for export; we do not discuss quantities at all.

Mr. NUGENT: Surely, the total amount of fish available for world trade is going to be a factor?

Mr. HYLAND: I am sorry, I thought you meant the individual canner's quantity.

Mr. NUGENT: However you arrive at it, you must have some idea of the amount that is going to be available from Canada as well. Since there is no distinction between what is a domestic-intended product and what is a foreign-intended product, until this has all been defined, where do we find the line where you are dealing only with the foreign or export products?

Mr. HYLAND: For that area we ship out of the country.

Mr. NUGENT: But there is no difference in the products till they are shipped out of the country?

Mr. HYLAND: No.

Mr. NUGENT: Or until it is ear-marked for that?

Mr. HYLAND: Yes.

Mr. NUGENT: And all your consultation and the setting of prices is carried on before this point?

Mr. HYLAND: Yes.

Mr. DRYSDALE: Did you not indicate the Canadian market was relatively constant, and somewhere around, I believe, 800,000 cases?

Mr. HYLAND: Yes, that has been our experience.

Mr. DRYSDALE: Perhaps I was wrong in my interpretation, but I had the opposite impression to the effect of what Mr. Nugent has just stated. In essence, he tried to establish what the demand was in the Canadian market as basic, and what was, shall we say, left over, or might be called surplus, was what you endeavoured to export?

Mr. HYLAND: Yes.

Mr. DRYSDALE: You indicated last year you could have virtually exported the whole pack and ignored the Canadian market. Therefore, the conclusion I would draw—and I wonder if you would comment on it—in essence is that there are two completely separate markets: there is the domestic market in Canada, which you endeavour to allocate to and compete among yourselves as to price; and the world export market, on the basis of price competition. Though there is a slight interrelationship in my own mind, they appear to be two completely different units?

Mr. HYLAND: Yes, they are.

Mr. DRYSDALE: I think you should clarify that, because the impression Mr. Nugent gave to me and, perhaps, to the other members of the committee—was that in effect it was the world price that was wagging the tail, shall we say, of the domestic price. I am not sure that you followed Mr. Nugent closely, but he built up the fact these two things were inextricably inter-related. I think there should be some clarification of that, if you did not wish to leave that impression.

Mr. HYLAND: The impression I wished to leave was that the combination of forces on prices of canned salmon sometimes will increase the domestic price and sometimes decrease it. It is merely our assessment of those factors which are reflected in our price-making for the export field.

Mr. DRYSDALE: If you have an unlimited demand, as you stated, on the world market.

Mr. HYLAND: We do not have an unlimited demand.

Mr. DRYSDALE: Last year, although you had allocated a specific amount to Canada, to take care of your relatively constant Canadian needs, you said, in essence, you could have disposed of almost any quantity on the export market. How could the export price, to be set up by competition from Japan and other countries, influence the domestic market? I think there are two completely separate things: the export market, and the domestic market. Although I am trying to separate them, you seem to bring them together again; and I wonder if that is what you intended doing.

Mr. PICKERSGILL: Perhaps it would be advisable to let the witness be the witness.

Mr. DRYSDALE: I have no objection to that.

Mr. HYLAND: It is one industry and one product. I do not want to make any unnecessary mystery out of that. We produce 1½ million to 1,900,000 cases a year, and the Canadian market can only take eight or nine hundred thousand, so we have an export marketing job to do each year. It varies in size, but sometimes it is easier than others because of the size factor. But we have always an

export marketing job to do for each year's pack. We have export price decisions to make, based on that year's pack.

Mr. DRYSDALE: I do not wish to labour the point, but if you have a set export market price, and as you have indicated that in one year you could have almost an unlimited number of cases—if that export price has been set in the world market, how can that have any influence on the domestic price in Canada which you have already provided for?

Mr. HYLAND: I think, because of the fact that we have people who are exporting who are not in the domestic market. Those people who are exporting and who are not in the domestic market create very substantial and real competition at the fisherman level. There is a ready sale for sockeye salmon in the export market, and at $23.00 a carton they are going to buy it aggressively, to sell it at that price. If we are going to get any salmon we have to buy it at the same price, and enter into the same cost structure they have created by reason of the export demands. Therefore, the people who serve the export market, twelve months a year, year in and year out, have created a cost structure which is really based on the world demand. Therefore, the Canadian price has been reflected in that way. Does that clarify it?

Mr. DRYSDALE: Yes; but it is your internal, shall we say, struggle before you get it on to the export market that in essence sets up what your domestic price will be; is that correct?

Mr. HYLAND: That is correct.

Mr. DRYSDALE: Then if the export price is $23 around the world, it does not matter whether or not you have one million or two million cases to dispose of; the export price will still be basically the $23.

What I could not see, having reached that basis, is how the export price can then come back and wag the tail of the domestic price.

Mr. HYLAND: The export price was only $23 when you produced less than 300,000 cases a year. When we produced over one million, the export price was $18.50.

The ACTING CHAIRMAN: I do not want to restrict the questioning; but it seems that the more questions we have, the more we are getting confused. I think it would be better to leave the evidence as we have it to date. We have two more groups to hear.

Mr. PICKERSGILL: Mr. Chairman, I have one or two questions that are not related to salmon at all. It may be that Mr. Hyland would rather have Mr. O'Brien answer them, and it does not matter to me which of them does it.

I must say—though I am not quite sure this is the best drafted amendment—that I am in complete sympathy with the objective that the fisheries council has, because we do know, some of us who represent the east coast fisheries, that with the kind of competition that has to be met in the markets for the east coast fisheries today, almost all of which are subsidized, except the Canadian sales, cut throat competition between Canadian exporters does not help matters very much for the trade, or even less for the fishermen.

I have wondered if the fisheries council does feel that this kind of safeguard is going to be necessary in the legislation for some other branches of the fishing industry.

Mr. HYLAND: Yes, in my opinion an industry which depends on two-thirds of its marketing outside of Canada is in a very vulnerable position if it is going to be restricted by taking joint action in the export field.

Mr. PICKERSGILL: My own opinion, of course, is that there is not nearly enough joint action at the present time of the east coast fisheries.

Mr. GORDON O'BRIEN (*Manager, Fisheries Council of Canada*): Mr. Hyland said, "restricted by taking". I think he meant, "restricted from taking".

Mr. HYLAND: Yes, I am sorry; I did mean, "restricted from taking".

The ACTING CHAIRMAN: Are there any more questions? Thank you very much, Mr. Hyland. We appreciate very much your coming here and giving us your wisdom and the facts and figures of your particular industry.

Next we have the council of the forest industries. Mr. J. R. Tolmie is their legal counsel; and Mr. J. R. Nicholson is president of the council of the forest industries of British Columbia.

Mr. J. R. TOLMIE (*Counsel, Council of the Forest Industries of British Columbia*): Mr. Chairman and gentlemen: if I may just introduce Mr. Nicholson, who will give the brief. Mr. Nicholson, as the chairman has said, is the president of the council of the forest industries of British Columbia. This is a newly formed body, which represents all the forest industry groups and businesses on the west coast. Mr. Nicholson wishes to speak to you in that capacity.

Mr. J. R. NICHOLSON, O.B.E., (*President, Council of the Forest Industries of British Columbia*): Mr. Chairman and gentlemen: as Mr. Tolmie has said, I am here as the president and spokesman for the council of the forest industries of British Columbia. Not that I think it will influence your decision in the final analysis; but it may interest you to know that at this time last year, when the first bill, Bill C-59, was being considered, briefs came in from all parts of Canada—that is, briefs to the Minister of Justice—including four from British Columbia; one from the B.C. loggers' association; one from the B.C. shingle manufacturers, the red shingle association; one from the plywood association, and one from the B.C. division, or the western group, of the pulp and paper association of Canada.

In the interval, the council has been formed. It has been formed as a coordinating group, of which the four associations I have mentioned—and one other—are the founding member associations, so that they will speak with one central voice and as a coordinated group, rather than as half a dozen different groups, with common objectives.

Our council has prepared a brief for presentation in the form of a letter dated July 17, and with your permission, Mr. Chairman, I should like to follow that brief. But by way of introduction to it, it might be helpful to state to you that we have a special interest—that is, the forest industries of British Columbia have a special interest—in Bill C-58. Our interest is primarily, or similar to that of the fisheries council that has just spoken. Canada is the largest exporter of lumber and lumber products in the world. Our exports comprise approximately—that is, in lumber, as distinguished from pulp and paper and newsprint: in lumber alone—30 per cent of the world market.

Canada's total export trade in commodities for the year 1959 topped $5 billion: it was $5,100 million. I think that most of you know that approximately one-third of that $5,100 million was the result of exports of products of the forest industry of Canada. But what some of you may not know is that one-eighth of that total amount, of that $5 billion that I have mentioned, comes from the forest products of British Columbia alone: approximately $650,000 comes from the export of the products of British Columbia.

Another significant fact is that over 50 cents of every dollar earned in the province of British Columbia is associated with the forest industry of that province. Seventy per cent of the products of the forests of British Columbia are exported: less than 30 per cent is in the domestic market. And in some branches of the industry, particularly the red shingle industry, 87 per cent of the total production is exported: there is only 13 per cent left on the domestic market. I think that it can safely be said that the economy of the province is more closely tied in with the forest industry than the economy of any other province or any other part of Canada; and it is because of that that our exports from this particular part of Canada differ materially from the exports from the three other major exporting countries.

I think that Canada is fourth on the list of trading countries in the world. There is the United States, Germany and Great Britain; and Canada is fourth. But we have this unique position, in that we supply basic commodities that are going to other parts of the world, and if we do not supply them—fish is a good example; forest products is another—you cannot recoup the situation next year, or change the situation next year. You either get the fish, pack it and sell it, or it is gone. The same thing applies in our forest industry today, when you have the program of sustained yield, where for every tree that is cut, there is one planted. We were a little late in this country in getting started on the program of sustained yield; but it has received nation-wide acceptance—and that is particularly true in the western part of Canada.

So that when you approach this particular problem from the standpoint of the forest industry and the fishing industry, the position is rather unique: you are not depleting something; it is growing; is is repeated—and it is of tremendous advantage to Canada that everything should be done to expand and to hold our export industries.

If you turn to page 2 of our brief you will be, I think, pleased to hear that the portion that relates to export is very small: it is three pages only.

I have made reference in the paragraph at the top of page 2 to repeated statements that have been made by the Right Hon. the Prime Minister, and by other members of the government, stressing the importance of expanding our export trade. The latest one, I think, was by the Minister of Transport, in greater Vancouver, within the last week.

Mr. DRYSDALE: Burnaby, specifically.

Mr. NICHOLSON: Well, I read it in a Vancouver paper.

Mr. DRYSDALE: That is very important.

Mr. NICHOLSON: Then it ought to get some support from the member for Burnaby-Richmond. But on that occasion, and on earlier occasions, the statement was made that nothing must be done, or will be done, to place any obstacles in the way of the development of our export trade.

As was stated to you yesterday by the delegation which presented the brief on behalf of the chamber of commerce, and as was repeated today by Mr. Hyland on behalf of the fisheries council, it is the view of most industries in Canada that are interested in exports that the present combines legislation does not apply to arrangements which relate solely to the export of commodities that are traded in world markets and with respect to which prices and terms of sale are influenced, and in many cases are determined, by competition from other countries.

But, as Mr. Hyland said to you—and this is set out in the second paragraph on page 2 of my presentation to you, Mr. Chairman—it must be recognized that in the case of certain commodities—and the products of the forest are a good example—the fact that they are exported from Canada in large quantities at prices and under conditions which are determined by international competition may nevertheless have its effect, or does have the effect of reducing the supply that is available at home. It does have an effect on domestic prices. One affects the other, and certainly arrangements made which are intended to facilitate or improve the competitive position of commodities being exported may, as Mr. Hyland said earlier, influence the supply of the commodities to the Canadian consumer and may affect the price to be paid.

This is true, even though the Canadian economy benefits materially from these export activities. The council of the forest industries of our province feels that the individuals and firms that are engaged in this important field of developing export markets for the products of our forests, as well as other exports, would be encouraged and supported if it could be made clear in the

new combines legislation that the act does not apply to arrangements for agreements relating solely to exports, provided, of course, that these arrangements are not detrimental to the public of Canada.

Frankly, the concern of the forest industries arises out of the incident to which Mr. Hyland made reference earlier this afternoon, that very recently, notwithstanding the fact that the forest and other industries have proceeded on the premise that any agreements that relate to exports, if they are going to be beneficial to Canada, do not come within the ambit or scope of the act, within the past few months an investigation has been conducted—and, mark you, as you will see a little further on in our presentation, no one can quarrel with the fact that in view of the law that we have in Canada today the director of research for the combines branch should make such investigation. He has a duty to perform.

There is a decision of our highest court—there is more than one decision—which made an investigation of this kind probably necessary, or at least desirable. But, as Mr. Hyland pointed out, in the summary that came out as a result of this preliminary investigation, the director alleged—this goes to the restrictive practices commission for further study and review—that there had been a lessening, or a preventing of competition in the supply of salmon in Canada and there had been an enhancement, or an increase, in price thereof in the domestic market, to the detriment of the Canadian public. And that is bound to follow, if you have a world market and a commodity that is being traded in the world market.

In the second sentence on page 3 of this presentation our council says: It may be that the arrangements entered into by the packing houses who were the subject of the investigation did result in more of the total canned salmon pack being sold on the export market, and consequently somewhat less being available for sale to the Canadian consumer. But I submit that there can be no doubt that the Canadian economy, particularly the economy of British Columbia, derived great benefit from the sale of the salmon abroad pursuant to the agreed program for export. As a result of the joint marketing arrangements or program, more fishermen were employed for longer periods at higher wages than would have been the case if sales were to be limited to the domestic market; and there can be no doubt that the profits derived from the export sales made it possible to keep the domestic prices lower than would otherwise have been the case.

I will, if I may, Mr. Chairman, digress for a moment, and perhaps you will pardon a personal reference, which will illustrate, I think, the importance to the domestic economy and to the price structure in Canada of the fact that you are able to export the bulk of a given commodity. As some of you know I was associated with the synthetic rubber industry of this country for about nine years, as an accident of the war. After Pearl Harbour occurred we found our supply of natural rubber cut off and we had to get a substitute. The industry in Canada played its part in producing synthetic rubber in Canada. When the war ended in 1945, the price for crude rubber on world markets was 44 cents a pound and synthetic rubber was being produced in Canada and sold at a profit of 18½ cents a pound. In many of the plants in the United States it was being produced at the same figure. The Canadian government was anxious to see an adjustment which would help the economy of the United Kingdom. Representations jointly were made by Canada and the United States, because there was a government control on rubber then, to reduce the price of crude rubber in order to put more dollars into the British treasury. We told them that since synthetic rubber could be economically produced at 18½ cents a pound they should be realistic because the Americans would keep their plants going and use their synthetic rubber which they also could produce at 18½ cents a pound, if crude rubber did not come down.

In January, 1946, as a result of the talks, the British, and its industry, which handled this commodity announced that the price of crude rubber was being dropped to 22½ cents a pound. They figured that crude rubber was sufficiently superior to synthetic and that they could command a premium price of 4 cents a pound. To their surprise they found that with manufacturers in this country and other countries getting used to synthetic and its qualities, that that was not so. Suddenly, without warning in May, 1947, the groups who controlled the supply of crude rubber to the world dropped the price of crude rubber to 15 cents a pound overnight for the highest grade of crude rubber in the world.

The plants in Canada could make a modest profit at 18 cents if you forgot about any thought of investment and forgot about overhead charges; synthetic rubber could be made in Canada and sold at that price by only one agency. It was run by businessmen. It was a government company but there were businessmen controlling its activities. Overnight we dropped the price of synthetic rubber in Canada to 15 cents a pound in order to hold our Canadian market. Our export market dropped off. The result was that our cost of production in Canada could not be held at 15 cents a pound because we did not have the volume of production that was needed to let the operation continue.

We saw a profit, out of this operation that was made in the first three months of 1947 of roughly $½ a million, disappear overnight. At the year end of 1947, even though we were holding our own in the Canadian market and competing successfully with crude rubber, we saw production costs in Canada going up gradually to 17, 18 and 19 cents a pound. We ended the year 1947 with a profit, without taxes of $25,000.

There was a council of war. It was not a council of the forestry or the fisheries industry. The directors got together and decided there was only one answer—to give it a try. They pulled out all the valves and all the stops and stepped up production. In the meantime a successful research program had been started. In 1948 there was an operating profit of roughly $½ a million, in 1949 an operating profit of nearly five million dollars, and in 1951 there was an operating profit of well over $10 million.

The price of synthetic rubber in Canada had been kept not at 15 cents but at a level between 18 and 20 cents a pound. Due to this large volume of production we went out and found markets abroad for this rubber in competition with crude rubber. Today, Polymer—I no longer have any connection with it—is producing nearly four times as much as it was originally designed for. It is producing at a level of upwards of 140,000 tons of rubber a year. Wages have gone up several times in the interim, the cost of raw materials has gone up, and synthetic rubber is being made available in Canada at roughly 23 cents a pound whereas the price of crude rubber, which they had dropped deliberately in order to force this economic battle, is now back at the world price of 44 cents a pound. The Canadian public is still getting the bulk of its demand from the Canadian owned plant at approximately the same price as they did. That could not be done without volume production and could not be done if there had not been a board of directors—in this case with the support of the government—which went out and met world competition and met the competitive price and competitive action coming in from industry in the other parts of the world.

I was shocked at the letter as I am sure you were—the letter that Mr. Hyland read here today which was written by the Japanese fishing cartel and written approximately eleven months ago. I am sure the words burn themselves in your mind just as in mine—"we have not yet fixed our final price for the sale of our salmon in the world market; we give you a tentative price and as soon as the Canadians and Americans have fixed their price we will give you ours." How in the world are you going to fight in world markets where 50 per cent of

the products of the forests of British Columbia are being exported and one-third of the income coming into this country from the sale of our exportable commodities coming in from the sale of Canada's forest products, if we cannot meet the competition coming in from foreign countries.

Mr. FISHER: Could the witness give us the parallels in the timber industry to the Japanese salmon industry? I do not think that is contained in the brief.

Mr. NICHOLSON: I cannot give it to you for Japan, but I can give it to you for Russia. Prior to the war, and in fact up until 1954, Canada was Britain's leading supplier of soft wood products—lumber, shingles and material of that kind. That is, as late as 1954 it was the leading supplier. By 1957, Canada's share of the United Kingdom imports had dropped to 14.7 per cent and Canada's position was that of fourth place supplier of products to the building industry in Britain. We had been replaced successfully by Sweden, Finland, and Russia. During this period when the Canadian sales were dropping off the Soviet of Russia had increased her sales from one-tenth to one-fifth of the total of the United Kingdom's soft wood importation. In the case of the Swedish and Finnish importers they were trading at a profit. Their objective was to make a profit, but their operating costs were lower because wages were lower. That was not so in the case of Russia, when they came in and took that market. I am reliably informed by an official of the Department of Trade and Commerce —this can be checked by reference to the minister or other officials of that department—that the Russian technique in invading the British market is that they will come in with a particular type of lumber which is in demand and, even though the lumber may be needed at home in Russia, they will quote to supply the whole demand at a price that is better than the Canadian price for a particular kind of lumber. It is even better than the Swedish and Finnish prices in some cases. Then if you repeat the order they will give you a further reduction. That is not done by any cartel. That is done by a government trade agency. Does that answer your question?

Mr. FISHER: Yes. I wanted that point made as strongly as possible.

Mr. NICHOLSON: I will come back now to the brief at the bottom of page 3. You will be glad I am moving on to the end of this part of the submission.

We submit—that is the forest industry of Canada—that Canadian firms or individuals engaged in the export trade in fish or other products should be free to act collectively without running the risk of extensive and expensive investigations and possible prosecution under the "Combines Act", where such collective arrangements are directed towards facilitation of the competitive position of articles to be exported from Canada against foreign competition.

This presentation certainly would not have taken this form if we had not learned of the development in the fishing industry; but if investigations are going to be conducted under the law as it now stands, regardless of whether the economic welfare of Canada is improved by the export arrangements, the mere fact that there is some lessening in competition or some decrease in the amount that might be available—and the supply at home is affected by this—the mere fact that there is such a lessening in supply and even the slightest increase in price, under the language of the act constitutes an offence and the director of investigation and research must enforce the law—that is his job.

If I might I would like for a moment to refer to the latest pronouncement of the supreme court of Canada on this very point. It is a case which I am sure those of you who are members of the legal profession are very familiar with. This is a case of the Howard Smith paper mills et al, reported in 1957 supreme court of Canada reports. The reference to this is given in my letter. This case appears at page 403. Under the act as it now stands the test is, is it detrimental to the Canadian public, and since it is criminal legislation

it means detriment to the Canadian public because we do not legislate extra territorially. The supreme court of Canada states that if, as a result of your agreement or your combination you have done something which is going to reduce the supply at home or enhance prices, then you are doing something that is to the detriment of the Canadian public.

There are two passages in this report to which I would like to refer briefly. One is at the bottom of page 426 and continues on page 427. This is in the judgement of Mr. Justice Cartwright. He says:

> —the court, except I suppose on the question of sentence is neither required nor permitted to inquire whether in the particular case the intended and actual results of the agreement have in fact benefited or harmed the public. In other words, once it is established that there is an agreement to carry the prevention or lessening of competition to the point mentioned,—

and if you export 90 per cent of your product and leave 10 per cent at home you will certainly come within that language.

> —injury to the public interest is conclusively presumed.

That is the end of it.

Mr. MACDONNELL: What year is that?

Mr. NICHOLSON: 1957. That is the latest expression of judicial opinion by the supreme court of Canada on that point.

Mr. Justice Taschereau in his judgement at page 407 says much the same thing. This is at the bottom of page 406 and continuing on page 407:

> It has been argued on behalf of the appellants that the offence is not complete, unless it has been established by the crown beyond a reasonable doubt, that the agreement manufacture or production was effectively lessened, limited or prevented, as a result of the agreements entered into. It has also been suggested that there is no offence, if it is shown that the acts complained of were beneficial to the public.

Take the forestry industry in British Columbia where 86 per cent of the products of that important industry is exported. There is 14 per cent left at home. Of course, if you had 100 per cent of the shingles available in Canada they would be invited to come in and take them away in cart loads; but would the Canadian public benefit? Yet his lordship says, if under the statute you have reduced supply in Canada as the result of this export or as a result of any act of combination or agreement then you come within the language of the act.

His lordship continues and says:

> The public is entitled to the benefit of free competition, and the prohibitions of the act cannot be evaded by good motives. Whether they be innocent and even commendable, they cannot alter the true character of the combine which the law forbids.

At the top of page 4 of our presentation we say as a result of the investigation into the export activities of the fishing industry in our province, firms engaged in the sale and manufacture for export of the products of our forests are concerned with the fact that arrangements which they may have to make in order to meet competition abroad from other countries and which they feel benefit the Canadian economy may result in their being suspect merely because these arrangements may influence supply and price of such products at home.

When this letter was dictated on Friday of last week it was dictated in order that I might, in fairness, get a copy to the minister. It was revised in three respects on Monday afternoon this week. After I got here I corrected the English. That is why you did not get it until Monday night. The submission of the fisheries council was given to me before I left Vancouver, but the letter had been written before we saw it.

If this committee sees fit to recommend to parliament acceptance of the definition of the fisheries concern, we commend it and go along with it in spirit; but frankly our suggestion to the committee, and through you to parliament, takes a slightly different form and if you have before you bill C-58, and it took this form because of the remarks made by the minister when he moved the second reading of the bill: he said that the bill reflected—or words to that effect—the considered judgment of the government and of its advisors, and that if, within the spirit or the framework—I am not sure of the language that was used—amendments could be suggested that would improve the legislation, he stressed the fact of the desirability of clarification of this one point which we feel should be clarified in furtherance of our export trade.

And if you look at page 5 or page 6 of the bill under part V, you will see the new section 32, and that there is a definition of "combine", and the punishment which you are to suffer if you are guilty of that offence.

Then if you move into subsection 2, it says:

> 2. Subject to subsection 3, in a prosecution under subsection 1 the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:
> (*a*) the exchange of statistics,
> (*b*) the defining of product standards,
> (*c*) the exchange of credit information,
> (*d*) definition of trade terms,
> (*e*) co-operation in research and development,
> (*f*) restriction of advertising, or
> (*g*) some other matter not enumerated in subsection (3).

And the minister explained when dealing with this legislation that this section was put in in the interest of clarity; and it seemed to our council, therefore, that in the interest of clarity it is desirable that if export trade is really excluded from the provisions of the act, it should say so, so that when the director of investigation and research under the combines investigation branch, or a court, is looking into it, they can see it.

So our suggestion is that you put in, following subsection (f), if you like—and you will have to renumber the sections, of course—and then put in as a new subsection 2 (b) the allocation of markets and the creation of uniform prices in terms of sale in the export trade to better facilitate the competitive position of articles exported from Canada as against foreign competition.

With all due respect to Mr. Hyland and to his draftsmen, I feel that this amendment accomplishes the same purpose, and that it comes within the framework and the spirit of the act.

One of the members—I think it was the member from Port Arthur—put his finger on it in the question which he put to Mr. Hyland, when he said that he was worried about the situation. But if you used the words we do now, we suggest in our brief that in addition to inserting this subsection (g), or some similarly worded paragraph, you come to the next part, to subsection 3.

Subsection 2 makes it clear that subsection 2 is not to apply if the conspiracy, combination, agreement, or arrangement lessens or is likely to lessen competition unduly in respect to one of the following; so I say that along with this new proposed subsection (g), that if you put in after "unduly" the words "within Canada", you have served or gained the objective that you are after, which is not competition unduly within Canada.

With respect, I feel that within the spirit of the framework of the legislation this is an improvement in the legislation in correcting something that has always been recognized as outside the scope of the act.

And while we are looking at that section I would agree with one or more of the delegations—and I might say that our council agrees with one or more of the delegations which appeared before you yesterday. The word "unduly"

is used in the second last line on page 6; and when you get to the top of page 7, in line 4, you have "conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade or industry".

One or more of the delegations yesterday suggested of the word "unduly" in that place. It may be questioned or not. I do not know; but I think the line would be improved if the word "unduly" was put in; because while it is possible to argue that the word unduly at the bottom of the previous pages applies, it would certainly correct the situation if you should repeat it at the top of page 7.

That is all I have to say on the subject of exports, except this: we are concerned with matters which affect the welfare of the people of Canada, and which are designed for the betterment of the people of Canada; and our council respectfully suggest that, regardless of whether you accept Mr. Hyland's recommendation, or whether you accept the recommendation that we put forward in this brief, in any event it would be well to avoid the serious consequences of this, and to rely on a strict application of the law as shown in the Howard Smith paper case. This is set forth at the bottom of page 5 of our brief, where two of the judges of the Supreme Court of Canada said in effect that however innocent or commendable a person's actions may be, the wish to accomplish a desirable purpose constitutes no defence in a case where an agreement or other act has been prohibited by statute.

Under the legislation today you cannot do that if it lessens competition or enhances prices, and under the Howard Smith case, even though it is to the economic advantage of the whole of Canada you cannot do this thing. But we respectfully suggest that it would be helpful, and it would also be fair to the public and to the people who are trying to promote exports and do business in a way which is beneficial to Canada—and I say that it would also help the official charged with the responsibility of administering this act.

Nobody can criticize the official, with the act as it now stands, in trying to enforce it in the way which the Supreme Court of Canada has indicated, and under the present legislation.

We say with respect that now is the time to correct it, and that if there are countervailing advantages to the betterment of the public of Canada, that the courts and independent judicial bodies should take all those factors into consideration in its final decision. That is all we ask.

Now, with regard to the other point in this submission, all of them have been touched on, but I shall try not to detain you too long. If you will look at section 31 of the act, the new section 31, if you have it before you, you will see that under the proposed new section 31, and under the existing law, that if a person has been convicted of an offence, whether it is a merger, a monopoly, or any offence under the act, that in addition to the penalty which is imposed, the person convicted may within three years move to have the merger or monopoly dissolved. That is in subsection 1 of the act.

But in subsection 2 it is proposed, in line with a suggestion put forward in the Macquarrie report, that—if my memory serves me right—frequently it is more important to prevent a merger taking place or a monopoly, than it is to try to punish them after the damage has been done.

It is unfair to shareholders and to other persons concerned, and frankly I think this is in one respect a place where, if it is constitutionally sound—and I am not expressing any opinion on that, because that is for the advisors of the government to say—but they have apparently advised that it is constitutional; and just as you can get a person bound over to keep the peace so that he will

not misbehave in the future, it is proposed in this legislation that you should be able to apply to the court to prohibit or get an injunction to prevent him acting in an illegal way.

As I say, in principle, I think it is a constructive move; and there is no mincing of words in the Macquarrie report. They said that if it could be done constitutionally, then it was something that should be done. But you will note in subsection 2—and this is the point to which I direct myself—that in addition to getting this injunction to prohibit it, in the last part, where the offence is with respect to a merger or a monopoly, they may do such things as may be necessary to dissolve the merger or the monopoly, and there is no time limitation. You can go back and attack a merger which took place ten years ago, and there is no statute of limitations in subsection 2.

Mr. FISHER: Are you suggesting one?

Mr. NICHOLSON: I heard the suggestion advanced yesterday, and that is why it is underlined in black type. Frankly, having heard it suggested in cross-examination the other way, that you have to construe the words "has done" perhaps in the light of something which happens, it may be, two or three years from now, and that may not be a correct way of doing it.

But I do suggest, with respect, that you could accomplish it if you have a three year limitation from the conviction under 31, and that you should have a three year limitation in subsection 2, by appropriate wording, which it would not be too difficult to draw up.

The only thing I would suggest is that if there is a limitation which goes into that section, it certainly should not be made retroactive. It should be made to apply to mergers or monopolies which occur after today. That is all I have to say on that.

On page 7 of our presentation reference was made yesterday to proceedings under the same section, 31, and it will be noted that while under 41A—if you look at page 10 of the bill, and section 19, introducing the new section 41A, it is proposed that where resort is made to concurrent jurisdiction of the Exchequer Court, that there should be an appeal to the Supreme Court of Canada. That is quite clear in subsection 3.

For the purpose of part eight of the Criminal Code, in any prosecution or proceedings under part V—and I draw your attention to the words part V, following a judgment of the court there shall be an appeal to the Supreme Court of Canada.

And if you go back to section 31, which is under part IV or under part V, the judge, whether it is a judge of the Exchequer Court or of the Superior Court of a province—if he makes a decision, no matter how arbitrary it may be—and to use an extreme case: he may have got out on the wrong side of the bed in the morning—and if he makes that decision dissolving a merger or a monopoly, there is no appeal from it. I am sure the government did not intend it. That must be an oversight.

So in principle we agree with the Macquarrie commission in making such a recommendation, and we certainly feel that there seems to be a need for it, because the consequences of the dissolution of a merger are far more serious than any fine or any injunction, and therefore there should be the right to appeal.

That is our first submission. That is No. 3 at the top of page 7. We respectfully suggest that provision should be made for appeals from the judgment of a superior court, or to the court of appeal of the province concerned, or to the Supreme Court of Canada, where it is the Exchequer Court below, and that you should have the same right to appeal.

Now we come to the next point of our submission, which is the new section 41A, the section which will give jurisdiction with the consent of the Attorney General to the Exchequer Court, that is, concurrent jurisdiction to the Exchequer Court of Canada.

Again may I say with respect that I like to express—and I am not complimenting him because he is here—but I would like to express thanks to our minister, when he moved the second reading of the bill, when he said that there might be cases in the twilight zone where, if the law is strictly applied, and if there is criminal jurisdiction, and there has been a breach of the law, it should be determined.

But if there are cases in that twilight zone, as the Howard Smith case would seem to indicate, then should they not be tried quickly and summarily in the Exchequer court of Canada I think that is sound.

So I say that you should note under section 41A, that if it is a criminal matter, you have to get not only the consent of the Attorney General of Canada or of the Attorney General of the province which is instituting these proceedings, these criminal prosecutions, but you have to get the consent of the accused.

We are dealing here with criminal law in the Combines Act, and if we are going to have the consent of the accused, where there is no criminal act, and you are dealing with a criminal matter, I say you should have the same consent of the accused or of the company concerned when you are proceeding under section 31.

I say that for two reasons: the first one is basic. Today, if this amendment did not go through, giving concurrent jurisdiction to the Exchequer Court and you are convicted in a superior court of a province, you have the right to appeal to the court of appeal of that province; and you have the right to apply for leave to appeal to the court of appeal of the province on mixed questions of law and fact, or just on a straight question of fact. That is a right which you have today.

But if this legislation went through you would be depriving a person living in any part of Canada of the right that he has of going to the courts, first tried by the superior court, and then to the Court of Appeal where there are five or seven judges as the case may be, who could take a look at the facts. So, therefore, I would suggest, with respect, that the consent of the accused or the consent of the person concerned should be to proceeding under section 31, in the same way as you get the consent to a criminal prosecution. They are both criminal offences, and they should be treated in the same way.

In addition to that, there is another argument which was touched on. I think the first one is basic, that you are depriving people of the rights they have today, with regard to their having the right to appeal to their provincial courts. But there is another argument that has peculiar application to the part of Canada where the honourable member from Burnaby-Richmond, the Hon. Minister of Justice, and I reside in British Columbia. The same thing applies to the member from Bonavista. We are far removed from Ottawa.

Mr. PICKERSGILL: Or we wish we were!

Mr. NICHOLSON: When you get into the Exchequer Court—it is true the Exchequer Court sits in every part of Canada periodically, but in many matters there is a whole series of interlocutory applications; and I could conceive of an application to desolve a merger, having some proceedings being instituted five years from now when it actually takes place next week—where you have shareholders and interests in the United States and other parts of the world. There could be evidence taken on commission in these places. For each one of these applications you would have to go to Ottawa because the judge only comes periodically to the remote parts of Canada.

So we submit, with respect, that while I think, perhaps, in a great many cases—perhaps 90 per cent of the cases—the accused or the companies concerned, or individuals concerned would be willing to consent to having them disposed of in the Exchequer Court of Canada, for this combination of reasons we respectfully submit that this concurrent jurisdiction of the Exchequer Court should be conditioned on the consent of the accused. That is all I have to say on that score.

I have suggested near the bottom of page 8 how that might be done with subsection (4) of section 41A, as proposed by section 19 of the bill. It says:

> Proceedings under section (2) of section 31 may in the discretion of the attorney general be instituted in either the Exchequer Court or a Superior Court of criminal jurisdiction in the province, but no prosecution shall be instituted in the Exchequer Court in respect of an offence under part V without the consent of all the accused.

Our suggestion or recommendation to this committee is that no prosecution or proceedings shall be instituted in the Exchequer Court under section 31(1)(b) without the consent of the accused, and with respect to proceedings under subsection 2 of subsection 31 without the consent of the person or persons concerned.

The last submission that I have to put forward—and, with respect, it would be helpful if you had before you the new section 29, which is found on page 4 in section 11 of the bill. This was touched on yesterday by the delegation from the Canadian Chamber of Commerce.

Section 29 reads:

> Whenever, from or as a result of an inquiry under the provisions of this Act, or from or as a result of a judgment of the Supreme Court or Exchequer Court of Canada or of any superior, district or county court in Canada, it appears to the satisfaction of the Governor in Council that with regard to any article there *has existed any conspiracy,*

—and so on.

Mr. NUGENT: What section is this?

Mr. NICHOLSON: Section 11 of the bill, page 4; it is the new section 29. That is intended, where combines or mergers or monopolies are working to the advantage of certain limited or selected groups of manufacturers and it is to the detriment or at the expense of the Canadian public, that action can be taken by the governor in council.

In the last part of the section, line 36, it says:

> —and if it appears to the Governor in Council that such disadvantage to the public is *presently being* facilitated by the duties of customs imposed on the article, or on any like article, the Governor in Council may direct either that such article be admitted into Canada free of duty, or that the duty thereon be reduced to such amount or rate as will, in the opinion of the Governor in Council, give the public the benefit of reasonable competition."

We respectfully suggest that nobody would quarrel with the principle of that legislation. It is in the law today, and there are advantages in continuing with it. All we are suggesting is that it should be done this way, that the Governor in Council should be invited to act after there has been a judgment of a court, and not merely after an investigation, when they get hearsay evidence and reports on which there has been no cross-examination. We respectfully suggest the Governor in Council should not be invited to act in this punitive way—and it is a very serious punishment, unless there has been a decision of a court. If there is a decision of the court, fine, let them act, but not merely on recommendation. That could be done by striking out the words in line 2:

> from or as a result of an inquiry under the provisions of this act.

I hope you agree that that is a constructive suggestion.

Mr. THOMAS: Has Mr. Nicholson ever known of a case where this penalty has been applied?

Mr. NICHOLSON: I know with respect to one that is now being effected. I learned of it. It does not affect any British Columbia company, except indirectly; but there is a proceeding pending now where the Governor in Council will be, or may be asked, under this act, or may be asked, under the Financial Administration Act, to take action of this kind. There is one now before the treasury board, actually.

Mr. THOMAS: That is, an application has been made—

Mr. NICHOLSON: Not only that.

Mr. THOMAS: —for the imposition of this penalty?

Mr. NICHOLSON: The companies concerned—there are six of them, I believe —have received notice over the signature of the Minister of Justice calling on them to show cause why they should not act under this section.

Mr. PICKERSGILL: This is in a case where there has been an inquiry?

Mr. NICHOLSON: That is a case of a conviction. I say that is quite proper. My suggestion is, do not take drastic action of that kind where it is an inquiry only. I think that is reasonable, and I think it would appeal to reasonable men and businessmen in their legislation.

The ACTING CHAIRMAN: I would like to get direction from the committee on two things. Mr. Nicholson has referred to his brief, back and forth but it has not been put in word for word. Perhaps it should be put in as an appendix to the evidence, so that we can follow through the references he has made.

Mr. PICKERSGILL: I would so move.

Mr. DRYSDALE: Seconded.

Motion agreed to.

The ACTING CHAIRMAN: We still have another delegation here. If I could ascertain how many questions there are, we could perhaps judge whether it would be better to retain these gentlemen here. If we do not we may have to put them over to a later time next week. If there are not many questions, I think we might proceed this afternoon. Are there many questions?

Mr. NUGENT: We have covered pretty much this ground with the fisheries.

Mr. HORNER (*Acadia*): I wonder if we could not have the Canadian manufacturers association read their brief, and have the two bodies open to questions together?

The ACTING CHAIRMAN: It is the Canadian metal miners. I think their problem is a little different.

Mr. NICHOLSON: It is very much the same.

Mr. PICKERSGILL: I think there might be quite a lot to be said for taking the course Mr. Horner suggested, if whoever is presenting the brief for the other association would simply read it relatively quickly, without amplification. Then perhaps we could ask questions about both of them, since they are both related to the export industry. It is really rather too bad to detain busy men unduly. If that would be agreeable to Mr. Nicholson, we might proceed in that way.

Mr. NICHOLSON: That is quite agreeable.

Mr. FISHER: We have only 50 minutes.

The CHAIRMAN: It may not take too long. There do not seem to be too many questions. Would you come forward, please?

The ACTING CHAIRMAN: Gentlemen, we have Mr. H. C. F. Mockridge, the counsel for the Canadian metal mining association, and Mr. V. C. Wansbrough, the executive director of the Canadian metal mining association here.

Mr. H. C. F. MOCKRIDGE (*Legal Counsel, Canadian Metal Mining Association*): My name is Mockridge, and I am acting as counsel for the Canadian metal mining association in this matter.

Mr. NUGENT: I do not have a copy of their brief. Have they been made available?

The ACTING CHAIRMAN: They have been made available.

Mr. PICKERSGILL: I do not seem to have a copy either.

Mr. MOCKRIDGE: Mr. Wansbrough will read the association's brief, as suggested by the chairman.

Mr. V. C. WANSBROUGH (*Executive Director, Canadian Metal Mining Association*): Mr. Chairman and gentlemen, first, may I thank you very much indeed for your courtesy in permitting us to appear at this particular time, and Mr. Nicholson for his willingness to concur in this procedure. I need hardly say that we appreciate the opportunity to appear before you. If we have no other distinction, I trust we do at least have the distinction of making the speediest and briefest submission that has yet been put on the record.

The association on whose behalf we have the pleasure of appearing here is very broadly representative of all the operating mining companies in this country producing gold and other precious metals, base metals, iron ore, uranium and some industrial minerals, of which the chief is asbestos.

In December of last year we presented to the Minister of Justice the views of our association on the legislation proposed at that time. We now express our pleasure that a number of recommendations then advanced were accepted and incorporated in the new bill which is now under consideration.

We regard Bill C-58 as in several respects considerably improved over the previous amending Bill, but there remain a number of points which we believe to be of substantial importance to industry and in respect of which the Bill is, in our view, susceptible to further improvement.

These we now propose to lay before you for your consideration and, we trust, for your approval.

I think, Mr. Chairman, that not too deep a sigh will go up from the committee if I say our first point is the export trade.

Export Trade

In our original submission we urged that there should be included in the Bill a section specifically excluding export trade from the provisions of the Act, with particular reference to trade arrangements in the export field where companies primarily engaged in export were endeavouring to conform to the recommendations of international bodies of which the Government of Canada was a member. No such provision is made in the current Bill. We therefore return to the point and urge reconsideration.

It is unnecessary for us to emphasize the vital importance of export trade in the national economy and welfare of this country; or to stress as has already been stressed, the highly sharpened conditions of international trade which we are currently experiencing—

Might I insert there that the Canadian exports of minerals and metals, including fuels, and semi-processed manufactured products, in the year 1959 amounted to $1.9 billion or 40 per cent of Canada's whole export trade. As far as the mining industry is concerned, the products of the mines I speak of—excluding coal, gas and so on, the dollar value of the production of last year was in the neighbourhood of $1.4 billion, the great bulk of which has to be exported.

—and, perhaps even more important and significant, returning to sharpened conditions of the international trade, is the potential threat of price-cutting competition from countries behind the Iron Curtain. Though I say "potential,"

this is competition we have already experienced in such metals as aluminum, lead, zinc and asbestos. I should like to add, though, I have not seen much reference made to it in this country, yet there is a good deal of speculation about it in the United States as to the possibility that the recent developments on the international scene might be a renewed drive on the part of the U.S.S.R. in such competitive trade matters, in so far as their products are easily identified products as our own, and the mineral industry, as much as any other industry, would feel the full impact of any such heightened competition.

We believe that in these circumstances no one would desire to impose on industry in Canada any legislation which could handicap it in its export trade.

In order that no doubt may exist in the minds of those responsible for maintaining our exports at the highest possible level, we believe that the application of the Act to companies and industries engaged primarily in export trade should be clarified beyond the possibility of doubt or dispute.

It is understood that a key phrase in the whole legislation, viz., "the detriment of the public", refers to the public in Canada. There is no other "public" over which the Government of Canada has jurisdiction. It would, in our view, be beneficial if this fact was clearly set forth in the definitions embodied in the Act.

Also, we strongly favour and support the proposal advanced by other organizations vitally interested in export trade to the effect that in all decisions arising in connection with this legislation due weight be given to all the economic and trade factors involved, including Canada's competitive position vis-a-vis external competition and export markets.

That is our first general point. We now proceed to some particular points in which we believe that the legislation could be beneficially amended, and draw to your attention the following specific sections of the Bill.

At this point, as the various points of law or legal procedure have been thoroughly discussed by the committee, I think, if I may, I will ask Mr. Mockridge to comment on them briefly.

Mr. MOCKRIDGE: The first point on which we comment on the bill relates to subsection (2) of section 31 as proposed by section 12 of the bill, which appears on page 5 of the bill.

This section resembles the existing section 31(2) in that it enables proceedings to be taken and orders made against a person who has not been convicted of any offence under Part V. However it goes much further than the existing section in the following respects:

(*a*) it is made applicable in cases where an offence has been committed; and

(*b*) it enables the Court to make an order of dissolution where the offence is alleged to be with respect to a merger or monopoly.

It has been said that the amendments to Section 31 (2) were for the benefit of persons alleged to have committed offences in that they would enable the making of a prohibitory injunction order or an order of dissolution without the necessity of subjecting the person charged to the stigma of a criminal conviction. Whatever may be said as to the desirability of the principle of the existing section 31 (2) at least it applies only prospectively to enabling the making of an injunction order where it appears to the court that an offence is about to be committed. In other words, it does not purport to affect things which have been done or rights which have been acquired.

The changes proposed by Bill C-58 very radically affect the rights of the subject.

Proceedings may be instituted under this subsection without the consent of the person charged and there is no indication that a court must adopt the same standard of requiring proof of guilt beyond a reasonable doubt which applies in prosecutions commenced by indictment under part V. It is further to be

noted that the subsection provides no time limit within which these proceedings must be commenced after the commission of an alleged offence while section 31 (1), which provides similar penalties after conviction, required that proceedings must be instituted within three years after conviction.

Therefore a person might find himself years after the time when the alleged offence was commited having a prohibitory injunction or a dissolving order made against him under subsection (2). A dissolving order might well affect rights which might involve millions of dollars and the dissolution might well cause substantial loss to many people in no way interested and having no complicity in the alleged offence. All this could be done without conviction as the person charged has no right to insist on being charged under part V.

If the purpose of the amendment is to enable the person charged to avoid the stigma of conviction on a criminal offence, it should be provided that proceedings alleging previous commission of an offence may be instituted only with the consent of the person charged and in any event within three years after the commission of the alleged offence.

It is to be noted in this connection, that section 41A(4) as proposed by section 19 of the bill enables proceedings under subsection (2) of section 31 to be instituted in either the Exchequer Court or a superior court of criminal jurisdiction in the province in the discretion of the attorney general without the consent of the person charged.

A further grave defect of section 31(2) is that it deprives the person charged of the rights of appeal to which he is entitled against a conviction under part V of the act. In prosecutions under part V it is quite clear that the person charged is entitled to the rights of appeal set forth in part XVIII of the Criminal Code. However, since part XVIII applies only to appeals from "proceedings by indictment" and as information under section 31 (2) is not a "proceeding by indictment", it appears that a person against whom proceedings are taken under section 31 (2) has no right of appeal.

It thus appears that a person proceeded against under section 31(2) may without his consent and without conviction be subjected to the rigorous penalties prescribed by the subsection and be left without any right of appeal.

Specifically it is suggested that section 31(2) be left in its present form—that is, the form in which it appears in the existing Combines Investigation Act—

except for the necessary amendment to correct the cross reference or if this is not acceptable that it be amended in the following respects:

(*a*) to provide that proceedings may be instituted thereunder only with the consent of the person charged;

(*b*) in the case of an offence alleged to have been previously committed that proceedings may be instituted in any event only within three years from the commission of the alleged offence; and

(*c*) that the person charged should have the same rights of appeal from any order of the court under section 31 (2) as he would have against conviction after indictment under part V.

Our proposal, with respect to section 41A, as proposed by section 19 of the bill, has been dealt with, to some extent, by Mr. Nicholson. However, I will try to make clear the distinction between the right of appeal which is provided in case of proceedings in the Exchequer Court and proceedings in the provincial supreme courts.

Mr. WOOLLIAMS: If I may interrupt, in order that we can follow you, do you say there has been a vacuum in the bill itself, as there is no appeal at all under certain circumstances?

Mr. MOCKRIDGE: Under section 31(2), as far as we can see, there is no appeal against proceedings under that subsection.

In connection with section 41A, this new provision, which enables the institution of prosecutions or other proceedings under the act in the Exchequer Court of Canada, seriously affects the right of the person charged in respect of appeals from a conviction. The new section provides that, for the purpose of part XVIII of the Criminal Code, the judgment of the Exchequer Court, in any prosecution or proceeding under part V, shall be deemed to be the judgment of a court of appeal, and an appeal therefrom shall lie to the Supreme Court of Canada as provided in part XVIII for appeals from the court of appeal.

The appeal from a court of appeal is, in essence, only an appeal on questions of law—that is the only appeal which is open to a person convicted under part V by a judge of the Exchequer Court—and is permitted only if

(*a*) a judge of the court of appeal has dissented— but, as the judge of the Exchequer Court will be sitting alone, that is not likely to apply—and

(*b*) if leave to appeal is granted by the Supreme Court of Canada.

On the other hand, if proceedings are instituted in a provincial Supreme Court the person charged may appeal from the trial judge to the provincial court of appeal:

(*a*) without leave on any ground of appeal involving a question of law;

(*b*) with leave of the court of appeal on any ground of appeal that involves a question of fact or mixed law and fact; and

(*c*) on any ground of appeal other than those mentioned if it appears to the court of appeal to be a substantial ground of appeal.

It is suggested that a person convicted by a judge of the Exchequer Court in proceedings under section 41A should have the same rights of appeal to the Supreme Court in Canada as he would on an appeal from a trial judge of a provincial supreme court to the court of appeal otherwise the rights of the person charged are dangerously and unjustifiably narrowed.

Our next proposal has been covered quite fully by the chamber of commerce and Mr. Nicholson.

Section 32 (3) as proposed by section 13 of the bill

Section 32(3) of the act as proposed by section 13 of the bill provides that subsection (2) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

(*a*) prices;

(*b*) quantity or quality of production;

(*c*) markets or customers, or

(*d*) channels or methods of distribution

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade or industry.

It may be that the intention of the draftsman was that the word "unduly" should limit the latter part of the subsection and it is submitted that it clearly should be so limited. However, grammatically it appears clear that the word "unduly" as it stands in the bill does not apply to restrictions against entering into or expanding a business and it is suggested—and this is the feeling of Mr. Nicholson—that the latter part of the subsection be amended to read as follows:

> or if the conspiracy, combination, agreement or arrangement unduly restricts or is likely unduly to restrict any person from entering into or expanding a business in a trade or industry.

An almost identical structure appears in section 19(a) of the act as enacted by section 9 of the bill and it is submitted that the word "unduly" should be added in the corresponding place in the latter portion of this subsection.

The CHAIRMAN: Thank you very much. Now, gentlemen, are there any questions?

The understanding is that questions may be directed to either of the witnesses.

Mr. NUGENT: Mr. Chairman, mine is a general observation rather than a question.

It appears to me that all the submissions have the same thing in common, based on the fact that the export part of the trade is so paramount to the country. However, I have the problem, that while they have given good reason to show why they should not come under the combines prohibition, in so far as export trade is concerned, there will be a great deal of difficulty in trying to find that point of divorcement—that is, what part applies to export trade and what part is going to affect the domestic market. Even if it is only aimed, primarily, at export trade, there is bound to be a considerable influence on the domestic market; and there is certain to be a great tendency to combine all domestic market problems as well. Certainly, it is more difficult to distinguish between their objectives, motives and actions, in this respect—whether they are for export purposes only—and, in view of these observations, I find it difficult to have too much sympathy with the worries about the power of the government to remove tariffs, or the efforts of the government to streamline, from the government side, their methods in dealing with questions of whether or not there have been breaches of the act.

Surely you cannot have it both ways. You cannot be given a lot more leeway which would deliberately enhance the possibility of restrictive combines, and not allow the government to be able to take more effective or even more severe remedies if they find in fact that these companies are asking for this extra leaway and are abusing it. I do not care who cares to comment on this.

Mr. MCINTOSH: Could not the industry that this is supposed to cover bypass the regulations, even though they did not export much at the present time, by just exporting one or two articles and being in the same position as the people presenting this brief?

Mr. NICHOLSON: Perhaps I should not be asking questions, but does not our suggestion at the bottom of page 4 of our brief cover that point if it is asserted as part of section 32? You will see that under subsection 3 of section 32 you do not get the benefit of any of the things in subsection 2 at all if it lessens competition, and so on.

Now, we propose putting in after the word "unduly" in the third last line at the bottom of page 6 "within Canada" and then inserting as one of the matters under subsection 2 the words "allocation of markets, the creation of uniform prices, and in terms of sales in the export trade, to better facilitate the competitive position of articles exported from Canada as against foreign competition". You cannot get the benefit of that protection under subsection 2 if it is affecting unduly or increasing prices in Canada. That is why we thought we could accomplish the particular objective you have in mind.

Mr. PICKERSGILL: Might I ask a question about that point? I must say to begin with that this whole suggestion commends itself very much to me.

I would like to say that I thought the suggestion of the fisheries council was better, but I really think this one is in fact less open to misconstruction. But it does seem to me—and I think it has troubled quite a lot of the members of the committee—it does seem to me that it needs to be accompanied by some words which would indicate expressly something like this—I am not a lawyer

to start with—that "provided that such allocation of markets or the setting of prices in terms of sale is not explicitly applied to the domestic market", or something of that sort.

And then there only seems to be two things that could happen, and if the chairman will permit me: if there was an agreement among all the producers to allocate so much of their production to the foreign market and so much to the domestic market, I would think that was a combine within the meaning of the act. But I think it ought to be clear that it would be of help if it was explicit to the setting of a domestic price.

And now, if you allocated the total production between the domestic and the external market, you probably would not need to set a domestic price in order to have something which was pretty close to a combination.

Mr. NICHOLSON: I can only say as to what you have suggested that we think that is the intent and purpose, when you insert the words "unduly within Canada" in subsection 3; that is the intent.

Mr. PICKERSGILL: There is another thing on which I would go even further, Mr. Nicholson, and if I understood you correctly: my own feeling is that we do not want to be legislating to limit the freedom of our export industry to determine for themselves whether they will export their product, or sell it at home.

I would not like our legislation to give the impression that by exporting too much our exporters were unduly unlimiting competition in Canada. I do not know whether I make my point clear.

But it seems to me there are times when it is so much more in the national interest of this country to satisfy the foreign market with some product, even if we have to go short here, or to "up" the price here. And it seems to me that we are running into that difficulty. They ran afoul of your phrase "suspicion of someone who is carrying out limited functions"; that is to say, if your prices do go up it is purely an evidence of combination in Canada.

Mr. NICHOLSON: In fairness to the director of investigation and research under the Combines Act, quite frankly I have had a fair amount of association with legal work, and with statutes over a number of years, and I do not see how he could do otherwise in the light of the decision of the Supreme Court of Canada in the Howard Smith case, because there has been a lessening of competition, and it has affected the price in Canada; yet the whole thing has been for the benefit of Canada.

Mr. MACDONNELL: It seems to me that there is very agreeable union on what should be done, and I do suggest that we do not get into a competition of draftsmanship.

Mr. PICKERSGILL: I think Mr. Macdonnell is very right about that.

Mr. NICHOLSON: May I answer the other question asked by Mr. Nugent. Mr. Nugent suggested that some group was forced to seek a change in the tariff. We have not made any suggestion on that score. All I said with regard to the tariff was that if the governor in council was going to make any change in the tariff, would he please not do it until after there has been a conviction.

Mr. NUGENT: Certainly the power is with the tariff board to change the tariff whether there has been a conviction or not, but they would do so in the best interest of the country.

Mr. PICKERSGILL: Parliament can do it, and this has troubled me in Mr. Nicholson's submission, and I would like to put to him, coming from an unrepentent free trader, this query: we know that some of these cases take years before they get to the Supreme Court; and that if there is a prosecution, the public is being soaked, and that this combination is going to go on until the final stage is reached.

It does seem to me—and I do not have much opinion of Her Majesty's present advisors again—although it does seem to me they could be trusted not to act arbitrarily in this particular respect, even with the law as it is.

Mr. NICHOLSON: That may be, but might I say that there is another side; there is the Financial Administration Act which enables them to accomplish the purpose which Mr. Nugent had in mind.

Mr. PICKERSGILL: That is right, I know.

Mr. FISHER: Are you not in effect asking here for a more sophisticated view of the public interest?

Mr. NICHOLSON: Yes.

Mr. FISHER: Are you not underlining something on which you can get general agreement that is within the nature of our export trade?

Mr. NICHOLSON: Yes.

Mr. FISHER: That is all very well; but what about the original purpose of the act as a whole? Do you wish to retain as much competition as possible and to block the development of mergers and monopolies?

Mr. DRYSDALE: In Canada?

Mr. NICHOLSON: Mergers and amalgamations are illegal in Canada today.

Mr. FISHER: The industries which you represent, the forest and mining industries, are ones in which I read a trend towards merger and towards increasing size, not only in a vertical way, but also in a horizontal way. And I could point out that in the gold field, or in the base metal field, you have some of the larger ones.

I wonder if the effect of the legislation we have now may not be badly affected by this emphasis on export trade and a more sophisticated interpretation? This is a point on which I would like to have your comment.

Mr. NICHOLSON: Well, Mr. Fisher, would you or any member of this committee or any member of parliament not be willing to leave that question to be determined by the court? I am strongly—just as strongly as you are—against mergers which are contrary to the public interest in Canada. But sometimes mergers are desirable.

Mr. FISHER: This, it seems to me, is our fundamental difficulty in appraising the act. It is the question of size; and we have the argument on the one hand—you say it in one way, that the domestic market derives benefit from the volume of production that is necessary for the export market.

Mr. NICHOLSON: I do not know how to answer it, except to say that there are in Canada 5,400 sawmills, and that we have pretty close to as many pulp and paper mills in Canada; we have eight or nine pulp mills in British Columbia; and out of 6,400 sawmills there must be plenty of competition in spite of the fact that they export 70 per cent of their production.

Mr. FISHER: What I am concerned about is the possibility of production such as you have here, with an accelerated trend towards consolidation.

Mr. NICHOLSON: I would not think so, with respect.

Mr. FISHER: What do you feel about this in respect to the mining field?

Mr. WANSBROUGH: I have been trying to think out your suggestion in terms of mines other than gold, to start with. I do not see this trend towards merger, that you speak of.

Mr. BIGG: What are we designing this act for?

Mr. WANSBROUGH: With respect to Mr. Fisher's question to me, as to whether there is a current trend in the mining industry in the two fields of gold and others—

Mr. FISHER: I was thinking of the activities at Noranda, and of International Nickel.

Mr. WANSBROUGH: If it comes to particular companies, we are fortunate to have with us a director of International Nickel who, I am sure, could answer any question you wish.

Mr. FISHER: I would like to have his views.

Mr. WANSBROUGH: I thought you were thinking of it more in terms of gold. A number of gold mines have recently fallen under single direction. But I would like to say that probably that it has saved some of those mines by enabling them to keep going.

The only case of price fixing I know of in the whole mining industry is that of price fixing by the Canadian government, which pays the international price for every ounce of gold.

Mr. FISHER: And there is uranium too. We have consolidation there now. But what I am after is really something very basic; it is that there are so many of these trends, let us say, in uranium and in gold, where you have a set price, and where there is a trend towards consolidation.

I am not arguing the merits of consolidation; but where do we tend to go in terms of this legislation in checking the growth of monopoly and merger, in so far as your recommendation is concerned?

It seems to me that on such a point in so far as export trade is concerned you give it a kind of approval.

Mr. NICHOLSON: With respect I do not see how it can, when you have that safeguard, and you cannot get the benefit with the amendment of the proposed subsection 2 of the act, if it is going to affect things unduly within Canada. Surely that is the answer to it.

And if you go one step further, is it right, for instance, when we are trying to encourage people by sending out salesmen to encourage sales abroad, to say, as two of our judges have said in the Howard Smith case, that regardless of the economic advantages which result to Canada, to the fishermen and to the people employed in the woods and elsewhere, that they cannot, even if they wanted to, take a look at these things?

Mr. FISHER: I agree that we need a much more sophisticated approach to combines. But it seems to me that it is not generally accepted by a lot of people who would support this act.

Mr. NICHOLSON: I am just as much against combines as you are, if they are going to be against the public interest of Canada; but these are in the interest of Canada.

Mr. PICKERSGILL: I would like to ask Mr. Nicholson if it is not possible that if we remove that shadow of doubt of legality of this arrangement between separate firms in the export field, it would tend, if anything, to retard rather than to advance mergers and that sort of thing by moving one of the impulses towards the other?

Mr. NICHOLSON: I think it would; that would be my offhand reaction.

Mr. NUGENT: Arising out of what Mr. Nicholson has said, I seem to recall the judges having said with respect to this that not only do they have the right to inquire whether the whole scheme was for the general benefit of Canada, but they do not have the facilities to do it, and they feel it is not their function. So if the basis of your submission is that the benefits to Canada should be considered, it seems to me that the courts themselves have expressed the view that they do not feel that they have the facilities, or can really go that far into it. They think it would require legislative functions, rather than judicial.

Mr. NICHOLSON: That is not what the Supreme court said. This is the highest court, and here is what Mr. Justice Cartwright said:

> In essence the decisions referred to appear to me to hold that an agreement to prevent or lessen competition in commercial activities of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence parliament is taken to regard as an indispensable protection of the public interest; that it is the arrogation to the members of the combination of the power to carry on their activities without competition which is rendered unlawful; that the question whether the power so obtained is in fact misused is treated as irrelevant; and that the court, except I suppose on the question of sentence, is neither required nor permitted to inquire whether in the particular case the intended and actual results of the agreement have in fact benefited or harmed the public. In other words, once it is established that there is an agreement to carry the prevention or lessening of competition to the point mentioned, injury to the public interest is conclusively presumed, and the parties to the agreement are liable to be convicted of the offence described in section 498(1)(*d*).

That is the reason why as an executive I would not want to send out salesmen to increase sales, with this communication hanging over my head.

Mr. NUGENT: You do not know whether or not they are capable of inquiring into these matters. But I have a recollection of a case in a lower court in which the judge said that this question of whether or not it is for the general benefit of Canada was not one for him to decide, and that the law will not allow him to do so, and that you do not have to look beyond that. And he said that even if he could, he did not think he could decide it, because the question was too broad. If it were in the legislation, I do not think we could arrive at that factor.

Mr. NICHOLSON: Then there is something wrong with the legislation.

Mr. FISHER: It was exactly this point that was bothering me. And not unlike Mr. Nugent, economists have suggested in some of the analyses that they have made, that this provision to allow the minister through the director to issue orders, or injunctions, if you like, is the kind of flexible action that we need in order to give a kind of economic judgment, and also with a view to the public consensus of the politicians, which the Minister of Justice can give, but which the courts cannot provide.

Mr. NICHOLSON: There is nothing in this act which lets the director do that; even with the injunction, such matters are covered in section 31 and are to be made upon the order of the court.

Mr. FISHER: They are to be orders from the court, but they do not have to follow a conviction.

Mr. NICHOLSON: There has to be a hearing in a court of law.

Mr. FISHER: Yes, but there does not have to be a conviction.

Mr. NICHOLSON: There has to be a judgment, and that judgment is in fact a conviction, although it is not called by that name. But in the judgment the court finds that an offence has been committed, and it is a finding of fact.

Mr. FISHER: Is it not an attempt to bring more cases into the Exchequer court, and an attempt to bring to bear a jurisdiction which is wider? I do not know about the economic matters.

Mr. NICHOLSON: That is one of the objectives, I daresay. But there are disadvantages the other way, particularly where you are miles away, and have these interlocutory applications.

Mr. PICKERSGILL: It seems to me, with respect, that a subject which is of much more interest on which to examine the present witnesses is that of export trade rather than this question of the difference between the Exchequer Court and the ordinary courts in a province.

Mr. MACDONNELL: May I say that representatives of the fishing industry said that they had been carrying on very well for 50 or 60 years, with no questions arising. How long has it been done in the lumber industry? Let us not get too much legislation.

Mr. NICHOLSON: With respect, is it working happily?

Mr. MACDONNELL: I am not competent to say; but it struck me that if an industry had been carrying on for 50, 60 or 70 years with no questions raised, it must have been working fairly happily. I have a kind of superstition about too much legislation.

Mr. NICHOLSON: Fisheries are under question now.

Mr. DRYSDALE: Regarding their export trade?

Mr. NICHOLSON: Could you estimate it?

The Acting CHAIRMAN: Are there any further questions?

Mr. PICKERSGILL: I have a question which I would like to put to Mr. Nicholson. I have indicated that I was very sympathetic with his first amendment which he suggested, but I am very much troubled by this amendment that is suggested on page 5, for reasons which have been given by several members, and by Mr. Nugent in particular, because it does seem to me that it lacks entirely the element of precision which is present in the other one.

Mr. NICHOLSON: This one here is not directed just toward export; there may be other factors. I can think of a situation which exists right now, which is peculiar to the lumber and forest industry.

As I told you, we export between 80 and 86 per cent of red cedar shingles in British Columbia, but due to a falling off, approximately all the mills within the last six weeks have gone on single shifts; and mills that were on double shifts are now working only 12 machines where they could work 18.

There is no question about it that the big mills in British Columbia, if they wanted to do so, could stay on double shifts and could take care of the demands very easily. But I am thinking of such a place as lake Mann, where the little mills employ people in the shingle mills, and when those plants are probably the only plants which are giving gainful employment and providing ready cash, other than what is desired from farm products which are close to town.

It ought to be possible to ensure them so that they could sit down and talk with the big firms who have pulp and paper and other things, and can stay in the export business, and say "Let us get going". But they do not dare to do so and under the present legislation they could not do it.

Mr. MCINTOSH: Do you represent the small mills?

Mr. NICHOLSON: I represent the small mills as well. I speak for practically all the shingle mills in British Columbia.

Mr. PICKERSGILL: Does that not raise a very fundamental question? I do not for one moment question the social desirability of what Mr. Nicholson asks, but here we are concerned with criminal legislation, and under the constitution that is the only kind of legislation we could make. No doubt the provincial government could legislate in the way you suggest but I do not think the parliament of Canada could. As I say, I am troubled in any kind of criminal legislation by improvisation of language. I have known a good many judges. I say this without any disrespect to judges. If it is an economic judgment I would not give you very much for it.

Mr. NICHOLSON: Sometimes, Mr. Pickersgill, when you are on the receiving end of a lawsuit you feel the same way about judges.

Mr. PICKERSGILL: I have no doubt; but more tangible facts perhaps are a better subject for criminal jurisdiction than attempting to determine this. Quite frankly it does trouble me.

Mr. NICHOLSON: It troubles me, because I have had to reiterate this case a great many times. When you look at it, it is tough on the businessman, whether small or large, to be handicapped in this way. That is what happens when there is legislation in this form.

The ACTING CHAIRMAN: Mr. Bigg wanted to ask a question.

Mr. BIGG: It seems to me that this question would never come up in the export trade. I cannot imagine anyone being prosecuted for lowering prices on the export market.

Mr. NICHOLSON: I have a copy here of the summary which was referred to. I borrowed it. This is what it says:

> It is my further allegation that during the period from August 1954 to June 1956 the following were parties to agreements or arrangements relating to the export market which had the effect of enhancing prices or otherwise preventing or lessening competition in the production, supply and sale of Canadian salmon for the domestic market to the detriment, or against the interest of the public, and during the same period agreed or arranged to prevent or lessen unduly competition in such products.

Of course, if you export two-thirds of your production it is going to affect your prices at home.

Mr. WOOLLIAMS: Surely these people should be able to combine even if it is working as a detriment to the consumer if in the overall picture it is a benefit to the country economically.

The ACTING CHAIRMAN: That raises a question of opinion here.

Mr. NICHOLSON: If it is going to enhance prices in Canada, let them be convicted. That is in our proposed amendment.

Mr. FISHER: Could I ask Mr. Nicholson or Mr. Mockeridge if either of them brought this particular subject to the attention of the minister?

Mr. MOCKRIDGE: I am not quite sure what you mean.

Mr. FISHER: The suggestion in connection with the export trade.

Mr. MOCKRIDGE: I might answer that by saying that when bill C-59 was introduced last summer we did present a brief on behalf of the Canadian metal mining association which, so far as the export question is concerned, made certain suggestions which were referred to in passing.

Mr. FISHER: But you did not go into the detail of the amendment of Mr. Nicholson?

Mr. MOCKRIDGE: No. We did however, discuss that brief with the minister.

Mr. NICHOLSON: I might say this. Two or three days after the bill had first reading in the house—I did not know whether or not it would be referred to a committee—I asked for an appointment to see the minister. As I was speaking on behalf of the forest industries council I said to him I was particularly concerned with this business about exports, and the minister said "the bill is going to be presented in the house; I hope it will be referred to a committee and I will so recommend, and it will be for the committee to consider any representations that you or any other bodies may want to make". He said "They are businessmen and elected representatives of the people of Canada, and I do not know what they may or may not do." My conversation with the minister did not last ten minutes. I had no proposal of this kind then. I went back then and tried to make something which would be helpful to the committee.

Mr. PICKERSGILL: Mr. Chairman, before we adjourn would you permit me to express the appreciation, I believe, of every member of the committee for what I think is the most interesting thing which has happened this afternoon, that is the little bit of history in which Mr. Nicholson had such a great part a few years ago.

The ACTING CHAIRMAN: I also wish to thank these gentlemen on behalf of the committee for appearing before us and giving us their opinion and wisdom. I am sure it will be helpful in coming to a decision in this matter. Thank you very much.

We will meet tomorrow morning at 9:30 in room 253D to hear the Canadian manufacturers association and the Automobile retailers association.

APPENDIX "A"

COUNCIL OF THE FOREST INDUSTRIES OF BRITISH COLUMBIA
Vancouver 1, B.C.

June 17, 1960.

To: The Chairman, and
Other Members of the Banking and Commerce Committee,
House of Commons,
OTTAWA.

Gentlemen:

Re: Bill C-58 and proposed amendments to the "Combines Investigation Act" and the Criminal Code

By letter, dated the 8th inst., addressed to the President, Council of the Forest Industries of British Columbia, the Honourable the Minister of Justice, advised us that Bill C-58 had been referred to your Committee in order that you might receive and consider representations from individuals and organizations regarding the changes proposed in the Bill. In his letter, he intimated that it would be in order for us, along with other interested parties, to make suggestions directed towards improvements in the Legislation, provided the suggested improvements come within the spirit and framework of Bill C-58.

I am the President of the said Council and I will appear before you as its representative and spokesman. We are grateful of the opportunity that you have afforded to us to state our views, which are summarized in this letter. We believe that our suggestions are in keeping with the principles enunciated by the Minister when he introduced this important Legislation on behalf of the Government and we trust they will commend themselves to you.

We present, for your consideration, the following submissions:

(1) *Export Trade*

During the three years that have elapsed since the present Government took office, the Rt. Hon. the Prime Minister, the Secretary of State for External Affairs, the Minister of Finance, the Minister of Transport and other Ministers have stressed on numerous occasions the desirability and necessity for action leading to or directed towards the improvement of Canada's export trade and correcting the deficit in such trade. The major export industries in British Columbia, of which the Forest Industry is the most important, are concerned over the fact that the freedom of action which they consider necessary to enable them to compete successfully in world markets will be threatened unless something is done in the new Combines Legislation to re-assure businesses engaged primarily in the production of goods for export.

It is our understanding that the present Combines Legislation does not apply to arrangements which relate solely to the export of commodities traded in world markets and with respect to which prices and terms of sale are influenced, and in many cases, are detemined by competition from other countries. It must be recognized that in the case of certain commodities, the fact that they are exported from Canada in large quantities at prices and under conditions determined by international competition may nevertheless have its effect in the domestic market. Arrangements intended to facilitate or improve the competitive position of commodities being exported from Canada in some instances may influence the supply of such commodities to Canadian consumers and the price to be paid for same. This is true even though the Canadian economy benefits materially from these export activities. The Council of the Forest Industries of British Columbia feels that the individuals and firms

engaged in developing export markets for the products of our forests, as well as other exports, would be encouraged and supported in their efforts to do so if it be made clear in the new Combines Legislation that the Act does not apply to arrangements or agreements relating solely to exports, provided, of course, that these arrangements are not detrimental to the public of Canada.

Our Council's concern regarding arrangements or agreements relating to exportable commodities arises out of the fact that it was brought to its attention recently that, following a preliminary investigation conducted by the Director of the Combines Investigation Branch, the Director alleged in his Summary that arrangements entered into some years ago relative to the export of canned salmon from British Columbia had had the effect of lessening or preventing competition in the supply and sale of this commodity and of enhancing prices thereof in the domestic market to the detriment of the Canadian public. It may be that the arrangements entered into by the packing houses who were the subject of the investigation did result in more of the total canned salmon pack being sold on the export market and consequently somewhat less being available for sale to the Canadian consumer, but there can be little, if any, doubt that the Canadian economy, particularly the economy of British Columbia, derived great benefit from the sale of the salmon abroad pursuant to the agreed program for its export. As a result of the joint marketing arrangements or program, more fishermen were employed for longer periods at higher wages than would have been the case if sales were to be limited to the domestic market. There can be no doubt that the profits derived from the export sales made it possible to keep the domestic prices lower than would otherwise have been the case. It is a well known fact in our part of Canada at least that the concerted and continuing efforts of the Canadian Fishing Industry to sell their products abroad has contributed much to the higher standard of living of all classes of persons engaged or associated with that Industry and others residing or doing business in communities where fishing is carried on on a commercial scale.

Our fish-packing companies have learned from experience that they cannot successfully meet competition from Japan, Russia, and other countries where exports are controlled by cartels and central government agencies unless they can act collectively when such action becomes necessary. It is respectfully submitted that Canadian firms or individuals engaged in the Export Trade in fish or other products should be free to act collectively without running the risk of extensive and expensive investigations and possible prosecution under the "Combines Act", where such collective arrangements are directed towards facilitation of the competitive position of articles to be exported from Canada against foreign competition.

As a result of the investigation into the export activities of the Fishing Industry in our Province, firms engaged in the sale and manufacture for export of the products of our forests are concerned with the fact that arrangements which they may have to make in order to meet competition abroad from other countries and which they feel benefit the Canaidan economy may result in their being suspect merely because these arrangements may influence supply and price of such products at home. We understand the Fisheries Council of Canada, which has been studying the Combines Legislation, intends to have one or more of its members appear before your Committee and that they will ask for a recommendation from you that provision will be made in the amending Legislation to make it clear that arrangements or programs for export, which are intended to strengthen Canada's competitive position in the sale of commodities traded abroad on an international basis, are outside the scope of the Act. Our Council endorses and gives its wholehearted support to any move on the part of the Fisheries Council or any other organization directed towards that end.

We believe that the Forest and all other Canadian Industries interested in export on a large scale will welcome the insertion of a provision in the legislation which would clarify the uncertainties which now exist largely as a result of the recent investigation into the export activities of the Fishing Industry to which I have referred. We respectfully suggest that one way to obtain such clarification would be to amend Section 32 of Bill C-58 as follows:—

(*a*) By striking out of s.s. (f) to s.s. (2) the word "or";

(*b*) By inserting as s.s. (g) the following:
"the allocation of markets and the creation of uniform prices and terms of sale in export trade to better facilitate the competitive position of articles exported from Canada against foreign competition, or,"

(*c*) By re-numbering s.s. (g) as s.s. (h);

(*d*) By adding after the word "unduly" in line 3 of s.s. (3) the words "within Canada", and

(*e*) By inserting after the word "restrict" in the second last line of the said subsection, the word "unduly".

In any event it is suggested that Section 2 (the interpretation section) of the present Act should be amended by inserting as sub-paragraph (g) thereof a sentence reading as follows:

"(*g*) In determining whether detriment to the public of Canada has resulted from any conspiracy, combination, agreement, arrangement, merger or monopoly, consideration shall be given to all relevant economic factors including all countervailing advantages which may result to the public".

The suggestion contained in this proposed sub-paragraph (g) will, I believe, commend itself to you for other reasons. We feel sure that you will agree that Canadian businessmen engaged in promoting and expanding the export from Canada of products of our farms, forests, mines and waters, which cannot possibly be consumed at home and which must be exported if we are to continue to enjoy our present standard of living, are entitled to the assurance that they are not going to be prosecuted for their efforts even though such efforts may, in some instances, indirectly, or even directly, affect the supply of the commodities in question or prices therefor on the domestic market. In fairness the overall good to the Canadian economy should be taken into consideration in determining whether an offence has been committed. In this connection, reference might be made to the decision of the Supreme Court of Canada in *Howard Smith Paper Mills Ltd. et al. v. The Queen* (1957) S.C.R. 403, where two of the judges of that Court, Taschereau J. at p. 407 and Cartwright J. at pp. 426-427, say in effect that, however innocent or commendable a person's actions may be, the wish to accomplish a desirable purpose constitutes no defence in a case where an agreement or other act has been prohibited by Statute.

Our Council respectfully submits that the overall benefits to the Canadian economy should be taken into consideration when a Court is asked to say whether firms or individuals have combined to do certain things allegedly to the detriment of the Canadian public. Surely the fact that collective action in the export field may tend to lessen competition or affect prices in the domestic market, regardless of how slight the lessening may be, is not enough to justify a conviction on a charge laid under the Combines Investigation Act. It is therefore submitted with respect that all relevant economic factors including the advantages to the Canadian public should, in fairness be taken into consideration, where agreements covering exports come before the Courts for review. In the interests of justice and, as an aid to the fair and proper admin-

istration of our Combines Legislation, it is respectfully submitted that a sub-paragraph such as the suggested sub-paragraph (g) should be incorporated in the new Legislation.

(2) *Time within which proceedings may be instituted under the new section 31.*

It will be noted that both under the present Section 31 of the Act and under the proposed Section 31, proceedings directed towards the dissolution of mergers or monopolies following conviction on such an offence must be commenced "within three years" of the conviction, but it would appear that there is no corresponding period of limitation in cases where the Attorney General of Canada or the Attorney General of a Province seeks to obtain an order dissolving a merger or monopoly. Statutory provisions prescribing the time within which proceedings must be commenced have been held to be procedural. If the amendment covered by Section 31(2) is adopted in its present form, mergers or amalgamations that took place any number of years ago would be open to attack even at this late date. I doubt if the draftsmen of the new sub-section intended any such result. It is submitted with respect that the three year period of limitation applicable to applications under Sec. 31(1)(a) should be extended to proceedings commenced under s.s. (2) of that Section or some other period of limitation substituted. To say the least such a provision as is now proposed should not be made retroactive.

(3) *Appeals from Judgments Pronounced In Proceedings Commenced Under Section 31*

It will be noted that, while the proposed Section 41A contemplates an Appeal to the Supreme Court of Canada from a judgment of the Exchequer Court in a proceeding under Part V of the Act, no provision is made for an Appeal of any kind against judgments or pronouncements made in Superior Courts under the proposed Section 31 (1) (*b*) or 31 (2). We respectfully suggest that provision should be made for such Appeals by including another subsection in Section 31 or by inserting a provision elsewhere in the Act which will ensure the judgments or pronouncements made by a Superior as well as the Exchequer Court under Section 31 will be appealable. Judgments in some such cases might be more far reaching than penalties imposed following conviction for an offence. We respectfully suggest that provision should be made for Appeals from judgments of Superior Courts to the Court of Appeal of the Province concerned and thence to the Supreme Court of Canada.

(4) *New Section 41A, Jurisdiction of Exchequer Court*

Undoubtedly cases will arise which, as the Honourable the Minister said when moving Second Reading of the Bill may be "in the twilight zone" and which it is desirable should be commenced in the Exchequer Court of Canada rather than in a Court of criminal jurisdiction. We agree in principle with this line of thinking. We feel strongly, however, that no proceedings directed towards obtaining a permanent injunction or dissolution of an alleged merger or amalgamation should be instituted in the Exchequer Court without the consent of all parties concerned. We note that, under Bill C-58, no prosecution is to be instituted in the Exchequer Court without the consent of all accused. It will be noted, however, that no such consent is necessary in the other type of proceeding contemplated by Section 41A, though the judgment in any such proceeding may well be more far reaching than a conviction and sentence in a criminal proceeding. Furthermore, in some such proceedings, e.g. one directed towards the dissolution of a merger that may have taken place some years earlier, there are likely to be many interlocutory applications before the proceeding can be finally determined. In fairness, particularly where the parties

concerned reside or carry on business some distance from Ottawa, as in British Columbia or Newfoundland, proceedings should not be commenced in the Exchequer Court without the consent of all parties. We believe that your Committee will agree that persons should not be deprived, at least without their consent, of the right which they now have of having their rights determined by a Superior Court of the Province in which they reside or carry on business. We respectfully suggest that the object that we have in mind would be accomplished if (3) and (4) of s.s. (3) and s.s. (4) of 41A be repealed and the following substituted therefor:

41A (3) For the purposes of Part XVIII of the Criminal Code the judgment of the Exchequer Court in any prosecution or proceedings authorized by subsection (1) of this Section shall be taken to be the judgment of a Court of Appeal and an appeal therefrom lies to the Supreme Court of Canada as provided in Part XVIII of the Criminal Code for appeals from a Court of Appeal.

(4) No such prosecution or proceedings shall be instituted in the Exchequer Court in respect of an offence under Part V without the consent of all the accused and in respect of proceedings under subsection (2) of Section 31 without the consent of the person or persons concerned.

(5) *Special Remedies—Reduction or Removal of Customs Duties*

In view of the serious consequences involved where action is taken either under the new Section 29 (or under Section 29 of the Act now in force), we respectfully submit that action should only be taken by the Governor in Council after judgment in a Court of competent jurisdiction. We feel that the Governor in Council should not be asked to remove or reduce the Customs Duties imposed on articles of commerce to the disadvantage of an established business or trade unless and until there has been a judgment of a Court. This end could be accomplished by the removal from lines 1 and 2 of Section 29 of the words "from or as a result of any enquiry under the provisions of this Act, or".

All of which is respectfully submitted.

J. R. NICHOLSON,
President.

JRN:pd

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament
1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

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MINUTES OF PROCEEDINGS AND EVIDENCE

No. 5

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

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THURSDAY, JUNE 23, 1960

WITNESSES:

Mr. A. J. MacIntosh, Mr. W. Allan Campbell, Q.C., Mr. T. R. McLagan, Mr. Ira G. Needles, of the Canadian Manufacturers Association; Mr. T. Lloyd Kinneard and Mr. D. Gordon Blair, of the National Automotive Trades Association.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23402-1—1

STANDING COMMITTEE

ON

BANKING AND COMMERCE

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Vice-Chairman: E. Morissette, Esq., M.P.

and Messrs.

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Allmark
Asselin
Baldwin
Bell (*Saint John-Albert*)
Benidickson
Bigg
Brassard (*Chicoutimi*)
Broome
Campeau
Caron
Cathers
Creaghan
Crestohl
Drysdale
Fisher
Hales
Hanbidge
Hellyer
Horner (*Acadia*)
Howard
Jones
Jung
Leduc
Macdonnell (*Greenwood*)
MacLean (*Winnipeg North Centre*)
MacLellan
Martin (*Essex East*)
McIlraith
McIntosh
*Mitchell
More
Morton
Nugent
Pascoe
Pickersgill
Robichaud
Rowe
Rynard
Skoreyko
Slogan
Smith (*Winnipeg North*)
Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams.

Antoine Chassé,
Clerk of the Committee.

* Replaced Mr. Cardin on June 22, 1960.

ORDER OF REFERENCE

Wednesday, June 22, 1960.

Ordered,—That the name of Mr. Mitchell be substituted for that of Mr. Cardin on the Standing Committee on Banking and Commerce.

Attest

L.-J. RAYMOND,
Clerk of the House.

23402-1—1½

MINUTES OF PROCEEDINGS

HOUSE OF COMMONS, Room 253-D.

THURSDAY, June 23rd, 1960.

(16)

The Standing Committee on Banking and Commerce met at 9.30 o'clock a.m. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Baldwin, Cathers, Drysdale, Fisher, Hales, Hellyer, Horner (*Acadia*), Howard, Jones, Macdonnell (*Greenwood*), Martin (*Essex East*), McIntosh, Mitchell, Morton, Nugent, Pascoe, Pickersgill, Rynard, Skoreyko, Southam—20.

In attendance: A delegation from the Canadian Manufacturers Association as follows: Messrs. A. J. MacIntosh, Acting Chairman, Committee on Combines Legislation; T. R. McLagan, President, S. J. Randall, 2nd Vice President; W. Allan Campbell, Q.C., Chairman, Legislation Committee; Ira G. Needles, Chairman, Tariff Committee; R. J. Beach, Beach Industries Limited; Paul S. Smith, Q.C., Dominion Rubber Company Limited; J. W. Younger, The Steel Company of Canada, Limited; J. C. Whitelaw, Q.C., General Manager; C. Willis George, Ottawa Representative; C. A. L. Sullivan, Legal Department; T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act), Department of Justice.

The Committee resumed from Wednesday consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

Mr. T. R. McLagan introduced the delegation from the Canadian Manufacturers Association. Mr. MacIntosh read the brief of the Association and was questioned thereon. He was assisted by Mr. W. Allan Campbell, Q.C.

At 11.00 o'clock a.m. the Committee took recess.

AFTERNOON SITTING

(17)

The Committee resumed at 3.00 o'clock p.m. The Chairman, Mr. C. A. Cathers, presiding.

Members present: Messrs. Aiken, Baldwin, Cathers, Drysdale, Fisher, Hellyer, Horner (*Acadia*), Howard, Jones, Leduc, Macdonnell (*Greenwood*), McIntosh, Mitchell, Morton, Nugent, Pickersgill, Skoreyko, Smith (*Winnipeg-North*), Southam, Woolliams—20.

In attendance: All those mentioned as in attendance at the morning sitting with, in addition, Honourable Davie Fulton, Q.C., M.P., Minister of Justice, and a delegation of the National Automotive Trades Association comprising, Messrs. Sven Jensen, President, Edmonton, Alta.; Raoul Ostiguy, 2nd Vice-President, Montreal, Que.; Norman Bryant, Treasurer, Toronto, Ont.; D. Gordon Blair, National Legal Counsel, Ottawa, Ont.; Mr. J. Lloyd Kinneard, Secretary, Vancouver, B.C.

The Committee continued and completed consideration of the brief submitted by The Canadian Manufacturers Association, with Mr. MacIntosh and Mr. Needles under questioning.

The Committee then heard the delegation from the National Automotive Trades Association with Mr. Blair and Mr. Kinneard under questioning.

At 6.05 o'clock p.m. the Committee adjourned to meet again at 9.30 o'clock a.m., Tuesday, June 28.

Antoine Chassé,
Clerk of the Committee.

EVIDENCE

THURSDAY, June 23, 1960.

The CHAIRMAN: Gentlemen, I believe we have a quorum.

Mr. MARTIN: (*Essex East*): Mr. Chairman, on a point of order, may I just make the observation that this is a very pleasant day.

Mr. MORTON: Mr. Chairman, I hope the workings of the committee will show by its smoothness how nice it is.

Mr. HELLYER: I am sure, Mr. Chairman, that Mr. Martin was not referring to anything with any political connotation; but merely to the fact that this is his birthday and that of Mr. Pickersgill.

The CHAIRMAN: Congratulations.

Some Hon. MEMBERS: Hear, hear.

Mr. MARTIN (*Essex East*): Well, on a question of privilege: I thank Mr. Hellyer for referring to the important event in the lives of Mr. Pickersgill and myself; but I really did not have that in mind.

Mr. JONES: Mr. Chairman, are the headlines to read, "Are the Liberal ranks split again?".

Mr. PICKERSGILL: Well, if they are as effectively split as they were yesterday, that will be fine.

The CHAIRMAN: Gentlemen, time is short, as you know, and we have with us today the Canadian manufacturers' association, to be followed by the automotive dealers' association. We are starting with the Canadian manufacturers' association this morning.

We wish to thank you, gentlemen, for giving your time and for the hard work that you have put in in preparing this brief and coming here today, because we are most anxious to get your views on this very important legislation.

Without any further remarks from me, I am going to call upon Mr. T. R. McLagan, president of the Canadian manufacturers' association.

Mr. T. R. MCLAGAN (*President, Canadian Manufacturers' Association*): Mr. Chairman and gentlemen, I generally start the day by saying good morning; but I do not dare say whether it is good or bad, in this political atmosphere. As president of the Canadian manufacturers' association, I am here to introduce the delegation from our association and to present a brief dealing with Bill C-58, an act to amend the Combines Investigation Act and the Criminal Code.

Before proceeding further, however, I should like to say a few words about the Canadian manufacturers' association, which is a non-profit and non-political organization, having nearly 6,500 manufacturing firms among its membership.

The members comprise both large and small companies, the majority of which employ less than 100 persons each. The total membership, however, includes three-quarters of the manufacturing industries of Canada, and the manufacturing industries of Canada employ about one-quarter of the working population. There are as many Canadians employed in manufacture as in the farming, forestry, fishing, mining and construction operations.

The manufacturing industry accounts for about 55 per cent of the net value of Canadian production and is the leading industry in seven out of 10 provinces.

As regards Bill C-58, we not only represent 6,500 members; but we have a common interest with about 4 million consumers who depend on manufacturing for their livelihood. We, as manufacturers, recognize the need for combines legislation; but we also recognize the need to keep the provisions of this act in accordance with present day business practices.

With your permission, Mr. Chairman, I should like to introduce the members of our delegation. We have Mr. S. J. Randall, second vice president of the association and president of General Steel Wares Limited of Toronto; we have Mr. Allan Campbell, vice president of Canadian Westinghouse Company Limited, of Hamilton; we have Mr. Ira G. Needles, chairman of the B. F. Goodrich Company Limited, of Kitchener; Mr. Paul Smith, second vice president of the Quebec division, and of the Dominion Rubber Company of Montreal; Mr. Beach, president of Beach Industries Limited of Smiths Falls; Mr. Younger, of the Steel Company of Canada, Hamilton; and finally, Mr. Whitelaw, general manager of the Canadian manufacturers' association; and Messrs. George and Sullivan, both members of the permanent staff.

I would now like to introduce our spokesman, Mr. MacIntosh, of the legal department of Blake, Cassels and Graydon, of Toronto, and the acting chairman of the association's committee on combines legislation. With your permission, Mr. Chairman, I will now ask Mr. MacIntosh to present the brief.

The CHAIRMAN: Thank you, Mr. McLagan. Mr. MacIntosh.

Mr. A. J. MACINTOSH (*Acting Chairman, Committee on Combines Legislation, Canadian Manufacturers' Association*): Mr. Chairman and members of the committee: with your permission I will read our brief; and then, of course, we will welcome your questions.

Gentlemen: Whenever occasion has offered or whenever invited to do so, the association has expressed to the government its views on combines investigation legislation. The association welcomes the opportunity of making representations with respect to the provisions of Bill C-58. Our representations are limited to the provisions of this Bill and, while they are in line with the submissions we have made previously, we have not thought it would be helpful to repeat those submissions.

In presenting our representations, we have considered it preferable to comment on the sections in the order in which they appear in the bill rather than in the order of their importance.

We respectfully submit as follows. First, as to section 11 of the bill, which relates to section 29 of the act: By virtue of this section, the Governor in Council may, if satisfied that there has existed, with regard to any article, any conspiracy, combination, agreement, arrangement, merger or monopoly under which disadvantage to the public is facilitated by the duties of customs imposed on the article, or on any like article, direct either that such article be admitted into Canada free of duty or that the duty thereon be reduced to such amount or rate as will give the public the benefit of reasonable competition.

Such action may be taken by the Governor in Council either "as a result of an inquiry" by the restrictive trade practices commission or as a result of a judgment of the Supreme Court or Exchequer Court of Canada or of any superior, district, or county court in Canada.

The association submits that no person should be subject to penalties without having been proven guilty of an offence *by the courts* and that, accordingly, from the first line of this section there should be deleted the words "from or as a result of an inquiry under the provisions of this Act".

Certainly, the ends of true justice cannot be served unless an accused is entitled, as of right, to a hearing *before the courts*. Under this section, the penalty that may be imposed could have an effect detrimental not only to the

accused with respect to his dealings in certain articles, but detrimental also to all those persons engaged in the sale of the same or similar articles throughout Canada.

Next section 12, which refers to section 31(2) of the present legislation: Under this section, a superior court of criminal jurisdiction may, if it appears to it that a person "has done, is about to do or is likely to do any act or thing constituting or directed towards the commission of an offence under Part V", prohibit the commission of the offence or the doing or continuation "of any act or thing by that person or any other person constituting or directed towards the commission of such an offence"; where the offence is with respect to a merger or monopoly, the court may "direct that person or any other person to do such acts or things as may be necessary to dissolve the merger or monopoly in such manner as the court directs".

The association is concerned that in respect of the remedies provided for in this section, no right of appeal has been given to the accused. Section 41A (3), proposed to be added to the act by section 19 (1) of Bill C-58, provides for appeals in respect of prosecutions of proceedings under part V of the act which, it is submitted, does not include proceedings under the proposed section 31 (2).

The association submits that any person faced with an order under this section should be entitled, as of right, to appeal. The dissolution of an alleged merger or monopoly would have far-reaching, irreparable, effects; certainly, an appeal should lie to the Supreme Court of Canada.

The retroactive provisions of this section are unlimited. The association submits that some limitation to such retroactive provisions should be provided, possibly by the insertion of an appropriate time limit after the words "has done".

Next section 13, which will be section 32 of the act: The offence created by section 32 is defined in paragraphs (*a*) to (*d*) of subsection (1) of that section which place an onus on the crown to prove that any conspiracy, combination, arrangement or agreement must have the result of limiting "unduly" facilities for transporting, producing, etc., or dealing in any article, or of preventing, limiting or lessening "unduly" the manufacture or production of any article, etc.

The onus of proving the "undue" character of the offence remains with the crown and, accordingly, it is submitted that, for the sake of consistency, the word "unduly" should qualify the words "restricted or is likely to restrict any person from entering into or expanding a business in a trade or industry" appearing at the end of this section.

It is further submitted that the above remarks apply equally to section 9 of the bill which proposes to amend section 19 of the act. We submit that, for the sake of consistency and ease of interpretation, the word "unduly" be inserted after the word "restrict" appearing in the ninth line of this section.

Next is section 13 of the proposed bill, which relates to section 33 of the act: The association questions the deletion from Bill C-58 of subsection 3 of section 33 as proposed by and contained in last year's Bill C-59. Section 33, subsection 3 read as follows:

> Subsection (1) shall not be construed or applied so as to limit or impair any right or interest derived under the Patent Act, or under any other Act of the Parliament of Canada.

Such deletion may, of course, have been inadvertent, but, in any event, we feel that Section 33, as now proposed, should include the paragraph above quoted. The granting of a patent is not a favour unilaterally conferred by the Government, but is the *quid pro quo* given in return for the disclosure to the public of a secret invention; accordingly, patents should be sacrosanct.

Then section 13, which relates to section 33(1) (*b*) and (*c*): In reviewing the proposed section 33A, we wish to express our concern over the introduction

into legislation of the phrase "or tendency" which, because of its vagueness, would lead to uncertainty of interpretation.

Paragraph 6, at the top of page 6, deals with section 13 of the bill, which relates to a proposed section 33B of the legislation.

The association notes that the proposed section 33B introduces into combines legislation a new concept purporting to have the effect of preventing discrimination through the means of promotional allowances made to trade customers. We feel that, as presently worded, the section raises many difficult problems of interpretation and may have impacts that are not intended.

Whether or not the implementation of this proposed section will help or injure business cannot, with any certainty, be foretold at this time. As a result of our inquiries, the view has been advanced that one of the results may well be to force a reduction in the advertising allowances to the smaller outlet—in other words, it may be to the detriment of "small business".

We are continuing our inquiry into the possible effects of this proposed section and we urge that it be "held over" to afford us, and other interested groups, sufficient time and opportunity to study fully its possible implications and to make representations thereon.

We believe that a defence similar to that now set out in the proposed section 33A(2) should be made available to anyone accused under section 33B. We respectfully submit that one isolated incident of the type described in section 33B should not be deemed an offence.

Paragraph 7 deals with section 19 of the bill, which relates to section 41A of the legislation.

The remarks contained in paragraph 2 of this submission apply substantially to our criticism of the proposed section 41A(3); it is submitted that the words "part V of" be deleted from the third line of this subsection so that an accused may be afforded the right of appeal in respect of any prosecution or proceeding under the act.

With respect to section 41A(4), the association submits that the consent of the accused should be sought before any proceedings under the act are instituted in the Exchequer Court.

The CHAIRMAN: Thank you very much, Mr. MacIntosh.

Now, I believe Mr. Drysdale had his hand up first.

Gentlemen, the recommendation of the standing committee was that when any member is asking a question, he should stand.

Mr. DRYSDALE: Mr. Chairman, I just have one brief question, and it concerns section 29 referred to on pages 2 and 3 of your brief.

I notice that this delegation, as well as previous delegations, have indicated that these certain specific words be struck out in this section 29.

From or as a result of an inquiry under the provisions of this act.

However, on page 3, you point out the possible effect, and the reason you feel there should be a judgment of the courts is because it might be detrimental to other persons engaged in business in Canada. The difficulty I have—and I wondered if you have directed your mind to this particular aspect of the section—is that I cannot distinguish, in my own mind, any difference as to whether or not there is a judgment or whether they decide, as the section is presently worded, that there is the possibility of a conspiracy or combine.

My particular question is this: how could this particular section be enforced, even if there has been a judgment?

For example, reference has been made that there are at present five companies under what I think would be a sort of a show cause summons, in connection with this particular section of the act. Assuming there are other

companies in the same position, if the act was enforced, so that the duty was taken off, what would be the effect on the other countries, then, of it?

Would it not be that you would, first, in effect, be encouraging foreign competition and, secondly, in respect of the innocent companies, would you then not be putting an unfair disadvantage on them?

Have you directed your mind to this, or would you care to make any comments on that section?

Mr. MacINTOSH: Well, sir, certainly if only five companies are involved in a price fixing conspiracy—

Mr. DRYSDALE: Five companies convicted.

Mr. MacINTOSH: Yes, five companies convicted; and there are a number of other companies making that particular product in Canada. As I say, in connection with this provision, if any action is taken, the duties will either be removed or reduced for the whole of Canada. The government has no option and, accordingly, I think your comment is well taken—that the people who were not involved in this in any way would be prejudiced by the activities of others, and in which they had no part.

Also, I think I might say that in the discussions we have had on the subject, we have taken note of the fact that this particular piece of legislation, as far as we know, has not been abused. We are more concerned with the possibility than with what has actually happened.

Mr. DRYSDALE: The reason I raised the question was because your mind only appeared to be directed to the fact that you assumed, in making this amendment, there was an implicit assumption that the remainder of the section was satisfactory, since you have no critical comment on it; and it was for that reason I was trying to direct your mind to that because, in my own mind, the amendment you have suggested does not make any material difference, as far as an innocent company is concerned, whether or not there has been a prosecution of certain individuals, or whether the governor in council has intervened to prohibit a combine.

Mr. MacINTOSH: Well, it would leave the discretion in the government.

What concerned some of our members, particularly, was that the government, in exercising its discretion, might be acting upon a report of the restrictive trade practices commission, which does not follow the same procedure as a court. We felt that if it acted on findings made by a court, we could have the assurance that this legislation, which has been held to be criminal law, would be applied only in circumstances where the facts, in respect of the combine, had been established in a court, where the ordinary onus of proof applies.

Mr. DRYSDALE: Well, could you suggest any possible way where this particular section could be enforced selectively against those that have been convicted, and to sort of leave those that are innocent in the same position they were before the prosecution?

Mr. MacINTOSH: We have not given any consideration to that. However, we recognize it is a problem. The section has stood there a long time, in its present form and, perhaps, we should have directed our minds to this in a broader way. But, this was the specific issue which our members thought should be raised with your committee at this time.

The CHAIRMAN: Mr. Martin, you are next.

Mr. MARTIN (*Essex East*): Mr. Campbell, do you know of any occasion when advantage has been taken by the crown, pursuant to the powers in section 11, old section 29?

Mr. MacINTOSH: You are addressing your question to me?

Mr. MARTIN (*Essex East*): Yes.

Mr. MACINTOSH: I am Mr. MacIntosh.

Mr. MARTIN (*Essex East*): Mr. MacIntosh, yes.

Mr. MACINTOSH: We are all in the same clan, but not quite the same name.

Mr. Martin, I do not know. I have had no experience of any case where this has actually been used. I understand that in one or two cases, consideration has been given to this type of thing.

Mr. MARTIN (*Essex East*): Are you aware that the crown has the authority, under other legislative powers, to take similar action?

Mr. MACINTOSH: Yes, we are, sir.

Mr. MARTIN (*Essex East*): And does your complaint apply to those other legislative provisions, as well as to the particular one?

Mr. MACINTOSH: Well, Mr. Martin, do you have in mind the sections which would permit a reduction of tariff?

Mr. MARTIN (*Essex East*): Yes.

Mr. MACINTOSH: Without any question of whether a combination was involved?

Mr. MARTIN (*Essex East*): Yes—inherent in the executive power given by parliament.

Mr. MACINTOSH: Yes, we have that in mind—that this is an action which the government might take, without any need to rely on this section.

Mr. MARTIN (*Essex East*): Well, that leads me up to the suggestion that there ought to be some further amplification of your objection to the proposed section, old section 29, on the ground it violates, let us say the concept of civil liberties.

I put to you this—and I do this because I will admit this section has given me some concern; I do not say I object to this section, but it has given me some concern, as one who would like to see the due process of law observed—this particular power does not necessarily violate, it seems to me, the traditional concept of civil liberty because it has a power that originally was given—a right which was given by the executive, through parliament, or a right given by parliament; and surely parliament has the right—or the executive has the right, to withdraw it without, in any way, necessarily contravening the normal course of due process.

Mr. MACINTOSH: Mr. Martin, I think our members regarded this as a special remedy which could be invoked for cases where combinations existed, and not that we thought it differed from the general power which the executive had which, presumably, would be exercised, not with particular regard to the existence of a combination but with regard to what was in the general interest of Canada. I think it is only because it is in this particular statute, which we regard as criminal law, that we take this particular objection.

Mr. MARTIN (*Essex East*): Have you given any thought to this further proposition? Assuming you agree with the philosophy of combines legislation—and is that a fact?

Mr. MACINTOSH: Yes.

Mr. MARTIN (*Essex East*): Well, if you admit that, then I think you must recognize that the crown has to resort to sanctions that are really effective, and although it has a power that has not been used, it might well be one of the kinds of sanctions that would be effective in particular instances.

Mr. MACINTOSH: Yes.

Mr. MARTIN (*Essex East*): And it seems to me that that is a very important consideration in assessing the argument which you make, and which other groups have made before us.

I now would like to go to section 2, page 4—and this is in regard to the dissolution of mergers and monopolies—where you say there should be a right of appeal.

Mr. MACINTOSH: Yes.

Mr. MARTIN (*Essex East*): And that the appeal should lie to the Supreme Court of Canada.

Mr. MACINTOSH: Yes.

Mr. MARTIN (*Essex East*): What limitation would you put on the time limit? You say that the restrictive provisions of this section are unlimited. However, you did not say you objected to the restrictive feature, but urged a time limit. How long?

Mr. MACINTOSH: During the discussions in our committee, there were two proposals made. One was a period of three years; the other was a period of five years.

Mr. MARTIN (*Essex East*): I just wanted to obtain that information.

Now, section 13, old section 33. You say that the deletion of the rights or interests under the Patent Act clause may have been inadvertently deleted. If I recollect correctly, the chamber of commerce suggested that the deletion was deliberate. Have you any comment to make on that?

Mr. MACINTOSH: Mr. Martin, I think the reason for that comment is that we had always insisted that the philosophy of this legislation was such that it would not interfere with patent rights.

Mr. MARTIN (*Essex East*): Yes.

Mr. MACINTOSH: There are certain specific actions which can be taken if patent rights are abused, and it seemed to us that when this proposal was made last year, there did not seem to be any reason for deleting it this year. It is just an assumption on our part, and no more.

Mr. MARTIN (*Essex East*): Now, I have one further question. You say, at page 6 in your comment on section 13, old section 33B, in the third paragraph, that you are continuing your inquiry into the possible effects of this proposed section, and that you urge it be held over. Is this the only section that you urge be held over in the proposed amendments, or would I be correct in saying that you would prefer that all of the amendments be held over so that a further study could be given to their implications?

Mr. MACINTOSH: No; our committee only made this point about this particular section, sir.

Mr. MARTIN (*Essex East*): Is it not a fact that in the United States, they have a similar provision? You are familiar with United States legislation, are you not?

Mr. MACINTOSH: Well, that takes in a lot of territory—and I do not mean to be facetious.

Mr. MARTIN (*Essex East*): I am referring, particularly, to the cost justification proviso in the American legislation. Are you familiar with that?

Mr. MACINTOSH: Yes, I am familiar with that.

What I was bringing my mind to was this, that I have seen books written on that particular section of the American legislation, and I would not wish to say that I am familiar with its operation; I know, generally, what it provides.

Mr. MARTIN (*Essex East*): Do you feel you are sufficiently familiar with it to say whether or not you think the present proposed amendment is of the same effect as the United States legislation?

Mr. MACINTOSH: Well, I am speaking as a lawyer now.

Mr. MARTIN (*Essex East*): And I am addressing you in that capacity—and it is not a capacity that you and I should be ashamed of.

Mr. MACINTOSH: No. I merely wanted to make the point that what I am going to say next has not been discussed with the committee.

Mr. MARTIN (*Essex East*): Yes.

Mr. MACINTOSH: Since this legislation has been introduced, I have had a number of discussions with other lawyers who are familiar with this field and, frankly, we find that some of these provisions are such that we are not willing to predict—we cannot predict what effects the court will give to them.

I had an illustration put to me the other day by a manufacturer, which indicated that in one case the small retailer would end up, under this legislation, with a less favourable advertising allowance than that manufacturer was presently giving. It seemed to us the explanation given was not the intent of this legislation.

I think one explanation for this is that it refers to certain practices which were found in the grocery trade and in the food trade. There are other trades too in which very different practices are being followed.

Mr. MARTIN (*Essex East*): You think this would be inimical to the interest of the small distributor?

Mr. MACINTOSH: In that case it would be. I think our point is that it will have mixed effects.

Mr. MARTIN (*Essex East*): Mr. Pickersgill said that I misrepresented—certainly unintentionally—the position of the chamber of commerce. I find that to be the case, because I notice that page 3, in the middle of the first paragraph, the chamber reads:

> It would appear that the omission of this wording was inadvertent since no reference is made to such omission in the explanatory notes to the bill and since provision is made for problems arising from abuse of patents in section 30 of the Combines Investigation Act.

So I correct at once what I did say.

Mr. BALDWIN: In your reference to section 11 of the proposed amendments, I take it you will agree with me that part of section 11 which you wish to have deleted is not something new which has been added, but it is something which has in fact been in section 29 of the Combines Investigation Act for some considerable time?

Mr. MACINTOSH: Yes sir.

Mr. BALDWIN: What you are asking for is the deletion of something which has been in the act and which has been available for a number of years?

Mr. MACINTOSH: That is correct.

Mr. BALDWIN: It purports to give—or parliament is purported to give to the executive branch of government certain prerogatives in connection with the subject matter set out in that section?

Mr. MACINTOSH: Yes.

Mr. BALDWIN: And I suppose you would agree, would you not, that any such prerogative should only be exercised after due care, inquiry, and consideration?

Mr. MACINTOSH: Yes.

Mr. BALDWIN: I ask for your fair comment now: do you not think that there is probably no better way to get facts outlined in detail than through a thorough-going investigation by that branch of the government which is qualified and which is a specialist in that particular line?

I refer to the director, as set out in section 29, and to the fact that he is able to carry out an inquiry, and is well qualified, as far as the government is concerned, to make a clear and careful appraisal of all the circumstances, and to lay his findings and recommendations before the executive?

Mr. MACINTOSH: Without giving offense to Mr. MacDonald, with whom I was a student many years ago, I would say that we would have more confidence in a finding by the courts.

Mr. BALDWIN: Are there not many occasions when the executive branch of the government does exercise its prerogative, following investigations and findings which are laid before it?

Mr. MACINTOSH: Quite.

Mr. BALDWIN: And I suggest that this may be just a parallel situation, and that they have gone to the organization which they think is best qualified to get the facts which they want to hear?

Mr. MACINTOSH: The only comment I would like to make as to that is—and I repeat something I said to Mr. Martin,—is that there is a provision which is the remedy for the enforcement of what has been held to be criminal law, and it is in that respect that this association thinks it differs from the general exercise of executive discretion.

Mr. BALDWIN: You would prefer that there should be a hearing in the courts of law, and a conviction?

Mr. MACINTOSH: Yes.

Mr. MACDONNELL: May I ask a supplementary question: is it clear then that what you are objecting to here is not the existence of the power, but merely as to the procedure which brings it into effect?

Mr. MACINTOSH: That is the objection which this committee has stated, yes.

Mr. MACDONNELL: Then I am not overstating it when I say that you are not objecting to the power, but merely as to the procedure?

Mr. MACINTOSH: That is the position we have taken.

Mr. PICKERSGILL: I have a supplementary question. My question relates to the phrase, "subject to penalties". This is a school-boy performance, and I find it distasteful. I hope the committee will change its mind about it. This phrase "subject to penalties" has reference to what, after all, is a reference to action under power given by parliament to the governor-in-council to reduce a tax.

As a representative of the people who are interested consumers, I find it hard to consider the reduction of a tax as being a penalty. But that is not my real question, that is just the introduction.

My real question is this: I appreciated the reference to this being criminal legislation, but this is criminal legislation for the purpose of protecting the public interest.

Mr. MACINTOSH: Yes sir.

Mr. PICKERSGILL: And if the governor in council reaches the opinion—which he would not reach very likely—that the public interest was not being adequately protected, and the fact that he exercises a power to reduce a tax—surely that is not intended to be a penalty.

Are you not looking at it from a very narrow point of view, from the point of view of someone who may have received some incidental advantage from the imposition of the tax? Surely it is an odd concept to suggest that the removal of a tax is a penalty.

Mr MACINTOSH: I think the reason we suggested that is that we believe this is criminal legislation. This is the ground on which this legislation was used constitutionally in the PATA case. And in provisions of that nature, from the very nature of them, this power which appears in the criminal law must be regarded as a penalty. But if it is exercised under the general provisions about which Mr. Martin spoke to me for a few minutes, then I would agree that

it is not a penalty. It is in this context however that we refer to it as a penalty, because if it is not a penalty, I would have grave doubts as to whether it is a proper provision in this particular legislation.

Mr. PICKERSGILL: May I ask you one more supplementary question on that point: after all, it is only the punitive parts of this act which are criminal law.

This is an act of parliament just like any other act of parliament; and would you question the right or even the desirability, if parliament should see fit, to put provisions in any statute giving to the governor in council the power, under certain circumstances, to remove a tax?

Mr. MACINTOSH: No, I do not think I would do that.

Mr. MORTON: On the basis that the combines legislation was passed to protect the consumer under certain economic conditions, might I ask Mr. MacIntosh if he does not think that, taking into consideration the time factor from the time the investigation is commenced until the inquiry is completed, when a judgement may not be obtained, that the government's hands might be tied from remedying certain economic factors which were detrimental to the consumer, if these provisions were not left in the act?

Mr. MACINTOSH: It seems to us that if the situation were that serious, the government would have ample power under other legislation to take the proper action.

Mr. BALDWIN: I have a supplementary question in response to the supplementary question which Mr. Pickersgill asked. You intimated, I think, in response to Mr. Martin and to Mr. Pickersgill, that you would have no objection if parliament were to give to the governor in council the power—but not in legislation of a criminal nature—to do exactly what they are now given the power to do in section 29; that is to say, if there was a simple act providing that upon inquiry made by the Combines investigation branch which disclosed certain facts, then the governor-in-council could make such changes in the customs tariff as it deemed necessary, I take it that you would have no objection to that?

Mr. MACINTOSH: I said that when I was addressing my mind to this, I was addressing my mind to the change of power, but I do not think I could take any objection as to the power to do it. I think that the members of our committee might want me to say that this was not discussed at any length because frankly, as has been indicated here this morning, this provision has not been used, and it was not subject to great discussion.

I think that the members of the association hold the view that it is a piece of criminal legislation, and that we should not take it as a sort of power which is exercised under the legislation of which Mr. Martin spoke; that is to say, I think we would prefer to see tariffs dealt with in the other way, on a general basis.

Mr. BALDWIN: This is criminal legislation, and in that event there should not be any conviction until the crown has sustained the proper burden of proving its case beyond any reasonable doubt. That is an acceptable proposition. But my point is this: if you tentatively suggest that before the governor in council could exercise its prerogative, if you remove that particular section, there would have to be a case established beyond any reasonable doubt, that is to say, the degree of proof which is required in criminal cases—it seems to me—and I offer this observation for your consideration—that it would impose a fairly intolerable burden on the governor in council, if that part were removed.

Mr. MACINTOSH: My only observation on that is that surely the governor in council has ample power to take action in respect to tariffs under other legislation; and I would not consider it to be an intolerable burden when this other jurisdiction exists.

Mr. BALDWIN: I have one more point which I think was brought out yesterday or the day before, concerning this question of appeal. You are familiar with the provisions of the Exchequer Court Act, or you have some knowledge of them?

Mr. MACINTOSH: Yes.

Mr. BALDWIN: Do you not think that there is built into that act provision for an appeal on any matter which is brought before the Exchequer court?

Mr. MACINTOSH: No sir, I do not. I do not consider that. I have looked at it, and, without getting into what is a very technical legal discussion, I have discussed it with a number of other lawyers, and I have not found any person who feels that there is provision in the Exchequer Court Act to deal with this particular situation.

Mr. BALDWIN: Even with the leave of a judge of the Supreme Court of Canada?

Mr. MACINTOSH: No. Let me put it this way: I think what we would like to see is the same provision as to appeal which now appears in section 382-3 of the Criminal Code for indictable offences applied to this particular piece of legislation.

Mr. BALDWIN: Finally I have this question on the changed definition of mergers and combines which eliminates reference to the rights under the Patent Act. Do you think it is possible that that particular phrase is now redundant, having in mind the changed definition of merger, and the provisions of the Patent Act?

Mr. MACINTOSH: I think, Mr. Baldwin, that if it is redundant, that this would be useful clarification, but I am not that sure about it.

Mr. BALDWIN: Would you like to have several opinions?

Mr. MACINTOSH: I think all lawyers would like that.

Mr. HORNER (*Acadia*): In looking over the bill and the act, I would say, and I think you would agree with me, that the whole tenor of the bill is the word "unduly".

Mr. MACINTOSH: Yes sir.

Mr. HORNER (*Acadia*): What difference do you find between the word "unduly" and the words "or tendency"? It seems to me that there is not too much difference between the two?

Mr. MACINTOSH: Well, first of all, the word "unduly" has been subject, over some 60 years, to judicial interpretation.

The words "or tendency" appear in the section where it is stated that an offence is committed if a person engages in a policy of selling articles in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having or designed to have the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada.

What we are concerned about is that, having decided to have the effect of substantially lessening competition—which is fairly broad language in itself—and then the words "or tendency", it must be intended to carry it some distance further than the language used previously.

In the dictionaries that I have consulted I find that tendency is not defined necessarily as probability, but more as a possibility. We are not sure of what interpretation the court would put on it. But I am certain that the court would say that it must have some additional meaning to the words "having or designed to have the effect or tendency", which in themselves go a long way.

I think when you get into the question of tendency, you are entering into the field of speculation.

Mr. HORNER (*Acadia*): You think that paragraph (C) of section 33 would do just as well without it, and it would mean the same thing without the words "or tendency"?

Mr. MACINTOSH: Well, sir, I do not wish to express any firm opinion as to what interpretation a court might put on that phrase in certain circumstances. But the view of our association is that this, being criminal law, it should be put in terms that lawyers can advise their clients with a certain amount of confidence. It places a solicitor in a bad position when he has to say, in a matter of criminal law: "I do not know what effect this will have."

Mr. HORNER (*Acadia*): Under section 32 of the bill you suggest that we put the word "unduly" after the words "restricted or is likely to restrict any person from entering into or expanding a business in a trade or industry".

Mr. MACINTOSH: Yes.

Mr. HORNER (*Acadia*): I think that the tendency would be pretty nearly the same under that phrase in using the word "unduly" in section 32 as it is in section 33.

Mr. MACINTOSH: I think I could agree with you completely if it were not for the fact that we do know what attitude the courts have taken to the word "unduly".

The word "unduly" has appeared in section 411 of the Criminal Code, and in its predecessor section, section 498, since some time around 1890, and we have a number of decisions on what meaning the courts place on this word.

Mr. HORNER (*Acadia*): Let us go back to 1896 when legislation of this type was first introduced. Do you think at that time that they were certain as to what was meant by the word "unduly"?

Mr. MACINTOSH: No. And if I had been there, and if you had been there in those circumstances, I think that I would have been taking the same objection to the word "unduly", because at that time I think it was indefinite.

Mr. HORNER (*Acadia*): Would you agree that the whole tenor of the bill or act is based on that word "unduly"?

Mr. MACINTOSH: It has been the subject of considerable clarification by the courts.

Mr. HORNER (*Acadia*): But if the whole act is based on the word "unduly", I feel—and mind you, I am not a lawyer, but I have an interest in this measure as a consumer and as a businessman—that the wording, or the tendency would seem to me to follow along that same line of reasoning or thought with respect to "unduly", and that perhaps we should establish in the courts, as they did back in 1896, this line of reasoning.

Mr. MACINTOSH: I am now speaking purely as a lawyer, and in my view criminal legislation should be as certain as it can be made. There never should be a possibility, if it can be avoided, of a person being convicted of a crime which no person, prior to the time that the judge decided the case, could say with any assurance that it was a crime.

Therefore terms which are indefinite, in my view, should be avoided if at all possible in criminal legislation.

Mr. HORNER: (*Acadia*): I fully understand your position on that, but I would point out, as I have already done, that the whole bill is based on that tenor of "unduly", and it seemed to me that the very tendency was not to veer away from it.

Mr. JONES: Might I ask a supplementary question: I wonder if the witness has directed his attention when considering this phrase "or tendency" to the code phrase "or of the tendency of substantially lessening competition"; and when you read it that way, the tendency of substantially lessening competition,

does it not remove some of the vagueness which might be left in your mind by the words "or tendency" alone?

We are not dealing with just some result or matter, but with a tendency which progresses towards an end. The first alternative has in effect already taken place; but the second alternative or tendency is one which progresses towards that end, or towards that effect. But what is it? Is it as a result of a tendency? No, it must be of substantially lessening competition.

Mr. MACINTOSH: Well, sir, even with the addition of those words, I still could not accept the matter.

Mr. DRYSDALE: Succinctly, your objection is the fact that "unduly" required the interpretation of some 60 years or so, and you can anticipate that "or tendency" would require a similar interpretation, and you do not want to be prepared to go into court to have an interpretation which I think would be inevitable.

Mr. MACINTOSH: I always welcome going into court, but not when I am speaking on behalf of this association.

The CHAIRMAN: Now, there is an honest lawyer.

Mr. DRYSDALE: You want to do us out of a lot of business. But basically, in 1960 you are in the same position with "or tendency" as they were back in 1891?

Mr. MACINTOSH: Yes.

Mr. HORNER: (Acadia): I wish to thank Mr. Jones for aiding me very substantially. I think that substantiates my case quite a bit.

Under section 33-B of clause 13 of the bill you suggest, on page 6, that you are in doubt as to whether this will be beneficial or hurtful to the small businessman.

Mr. MACINTOSH: Yes.

Mr. HORNER: (Acadia): My thoughts behind this section are these: that in order to enforce section 33-A, clause A, you pretty nearly have to tie it in with something like 33-B, because of the fast-moving competition which businessmen find themselves faced with today, and because people seem to be able to get around the acts.

My thoughts on 33-B is that you have to have it in order to enforce 33-A.

Mr. MACINTOSH: I would like to make this clear, that we are not taking objection to the legislation as such. The feeling of our committee was that this legislation had been drafted in view of unfair practices which prevail in certain industries. We want to be sure that the result of the legislation will, in practice, carry out what we believe to be the intent, and we are directing our minds towards the possibility that in certain instances—which we have not discussed to date—we think it leads to a result which is different than perhaps the craftsmen contemplated. The association simply believes this; that this is a new type of legislation. It is going to affect business practices which exist in many different industries very substantially. We think it should be clear to this committee and to the government just what effect it will have in all of those industries.

Mr. HORNER (*Acadia*): That is the very point I was trying to make. I do not think it differs too much from the legislation in section 33(a). It perhaps clears it up to some extent when you read section 33(a) which says:

> —or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage—

That sets it out pretty clearly in my mind. It suggests that advantages over and above a price advantage, a discount, a rebate or an allowance, and definitely an advertising advantage, at least to me, would get around section 33(a).

Whereas now it will not under section 33(b). I do not think this actually differs very much from the legislation contained in the criminal code, section 412.

Mr. MACINTOSH: This may be an extension of the principle. I do not quarrel with you at all. I am simply saying that we understand that the purpose of this is to assist the small retailer who, in some cases, is not getting terms as beneficial as those compared to large retailers. Now we have, sir, a number of instances where, instead of the legislation having this effect, it may well remove from the small retailer, in certain industries, advantages which he now has. I will give you an illustration of that if you wish.

Mr. HORNER (*Acadia*): I would like you to.

Mr. MACINTOSH: It has been the practice of some businesses, when a new retailer establishes a store, the manufacturer, on the occasion of the establishment of the store, will give him certain advertising allowances which are not available to any of his competitors at the time. This is given on a special occasion to help this man establish himself in business.

Under this legislation it is our view that that kind of an allowance cannot be made because the allowance to each of these competitors would have to bear some proportion to their respective sales. This is one instance where it seems to us htat so far as the new dealer is concerned this is the kind of advertising allowance that helps him.

Mr. HORNER (*Acadia*): For the sake of getting along, I will agree maybe with you in respect of a new dealer, but do you see anywhere that it will hurt the small businessman that is already established?

Mr. MACINTOSH: Yes.

Mr. HORNER (*Acadia*): Could you give us an example of that?

Mr. MACINTOSH: Yes.

I understand and have been advised that there are manufacturers who, today, are prepared to make cooperative advertising allowances which do not bear a fixed relationship to sales, and a large department store can obtain advertising which represents a very small proportion of its sales. Take the case of Simpsons, who advertise in two Toronto papers. They pay so much for an ad. That ad brings them a tremendous amount of business. Now, the small man's advertising cost may be much higher in relation to his sales. So, if he gets 25 per cent of the cost of his advertisement without relation to sales, he does get a larger percentage of an advertising allowance in proportion to sales now than he will if this is strictly enforced because, if Eatons are getting an advertisement allowance which represents one per cent of their sales, we think the effect of this will be that the small retailer will get one per cent: that is the same percentage.

Mr. HORNER (*Acadia*): This is true in regard to advertising only. I think that perhaps the lowest price would be the best advertisement that a retailer could employ to influence his customers or consumers.

Do you not think that the large retailer is at an advantage because the advertising grants lower his price on some products and he has then an additional advertising gimmick. He could put on a sale and be given an advertising bonus with that sale?

Mr. MACINTOSH: Sir, I do not think that I have sufficient knowledge to say that this is universally the case. Certainly some of the report made by Mr. Stewart would indicate that the small retailer was handicapped in that way. All we are saying today is that we want to be sure, and we want the government to be sure, that this will have the intended effect. We are not quarreling with your idea that this is a desirable thing.

Mr. HORNER (*Acadia*): I believe that most people will agree that we will never know the effect of the bill until after it has been enforced for a few years, so I imagine we will have to probably wait and see.

Mr. MacINTOSH: All we are interested in, sir, is that in a year's time the retailers could consider this; the manufacturers could consider this; and there could be representations made on the basis of knowledge which would perhaps confirm your view completely.

Mr. HORNER (*Acadia*): I think that if that is the case, then the whole intent of the amendments to the bill is to bring about some relief to the small businessman. If we do not do that I would think that the small businessman's position would be readily reviewed again.

I have one further question, Mr. Chairman. Clause 14 of the bill is not mentioned in your brief. I wondered what your position is in regard to resale price maintenance, or if you have had any discussions or considerations in this regard.

Mr. MacINTOSH: The discussions which took place in the committee would indicate that in our view this is a problem which bears most heavily on the small retailer. Many of our members have received, over the years, complaints from the retailers as to certain practices. It seemed to be the view of the committee that this legislation would assist and go some distance towards removing those complaints. I think our position was that we wanted to wait and see what effect this legislation had.

Mr. HORNER (*Acadia*): The Canadian manufacturers association does not think that this will reinstate resale price maintenance?

Mr. MacINTOSH: All I can say is that that certainly was not the view taken by the committee. There were a number of people there who were familiar with these practices and they certainly did not hold that view.

Mr. HORNER (*Acadia*): What is the position that the Canadian manufacturers association takes in this regard? Is the association in favour of full price maintenance, or does it take a stand on it at all?

Mr. MACINTOSH: I was not a member of the committee when this was previously considered. Perhaps Mr. Campbell here would like to answer that question.

Mr. W. Allan CAMPBELL, Q.C., (*Chairman, Legislation Committee (C.M.A.)*): I think we could say in our earlier submission that our thoughts were in support of the repeal of section 34. There are other thoughts within our group because of the size of the association. As a result it is not as clear cut as you probably will find it has been in respect of other groups that have been before you here. Our attention was directed more to the points that Mr. MacIntosh has mentioned with respect to the abuses and the problems that we have heard of.

As we looked at the proposed amendment we felt there were merits to that.

Mr. HORNER (*Acadia*): I have one further question. Has your association taken any view in respect of allowing these manufacturing firms, if there are any, to combine in order to exchange information and compete in the export market? Yesterday afternoon we heard three briefs which dealt largely with exporters being exempted from this legislation to some extent. Do you take any views in this regard?

Mr. MacINTOSH: We noticed those submissions with interest because certainly the Canadian manufacturers association has an interest in the export trade. We all know that certain other countries do have national trade units. Our members, who have particular interest in the export trade, were among those who made the representations yesterday.

I think that the view of the committee was, when this question came up, that if this is a desirable thing and in the interest of the export trade, we certainly would favour it; but we have not had discussions about the subject in connection with this bill.

Mr. HORNER (*Acadia*): Do you think that the Combines Investigation Act could be worded in such a way as to exempt exporters from the bill but still include all Canadian industry in a practical sense? Do you think the law could then apply to these manufacturing firms, manufacturing products for Canada, but who do some exporting as well?

Mr. MACINTOSH: I am speaking very generally now and I have not given this question great consideration, but I see no reason why there should not be a different pricing policy for export and one for Canada. I do not think that it necessarily follows that, because you have certain arrangements for export, those arrangements are going to slop over into the domestic market. This depends on the people who are subject to those arrangements.

Mr. HORNER (*Acadia*): In other words you see nothing wrong with a manufacturing firm having one price for export and one price for Canadian market? I suppose to some extent this exists now?

Mr. MACINTOSH: It seems to me, to my knowledge of the export trade, that certainly it does exist now, because the manufacturer must face the competition in the market in which it is trying to sell.

Mr. HORNER (*Acadia*): That is all, thank you.

The CHAIRMAN: I would like to warn the committee that it is eight minutes to eleven now, and that it is the intention of the committee to adjourn at eleven and reconvene at two.

Mr. HOWARD: The notice said three o'clock, Mr. Chairman.

Mr. MORTON: We decided at our business meeting yesterday to meet in the afternoon at 3 o'clock.

Mr. DRYSDALE: We decided to meet at 9.30 in the morning and 3 in the afternoon each day on Tuesday, Thursday and Friday.

The CHAIRMAN: You do not wish to reconvene at 2? We will reconvene in this room at 3 o'clock then.

Mr. HOWARD: Mr. Chairman, with only the few minutes I have left before the recess I will try to confine my questioning to one specific point and then perhaps I could be given the opportunity to resume this afternoon.

I would like to follow your approach or suggestions in so far as clause 11 of the bill is concerned, which gives the right to the Governor General in council to reduce or eliminate tariffs, and I will put my question in a hypothetical way. I will suggest an example of a case which might occur if the legislation were enacted as you suggested. If tariffs could only be reduced following a conviction against, say, a number of firms charged with conspiracy—keeping in mind that the processes of the courts in some cases takes two or three years, and that during the intervening period when it might be desirable to have agreements with other countries for reducing or lowering tariffs on a particular article,—that there would be a conflict arise as a result of the Governor General's hands being tied in respect of reducing tariffs only after there had been a conviction?

Mr. MACINTOSH: Mr. Howard, in those circumstances it seems to me that there is ample jurisdiction for the governor in council to deal with those tariffs and reduce them as any other tariff might be reduced in those circumstances. This is not the only authority for that at all. It seems to us that if it were desirable, in the interest of Canada, to go to GATT and make some trade, it would be made as it would be made in the ordinary course, whether there was a proceeding before the court or not. We are not suggesting that that power be reduced.

Mr. HOWARD: I can appreciate that you are not doing that. I am referring to only a very slight part of the whole tariff approach. I am saying that if it were the case that the governor in council could only reduce or eliminate

tariffs following a conviction and it appeared desirable to take action to reduce tariffs under the tariff act, would this not initiate a series of other legal cases in the courts in respect of whether or not the governor in council had the right to reduce these tariffs in view of the reference in the Combines Investigation Act to the effect that he could not do so except following a conviction, particularly if the people who were before the courts were charged with conspiracy, for the sake of argument, or using their tariff protection in a conspiracy?

Mr. MACINTOSH: I think, sir, we are looking at this a little differently. We would not envisage that there be any prohibition put in the Combines Investigation Act. We feel rather that there is specific jurisdiction given in the Combines Investigation Act to reduce tariffs in certain circumstances. One of those circumstances is that an inquiry has been made. We would simply eliminate that circumstance.

I do not think, with respect, that any argument could be made in court that because that power was not found in the Combines Investigation Act, it had any limitation whatsoever on the provisions of the tariff act. In my view they are quite independent as a matter of law, and there would be no limit at all.

Mr. DRYSDALE: Perhaps we should adjourn and Mr. Howard can carry on at three.

Mr. HOWARD: Yes, perhaps I should cease and desist.

The CHAIRMAN: All right, we will adjourn to 3 o'clock.

—The committee adjourned.

AFTERNOON SESSION

THURSDAY, June 23, 1960,
3:00 p.m.

The CHAIRMAN: Gentlemen, I see that we have a quorum. Before lunch Mr. Howard was asking the witness, Mr. MacIntosh, some questions. I will ask Mr. Howard to continue.

Mr. HOWARD: Mr. Chairman, if I may, perhaps deal with another matter. This is concerned with the insertion of the word "unduly", I believe it is in two places in subsection (3) of section 32. But that is not what I want to direct my thoughts to. But, as has been indicated, the word "unduly" and what it means in different actions has been pretty well determined, as you have indicated, by the courts.

Would it not be advantageous, then, to place the same word, "unduly", in the definition section on merger? That is one thought that I have, as to whether this might not make for clearer court decisions as to what the effect of this has been, without reading the entire definition part of merger—and I have some other thoughts about it.

I wonder if this might not be advantageous, in the application of the act, to say that "merger" means a certain thing, and then, "whereby competition is or is likely to be lessened unduly".

Mr. MACINTOSH: I see that Mr. MacDonald is here, and he can correct me if I am wrong; but my understanding of the cases where the meaning of the words "to the detriment or against the interest of the public" has been considered is that the courts have taken the attitude that the same meaning is to be given to that phrase that was given in section 498 to the word "unduly".

For my own part, I see no distinction in these two phrases. For example, I think that the leading case on the meaning of the words "to the detriment or

against the interest of the public" is probably the Queen and Eddy Match Company, which was decided by the court of appeal in Quebec; and certainly that was the view taken at that time. For my own part, that is my view.

Mr. HOWARD: If I may ask further—and this is a legal question, with which I am not familiar in the least: did that case have to do with the merger sections of the present act?

Mr. MACINTOSH: Yes, of the existing legislation. In addition, Mr. Howard, as you probably recollect, in the old act, under the definition of "combine", the words "to the detriment or against the interest of the public" appear. "Combine" included a combination, merger, trust or monopoly, and merger, trust or monopoly were defined.

In addition to proving that parties came within that definition, it was an essential element of the offence that they also proved that it was one to the detriment or against the interest of the public. This opinion was not only expressed in the Eddy Match case; but in at least one case in Ontario.

Charges were laid both under section 498 of the Criminal Code and under the Combines Investigation Act; so that the court—this was in a combination case; but the same point came up as to what was the meaning of the words "to the detriment or against the interest of the public", and the view was expressed by the court that the words should be given the same meaning; that there was no distinction to be drawn between the two phrases.

Mr. HOWARD: I take your word for it completely.

Mr. MACINTOSH: Thank you.

Mr. HOWARD: I take your word for it completely, not knowing one way or the other whether that is so or not, from my own personal knowledge. But it would have appeared to me that the word "unduly" would have accomplished the end to which you are looking. However, if the courts, of course, have decided that the words "to the detriment or against the interest of the public" substantially mean the same thing as "unduly", then it appears to be unnecessary.

Mr. MACINTOSH: I would anticipate that if you are having crown officers here to express opinions on the law, that their views would be the same as mine. Certainly I have heard such views expressed by them.

Mr. HOWARD: Further with reference to "merger"—and perhaps this should be addressed to the law officers of the crown, or to Mr. MacDonald—in the definition of "merger" it lists (i), (ii) and (iii) and says:

> in a trade or industry,
> among the sources of supply of a trade or industry, or
> among the outlets for sales of a trade or industry.

Does that appear to be sufficient to you, from your point of view?

What is the purpose of it? Competition is competition, and if you define whereby competition in three different fields is or is likely to be lessened, does this not preclude, maybe, competition being lessened in fields other than mentioned here? Is this exclusive to competition being lessened, or likely to be lessened, in some other phase of business function?

Mr. MACINTOSH: I would not have considered it so. In my view, this new definition of "merger" does make one thing clear that I think could have been argued before; and that is that it makes it quite clear that a merger applies not only to a case of horizontal integration, but also to a case of vertical integration.

I had not thought of these terms being restrictive; instead, I thought that the amendment proposed did something to add to the clarity of the legislation, because it makes it quite clear that not only can you have a merger where competition is lessened in a trade or industry itself; but you can have that

merger where the effect of the merger is going to lessen competition among the outlets in a different trade and also among the sources of supply.

I do not know of any decision in which the old section was ever applied to as case of vertical integration—(i), (ii) and (iii). I regarded it as adding useful clarification.

Mr. HOWARD: I just wondered. Reference has been made to this in the house occasionally, on other things.

The same argument is used, I understand, in 32(2), which says:

> the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

And then, in order to ensure that one or more of the following are completely restrictive and are not excluding other forms of combination, they put in (g):

> some other matter not enumerated in subsection (3).

That is to indicate that those points in (*a*) to (*f*) are not restrictive to those alone. This is what I was thinking in terms of, in thinking of (i), (ii) and (iii) in the merger section.

Mr. MACINTOSH: I appreciate the point. It does seem to me, however, Mr. Howard, that all of the ways in which I can think of that a merger would lead to a lessening of competition are covered, if you say that it may lead to a lessening of competition in the trade or industry to which it relates, in the trade or industry which constitutes the source of supply of the article in question, or in the trade or industry which serves as an outlet. I do not know in what other circumstances competition would be restricted. I may have overlooked something.

Mr. HOWARD: I do not know either, quite frankly; but I thought in the way it is worded it could properly be argued that a certain type of merger took place which is not a merger that is restricting competition to these confines.

Mr. MACINTOSH: I think the only useful comment I can make is that this seems so broad that I cannot see that it excludes anything.

Mr. HOWARD: One other thought that I have, Mr. Chairman, is this, in relation to section 32. While I understand you make only reference to the insertion of the word "unduly" in your brief, nonetheless your association is in favour completely of the proposed changes to section 32?

Mr. MACINTOSH: Yes, that is the position of the association. Frankly, I cannot see where these defences would alter the result of any case that has ever been decided before our courts.

Some businessmen had some reservations, or I have heard reservations expressed about some of these activities outlined, such as the exchange of statistics.

It has always been my view that an agreement for the exchange of statistics was either good or bad, depending on the purpose. An agreement for the exchange of statistics could be wrapped up in some way with price fixing. The question is whether it is, or whether it is not.

You could have statistics that are exchanged for very useful and desirable purposes. But while I think the opinion of the association is that we welcome this change as clarification, we generally regard it as a basic change in the law.

Mr. HOWARD: I have heard economists argue that it is possible, and perhaps takes place in some industries, and that it is even more possible under the proposed amendments here—and specifically under subsection (2), the so-called escape clauses, as it were—to engage in conspiracy, combination, or whatever you have, with respect to the exchange of statistics, the defining of product standards, definition of trade terms, and such, which would allow for a price conspiracy to be engaged in by the so-called price leadership approach, which would be almost without detection. I wonder what your view is about that.

Mr. MACINTOSH: I do not share these reservations about the ability of Mr. MacDonald's department to discover these matters.

Mr. HOWARD: I am not talking about the ability of Mr. MacDonald's department to discover this sort of thing; I am just saying that this is the argument I have heard expressed by economists, that if corporations want to engage in a price fixing arrangement, by the price leadership approach, it could be done without detection or apprehension, and the insertion of subsection (2) will facilitate such conspiracies for price fixing, or price enhancing, by the price leadership approach.

Mr. MACINTOSH: Mr. Howard, I can only speak as a lawyer. I do not know what they have in mind; but I do not agree with that as a practical matter. I do not think that is correct.

In my view—and I think there have been many lawyers who have given opinions that statistics could be exchanged under the existing legislation. I do not think it makes any change.

Mr. HOWARD: Quite frankly, to me this adds nothing to what is in the act at the moment, that cooperation, or cooperative approaches, or agreements, on these specific items are allowable now. This is my thought.

Mr. MACINTOSH: I think we are in substantial agreement on that.

Mr. HOWARD: Except that the argument is that it gives sort of legislative sanction to the end of the price leadership approach to price fixing, and things may be more easily done.

Mr. MACINTOSH: I think this does have some useful purpose, and I will draw on an example from my own experience, where an American company was involved in a proposal for the development of a new product in Canada by joint arrangement. They were going to do joint research. The arrangements were such that if the product developed, everybody would use it, so far as any disclosure was made to me, it would be dealt with on a completely competitive basis.

The attorney from New York came to a meeting, and he said, "I have read this legislation. We have had a number of experiences in the United States, and as far as I am concerned, until you can point to some specific case which would approve of this sort of thing, I am not going to advise my client to take any part in such an arrangement".

As far as I am concerned, that was a most undesirable result, on the facts outlined to me.

Mr. HOWARD: Would your association be agreeable, for arguments sake—we are not trying to burden Mr. MacDonald and his staff unnecessarily with a huge amount of documents—to filing with the director, or some other similar public body, if such is established, any agreements, arrangements or combinations that are entered into pursuant to subsection (2) as proposed?

Mr. MACINTOSH: I have not been a party to any such discussions, and I do not know that I should speak for the association, for my own part.

That has been done in England. It leads to a lot of administration. I do not entertain strong feelings on it one way or the other; but perhaps some of the other members of this group would like to speak to it.

Mr. IRA G. NEEDLES (*Chairman, Tariff Committee, Canadian Manufacturers' Association*): Mr. Chairman, I would like to comment that that would be a terrific administration job for Mr. MacDonald's department. There are many things on which ordinary transactions, such as statistics, give information about sizes and types that are useful for the control of inventory and of production that would be available for use in order to have products in the hands of customers at the right times of the year—information of the sales volumes

and types in various sections of the country, in order to get good distribution, technical information, interchange.

There could be various types of research information exchanged, information about activities of various kinds that have no relationship at all to price.

The first thing that would happen is that probably no one would do it, because they would not want to be bothered with the filing of information. The second thing is that they would be fearful that if they did it they would simply draw down on themselves a lot of administrative investigation. Thirdly, I think you would plug up your department so much here that he would not have enough time left to do his valuable work. I think it would be completely unrealistic to try to approach a think like that, in a modern business complex. There is just too much work to be done.

Mr. HOWARD: I expected a negative answer, frankly.

Mr. DRYSDALE: Mr. MacIntosh, perhaps for the benefit of myself and the other legal people here, it is an opportunity to get some free legal advice.

Mr. HOWARD: Are you not a member of the bar, John?

Mr. DRYSDALE: I am interested in page 7, section 33. Although it has not been mentioned in your brief, it reads as follows:

> Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years.

I have two points in respect to this section. The first one is: I wonder if it has been considered by any of the members of the legal profession on your board here, the question whether "knowingly assists" has been construed to necessarily involve *mens rea.*

I raise this problem because on that PATA case that you referred to this morning I believe that it also included matters which would come under other sections of the B.N.A. Act and which would be dealing with purely civil matters.

In fact, perhaps I could quote from the beer case, which was held in February of this year. Chief Justice McRuer stated—and I am using a copy here; I cannot give the exact quotation:

> The constitutional validity of the Combines Act was challenged in Proprietary Articles Trade Association *v.* Attorney General of Canada, 1931 Appeal Cases, page 310. The validity of the act was upheld as being legislation relating to the criminal law and as ancillary to the power given to the Parliament of Canada under section 91 of the British North America Act, Head 3, and section 122, the raising of money by any mode or system of taxation, and under section 91, Head 22, patents of invention and discovery. With respect to section 91, Heads 3 and 22, and section 122, it was stated, at page 326:
>
> "It is unfortunately beyond dispute that in a country where a general protective tariff exists, persons may be found to take advantage of the protection, and within its walls form combinations that may work to the public disadvantage. It is an elementary point of self preservation that the legislature which creates the protection should arm the executive with powers of withdrawing or relaxing the protection if abused. The same reasoning applies to grants of monopolies under any system of patents".
>
> And, he states further on, in this particular case:
>
> In the last analysis, the object of the combines act is to protect the public interest against the enhancement of prices that will likely flow from combines as defined in the act. It matters not whether they arise out of agreements, mergers, trusts or monopolies.

And, referring to Stroud's judicial dictionary, third edition, volume 2, at page 1561, under the definition of "knowingly":

> (2) Sherras versus DeRutzen (1895) 1 Q.B. 918, seems like a very emphatic re-assertion of the doctrine that mens rea is an essential ingredient in every offence; and there Wright, J., in a remarkable judgment, reduced the exceptions to three classes:
>
> (a) cases not criminal in any real sense but which, in the public interest, are prohibited under a penalty;
>
> (b) public nuisances;
>
> (c) cases criminal in form but which are really only a summary mode of enforcing a civil right.

The reason I raised this particular point was that if mens rea is an ingredient, then lawyers, bankers and accountants who are involved in mergers, and so on, are protected; but if it is not an ingredient, it would appear to me the mere fact the courts find there is a monopoly or a merger, then you would work back to the fact that their mere participation would involve them in the latter part of the section, which would mean two years imprisonment.

Would you like to make any comments in that connection? I mention this only as a matter of self interest.

Mr. PICKERSGILL: On a point of order, Mr. Chairman, we are examining the witnesses on their brief.

If we are ever going to conclude the business of this committee, surely we should examine the witnesses on those matters on which they wish to make representations, and not on those matters on which we wish to be educated.

The CHAIRMAN: I think Mr. Pickersgill has a point there, Mr. Drysdale; you have gone into a lot of history in regard to certain cases, and I do not think it quite applies here. It may apply, in furthering your education but, frankly, I think we should ask questions, particularly in regard to this brief.

Mr. DRYSDALE: On the point of order, Mr. Chairman, we are here in this committee, examining the amendments to the Combines Investigation Act.

The minister stated the purpose of the committee was to obtain clarification on certain aspects of this—and that is what I am trying to do.

These gentlemen here, with the C.M.A., have directed themselves to certain specific sections in the act. I saw in here a possible conflict, and I was trying to draw it to their attention when they were here, so that they would have an opportunity to make a representation on it.

The importance of this interpretation is that if mens rea is not an ingredient—in other words, the idea of the guilty mind is not an ingredient, it means that lawyers, bankers and accountants, as well as anyone involved, are subject to go to jail for two years. I do not think that was the intention of the act, and I had asked if they had given any interpretation to that.

As we are examining the whole act, I think I am entitled to ask what I did, and to receive the benefit of their opinion.

Mr. JONES: Mr. Chairman, the point was raised this morning, in discussion, and, probably, it was arising from that discussion of this particular point that Mr. Drysdale founded his question.

The CHAIRMAN: Well, to facilitate things, if Mr. MacIntosh can answer it briefly, I would ask him to go ahead.

Mr. HOWARD: At the same time, would he care to explain, for the great unwashed bulk of us, what *mens rea* is.

Mr. MACINTOSH: Well, gentlemen, I was hoping Mr. Pickersgill's intervention on behalf of a fellow lawyer would relieve me from the necessity of teaching, when I am not a very well prepared teacher.

However, to answer the question seriously, this committee has not considered this question.

I am also a member of a committee of the bar association, which is presently considering this legislation and, frankly, I would like to take that question back to them, consider it at some length with them and, if we have views on it, we will put them before this committee. However, any opinion of mine, given to you today, would be a very offhand opinion.

Mr. HOWARD: You do not know of any cases on this particular section?

Mr. MACINTOSH: No, I do not know of any cases where the words "knowingly assists in" have been construed.

Mr. DRYSDALE: I have discussed these problems with other lawyers. They felt there was the possibility of some ambiguity in it and, therefore, I thought I would raise it, at least to bring the problem out into the open, and possibly get your opinion on it.

Mr. MACINTOSH: My opinion, for what it is worth today, is that a court would conclude there had to be an element of guilty mind in such an offence.

Mr. MACDONNELL: Are we going to get the opinion of the bar association?

Mr. DRYSDALE: The usual practice is to give the opinion after the legislation is passed.

Mr. MACINTOSH: I am sorry, but I am not in a position to answer that today.

Mr. DRYSDALE: That has been the tendency in the past. We had the criticisms concerning the estates tax act after it had been enacted, and I wanted to raise this now, while we could do something about it. Personally, I do not want to go to jail, although I suppose there are a few people who would like to see that.

The second part of this particular section, involves sections 32, 33 and 33A, where the words are used:

> Is guilty of an indictable offence and is liable to imprisonment for two years.

I realize these are enactments of sections 411 and 412 of the code. However, under the old combines act, under section 32, which, I believe, was, basically, this section 33, the words used are:

> Is guilty of an indictable offence and liable, on conviction, to a fine, in the discretion of the court, or to imprisonment for a term not exceeding two years or both.

I realize, under section 28 of the Interpretation Act and section 622 of the Criminal Code, that you can read into it that there is the alternative of a fine to the imprisonment. However, the thing that bothered me was when section 33—the new section 33—was section 32, and in a separate act—the combines act—that at that time the legislature took the precaution to spell out the alternative of fine and imprisonment. I just wondered whether you have any comments in connection with doing that in this particular legislation, when you are taking sections 411 and 412 out of the Criminal Code and putting it into the combines act as a separate act.

I merely ask this as a point of clarification.

Mr. MACINTOSH: I may be wrong, but it is my recollection that section 32 was amended in 1952, and that prior to that time there was not a specific reference to a fine, in the discretion of the court.

I see Mr. MacDonald sitting here; he would be able to tell you that.

I am just speaking from my own recollection.

Mr. DRYSDALE: Section 28 of the Interpretation Act and section 622 of the code provide that alternative.

Mr. BALDWIN: In connection with that specific point, perhaps Mr. MacIntosh would consider the fact that section 41A, as introduced by section 19, provides that the Exchequer Court has all the powers and jurisdiction of a superior court under the Criminal Code which, I suggest, would bring in the benefit of being able to provide fines instead of imprisonment.

Mr. DRYSDALE: There was no question of benefits; the only point I was trying to draw to your attention was the fact at one time, at least, they spelled out the alternative when it was separate from the code, and we have taken sections 411 and 412 and used the same wording, taken it out of the code, and put it into the combines act.

Do you feel it is quite satisfactory as it is?

Mr. MACINTOSH: I have discussed this point with other lawyers and, although I cannot say it was discussed at great length, our view was, as you indicated, that we should have the benefit of this section, and the court would have the jurisdiction to impose an alternative.

Mr. HOWARD: A supplementary question, Mr. Chairman; my question has to do with the same thing.

The amendment to section 34 of the act, is to add a subsection 5, but to retain in the act, under subsection 4 of section 32, the alternative penalties which may be imposed by the court.

Might there not be some conflict there? If this bill goes through, we will have some sections that will say, as it does in section 33 now:

> Is guilty of an indictable offence and liable to imprisonment for a term of two years.

And, in another section, section 34(4), which will read:

> Every person who violates subsection 2 or 3 is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both.

Mr. MACINTOSH: Your point is well taken. I share your view, that it would be preferable to have uniformity. Any time you do not, in a piece of legislation, the point can be raised: did they mean a different result here than they did in the other section?

The CHAIRMAN: Mr. Pickersgill, have you a question?

Mr. PICKERSGILL: Mr. Chairman, I was a little late in coming in. I may not have understood correctly, but Mr. MacIntosh said just at the time I came in—and if my question is repetitious, I would not want him to waste his time answering it—but, as I understood it, he said the association was in favour of the proposed subsection 2 of the new section 32. However, he went on to say that he did not think there were any of these things, whether enumerated or not, which the court had ever taken exception to.

Mr. MACINTOSH: I think "ever had" were my words. I think what I said—and if I did not say it when you were here, I said it when you were out—that in my view these defences would not have changed the result of any case ever decided under this legislation.

Mr. PICKERSGILL: That is precisely what you said—and it was when I was here; I am sorry I did not reproduce it precisely.

The question I really wanted to ask is this: does the witness, or the association, feel this is a sort of bill of rights for businessmen?

Mr. AIKEN: That is a tricky question.

Mr. DRYSDALE: Watch it.

Mr. PICKERSGILL: Perhaps I should explain myself. If there is nothing wrong with doing these things, but you have the right to do them anyway, we are just going to tell you you have the right to do them.

Mr. MACINTOSH: Perhaps before or after you were in the room, I expressed the view that, certainly, I have found among businessmen a disquiet about doing some of these things, and a reluctance to do them, because they were afraid they might involve themselves in a prosecution under the act. Now, frankly, for my own part, I might be taking what may be a more foolhardy or courageous view. I think that anything that makes possible certain exchanges of statistics and remedies, there is no doubt about it but that it is desirable.

Mr. PICKERSGILL: You do not take the view then that any citizen of a free country has a perfect right to do anything that is not specifically against the law—and I should have referred to your association rather than to yourself.

Mr. MACINTOSH: I do not think—

Mr. DRYSDALE: You generalize everything, Jack.

I have one further question of Mr. MacIntosh—and I hope Mr. Pickersgill will not object.

On the brief we had yesterday, three of the organizations asked for specific exemption of the export trade. I wonder if your organization, which I presume would be interested in exporting, have given any consideration to this particular point, and whether or not they have any recommendations in regard to it.

The CHAIRMAN: Did you not answer that?

Mr. MACINTOSH: Yes, we did.

The CHAIRMAN: He answered it this morning.

Gentlemen, I think there is quite a bit of repetition coming in here. I would hope that we do not have to go back over all these things. I do know that some of you were out at other meetings this morning, and that may account for the repetition of certain matters.

Mr. DRYSDALE: I was here all the time, but I must have been looking up something else.

The CHAIRMAN: Are there any other questions? Have you a question, Mr. Howard?

Mr. HOWARD: Oh, I thought you had quite a list of questioners there.

Mr. DRYSDALE: Get up and ask it.

Mr. HOWARD: I did not want to take the time up when someone else may not have had the opportunity of asking questions.

Could Mr. MacIntosh, make some point of the desire to eliminate the words "or tendency" in section 33A, which are additional words?

The CHAIRMAN: We covered that this morning as well.

Mr. HOWARD: I was just reiterating that in order to follow on to my next point. I note the words "substantially lessening competition", and I wondered what the word "substantially" meant. To what degree is it?

Mr. MACINTOSH: I think that "substantially" is an elastic word. I cannot tell you of any outside case in which this problem has ever been dealt with, with the exception of this brewery case, which was referred to earlier today.

I think I am not misquoting Mr. MacDonald, when he said that under section 498, where you had an agreement lessening competition, that it became an offence where the restriction was substantial. I am quoting from a speech which Mr. MacDonald made, where he discussed the meaning of the term "detriment to the public". He said they—referring to the courts—have said that if they find prices fixed by collusion over a substantial part of the market, they will not try to raise an issue as to what these prices should have been.

Now, in the case decided under the price fixing provision of section 498 and of the combines act, in most cases the courts had evidence before them which indicated that substantially all of the people—80 or 85 per cent of the market—were parties to this agreement. That percentage has been somewhat lowered; in some cases it has been 70 per cent. There was a case where there was a lower percentage, and that was in the breweries case, where Mr. Justice McRuer found there was effective outside competition and, therefore, in other fields in which there could be competition, admitting the price was not part of that trade, that because there was this effective outside competition, there was 30 or 35 per cent against which, in his view, no offence had been committed. Now, it is in this field where your restriction is less than the virtual monoply, which the courts have dealt with, that the courts have yet to determine. Perhaps, to put it in a very slangy way: how much is too much? However, I think this is something that, in this field, must always be present.

I do not know how many acts could be framed that said that a certain precise percentage was too much and a certain precise percentage was all right, of control of the market. It seems to me that could vary very greatly, depending on how effective the total competition was.

I do not know whether or not I have helped you.

Mr. HOWARD: Yes, I think so—to the extent that we do not know, for instance, with respect to mergers, how big is too big, or how big is big enough.

Mr. MACINTOSH: It seems to me it would be very difficult to set a percentage.

Mr. HOWARD: Yes. However, I am not thinking in terms of a percentage specifically; but I was just wondering what the word "substantially" in 33A would tend to mean, or might mean, to the courts? Now, while your reference—and in the brewery case too—was not under the discriminatory pricing section of the act—

Mr. MACINTOSH: You can appreciate my difficulty in quoting cases on discriminatory pricing.

Mr. HOWARD: When it does not exist.

Mr. MACINTOSH: Yes.

Mr. HOWARD: But, I wondered whether the analogy is correct—that if there is substantial control throughout the country, the courts do not look at what prices might have been, and say: this is an offence—whether there is a difference between the reference there of a tendency of substantially lessening competition, whether they might take the same view—and I am wondering, from a lawyer's point of view, what you thought?

Mr. MACINTOSH: This is the only useful analogy I can throw out. It seems to me, when a court is called to interpret this section, it will probably look to what Mr. Justice Duff has said about the purpose of combines legislation—that it is an attempt to observe freedom of competition—and it will be from that point of view the court will determine, in my own opinion, whether there has been a substantial lessening or not.

Mr. HOWARD: I wonder if I could pose another question under this same section?

You made reference to 33B, which is a new entry into combines law of something not directly applied to the selling price, and being provided to competitors on a basis proportionate to their sales. I am wondering if it is the intent of this legislation to thus protect the smaller retailer and ensure he gets a proportion of the allowances, as compared with the large one, and whether it might not be better, in the light of the philosophy of trying to protect the small retailer, of establishing the same sort of principle—that is, an allowance on a

proporionate basis, applying this to discounts, rebates, allowances, price concessions, and the like under 33A(*a*), where it says:

Everyone engaged in business is a party to

and so on—and, in effect, shall not give a price concession to one person, or rebate, or discount, to one person that is not available to another person—a competitor, in respect of a sale of articles of like quality and quantity—and the like quality and quantity, I am sure you appreciate, nullifies the price discrimination in its entirety. I am wondering whether it would not have been more advisable to apply this principle contained in 33B—keeping in mind the fact that you think 33B should be held over for further study.

Mr. MACINTOSH: Mr. Howard, a short answer to that is that, in practice, I find that most people who do, in fact, give discounts that are proportionate to sales—if they are going into a discount system, the way it ordinarily works is that they do make some effort to relate these two sales. For example, if you have a quantity discount, it will be on the basis of a 20 per cent discount on sales over $200,000, or 5 per cent over $1,000, or what have you. I think the result is probably the same under both.

Mr. MACDONNELL: May I make this comment, Mr. Chairman. I have no doubt that the highly skilled draftsmen have worked hard on this, but it seems to me the word "substantially" is a very unhelpful word—a colourless word, which could mean almost anything, according to the connotation.

Mr. DRYSDALE: It has been in the code since 1937.

Mr. JONES: I wonder if all the questions which have to do with the supposed meaning of words might be dealt with when we have the officers of the crown before us rather than for us to take up the time of these gentlemen who have come down here to make their presentation.

In looking around the committee I have a feeling that we have pretty nearly concluded with the Canadian Manufacturers Association. I know we are 50 minutes behind time, and that we have another group of witnesses waiting to be heard. So, if there are no further questions, I suggest that we thank the Canadian Manufacturers Association and move on to the next group.

The CHAIRMAN: Is that the feeling of the committee?

Agreed.

Mr. HOWARD: It is not agreeable to me, but apparently I am overwhelmed.

The CHAIRMAN: Well, we have covered most of it with either this witness or with previous witnesses.

I shall now ask the National Automotive Trades Association to come forward.

Gentlemen, please come to order. I am going to call on Mr. Blair to introduce the representatives we have here of the National Automotive Trades Association. I apologize very much for keeping you waiting so long, gentlemen, but that is the way these things happen to go along.

Mr. D. GORDON BLAIR (*National Legal Counsel, National Automotive Trades Association*): Mr. Chairman, and gentlemen: we regard it as a great privilege to be here, and we have learned a lot through listening to the committee's proceedings this morning and this afternoon.

Gentlemen, I would like to present to you the president of the national automotive trades association. He also is a past president of the Alberta branch of that association. I present to you Mr. Sven Jensen. He in turn will introduce the members of the national executive and other supporters who are here today. Mr. Jensen.

Mr. SVEN JENSEN (*President, National Automotive Trades Association*): Mr. Chairman, on my extreme right I would like to introduce to you the treasurer

of the national automotive association, and he is also president of the garage operators' association of Ontario. I present to you Mr. Norman Bryant, from Toronto.

And from Montreal I would like to introduce to you the vice-president of the national automotive trades association. He has also been engaged in the automotive retail trade for many years. I present to you Mr. Raoul Ostiguy, from Montreal.

Next, from Vancouver, where he has been the secretary-manager of the automotive retailers' association of British Columbia for many years, I would like to introduce to you Mr. J. Lloyd Kinneard. Mr. Kinneard is also secretary of the national automotive trades association.

We also have a number of observers present, that is, people who are engaged in the trade. And I would like to introduce to you now the gentleman sitting on my right, Mr. C. West, manager of the garage operators' association, Toronto; and Mr. Richard Dore from Montreal, of the Quebec gasoline retailers' and garage operators' association, inc.

Now, Mr. Chairman, I would like to call on Mr. Kinneard to present our brief which has been approved for presentation to this committee.

The CHAIRMAN: Before Mr. Kinneard commences his presentation might I say that the hon. Mr. Fulton has just arrived. He came in when I was looking the other way, but we now welcome him here this afternoon.

Hon. E. D. FULTON (*Minister of Justice*): Thank you very much.

Mr. J. LLOYD (*Secretary, National Automotive Trades Association*): Mr. Chairman and members of the banking and commerce committee: I see that most of the members here already have a copy of the written presentation which we made some time ago, but with your permission I would like to go over it again and perhaps insert a few appropriate explanations and examples of some of the points that we want to make.

This submission is made by the national automotive trades association on behalf of service station operators and garage operators across Canada. The national automotive trades association is a federation of the following provincial associations of service station and garage operators, namely, the automotive retailers' association of British Columbia, the automotive retailers' association of Alberta, the automotive trades association of Manitoba, garage operators association of Ontario, the Quebec gasoline retailers and garage operators association inc., and the Maritime retail gasoline association.

I might say by way of explanation that these provincial associations do operate under charters from their respective provincial governments. The national association operates under a national charter from the dominion government. For this reason we think that the national automotive trades association is indeed the only national association of automotive businessmen who are speaking for the retail automotive industry.

It is not necessary to dwell at length on the disparity in the bargaining position between the small bussinessmen who are members of this association and the large oil companies who are their principal suppliers. This disparity is enhanced by the fact that all but a small percentage of service station operators in this country lease their business properties from their supplier oil companies. In most instances, the terms of these leases are stringent in the extreme, giving to the oil companies the right of termination on short notice.

We have on hand sample copies of typical restrictive types service station leases which would be of interest to the committee.

The special conditions in this industry have been noted by the director of investigation and research who has instituted an enquiry under section 42 of the Combines Act into the problem of "tied sales" of tires, batteries and

accessories. This fact-finding investigation has proceeded for a considerable period of time I believe for more than two years. And it is believed that the information disclosed by this investigation will be of considerable assistance to the government of Canada in formulating policies designed to protect the independence of small Canadian businessmen.

We regret that this important report is not available to the banking and commerce committee at the present time.

While the enquiry into tied sales will illuminate the problems faced by industry, this Association considers that it cannot await the findings of this study before making specific recommendations with regard to the amendment of the Combines Investigation Act. In particular, it considers that the enactment of the amendments to the Combines Investigation Act may set the coarse of combines policy in Canada for some time to come and that the special position of the independent service station and garage operators should be considered before the amendments are adopted.

It is our principal contention that, under present circumstances, some of the basic principles of our democratic and free society should be restated and re-emphasized. Because of the disparity in economic power between large and small business, it is necessary for government policy and legislation to protect small business and to strengthen it against the ever-present attempts of large business to assert effective control over it.

This is a principle that all Canadians agree with, and it has been very well expressed by Mr. Fulton as reported in Hansard for May 30, 1960, on page 4341, where the minister did say:

> ....believe over the years that the best and soundest economy is that economy which is based upon the maximum participation of the greatest possible number of independent operators in that economy, and that it is an unsound economy which relies for its operations either on the employment of everbody by the government or the employment of everybody by some giant corporation or corporations. Our objective, therefore, and our philosophy in this field is to bring the maximum reconcilation in the way of the protection of small businessmen, on the one hand, and the interests of the community, of the consumers and of society generally on the other.

If economic freedom is to continue to have practical meaning in Canadian society, independent businessmen must be left free to make their own decisions as to sources of supply, pricing and other business policies and not be subject to the dictation, direct or indirect, of large organizations on these matters vital to the operation of their businesses.

This is particularly so in the case of a major oil company and a small service station operator.

The present Combines Investigation Act does not provide any simple explicit sections which protect the inherent right of businessmen to purchase their supplies, establish their prices, and otherwise conduct their businesses without dictation from large organizations. The inadequacies of the present law are felt particularly by service station operators who lease their premises from large oil companies. These operators are forced to purchase products from oil companies owning their stations or from suppliers nominated by such oil companies.

In many instances it is capable of demonstration that the favoured suppliers "kick back" a portion of their profits from such business to the oil companies. I myself have personal knowledge of such practices, and Mr. S. Jensen has had personal experience along the same line. Such profit sharing at the expense of small independent businessmen is odious. It confers no benefit on the consumer and is contrary to the public interest in that it destroys the

independence of retail dealers who form an essential link in the distributive chain.

The arrangements which large oil companies have foisted upon members of this association take many forms which cannot be described within the compass of this submission. It is sufficient to say that, in the absence of effective control, the large oil companies are free to devise almost any type of scheme they may wish in order to enhance their profits and their economic position at the expense of the small independent retailer of petroleum products.

The evils of this situation have been recognized in the United States of America and in at least one anti-trust decision of the United States District Court of the Southern District of California in the case of the United States of America vs. Standard Oil Company of California and other companies decided on June 19, 1959, comparable attempts by United States oil companies to dictate to retail gasoline dealers in the United States were declared contrary to its anti-trust laws. To this Association, it appears that it must be possible by appropriate amendment to the combines legislation to provide no lesser protection in Canada for the small businessman than he obtains in the United States of America.

In "dictating to gasoline dealers" we do not refer to the purchase and sale of petroleum products—but rather to other lines such as tires, batteries, accessories and parts, which are not a product of the oil company.

It is our respectful submission that the problem could be solved by a simple prohibition against the suppliers of one type of goods or their services, e.g., petroleum products, compelling their customers to take other types of goods and services either from them or from suppliers of their nomination as a condition for the continued supply of or the maintenance of any other contractual arrangement between the parties such as the lease agreement between an oil company and the independent operator of a service station.

In effect, such a provision would be somewhat akin to recent bills introduced into the United States Congress which have been termed "equality of opportunity bills" and would be an affirmation of the basic right of businessmen to carry on their business without dictation from powerful selling organizations.

One continuing problem in the petroleum industry is the large discount given to substantial distributors of petroleum products such as the department stores. While this association recognizes that quantity discounts are justifiable within certain limits, it believes that they can only be justified to the extent that actual economies can be proved to result from quantity purchases. The present law imposes no restraint at all on the granting of quantity discounts. The typical small operator of a service station cannot under any circumstances hope to attain the volume of purchasers of large distributors. Accordingly, it is quite possible for major oil companies to prescribe a very favourable discount for a large purchaser which gives to that purchaser a tremendous economic advantage and which is in no way related to the actual economies resulting from the large purchase without becoming obligated in any way to give any comparable price advantage to the small distributor.

Perhaps I might explain in greater detail, for example, at the retail level, and I made a note which I think might interest you. For example, one large department store buys gasoline from a major oil company at two cents below the wholesale tank wagon price charged to the trade. This department store purchases in railway tank car lots and takes delivery of the whole carload at the one time. We feel that the discount is justified and this firm passes the savings along to the consumer. This we feel is fair competition.

Another department store in the same area, who operate several very large service stations, also purchase gasoline at a discount which we are informed is

three to four cents below the posted wholesale tank wagon cost. But in this case they do not purchase in bulk quantity.They take their delivery by tank wagon lots—the same method and size of delivery that applies to service station competitors. This we feel is unfair competition. Again we suggest that these favourable discounts should be made to apply to the trade, so that they could compete in offering such savings to the public.

Another situation which I would like to report on briefly is the question of what we call in the trade consumer pumps or industrial accounts.

We appreciate that these people may not be direct competitors, but some of our service station people have been placed at times in a position where they are competing with their supplying oil company. While it is appreciated that the present law endeavours to prohibit price discrimination between retail competitors dealing with the same supplier, it does not prevent discriminatory prices being quoted by a supplier to a "commercial account".

By commercial account we mean that the commercial consumer may be provided with a private pump, by an oil company, and he obtains his supplies directly from the oil company.

For example, in one case we have some soft drink companies who no longer deal with their neighbourhood service station. The supplying company has installed a "private pump" for their use. It is reported on good authority that the oil companies are supplying gasoline to these firms at 3½ cents below the wholesale tank wagon price they charge their own service station dealers in the same area.

It is not a question of volume, since the purchases of the soft drink firm are only a small fraction of the purchases of even the smallest service station. It is not a question of delivery—since the service station is required to take a minimum of several thousand gallons at a time, while they are prepared to deliver a few hundred to the soft drink firm.

It is not a question of credit, since the stations are required to pay cash on delivery, while the soft drink firms are charged and billed.

We suggest that these favourable prices being given to some commercial accounts should apply throughout the trade and the savings passed on to the public.

In our submission it is necessary to protect small distributors by enacting a provision similar to that occurring in section 2(*a*) of the Robinson-Patman Act of 1936 limiting differential discounts to those "which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities" in which commodities are sold or delivered. We believe that this "cost justification proviso" is essential to the control of quantity discounts or other advantages which may be conferred by suppliers upon large purchasers.

In making this submission it is not part of our purpose to suggest that discounts should not be passed on by suppliers through retailers for the benefit of the public. Our point is that these savings, which the major oil companies presumably are capable of making, should be spread equally throughout the whole distributing system and not confined to the favoured large organizations.

This industry has particular knowledge of the provision of the present prohibition against re-sale price maintenance by large suppliers or branded goods. While the association approves of the prohibition against re-sale price maintenance as being an affirmation of the retailers' inherent right to control the merchandizing of his products, it feels that an unintended result of the present law has been the large degree of control which particular suppliers have been able to fasten upon retailers purchasing from them.

The present law prohibits the prescription of minimum re-sale prices but does not prohibit the prescription of maximum re-sale prices by suppliers. In

one instance the supplier of a well-known branded article raised its price to the retail service station dealers and at the same time advertised in newspapers that the re-sale price to the public was being reduced. By this device, the manufacturer was able to attract a considerable amount of public good-will which was purchased solely out of the profits of the retail service station dealer.

During October, 1960, a large manufacturer of spark plugs advised his wholesale distributors across Canada that he was concerned regarding inflation. He therefore announced that effective on November 1, 1959, the retail price on his plugs would be reduced from $1.05 to .95 cents each. At the same time he announced that effective the same date, the wholesale price to the retailers would be increased by six cents. This did result in arbitrarily taking 16 cents out of the retails dealer's profit, and forcing the retailer to absorb the manufacturer's increased costs.

There is nothing in the present law to protect him from this high-handed action by his supplier.

In a similar manner, oil companies wishing to enhance their position, and maintain competitive retail prices, have forced dealers to absorb costs by prescribing a selling price—which may not be stated as a minimum price—but which has prevented dealers from passing on increases given to them by their suppliers.

Another abuse which has developed under the cover of the present legislation is the device of supplying gasoline on consignment to service station operators instead of by outright sale. In certain cases a major oil company owning and leasing a large number of stations in an area will select a few strategically located outlets and operate them on a commission or "C" type basis. By reducing prices in these pilot locations and forcing their other leased stations to be competitive they can completely dominate and control a large marketing area. Such practices have led to another situation. Dealers who find they no longer can exist under such conditions are forced to take gasoline on consignment and can then be directed to sell it at whatever price might be dictated by the supplier, and the operator becomes a mere tool in the competitive struggle between large oil companies for an increased share of the market. His selling prices are raised or lowered at the dictate of the oil companies and he is reduced to the position of merely being a commission agent.

This is the situation today in major cities in Canada. Such dealers are no longer independent business men, and price competition between such dealers at the retail level no longer exists. This retail price manipulation by major oil companies is contrary to the spirit, if not the letter of the Combines Act, and is destroying the independence of automotive retailers.

It is our respectful submission that note should be taken of the way in which major oil companies and other suppliers have been able effectively to control the prices at which their products are sold notwithstanding the clear prohibition against the practice of re-sale price maintenance. We feel that the law should be amended to prevent indirect violation of the prohibition by classing sales as being on a consignment rather than on an outright basis. We also submit that the prescription of any selling price, whether maximum or minimum, should be prohibited because the only effect of such a prescription is to enhance the power of a large supplier of goods against his retail distributors.

The foregoing indicates that under present conditions suppliers are still able to exercise a substantial degree of control over independent retailers, notwithstanding the prohibition against re-sale price maintenance. It is the submission of this association that this situation will manifestly worsen if the proposed section 34(5) is added to the Combines Investigation Act. In this connection, this association notes the apprehension expressed in the editorial page of *Saturday Night* for January 9, 1960, and elsewhere about the large

degree of control which this proposed section would give to suppliers over distributors of their products.

It is unnecessary to quote here our written submission which sets forth section 34(5) as it was last year, as it now has been changed; but these changes do not affect the point we are making except to make it worse because suppliers apparently will not have to accept personal responsibility, but they can justify their actions on the basis of reports from third parties.

It is obvious that paragraphs (*a*) and (*b*) are designed to control a practice which has come to be known as loss-leader selling. However, this association notes that a large degree of discretion is left to the supplier to determine whether or not the distributor is selling articles in a manner contrary to these two paragraphs and it is to be presumed, having regard to the unequal bargaining position between large suppliers and small distributors, that under cover of these two paragraphs the supplier will be able to enforce a very considerable degree of re-sale price maintenance if these paragraphs are enacted.

Of even greater concern to service station and garage operators is the import of paragraphs (*d*) and (*e*). It is apparently left to the discretion of the supplier to determine that the level of servicing is not such as might reasonably have been expected from a distributor or that his articles are being "disparaged" (whatever this may mean) by the distributor. Again, having regard to the unequal bargaining position between large suppliers and small distributors, it is to be presumed that if these paragraphs are enacted the large supplier will be provided with an ever-present weapon to justify withholding of supplies or termination of contractual arrangements to the disadvantage of the small distributor. While it may be objected that the small distributor might have a remedy by way of complaint under the Combines Investigation Act, it has to be recognized that the enactment of these justifications for supplier control would enable any such complaint to be challenged so that it could not be dealt with expeditiously. The expense and the difficulty of a small distributor making a complaint against a large supplier under these circumstances would be virtually prohibitive and the remedy which the law intends to give would become largely illusory.

The proposed section 34(5) will not in our judgment control any undesirable loss-leading practices and at the same time it will strike a mortal blow at the independence of distributors. The section proposed is not addressed primarily to large merchandizing organizations which might indulge in what is popularly known as "loss leader" selling. Such an organization has the ability to choose from a large number of products of different manufacturers for the purpose of creating spurious bargains to attract customers to its stores. Properly managed, it is hard to conceive that such an organization would put itself in a position where a manufacturer might be able to invoke section 34(5) against it. It is not likely that it would have to use the products of one manufacturer for purpose of loss leader selling sufficiently to create a justification for cutting off supplies. Hence, to the extent that loss leader selling is a problem, it is not considered that the presently proposed amendment will have any material effect in controlling it.

Much more serious is the apparently unintended effect which this section may have. While, as indicated in the previous paragraph, it is not addressed specially to the "loss leader" seller, it is directed at the manufacturer in such a way as to enhance his power over his customer. Against a large customer it is not to be thought that the manufacturer's power will be materially increased. However, against the small retailer it is considered that the manufacturer will now be in a position to dictate terms and conditions attaching to the sale of his product. For all practical purposes, it is considered that the introduction of this amendment will have the effect of legalizing once again the practice of

re-sale price maintenance in the relations between manufacturers and small retailers.

All of which is respectively submitted by our organization.

If there are any questions the committee would like to ask, I am sure the members of our delegation would be happy to provide the answers.

Mr. DRYSDALE: Mr. Kinneard, I am wondering if either you or Mr. Blair have any specific recommendations as to how the particular sections of the Combines Act, in your opinion, could be amended to give effect to the suggestions you have made.

Mr. BLAIR: Mr. Drysdale, we have not attempted to do any drafting, because this is the function of the law officers of the crown, but we have made three or four suggestions here which may commend themselves to the committee.

The first suggestion referred to is on page 7, where we say that there should be a provision inserted in the law to prohibit the present practice of large suppliers, such as oil companies, forcing their customers to do business with other companies of their choice as a condition of continuing to be lessees or the distributors of the oil companies' products. In other words we strike at the tied sale provisions which have tied up the retail dealers of the gasoline in this iniquitous fashion.

The second specific suggestion we make occurs on page 9 where we deal with the question of the discounts which are offered to large customers by the oil companies. It is our opinion that if any success is to be achieved in establishing some form of equality among retail dealers, then that success only can be obtained if they are put in a position costwise to compete with their competitors. Under present circumstances if one dealer, for instance, buys one thousand gallons of gasoline he is entitled to one range of discount. If somebody else down the street buys twelve hundred gallons of gasoline he might get a discount of double the amount, and it would be legal because discounts simply are related to quality and quantity. We say that these discounts, which can be arbitrarily manipulated to favour particular dealers in particular localities, should be related to economies, if any, which result from the volume purchases, in the same way as is done under the Robinson-Patman Act in the United States.

The third suggestion we make occurs on pages 11 and 13 where we draw the attention of the committee—I think for the first time—to a real gimmick which has developed from the prohibition imposed on resale price maintenance in 1951. At that time it appeared to be very sensible, to say that although no one could prescribe minimum resale prices it would be desirable to permit manufacturers to fix maximum resale prices. I think at that time it was considered that this was a sound proposition and that no harm would occur if the power were given to prescribe maximum resale prices. The oil companies, however, have used this power in a way which has destroyed the independence of the dealers.

As you gentleman know, the oil companies are the sole suppliers of gasoline to these retail dealers. If it is the desire of an oil company to try to increase its share of the market in a particular area, the oil company will go to the dealers and say "From now on the maximum price of gasoline is reduced from thirty-nine cents to thirty-five cents per gallon", but the selling price to the dealer remains the same. This is the origin of a lot of these price wars which have been getting a great deal of publicity recently. This is the third suggestion we make—that this permission to fix maximum resale prices should be taken out of the act.

The fourth and final suggestion occurs on pages 11 and 13, where we draw attention to the fact that the oil companies have been able to get out from

under the prohibition against resale price maintenance altogether by supplying gasoline on consignment to dealers. When they get them into the chaotic position where the margins are shaved, they turn around and say "You take it on consignment and we will allow you a commission". Of course, on these consignment sales—and I think the legal members of this committee will bear me out on this—the prohibition against price maintenance does not apply, and you have a new price fixing scheme established by the oil companies.

Mr. DRYSDALE: Could you file the contract to which Mr. Kinneard referred?

Mr. KINNEARD: Certainly.

Mr. BLAIR: We have two typical leasing contracts. We are trying to avoid mentioning the names of any company or products. I think the committee would prefer that we do that. One of these sets forth very clearly this terrible termination clause, and the other is a lease which contains within it the terms under which the lessee will be compelled to buy all his supplies either from the oil company or the suppliers nominated by the oil company.

Mr. HORNER (*Acadia*): Mr. Drysdale has suggested that these be tabled and printed in the proceedings.

Mr. AIKEN: I do not think necessarily we should table them.

Mr. BLAIR: We have no hesitancy about tabling them.

Mr. AIKEN: The only thing I am interested in is that this is a terrifically long bulk of contracts to have printed in the evidence.

Mr. NUGENT: Would Mr. Blair read the pertinent paragraphs.

Mr. BALDWIN: He might mark the paragraphs to which they have special reference, and before the proceedings are completed he might read them into the record.

Mr. BLAIR: Actually, the offending paragraphs are very brief. If it would be of help to the committee I could read them.

Mr. JONES: Excuse me, Mr. Chairman. Had you completed your answer to the first question— the four recommendations you had made.

Mr. BLAIR: Yes.

Mr. JONES: Is there really not another one. The four recommendations you have made, sir, have to do with the existing legislation. I believe you then have some further comment about the amendments. I notice the four specific points you have made all deal with existing legislation rather than the amendments before the committee at the present time.

Mr. AIKEN: May I ask a question before we go ahead with this particular problem. Presumably these are contracts which the supplier and the dealer sign. Am I correct in that—the documents which you have tabled?

Mr. BLAIR: Yes.

Mr. AIKEN: I would like to know what position you take on these contracts Is it your position that you have to sign them in order to get the dealership? I am merely pointing out that in the ordinary course of law, if you are not satisfied with a contract you do not sign it. Even if these contracts are contrary to the combines law then possibly even the dealer may be guilty of an offence. I would like to know what is the position you take on this? Is it merely that in order to get a dealership at all you have to sign these contracts?

Mr. BLAIR: I think the answer to Mr. Aiken's question is two-fold. First of all, if you are going to become a dealer, you become a dealer on the terms prescribed by the large oil companies. Some of these contracts contain all the restrictive conditions; others do not. The ones that do not usually contain sufficient general words which enable the dealership to be cancelled if you do not conform to the general policies laid down by the oil company.

Mr. AIKEN: In the latter case you certainly would have ground for objection. It is the first case which really bothers me; the fact that when these contracts are submitted to you and all the schedules attached to them—I have seen the agreements; they are big long pages telling exactly what you must do. On occasion I have been successful in having certain clauses struck out, merely because the oil company happened to want this dealer. On other occassions they stick to their form absolutely because the company is in a strong position and the dealer is in a weak position. If you are in a position of this kind, can legislation help you, or is it not a case of combining to force better terms out of your suppliers?

Mr. BLAIR: I think the disparity of bargaining positions between the various groups is so obvious that—I would not say it was fatuous, but it is erroneous to think it can be corrected by a dealer standing up to one of these international oil companies and saying that he wanted better terms. It is just not in the cards for him to do that.

Some, undoubtedly, with the benefit of good advice are restrained from entering into particularly imprudent transactions.

Another factor occurs, as I have been told here. Once a man invests his little bit of money in one of these service stations he is right over the barrel. The contract can be changed; the conditions can be changed, and this happens all the time. This is the sort of thing that we are protesting about; the inequality between the little man and the large company.

Mr. AIKEN: I agree with you 100 per cent, but I am just wondering if the Combines Investigation Act can help you.

Mr. BLAIR: If the combines legislation cannot help us then the question arises: where else can we go, because these operators have been right around the circle. They have gone to the municipalities; they have gone to the provinces, and they have now come to Ottawa. They have been to see the director of investigation and research and now they are before the parliament of Canada saying, in effect, that they need new legislation to get adequate protection.

Mr. BALDWIN: The question I wanted to ask was on the subject which has been brought up. The complaint that you make I think is justifiable, having in mind these stringent contracts and leases. Keeping in mind the limitations as to what this parliament can do so far as contractual relationships are concerned, have you sought from the provincial government, or any provincial government, remedial legislation against these improvident and oppressive contracts in view of the fact that the provincial governments have the jurisdiction to override these oppressive contracts, if they see fit. Have you approached the provincial governments for relief against these contracts?

Mr. BLAIR: I think there have been approaches in times gone by, but at the moment, the most helpful type of approach has been here. There is a review of this whole question of tied sales underway, being made by the restrictive trade practices commission.

This is a problem which exists on a national scale. I do not think that anybody connected with these industries feels that there is any form of effective relief unless it is by the extension of the present provisions of the Combines Investigation Act, dealing with discriminatory merchandising practices.

Mr. BALDWIN: I am not suggesting that the provincial governments might give you alternative relief. I do not have in mind just additional relief. Let us assume that the federal government can assist you with regard to the combines legislation, and keeping in mind that these are firm contracts, do you think some relief might come from the provincial government? Have you considered that source as a source of additional assistance which you might secure?

Mr. BLAIR: I am advised, Mr. Baldwin, that there has been no formal approach in recent years to provincial governments. They have discussed these matters with various provincial governments informally and have been advised that it is, in the view of the provincial governments, a national problem, and one which is within the scope of parliament.

Mr. WOOLLIAMS: That is what we call buck passing, Mr. Blair.

Mr. BLAIR: I am just a lawyer. I would not care to make a comment.

Mr. BALDWIN: I will not pursue this, but I wanted to draw it to your attention that there are a number of contractual relationships which are held to be against public policy, and provincial governments have been held to have the right to undo these contractual relationships, if they see fit.

Mr. BLAIR: Pardon me just for a moment. I did not want this part of the discussion to stop. I did not want to interrupt you, Mr. Baldwin.

Mr. BALDWIN: I was going to leave the subject anyway.

Mr. BLAIR: I see.

Mr. BALDWIN: I think we have gone as far as we can with it. I was leaving it anyway.

Going on to page 17 of your very useful and valuable statement, you say:

> While it may be objected that the small distributor might have a remedy by way of complaint under the Combines Investigation Act—

I think you have in mind possibly there the length of time which may be needed to secure convictions; in regard to possible appeals, and so on. I wonder if you have considered the benefits which might flow to your people from the amendment to section 31 which would provide that the attorney general of Canada, or the attorney general of a province may apply, without waiting to secure a conviction, to secure an order of prohibition immediately. That is one of the benefits which has been suggested you receive under the proposed change. In such an event it would appear that you might not have to wait until the determination of the legal proceedings, including appeals, but that you could request the director to approach the attorney general of Canada and apply for an order of prohibition without having to obtain a conviction.

Mr. BLAIR: I am inclined to think that anything that would speed up the process would be helpful.

Hon. E. D. FULTON: (*Minister of Justice*): May I ask a question with reference to contracts, Mr. Chairman?

The CHAIRMAN: Yes.

Mr. FULTON: I would like to ask whether the type of restrictive clause especially the tied sale type of restriction, is peculiar to these contracts between suppliers and dealers in the form of leased premises from the supplier, or whether they are common also in the case where the dealer happens to own his premises and makes an agreement with a particular oil company to be their agent. Is there the same attempt to force a restriction in both types of contract, or agreement?

Mr. BLAIR: I think in a general way the answer is, that where money is owing to the oil company, then there is the restriction. I am speaking of money owing by way of mortgage, or any other form of loan. These restrictions are worked in.

If the dealer deals independently, from his own location, which he owns, then obviously his bargaining position is better and he is not so prone to these restrictions.

Mr. WOOLLIAMS: I suppose the point you are making is that in many cases the small operators borrow mortgage monies from the company on

a 20 year pay back, and he is then restricted to operating under an agreement. That has been my experience.

Mr. BLAIR: That is right.

Mr. MACDONNELL: Reference was made to some act in the United States which I understood was supposed to have solved or partially solved this problem. Do you propose to bring this act to our attention? I think our feeling at the moment is, however much we regret,—and we do regret this type of distress of business which we have heard in the legal sense,—that these contracts that are entered into are done so at arms length, and there is nothing illegal about them. The remedy does not seem very clear.

Mr. Drysdale has just drawn to my attention a paragraph at page 9 I had not read it before.

Mr. HORNER (*Acadia*): The anti-trust act is also mentioned.

Mr. BLAIR: We make reference at page 9 to the Robinson-Patman Act which controls the differential discount. This question of trying to control the tied sales has apparently been dealt with in two ways in the United States. Their present anti-trust laws have been strong enough, as is shown on page 7, to be the foundation for a decision which declared some of these tied sale arrangements illegal. In addition we are advised that various congressmen have introduced into the United States congress other legislation which is designed to make this prohibition more effective, and which we have referred to as "equality of opportunity bills".

Mr. MORTON: I would like to ask a supplementary question in respect of these tied sales, to perhaps clarify the definition of them.

In respect to a contract between a lessee and a supplier—when you refer to sales—I take it there is a difference between the oils and lubricants, and so on, which are perhaps made by the company that supplies the gas, and the tires and accessories made by some other company? I take it you are not objecting to having to sell the gas and oils etc., but you are objecting, I presume, to selling the accessories, tires and other things, which may be made by other companies than the supplier?

Mr. BLAIR: That is right, Mr. Morton, and these gentlemen have given me very distressing examples over the past few days of the extent of these tied sales arrangements, and have illustrated what they mean in terms of dollars and cents and loss of choice to the consuming public.

Mr. SKOREYKO: I would like to ask a question of Mr. Kinneard.

Could Mr. Kinneard tell us how many lessee stations there are in Canada and how many independent stations, in percentages? I think this information is very important to the committee.

Secondly, in the first paragraph of the brief Mr. Kinneard said,—and unfortunately I did not hear the evidence given by the retail merchants association in view of the fact that I was out west at the time— that they left the inference with this committee that in the event of a price war in the service station business, the service station operators used and sold inferior products, specifically gasoline which was detrimental to an automobile engine. I would not like the committee members to think that service station operators operated without scruples. Could you clear that up for us, and tell us how Mr. Gilbert spoke on behalf of our association?

Mr. KINNEARD: Perhaps I could answer your question, Mr. Skoreyko, by taking the second part first. I think I can explain that. When there is a situation where you have what is commonly called a price war in gasoline, it is not uncommon for uninformed people to assume that probably the product has been adulterated in some form; but in point of fact, we have checked most carefully through our organization across Canada, and to the very best of my knowledge,

if that is the statement made by Mr. Gilbert, I would suggest that he does not know what he is talking about. We have found no evidence whatsoever of inferior gas being sold where there is a brand line product. I would correct that statement by saying it is simply not true.

In regard to your second question as to how many service stations there are in Canada, I would say that I am sorry that I do not have the statistics with me at the moment. I did get some figures from the bureau of statistics about ten days ago, and I think the figures at that time showed slightly less than 40,000 service station outlets in Canada. These statistics gave a breakdown for each province. I do not have the exact figure with me, but that information would give you an idea of the approximate number. It was pointed out that the garage and service station group represent the largest single service industry in Canada.

In regard to these service stations I have been mentioning, we have not got the specific figures on the number of leased stations as compared to the total. I am speaking now as far as British Columbia is concerned, and I would say I would be on the safe side in saying that at least three quarters of them would be in the leased category.

Does that answer your question? I am sorry I cannot be more specific.

Mr. HELLYER: Mr. Chairman, I would take it from reading the brief and from listening to the evidence given here that this organization is definitely against any legislation which would permit manufacturers to impose resale price maintenance in any form, is that correct? In addition to that, you have indicated that you feel that not only is it undesirable for manufacturers to have the power to set minimum resale prices, but also practice abuses can arise when they are allowed to set maximum resale prices?

Mr. BLAIR: That is correct.

Mr. HELLYER: From your knowledge, do you think these abuses could have been foreseen at the time that this provision was introduced into the act?

Mr. BLAIR: That is a very difficult question to answer. I do not think they would be foreseeable.

Mr. HELLYER: I think that is a reasonable assumption. Perhaps I could rephrase it in another way. It is not the type of practice that you would, as an organization, anticipate at that time?

Mr. KINNEARD: You are referring to 1951?

Mr. HELLYER: Yes.

Mr. KINNEARD: No, we would not have anticipated that at that time.

Mr. HELLYER: And on the basis of your experience you have been able to show that abuses can arise when manufacturers are given the power to designate and enforce resale prices of any description, maximum or minimum?

Mr. BLAIR: That is correct.

Mr. HELLYER: You have been also able to show that this can be to the detriment not only of the retailers and distributors handling these products, but also directly or indirectly to the consuming public?

Mr. KINNEARD: Yes, I agree with that.

Mr. HELLYER: It seems like a fair argument, Mr. Chairman, that if this organization obviously does believe that marketing economy prices find their own level in accordance with the efficiency of various operators, that prices should not be dictated by the manufacturers and by the suppliers, but should be left to the people doing business in the market.

Now, with respect to the provision forcing the use or sale exclusively of products supplied by, in this case the major oil company, what evidence do you have that this creates a monopolistic situation and that the public might in fact suffer, due to the restriction of competition in this field?

Mr. KINNEARD: We have had numerous reports from our membership that on a good many occasions had they been free to conduct their own business in accordance with their own business judgment, and to secure their products—I am not referring to petroleum products, but automotive parts and accessories, and so on—from the wholesale supply of their own choice, in many cases they could have purchased more advantageously on behalf of their customers than would be the case if they were required to deal with a particular wholesale distributor. Does that answer your question?

Mr. HELLYER: Yes. In other words if they had the freedom to buy these automotive parts, be they tires or batteries, from a supplier of their choice, they could in fact service the automobile user coming in from the highway with a product of equal quality but at a lower price to the consumer?

Mr. KINNEARD: Not only that, sir, but in many cases give faster service for that particular customer, if he were free to deal with a more conveniently located wholesaler, and he certainly could supply comparable products in many cases at a more favourable price.

Mr. HELLYER: He could supply as good a product, give faster service, and in some cases, lower prices?

Mr. KINNEARD: Yes.

Mr. HELLYER: So that this practice is reducing competition, providing a higher price scale to the motoring public than would be possible if the retail distributor had the freedom of action in respect to the goods and services they supply from their service stations?

Mr. KINNEARD: In most cases that would be quite correct.

Mr. HELLYER: Under these circumstances, Mr. Chairman, it would seem that these abuses should be looked at very carefully by this committee and by the minister when he considers these amendments to the act.

You have mentioned the Robinson-Patman Act in the United States which provides, as you state, that the discount should only be applied to the extent of demonstrated economies. Do you have any information as to how this would be, or what regulations could be made for manufacturers or distributors to demonstrate what economies have been and were, therefore, available to be passed on as discounts?

Mr. BLAIR: The act is administered by the federal trade commission of the United States, which is a large and fairly old organization—and I am subject to correction by Mr. MacDonald and others who know a great deal about its operation—but I suspect that in the long run it proceeds along the same lines as we do here, that it deals with particular complaints and attempts to adjust complaints when they are made.

Just as the customs department of this government, or the combines branch and others have ample powers to seek information from members of the public when their affairs are before them, obviously down here they can get figures on discounts and costs, and make a necessary determination as to whether the discounts are related to the costs.

Mr. HELLYER: In your opinion, the operative control would force any manufacturer to realize that if he granted discounts which appeared to be unreasonable he would have to prove, through some audited statement, for example, they were, in fact, in accordance with the demonstratable economies?

Mr. BLAIR: That is my impression.

Mr. HELLYER: Finally, Mr. Chairman, are there any further suggestions that this organization would have in respect to this combines legislation which are not included in the purview of the particular amendments included in the bill now before us?

Mr. BLAIR: Mr. Hellyer, Mr. Jones asked me this question. Actually the four main suggestions we make are not included in the amendments, having to do with this question of tied sales, discounts, prohibition against the fixing of maximum resale price, and the consigment arrangements of which we spoke. The only part of our brief which deals specifically with the new amendments is critical of one section of the proposed bill, where we ask that the new section 34(5) be withdrawn as being a further means by which large companies can fasten their control on small operators.

Mr. HELLYER: This is the section under which you fear there will be the re-imposition of resale price maintenance?

Mr. HORNER (*Acadia*): It would not matter to them, because they have it now.

Mr. BLAIR: Yes, we think it is a real danger, and it has all these collateral disadvantages of enhancing the power of the large companies against small dealers.

Mr. MACDONNELL: Just a supplementary question, Mr. Chairman. Could I ask whether the witnesses have any knowledge of the extent to which the American act has been used? It is one thing to have an act, but another thing to have it made use of. Have you any knowledge of the extent to which it has been made use of, and the extent to which it has done away with the abuse in the United States?

Mr. BLAIR: I do not think, as an organization, we have particular knowledge of how the American statute has been employed. Speaking of the Robinson-Patman Act, it has obviously been very important in the United States in limiting discount to the actual economies achieved. The other aspect of this—tied sales—has only been vigorously attacked by the United States anti-trust division in the last one-and-a-half years. It has been notable they have been successful in winning judgment against large companies such as Standard of New Jersey. We are of the opinion, Mr. Macdonnell, the American legislation has been helpful, and certainly the current enforcement procedures have been of assistance to the small retail gas operators.

Mr. MACDONNELL: May I suggest that if you have any further information on that, at any time, it would be helpful to us?

Mr. BLAIR: Certainly.

Mr. HORNER (*Acadia*): They say gas was sold to soft drink companies at 3 cents below what another person or agent or their association can buy it for. I wonder if this is not contrary to section 33A. If your association is purchasing the gas—maybe this contract which I have not had a chance to look at is the way you have got around it—it seems to me it would be contrary to that section.

Mr. BLAIR: Mr Horner, certainly, on first impression you would think it is, but if you look at the first line of that section it reads:

> Every one engaged in a business who:
>
> (a) is a party . . . to any sale that discriminates to his knowledge ...against *competitors* of a purchaser...

That is interpreted as meaning this, that if two retail gasoline dealers buy the same amount of gas at different prices they are competitors and therefore, the section applies. But if the retail dealer buys at 30 cents a gallon, and the soft drink company at 25 cents a gallon, they are not competitors. Actually the soft drink company should be a customer of the dealer Therefore, they can get away from this prohibition by siphoning it off to the customers direct.

Mr. HORNER (*Acadia*): Would section 33(b) be of any assistance in conjunction with section 33A?

Mr. BLAIR: Mr. Horner, I think the answer to your question really is this—and I mean no disrespect to the minister or Mr. Macdonnell: section 33(*b*) and (*c*) have been in effect more than twenty years, and nobody has ever really figured out what they mean.

Mr. HORNER (*Acadia*): I mean the new addition, section 33B—at the bottom of the page. Section 33B of the bill.

Mr. BLAIR: I am so sorry.

Mr. AIKEN: These are the amendments.

Mr. BLAIR: Section 33 big "B", you mean?

Mr. HORNER (*Acadia*): Yes.

Mr. BLAIR: That is a different thing. As I understand it, this is a proposition where a big company offers its various customers allowances in lieu of or to support advertising campaigns. This does not rise in this business where one customer buys gas for 35 cents and another at 30 cents.

Mr. HORNER (*Acadia*): Well, that is true to quite an extent, but taking that along with section 33A, it seems to me it would tie up pretty nearly every combination a company would try to take advantage of in a price concession, or any other advantage at the time an article was sold to such a purchaser. I would think section 33B—though we will see the practical application of it—may be of some assistance to your association.

You stated on page 17 of your brief:

> The proposed section 34(5) will not in our judgment control any undesirable loss leading practices—

Why do you make that statement? Have you any belief, other than that it is not helping you and, therefore, it will not help someone else?

Mr. BLAIR: What we say—and this is, of course, an opinion expressed by the association—is that if there are people in Canada now who are abusing the merchandising process they are, generally speaking, people who are well-financed and are able to take and choose their suppliers from a large number of different suppliers. I do not think that operators of that kind or calibre are likely to get scared very much by this type of legislation, if there are people of that kind.

But it is the little fellow who might be willing, because of the economics of his operation, to offer a lower price on occasion, or otherwise exercise his judgment and intelligence in the conduct of his affairs, who will be put right under the thumb of the manufacturer.

Mr. HORNER (*Acadia*): The little fellow, if he is running his own business—in other words, if he owns his business, or is the largest shareholder in his business, or something like that, he can also go to another manufacturer of that article. It may be beneficial. I am not giving a definite opinion; but it may be beneficial. You consider loss leadering a problem in your association?

Mr. KINNEARD: I would say loss leader selling is not such a problem in the automotive business as it might appear to the storekeeper association. The one part that does give concern to our members—and, perhaps, undue concern—is because of the fact that in the proposed remedy there does not appear to us to be any guarantee of prohibition against loss leader selling at all. If I read it correctly, it seems to say that if in the opinion of some manufacturer it seems that loss leadering is taking place in one of the retail accounts, he may cut that man off from supply. We take it a step further. Perhaps he may cut off one dealer doing one of these things, and be under no obligation whatsoever to apply

the same medicine to another account. On that basis it might lead to some discrimination.

Our concern is not so much with the storekeeper people, but it appears to give rather arbitrary control to the manufacturer of a product, without requiring him to apply the same to all the accounts, or to do anything about it, if he did not feel he wanted to do so.

Mr. HORNER (*Acadia*): Naturally, he is not going to be too eager to use it, because he could be subject to prosecution, unless he had a good reason for his action; and it would fall within one of these five categories.

Where loss leadering may not be a problem with your industry, I feel then you are less qualified to say whether or not the amendments in five are going to be beneficial or not to the general public. That is what I would gather from that.

Again, on your recommendations that this is going to reinstate resale price maintenance—I am one of those gentlemen who do not want to see resale price maintenance reinstated, but in your industry you have it already, as I gather from your brief and your explanations of it. So I cannot see how it could affect you in that way.

Mr. KINNEARD: I appreciate your thoughts with respect to the fact that the loss leader may not apply so directly in our industry as it would through the storekeeper group. But I would also point out that in so far as our garage and service station operators are concerned, I think that it is quite well recognized across the country—that our particular class of retail business is under perhaps more coercion, direction and control than would apply to many other types of business, such as the particular stores you have mentioned. For that reason our people are far more sensitive to anything which tends to increase the power of the supplier over them. If we are not suffering so much from the effect of loss leaders, we are qualified to state our concern about anything which would tend to increase the control rather than to alleviate the pressure our people are under at the present time.

Apart from loss leaders, generally, our trade has been most seriously concerned about the effects that might accrue from the last two paragraphs, (d) and (e). Perhaps they could be more closely aligned to our garage and service station business. When it comes to such things as "disparaging" we have had some of our people seeking an adequate explanation of what you mean. If one of our operators was supplying spark plugs for your car and suggested one was better suited to fill your needs than another, could he be accused by a competing company of "disparaging" their plug? These are matters of concern, particularly when you come to the level of servicing. I think the name "Service Stations" is, in fact, indicative they are involved in servicing very directly and are subject to considerable control from their suppliers. They are very much concerned lest somebody should take advantage of the way in which the section is worded and apply the level of the servicing. It might mean the company representative could call and say that they had not cleaned out the wash room and it was not up to the degree of servicing they expected, and they could cut him out. If that is the intent of that, then our people have a right to be concerned; perhaps we are unduly concerned; but we have to read what is in the amendment.

Mr. HORNER (*Acadia*): I agree if this applied to your organization; but, as I understand it, 85 per cent of the retail service stations are under a lease. If Imperial Oil would cut one of your service stations off because the wash rooms were not clean, they would be cutting their own throat, and I fail to see where that would apply in that regard.

Mr. KINNEARD: I think the operator would lose his investment along with it, which is a matter of considerable concern to the man involved.

Mr. HORNER (*Acadia*): That may be, but they would still lose their outlet?

Mr. KINNEARD: It might be just as well to say this: there has been a well-known expression that service stations never go broke, but it is just the operator who does.

Mr. HORNER (*Acadia*): That may be true, I do not know; I have not had the opportunity of running a service station. But I do not think that section 34(5) should be excluded from the act. I think it may be beneficial to loss leadering. I cannot see where it applies too much to your position, because you are buying from the consignee. That seems to be the root of your problem. You have a maintained selling price right now. I do not see where it would apply to your case.

Mr. KINNEARD: Would it be implied that subsections (*d*) and (*e*) are directed to loss leader selling? I did not get that meaning from it.

Mr. HORNER (*Acadia*): I think the whole section is devoted to loss leader selling.

Mr. WOOLLIAMS: I would like to direct first some questions to Mr. Blair.

In reference to this point raised by the witness as to discounts and prices, and the differences between various dealers or chain stores, like Simpsons Sears, if the industry in question is complaining about discrimination, one against the other, surely, those particular prices could be controlled by provincial legislation, just as the land contract rights act and the civil land rights act of Saskatchewan control agreements of sale and purchase of mortgages in Saskatchewan—they could be controlled by provincial legislation?

Mr. BLAIR: I think they can be controlled within a province.

Mr. WOOLLIAMS: One other question—and Mr. Horner pretty well covered that: I would like to get from Mr. Kinneard one answer. Are you against the loss leader practice? Is your industry—when I say "you"—

Mr. KINNEARD: Our industry certainly is not in favour of loss leader selling.

Mr. WOOLLIAMS: I take it that in your industry the petroleum products which come from the refinery are not subject to loss leader selling such as, say, the manufacturer of electric appliances or the manufacturer manufacturing clothes?

Mr. KINNEARD: I would say it does not apply as frequently.

Mr. WOOLLIAMS: Thanks very much.

The CHAIRMAN: Mr. Nugent is next.

Mr. NUGENT: I think we should bring into perspective some of the problems with which we are dealing. It seems to me the problem varies with the type of service station operator, and these could be put into two or three classes, more or less, depending on the amount of the investment. Would it be true that the complaint, or most of the abuse the trade complains of, arises out of what strictly is a leased operation deal where the operator goes into complete premises and invests a part of his money and enters into a lease which contains all the provisions as to how he is to conduct his business? Is not this the type of business which gives your association the most trouble?

Mr. KINNEARD: I would say that the items which we have complained of would not be confined to lease service station operators.

Mr. NUGENT: You did not answer my question. I want to know if the majority of the complaints arise out of the leased operation type of business.

Mr. KINNEARD: I think the answer would be entirely obvious. There are far more of them than anything else and obviously the majority would come from that source.

Mr. NUGENT: And the majority of the trouble comes from the clauses in the contracts these people enter into because with these dealers the companies can get away with practices which they could not with others.

Mr. KINNEARD: That might appear to be the case, but it certainly is only in respect of some of them.

Mr. NUGENT: Would I be far wrong in stating that most of the gasoline service stations on a good corner lot with four pumps and three stalls cost in the neghbourhood of $100,000 to put up.

Mr. KINNEARD: That would depend on the property value but I think that would be reasonable in a good number of cases.

Mr. NUGENT: A leased operator would go in with a very small percentage of that amount, perhaps up to 5 or 10 per cent of this amount.

Mr. KINNEARD: There have been those who go in with up to 10 per cent.

Mr. NUGENT: But it is not unusual for a operator to go in with a sum as small as $2,000 or $5,000?

Mr. KINNEARD: In an operation such as you describe I think it would be extremely unlikely.

Mr. NUGENT: Somewhere between $3,000 and $10,000.

Mr. KINNEARD: In most service stations the investment would run between $3,000 and $10,000 I think on the average.

Mr. NUGENT: So we have a situation wherein the operator has a small investment of $3,000 to $10,000 and the company has an investment of anywhere between $50,000 and $100,000. Is it a fair submission to say that in agreements the person who has the smallest sum of money has the smallest voice as to how the operation is run?

Mr. KINNEARD: No. I think in most cases the supplying companies make it a major point in their advertizing to convey to the customer generally the fact that these are independent businessmen operating their own independent businesses in a community.

Mr. NUGENT: It does not matter what it means to the public. The point is, in so far as the man investing his money—the lessee who operates the station—is concerned he knows he is putting anywhere from one-twentieth to one-tenth of the money which is being put in by the other party and the same as in any other business the person who puts in only five or ten per cent of the shares only expects to get a five or ten per cent voice in running the business. Is that not accurate?

Mr. KINNEARD: Not at all. In one case a piece of real estate is leased or rented. Another man could own his own business.

Mr. NUGENT: You describe it as renting a piece of real estate and yet you have produced before this committee contracts which show it is a long way from being a leasing of real estate and in fact is an agreement between them as to how a business will be run, how he will get his supplies and who he will deal with. Surely you would not contend that this is a leasing of real estate.

Mr. KINNEARD: He pays a rental for the property and having paid the rent he should be free to conduct his own business in accord with his own business beliefs.

Mr. NUGENT: In accordance with the contract into which he has entered.

Mr. KINNEARD: The contract to which you refer very seldom is included in the lease.

Mr. NUGENT: Surely you are not contending that for the small amount of money he invests that anyone is going to invest a huge sum of money without the numerous safeguards there are in these contracts? Or, to put it another

way, is it not quite often the case that an operator may go in and find that the amount of business which can be attracted to that service station falls off, the capital cost of the investment there cannot be justified, and there is not a fair return on the money invested.

Mr. KINNEARD: I do not doubt there are a few cases in which that might be so.

Mr. NUGENT: And the small operator loses his small investment and the oil company is faced with the vacant premises and has the problem of trying to unload them, or get a succession of suckers to put their money in, or continue to lose many times the amount of their investment.

Mr. KINNEARD: I think the expression you used is well taken. I think the usual practice is to find a succession of suckers, because they find it more advantageous to lease it out than to operate themselves. If that is not so I would suggest there would be fewer service stations.

Mr. NUGENT: Certainly it is an understandable motive. A man is likely to spend a lot more time in looking after a business in which he has a financial interest than he would if he worked just for wages.

Mr. KINNEARD: You mean this would be a means of exploitation which perhaps would not be possible in the case of a paid employee of a company. I think, once having the man with an investment involved, that man is not in a position to quit even when he finds that the conditions are not those which he anticipated when he entered into the lease.

Mr. NUGENT: Have you any idea of the percentage of your lessee operators who would be able to come up with the finances necessary to build a service station without the financial assistance of an oil company.

Mr. KINNEARD: I have no figures on that.

Mr. NUGENT: I have just one more point. This arises out of what Mr. Horner said in relation to section 33(1)(*a*) and your example of the soft drink company being able to purchase gas at a better price than the service station operators. Would you, Mr. Blair, agree with me, in respect of section 33(1)(*a*), that if the term "competitors of a purchaser of articles" meant competitors in purchasing from the suppliers as well as just competitors of the business, that that would give you all the protection you need.

Mr. BLAIR: That would be an excellent amendment to cover the problem we are mentioning.

Mr. NUGENT: That would, or should, take care of all those examples that you have given of unfair advantage and the supplier dealing directly with truck companies.

Mr. BLAIR: I may misunderstand you. You are not suggesting that the section as now worded is capable of that interpretation?

Mr. NUGENT: It would seem to read that way. I regret that I have not bothered to look up the law, but when it is from the criminal code I would gather it has been interpreted differently. I was trying to get your opinion, if an amendment is necessary, as to the value of that amendment.

Mr. BLAIR: That is the type of amendment which would cure our situation.

Mr. DRYSDALE: Mr. Blair, would you comment on a statement made on page 17 of the brief. This is the statement:

> The expense and the difficulty of a small distributor making a complaint against a large supplier under these circumstances would be virtually prohibitive and the remedy which the law intends to give would become largely illusory.

I am wondering how the expense has increased through the amendments in this act over what you had in the previous act?

Mr. BLAIR: I do not say this in any way as a reflection upon the statute or the way it is administered. Most of the people who are members of this association are operating very close to the line and simply cannot afford to get into long prolonged hassels about the treatment they are getting from their suppliers. Moreover, the fact has to be recognized that it would be very unwise for them to start laying complaints against the oil companies because of fear of reprisal. I think it is proper for me to mention that there is one city in this country where we know that certain things are going on which may or may not be contrary to the law, but nobody will put his signature on a piece of paper, because they all are afraid.

Mr. DRYSDALE: I can see that particular difficulty, but the statement here is that it is an expense difficulty. I was specifically wondering how is the expense increased because of the amendments in this act over the expenses which you had under the previous act.

Mr. BLAIR: I would think obviously the expense would come in part from having to obtain professional advisors but there is also expense in terms of time.

Mr. JONES: The prohibition provides an alternative remedy in which there is less time under the amendments, and I take it therefore that the amendments would be valuable.

Mr. BLAIR :They might be helpful.

Mr. DRYSDALE: But basically you still have the same limits in the new act as in the old and in fairness there would be no additional monetary expense.

Mr. BLAIR: I think possibly there may be some misunderstanding. We are not suggesting it will be more expensive or more difficult.

Mr. DRYSDALE: That is the impression I had which I wanted to clarify.

Mr. BLAIR: It is inherent in this kind of proceeding that where you have somebody complaining in Vancouver and the investigation initially is in Ottawa, you cannot get this kind of thing underway overnight.

Mr. MCINTOSH: I was interested in Mr. Blair's answer to the first question he was asked this afternoon when he stated that he was not quite sure whether or not this was the place to come with their problem. In respect of these big oil companies—I am not upholding their stand by any means—it would seem reasonable that if they had invested this amount of money in these service stations that they would take steps to see that quality merchandise is carried in the service station which bears their name, whether it be Esso, B.A., or whatever it is. I would compare it to the case of the manager of a store which I might own. I would want certain products carried in that store for reasons I know best. It may be that my manager wants to carry inferior quality products and he might be able to sell them, but I do not want my store to get that kind of a name. Perhaps the oil companies have the same reason for wanting you to carry certain products.

When you sign the lease, do I understand that you have to sign another agreement called, I think, a products contract? Is that done at the same time you sign the lease for the property and the building, or is it all tied into one? Are there two separate agreements?

Mr. BLAIR: I think there has been some misunderstanding here about these contracts. There are perhaps ten or more major oil companies in Canada and they all have a different method of approach to this question, although they all come to the same result. Some of them prescribe in their leases that the operator shall carry certain products apart from the products of the oil company. Others may have collateral agreements, and there are still others who just come around and tell the people that they are going to do thus and so and if they do not the lease will be terminated. I say that because I have a feeling there is a suggestion creeping into this discussion that all of this is a matter of

contract between the oil companies and these dealers, when in fact it is not. It is a question of the control which the large companies impose upon the dealer.

That leads me to the second point with which I would like to deal. It is not to be thought that the retail dealer is a pauper; he may be sitting in a property that is worth $100,000, but you can bet that amount of money that he is paying enough rent so that the oil company can recover its investment. This is where I might take issue with Mr. Nugent who has now left the room. There may be an odd case where he is not paying enough rent, but that is pretty rare. Therefore, your analogy of the man who is the manager, I do not think is relevant. This man is an independent operator; he has put enough money into this business to satisfy the oil company that he can run it.

Mr. McINTOSH: The operator who owns his own station is not restricted to the product he will handle. Could he not go out and buy gasoline at the same price the soft drink people buy it or buy tires cheaper then you can buy them wholesale? There is nothing to stop him going out and making a deal with any tire or gasoline company he wants to. In the retail merchants brief, either in the questioning or during a discussion afterwards, I understood that there is a division between your people and some of the other operators of service stations; some belong to the retail merchants association and your people do not.

Mr. KINNEARD: In fairness to the independent operators I should say that we had an occasion not too long ago of a person who endeavoured to secure supplies. He was an independent operator. He owned his pumps and equipment. He asked the various companies if they would supply him with gasoline to sell, because at his particular place he was not near anyone else and he wanted to cater to the trucking and tourists business. He was told by each of these companies that unless he took an exclusive contract that they would not supply him at all. He could be supplied, but not by more than one at a time.

I have never heard of a contract where a product was not coupled with the contract whether or not he was independent.

Mr. JONES: That would be a combine in restraint of trade. That is in contravention of the present combines act.

Mr. KINNEARD: They simply said they would serve him but only with an exclusive contract with their company and not if he handled another brand of gas at the same location. That is what the man was informed. I understand it is the general practice that they will enter into a contract with an independent provided there is not another brand sold at the same location. The operator has to choose the one he wants to handle. Where you are selling a brand product of any oil company it is common practice to require a products contract to go along with it.

Mr. JONES: That is an exclusive contract?

Mr. KINNEARD: That would be an exclusive contract with whatever company he deems to do business with; and he can, of course, choose whatever company he wants to do business with. He would have a contract for a period of time with whatever company would be involved.

A question was raised with regard to the automotive industry. I have no quarrel with the storekeepers' association at all; but I can tell you in all sincerity that as far as British Columbia is concerned there is no effective division, or branch, or organization in British Columbia attached to or affilated with the retail merchants' association in any respect that they have had any meeting with the trade and the operators in that province for at least 10 years; and I think they would be unqualified to speak for the trade in British Columbia.

I have made similar inquiries in other provinces, and the same applies in the province of Ontario, the province of Quebec, and also in other provinces, I understand. I am not familiar with all parts of Canada; but to the very best

of my knowledge, the retail merchants' association do not conduct trade meetings, nor do they have an organization of automotive men.

Therefore, if they are speaking, it would be presumably because of someone they had talked to, rather than a decision or opinion expressed collectively by a group of organized service station operators.

To suggest there would be a difference, or a split, in opinion in our industry would, in my opinion, not be correct.

Mr. McINTOSH: I did not want to suggest that. I was trying to clear up in my own mind why a large group of retailers would seem to approve of the amendments to the act, and then a comparatively small group—and I am not saying that to belittle you—such as you people are coming along and saying you do not want this at all—when groups in grocery, furniture, clothing, and everything else, think that the act is all right. From the retail merchants' brief, they thought it was all right.

Why does a small group like this come along and say that they do not want this? Is it because of some other problem, that could be fixed up by amending some other act, rather than this one?

It seems to me that the retail merchants did say that there were some of you people in their group.

Mr. KINNEARD: I believe that in Saskatchewan, Alberta, and Manitoba some automotive service stations subscribed to the collection service of the retail merchants' association. How many, I am not aware. I am only pointing out that they do not have an organization of automotive trades.

To answer the question that was asked, I would think that the disinction to be made is the fact that our industry is a little different. For instance, I am not suggesting that the merchants are not quite qualified to speak for storekeepers; but other than the fact that it is indeed a retail business, there is nothing in common between a man who operates a store as a storekeeper and a man engaged in a garage, motor dealer, or service station business. It is retail; but it is quite far and apart from any of these businesses of the storekeeper and his product.

We are suggesting that the storekeeper people who perhaps would seek legislative protection from the competition offered by loss leaders are perhaps prepared to pay a price for that protection that our people are reluctant to pay. Therefore, we do not feel that it applies to us, and we do not feel in a position where we can support the retail merchants, for that reason, that I think it is quite obvious that the merchants presentation would undoubtedly be referring to the storekeeper people for whom they speak—and it could hardly apply to us.

Mr. McINTOSH: You said loss leadering does not apply to you at all?

Mr. KINNEARD: No, I mentioned the brief that the retail merchants' association presentation was presented we presume, on behalf of the storekeepers they represent, and not on behalf of the automotive trades industry.

Mr. MACDONNELL: I want to make one general observation, Mr. Chairman, and it will be very brief. I think I have been perhaps stimulated because of a remark made by Mr. Blair. He said that it is not a matter of contract about which we are talking, but a matter of control.

I want to point out, Mr. Chairman, that what we are dealing with is contract; and, of course, contracts were regarded as absolutely sacred a generation ago. It would have made people turn in their graves to hear what we are talking about this afternoon. But we have come a long, long way in our attitude, with regard to the extent to which governments control. We have interference that we would never have dreamed of.

But, nevertheless, do not let us fool ourselves. This is a difficult thing. When a man freely enters into a contract, he enters into that contract in a legal sense; and all these people have entered into contracts in a legal sense.

What we are seeking to do is to relieve them from the effects of their contracts, and I suggest it is a very difficult thing.

I have been trying to put myself in the position of the drafters of the sections that are suggested, and I suggest to you gentlemen who have come here today that perhaps you are taking this job much more lightly than you should. That is why I am so anxious to find out what happened in the United States, because we have these suggestions which you make sound quite easy.

You say that it is necessary for the government to do so-and-so; but nevertheless the government is going to come face to face with people who have signed contracts in good faith, and freely.

For instance, one of the things that came up this afternoon was this. I can quite imagine that when it was suggested it was regarded as a very great contribution by the lawyer who suggested it. One of the devices they use, selling on consignment, is as old as the hills. That is a contractual right which is just as sound and basic as any other contractual right you can think of.

Mr. JONES: In fairness to Mr. Blair, who mentioned that, Mr. Macdonnell, I think he was referring to the use of consignment sales to avoid loss leader selling.

Mr. MACDONNELL: The only reason I am mentioning it is to bring out one of the contractual rights that people can resort to for the purpose of reaching their end.

I was in business for years. This world would be a better place if there was more live-and-let-live in business. I am not sure that business would not be better carried out if we did not spend so much time trying to get the last dollar and if we were more ready to let other people get a dollar as well as ourselves. But now we have hard-boiled people who have men who think of clever and devious ways of extending their business. That is what we are facing. Do not forget that the law of contract is one of the basic laws of principle by which we exist, and it just cannot be overthrown easily.

Mr. AIKEN: Mr. Chairman, my question is like Mr. Macdonnell's and perhaps it will close it off. I hope that the gentlemen who have appeared do not think we have been riding them too hard; but in this committee we are trying to get suggested amendments or improvements to the legislation that has been made.

I seem to have gathered, also, and I would just like one of the gentlemen to answer this, that there are two suggestions which they think will help them, as automotive dealers, in this legislation.

The first one was under proposed section 33A, which the association feels is too loose and does not cover people who are not competitors.

I should like to ask if the spokesmen think that the wording of 33A should be tightened up to cover people who are not competitors, and if that would help them to a considerable extent in their own problems.

Mr. BLAIR: That, I think, is the way that it would be done. We have tried to avoid being presumptuous and saying how these things should be done; but if I were the draftsman, I would attack it that way.

Mr. AIKEN: The second one follows under section 34, subsection (5). This association, I think, definitely has problems of its own that do not relate to the grocery trade, and so on, by reason of the set-up.

I rather gathered that the main objection to section 34, subsection (5) was the last two subparagraphs, which do not deal with what you would call loss leadering; but merely to the supplier in a position to cut you off if he wants to deal roughly with you—not because you are engaging in loss leadering, but merely because they are going to find some excuse to clobber you if you are not following along with what they want.

You feel that the last two subsections of that go too far in remedying the situation of loss leadering? Are those the two things that would help you?

Mr. KINNEARD: Those are two points that I think would be of very considerable assistance.

Mr. DRYSDALE: I have a supplementary question, Mr. Chairman. Since Mr. Blair pointed out that they did not, more or less, have the temerity to suggest the amendments, I think that, if they would like to, they should be permitted to file any specific suggested amendments with the committee, because I think the gentlemen present have seen the difficulties that we have in framing the proper amendments. I know it would be of invaluable assistance to the committee, if they wish to do that at a later date.

Mr. BLAIR: If it would be of assistance, Mr. Chairman, we would be glad to do that.

The CHAIRMAN: That is why you are here, to be of assistance to us in respect to this legislation.

Mr. MORTON: Mr. Chairman, this is along the line that has been carried on by Mr. Nugent, Mr. Macdonnell and Mr. Aiken. I think that if we are going to understand the problem of the people before us, we have got to come to grips with actually what we are trying to do here; and the more I hear of it—the more I believe we are getting mixed up—whether you say it is with or without contracts. Your group is an unique group in that it is different from most retailers. You are dealing with a supplier with whom you make a contract. Then you deal with a supplier who is your lessor and may also be your mortgagor. Because of his unique position he endeavors to have more control over the business than would be the case in the case of other retailers, where the mortgagor and lessor remain outside the operation of the business which is concerned. Because of the close relationship here we have, in effect, a contractual basis. When your relationship starts you must enter into some sort of a contract. It is hardly fair when Mr. Nugent made the observation that because his supplier has a greater investment he should have more control because, actually, he is trying to use his position as a lessor and/or mortgagor to take day-by-day control of something he should perhaps have less control in. Because if his lease is drawn well and his mortgage and so on are drawn well, he is well protected. I think in that respect your observations in respect to section 34(d) and (e) are not really valid because you could be protected there by your contractual relations, by which other merchants cannot be protected, because in most of your leases or contracts with your supplier they would set out the condition in which you must keep it. If they do not, I think there is the basis you have to be. Perhaps the practice had been too lax in the past. Perhaps what you have to be protected against is the arbitrariness of one supplier, because you cannot easily change from one supplier to another. There is Mr. Macdonnell's concern that we are, in effect, trying to go back over past relationships and relieve you of the contractual situation you got into through the provisions of this act. If we were to take these sections out which you object to, we are going to take away a remedy which is perhaps necessary in another field of merchandising. We think this should be here, to protect this other group; but perhaps we could find some way of protecting you in another way against the possibility of being forced to sell products of a designated supplier by your main supplier. Is that your problem?

Mr. BLAIR: Our problem is unique; but I think, in view of Mr. Macdonnell's comments and others, I should say a word about contracts. Every business arrangement is based upon contracts: there is a contract to buy; there is a contract to sell. All of the combines legilsation interferes with contracts. It is illegal for people to contract to fix prices or to rig the market. It is illegal

for a fellow to make a contract to supply eggs at one price to one dealer and at a different price to another dealer. What we are asking for today is just what this combines legislation has been doing, in varying degrees, for a long time—that is, interfering with contracts where parliament itself thinks the contractual rights create what once was called a public wrong.

Mr. JONES: If I might ask a supplementary question arising from what you said now, and your earlier remarks that contracts are primarily a provincial matter: I take it you suggest that when oil companies combine to impose onus contracts, that should be an offence under the combines law. Is that a summation of your position?

Mr. BLAIR: Yes, and we say—and I think with some justification—these businesses are conducted on a national scale. It had been judged by the parliament of Canada in times gone by, that it was a crime to fix prices or a contract to provide discriminatory discount. There is nothing new or revolutionary in asking parliament to regulate other types of contracts which are detrimental and hazardous to all types of business.

I would like to say one word about Mr. Morton's question. A lot of the things these dealers are subject to may or may not be written on paper, But it is not all a question of what is written down. A man goes in and he is paying a huge rent per month to an oil company for a service station.

Now he has no real freedom to leave that place and to go down the street and open a new business. He is in there, and if that oil company should come along to him and say "from now on you are to buy your tires" or such and such from such and such a person, and "you have to do this" or to do that, then he has to do it, or he has to get out.

That is the kind of dictation we are complaining about.

Mr. PICKERSGILL: I have a supplementary question. Is not what you are objecting to a proposal to change the existing law? And if parliament should leave the law alone as far as section 34 is concerned, you would be quite satisfied? I am asking the question and perhaps the witness might be allowed to answer it.

Mr. BLAIR: I think the answer would be that we would be less dissatisfied if this part of the Law was not changed. We have offered what we think are very valid objections in respect to subsection 5 of section 34. But apart from that we have made four suggestions for other changes in the law.

Mr. PICKERSGILL: I was referring only to section 34, to try to get it clarified in my own mind. But I take it you would be better satisfied with the law as it is now than with the proposed amendment?

Mr. BLAIR: That is correct.

Mr. MITCHELL: I shall address my question to Mr. Kinneard. I understood him to say that his association is not a member of the Retail Merchants' Association. Is that correct?

Mr. KINNEARD: No, we have nothing to do with stores. Ours is the automotive trade.

Mr. MITCHELL: I thought that Mr. Gilbert asserted that you were a member of the Retail Merchants' Association, when he gave evidence previously; but regardless of whether he made that assertion or not, you do not agree with his submission?

Mr. KINNEARD: We do not support the representations of the Retail Merchants' Association.

Mr. MITCHELL: You are aware that he recommended to this committee that this bill be received and passed as it is now?

Mr. KINNEARD: Yes.

Mr. MITCHELL: And you are aware of the various representations made to this committee before you were here, in which they have all suggested that specific changes be made in this proposed legislation? And you are aware that one association suggested that this bill be not passed as it is at present, and that they submitted improvements in the bill?

Mr. KINNEARD: I have not sat in at all the hearings, but I presume that is correct.

Mr. MITCHELL: And you are also afraid, I think, that this legislation will give more protection to manufacturers—I suppose a supplier of gasoline is a manufacturer—and you are afraid that it will give more protection to the manufacturer than it does to the retail outlet.

In other words, he has more active opportunity to go before the court to correct the situation of the outlet, than you have, in the same case to object to anything that is affecting your business, shall we say, in the way that he suggests?

Mr. KINNEARD: We had hoped that the legislation that the government is considering would provide a greater degree of freedom for the smaller retail operator, but we are concerned lest this proposed amendment have the opposite effect.

Mr. MITCHELL: That is fine. I want to take issue with Mr. MacIntosh in what he said when he suggested that the Retail Merchants' Association were representative of your organization. I suppose that is not correct. I submit that the retail merchants association are representatives of individuals of these associations. The individual who is an operator of an individual store, or whatever type of retail business it may be, becomes a member of his association. I submit that it is the Canadian Retail Federation which is more representative of all associations, and I submit that many of the associations in their own names are members of the retail merchants federation through the membership of their own secretary-manager in that particular federation. For that reason I feel that a proper and more complete picture of retail operations in the dominion of Canada would be forthcoming to this committee if this federation was called to give evidence.

The CHAIRMAN: I received today a letter, Mr. Mitchell, from this federation of which you speak, but they do not make any request to come before this committee.

Mr. MACINTOSH: I think that I should apologize to this group for some of the remarks I made. One of the members came over and asked me what I meant by "a small group". What I was trying to get at was that there may be 100 different types of businesses represented by the retail merchants association, and that this group was just one. I do not know how many retail merchants are represented, but you are just one group and, in that way, were small.

Mr. MITCHELL: I would like to ask a question in relation to what you have told me, Mr. Chairman. Have all the associations or witnesses appearing before this committee come voluntarily, or have they been asked to appear?

The CHAIRMAN: They have all come voluntarily.

Mr. HORNER (*Acadia*): I would like to ask one short question, Mr. Chairman. In your opinion, Mr. Blair, do you think the Combines Investigation Act and the criminal code should be amended in any form whatsoever?

Mr. BLAIR: We have made four specific proposals for amendment, and then we have softened this by suggesting that one should not be made.

Mr. HORNER (*Acadia*): I realize that, but do you think that some specific amendment under bill C-58 should be made to section 33 which would be beneficial to your association?

Mr. BLAIR: I am going to dissociate myself from any general capacity to comment on this legislation. There may be many people, as individuals, who have views on combines law, and so forth; but so far as we here today are concerned, we have no comment on or knowledge of some of the other issues which are involved in this legislation, and no intelligent comment which we would care to make about it.

Mr. HORNER (*Acadia*): I was asking you in regard to an amendment in the bill, C-58. I had in mind clause 13, section 33 of the old act. Could some amendment be made to this which would be beneficial to your association? Certainly that is not a difficult question to answer.

Mr. BLAIR: I am sorry, Mr. Horner, but the new section 33 is going to deal with mergers and monopolies.

Mr. HORNER (*Acadia*): I was speaking of section 33(*a*).

Mr. BLAIR: Oh, you are referring to the old section 412.

Mr. JONES: I think he said already that it would improve it.

Mr. HORNER (*Acadia*): I want it clear on the record, if Mr. Blair feels that some amendment could be made to this section which would be beneficial and improve on bill C-58 as it now stands.

Mr. BLAIR: Yes.

Mr. HORNER (*Acadia*): I wanted that to be clear.

Mr. BLAIR: I am not so sure that I quite understand the question. What we have said here is that this section as drafted really does not cover the problems.

Mr. HORNER (*Acadia*): I said, our amendments to this bill under that section could be beneficial to your association.

Mr. BLAIR: That is true.

Mr. JONES: Mr. Chairman, I think it is 6 o'clock. The witnesses have been very patient and I think we should extend to them our appreciation for their courtesy, kindness and help in coming here.

The CHAIRMAN: I think you feel you have presented your case. It is different from any we have had previously. I think you have presented it in such a way that the committee is well aware of your problem. I believe if you can make some suggestion as to an amendment to the legislation and forward it to us that when we get to the clause in the legislation itself we will give it consideration.

Thank you very much for coming here.

Mr. BLAIR: Mr. Chairman, it might be presumptuous for me to express the thanks of the whole group, but I would like to do that. Somebody mentioned that we had been asked a lot of questions, but I think we would have been disappointed had we not been asked questions.

I would like to thank the committee for its consideration, and I assure you we will give whatever further assistance we can.

The CHAIRMAN: The next meeting is on Tuesday, June 28, at 9:30. We will have before us the board of trade of Metropolitan Toronto and then another association, the cooperative union of Canada. We will meet in this room.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament
1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 6

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

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TUESDAY, JUNE 28, 1960

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WITNESSES:

From *The Board of Trade of Metropolitan Toronto:* Mr. W. E. Williams, President; Mr. A. C. Crysler, Q.C., legal secretary; Mr. J. P. Anderson and Mr. C. W. Duncan. From *the Cooperative Union of Canada:* Mr. R. S. Staples, President.

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Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams.

Antoine Chassé,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

TUESDAY, June 28, 1960.
(18)

The Standing Committee on Banking and Commerce met at 9.40 a.m. this day. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Broome, Cathers, Hales, Horner (*Acadia*), Howard, Jones, Leduc, Macdonnell (*Greenwood*), Martin (*Essex East*), McIlraith, McIntosh, Mitchell, More, Morton, Pascoe, Pickersgill, Rynard, Slogan, Southam and Thomas—20.

In attendance: Honourable Davie Fulton, Minister of Justice; Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act), Department of Justice. *From the Board of Trade of Metropolitan Toronto*: Mr. W. E. Williams, President; Mr. A. C. Crysler, Q.C., legal secretary; Mr. J. P. Anderson and Mr. C. W. Duncan.

The Committee resumed consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

Mr. Williams presented a brief on behalf of the Board of Trade of Metropolitan Toronto.

The Committee questioned Mr. Williams and Mr. Crysler on their brief.

By consent, the Honourable D. Fulton questioned the witnesses.

At 11.00 a.m. the Committee adjourned to 3.00 p.m.

AFTERNOON SITTING

TUESDAY, June 28, 1960.
(19)

The Committee resumed at 3.10 p.m.

Members present: Messrs. Campeau, Cathers, Hales, Hellyer, Horner (*Acadia*), Howard, Jones, Leduc, Macdonnell (*Greenwood*), Martin (*Essex East*), McIlraith, McIntosh, Mitchell, Morton, Nugent, Pascoe, Pickersgill, Slogan, Southam and Thomas—20.

In attendance: Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act), Department of Justice. *From the Board of Trade of Metropolitan Toronto*: Mr. W. E. Williams, President; Mr. A. C. Crysler, Q.C., legal secretary; Mr. J. P. Anderson and Mr. C. W. Duncan. *From the Cooperative Union of Canada*: Mr. R. S. Staples, President.

The examination of Mr. Williams and Mr Crysler was continued.

At 3.55 p.m. the questioning of the representatives of the Board of Trade of Metropolitan Toronto was concluded.

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The Chairman thanked the witnesses for their appearance.

Mr. R. S. Staples, President of the Cooperative Union of Canada, was called before the Committee and presented a brief on behalf of his Union.

Mr. Staples was questioned by the Committee on his brief.

The Chairman thanked the witness for his presentation.

At 5.15 p.m. the Committee adjourned until Thursday, June 30th at 9.30 a.m.

Clyde Lyons,
Acting Clerk of the Committee.

EVIDENCE

TUESDAY, June 28, 1960.
9.30 a.m.

The CHAIRMAN: Good morning gentlemen. Come to order. We have a quorum.

Today we have the honour of having the board of trade of metropolitan Toronto represented here.

Mr. MARTIN (*Essex East*): Mr. Chairman, on a point of order. May I say to you again this is a very pleasant day.

The CHAIRMAN: You are in a good mood this morning, Mr. Martin.

Mr. MARTIN (*Essex East*): It is early yet, Mr. Chairman.

Mr. PICKERSGILL: I wonder, Mr. Chairman, if I could make an observation. My observation is a very simple one. There seems to be one field in which there is no need of anti-combines legislation in order to practice monopolies.

Mr. MACDONNELL: We must let them have their fun.

The CHAIRMAN: We have got off to a very good start this morning.

Mr. McIlraith, do you have a comment you wish to make this morning?

Mr. MCILRAITH: I find 9.30 very early this morning.

The CHAIRMAN: Gentlemen, we welcome here to-day, and we appreciate very much their coming and giving us their time, representatives of the board of trade of metropolitan Toronto.

I will call upon Mr. Williams, who is president of the board of trade of metropolitan Toronto, to introduce his other members.

Mr. W. E. WILLIAMS (*President of the Board of Trade of Metropolitan Toronto*): On my right, gentlemen, is Mr. Anderson, a member of the council of the board of trade and also president of the Dunlop Tire and Rubber Company.

Next to Mr. Anderson is Mr. A. C. Crysler.

Are you having trouble, sir.

Mr. MCILRAITH: It is very difficult to hear.

Mr. WILLIAMS: I thought I had a very loud voice this morning.

Mr. Crysler is the legal secretary of the board of trade of metropolitan Toronto.

On Mr. Crysler's right is Mr. C. W. Duncan, a member of the council of the board of trade of metropolitan Toronto.

This then constitutes our group.

Mr. MARTIN (*Essex East*): We have sitting at this table a former president of the Toronto board of trade in the person of Mr. Macdonnell.

Mr. WILLIAMS: I said the president of the board of trade. In order to assume our correct status I should say that this is the board of trade of metropolitan Toronto, no less.

Mr. MARTIN (*Essex East*): Yes, the city is growing.

Mr. WILLIAMS: We had better put this in its proper context, since we have had a little bit of by-play this morning.

The CHAIRMAN: Perhaps you should have brought Fred Gardiner along with you this morning.

Mr. WILLIAMS: We would then have had some fun.

The CHAIRMAN: He would be an asset.

I think each member has a copy of this brief.

Mr. WILLIAMS: Mr. Chairman and gentlemen, we are here, of course, in respect to bill C-58, but with primary emphasis on section 33 (b).

The board of trade of metropolitan Toronto has considered House of Commons Bill C-58—An Act to amend The Combines Investigation Act and the Criminal Code.

It expresses to the Chairman and members of the House of Commons standing committee on banking and commerce its appreciation for the opportunity accorded to it for its representatives to appear before you to explain the board's views concerning this bill.

And I add my personal thanks.

First, the board wishes to inform you of the constituency for which it speaks. The membership of the board is comprised of more than 9,000 persons who represent all types and sizes of business enterprise, as well as the professions. While this membership is concentrated mainly in the metropolitan Toronto area, the business and professional interests of many members extend throughout Ontario and Canada and to other countries.

In dealing with bill C-58, it has been kept in mind that this bill covers approximately the same area of amendments as bill C-59 of last year, which was withdrawn to enable further representations and consideration of them.

In these circumstances bill C-58 has been regarded as expressing the policy of the Government after giving weight to the representations made in so far as the scope of last year's bill is concerned.

For that reason the board has confined the comments which follow almost wholly to changes and new material in this year's bill as compared with last year's bill.

Conspiracy—S. 32

In s. 32(3) the word "unduly" qualifies sub-clauses (a), (b), (c) and (d). However, in the form in which this subsection is drafted, this word does not qualify the last three lines of the subsection which relate to conspiracies, etc., which have restricted or are likely to restrict any person from entering into or expanding a business in a trade or industry. Unless the last three lines are qualified by the word "unduly" a firm could scarcely be efficient without technically offending against this portion of the subsection. For that reason, the board recommends that s. 32(3) be revised so that it will be clear that its last three lines are qualified by the word "unduly".

Mergers and Monopolies—S. 33

This year's bill does not contain the provision, presently in s. 2(e) of the Act and which appeared in s. 33(3) of last year's bill, that provided the legislation "shall not be construed or applied so as to limit or impair any right or interest derived under the Patent Act or under any other Act of the Parliament of Canada". The words quoted are a long-standing provision in the Combines Investigation Act and their omission may have been inadvertent. In any event, this board requests that these words be reinstated in this year's bill so that they will continue to form part of the act.

Illegal Trade Practices—S. 33A(1)

There is substantial concern regarding the use of the word "tendency" in s. 33A(1). The effect of this general word, which is not defined, could go to the extent of precluding normal commercial price competition as it could

be said that this would have a "tendency" to substantially lessen competition or eliminate a competitor. No doubt, it would not be the intention to so administer the subsection that it would have this effect. However, those who operate under the subsection have to face the active possibility that if for any reason their conduct comes under judicial review the court will have to interpret and apply the word "tendency" according to its proper meaning. Businesses should not be placed in the position of having to operate in the shadow of such an undefined danger respecting transactions entered into with good intention and in good faith. For these reasons, it is proposed that the word be deleted from this subsection. Now we reach that portion which is of great concern to us.

I would like to say outside of the area of this brief, gentlemen, that our council and our membership are in agreement with the general goals of this act. We think that if some way can be worked out to make it completely fair to all other elements of the business community it is fine. I have so expressed myself to Mr. MacDonald. We have had quite a conversation about this. We are in a little disagreement as to exactly how to phrase it.

Allowances for Advertising and Display—S. 33B

The board is in agreement with the intent of s. 33B, which, according to its understanding, is, first, to prevent varying amounts of advertising payments as between different customers for the protection of small operators, as compared with major corporate operators, and, second, to protect the small and, therefore, partially defenceless manufacturer in negotiations with his customers.

And I will add: "in particular his big ones."

The section, however, is subject to a number of major criticisms.

The language employed does not express its intention with sufficient clarity to carry the intention into effect. The wording of the section is confusing to the degree that a leading counsel has stated he did not know how he could either prosecute or defend anyone under the section as it is presently written.

When you get lawyers admitting that, that is pretty good.

The confusion surrounding the section is probably in part due to the consideration that, according, to the explanatory notes in the bill, circumstances in the grocery trade were principally in mind in drafting the section. However, the section has been applied to all distributors. But the conditions existing in the food field do not exist generally throughout the distribution field where other and older methods of distribution are not experiencing the same problems.

In addition, while the section appears to contemplate principally allowances respecting national advertising, it seems to have swept into its application advertising respecting private brands which are privately advertised; in the latter case there is frequently a price allowance in lieu of national advertising.

Similarly, it has long been the custom for manufacturers to make allowances to retailers in return for such services as storage, transportation, guarantees, warranties, etc., normally provided by the manufacturer. It would not be either possible or fair to expect manufacturers to grant the same allowances to retailers who do not perform these services in the same proportion.

Further, there should be included in s. 33B a condition analogous to the provision in s. 33A(2) which limits the application of the section to circumstances in which the illegal trade practices therein defined are "part of a practice".

The following are some of the problems which have become apparent on trying to construe the section and apply it to practical distribution and merchandising operations.

Under s. 33B(1) this could happen. A manufacturer might be giving a 3 per cent quantity discount and, say, a 2 per cent advertising allowance. He might then set annual purchases of $100,000 as a target and pay any customer who reaches it the 2 per cent previously given as an advertising allowance. This would not contravene the provision.

I am going to interpolate a little here and say that this is probably the small man having only twelve salesmen. It is almost impossible to offer his advertising allowance to all classes of trade, so he sets an arbitrary range. Any retailer who reaches the $100,000 mark in respect of one year, then he will have that customer's 2 per cent, previously given as an advertising allowance, and call it a quantity discount on the original percentage. This would not contravene the provision.

The words "to his knowledge" are used in s. 33A but not in s. 33B(2). It would be possible for a court to interpret s. 33B(2) so that whoever is party or privy to the granting of an allowance is guilty whether he has knowledge or not.

From the retailer's point of view, it is difficult for a purchaser to have knowledge of allowances granted to purchasers in competition. And from a manufacturer's point of view it is impossible to get the cost of newspaper space from the trade; this is because each enjoys a local rate versus the national rate, and these rates are negotiated individually by accounts with various newspapers. This information simply cannot be gotten from the trade under any circumstances.

Owing to the absence of the "to his knowledge" qualification, the present joint responsibility in the case of illegal allowances may no longer continue in effect. In that event each operator would have to police his suppliers or customers, as the case may be, and this is an impossible task in today's circumstances.

Distribution is a wide and complex field. S. 33B(3) is not sufficiently comprehensive to embrace all types of proper and legitimate allowances, where no such mischief exists as may have occurred in the food trade. For instance, there are many cases where a small supplier may wish to introduce a new product through a large store. Once such a store has accepted the product and advertised it, the whole retail trade becomes opened to it. The product thereby gains an acceptance that such a supplier could not hope to achieve so quickly on his own. The question has been raised of why such a supplier should not be allowed to pay for this if it is important to him.

S. 33B(3) does not state the time period to which it applies nor the extent of the lines it would cover. What, therefore, does the total value of sales mean? Does it refer to all items purchased from the supplier and over what period of time?

S. 33B(3)(a) and (b) create an offence at the time an allowance is offered and condition the allowance upon an approximate proportion of the value of the sales. The value of the sales cannot be computed in advance at the time the allowance is offered. Consequently, it is impossible to tell whether an offence is committed until the costs are known and the total number of sales, resulting from that ad, are known. In mail order that period may be as long as nine or ten months. No one can foresee accurately the sales any ad may bring.

S. 33B(3)(b) is conditioned upon a proportion of the value of sales to the vendor in relation to the cost of advertising to the purchaser. The vendor is not in a position to know the purchaser's advertising costs. Also, it is not clear what is meant by the expression—value of sales. Does it mean the estimated value of sales, the actual value of sales, net sales or gross sales?

The problem involved in checking on "cost" of services under sub-sections 3(b) and (c) and getting it on a proportionate basis is beset by so many varying factors that it is not possible to foresee how it can be implemented in

practice. For instance, how can one bring to a basis of comparison such things as stamps, mass display, radio or newspaper advertising, contests involving unusual display effort, etc.

Another complicating factor would be having a customer who is being paid say 10 cents per unit for newspaper advertising who does a large volume in a low cost area and having another customer doing much less volume in a high cost area.

If we say "proportionately", and we stick to that, you cannot bring these two customers into line.

A further complication would be that an advertising allowance could be paid without a stipulation for any particular kind of service without contravening the provision. This makes it possible for allowances to be paid to the disadvantage of businesses which base such allowances on wise and efficient plans.

In other words, the man who wants something for his money.

S. 33B(3) (b) and (c) employ the word "services" without defining its meaning and scope. The draftsman may have intended to confine the meaning of "services" to advertising and display services but, in the absence of a definition so qualifying its meaning, the word has a much wider application.

The application of this section to a large retailer is not intelligible. To be justified under the section the service must be of such a type that competitors, at the same or different levels of distribution, are ordinarily able to perform. But the number of services that can ordinarily be performed by jobbers, wholesalers, large retailers, small retailers and mail order houses, etc., are very few and far between and may be non-existent.

Are demonstrators covered by this subsection? If so, it carries the case to the extreme, as the volume of sales might justify a demonstrator in a large company for one week, but would only justify a demonstrator to some competitors for a fraction of an hour or minute.

The bill provides two methods for granting an advertising allowance. S. 33A(1) deals with an advertising allowance related to the purchase price; under this section the allowance must be available at the same time to competitors of the purchaser in respect of the sale of like quantity and quality. Section 33B governs where the advertising allowance is not applied directly to the purchase price; in that case the allowance must be offered on proportionate terms to competitors of the purchaser.

A question has been raised as to why the yardstick in S. 33A could not be used whether or not the allowance is related to the purchase price.

This would give effect to another question that has been raised, namely, why should there be any limitation on the amount of money a manufacturer can spend upon a customer, provided such expenditure is available on the same basis to all customers willing to render the same type of service, i.e. newspaper advertising on a stated basis; the manufacturer could then pay his own established rate under contracts with individual customers in proportion to the extent of each customer's compliance with the contract. You set a goal and if they do 50 per cent of it you pay 50 per cent of what the agreed amount would be.

In the realm of general trade considerations, Advertising and Display are integral parts of merchandising and are important in all levels and forms of distribution. Modern-day merchandising uses advertising and display aggressively and in many diverse ways throughout the distribution trades, depending on geographical location, levels, types and methods of distribution and the product to be distributed. It is not in the interests of either the consumer or the trade to confine all types of advertising or display within the limits of S. 33B in its present scope and wording.

From the point of view of administration and the practical operation of business under S. 33B, there are too many uncertainties concerning the section as presently drafted. It is respectfully suggested that the section in its present form cannot be effectively administered. Upon behalf of the wide business community for which this board speaks, it is also respectfully requested that the area of businesses concerned be not required to operate with a provision in the act about which there is so much confusion in interpretation and which is so inadequately related to the facts of the business operations to which it applies.

This is particularly so as the section is penal in character. Business cannot properly meet its responsibilities to itself or to consumers if required to operate under legislation which is not adequately adjusted to the facts and in the shadow of apprehension respecting violation of the provision.

So many questions, which in the opinion of this board are valid, have been raised respecting S. 33B that this section should not be enacted until it is redrafted to take these questions and many others into account. The redrafting operations would be so extensive and would involve consideration of so many facets that, assuming parliament will rise shortly for the summer season, sufficient time will not be available to carry out the operation properly at the present session. The board, therefore, proposes that S. 33B be withdrawn from the bill for further consideration and redrafting and re-introduction at a later session.

We strongly feel that there should be this project of re-introduction.

Investigation

The attention of the board has been drawn to the procedure followed by administering officials in carrying out enquiries which might lead to the institution of a formal investigation under the act. A series of enquiries are addressed to firms sometimes over a very long period of time, respecting which the firm under investigation has no means of control. These enquiries are the normal duties of departmental officials, but they place quite abnormal work and strain upon the officials of the firms to which they are addressed. The period of the enquiries is sometimes very protracted and many of the points upon which the information is requested are extraneous to the subject matter at issue. In view of this, the board asks that you give consideration to including provision in the act which would allow an adequate time limit for appropriate departmental enquiries, after which the firm concerned would be entitled to initiate the holding of a preliminary enquiry for the purpose of deciding whether there would be a formal investigation under the act or whether the informal enquiries should be terminated.

Respectfully submitted,

(Sgd.) W. E. WILLIAMS,
President.

(Sgd.) J. W. WAKELIN,
General Manager.

I am sorry the brief is as long as it it. However, it is a very complex matter, as you know.

I have spent the better part of seven or eight days, in toto, working with these massive papers, and trying to bring myself out on it. Mr. Crysler, our legal secretary, has done a tremendous amount of work on it. I have been in Ottawa and talked to Mr. MacDonald in connection with the matter, in an endeavour to point out some of the facts of the issue. The problem which you are trying to attack is a very real one. There is no question about that.

Take, the small manufacturer, with 100 employees, and a brand that is not very highly publicized, say in the grocery field—and he has a warehouse full of stock; if he goes into a big customer, the wheedling and dealing that goes on, is to the detriment of the little guy. He cannot say no to a proposal he spend extra advertising money. You will find instances of brands being sold at what you know is below cost, according to list prices, by people who do not sell below cost and, maybe, have arranged some other way to get the price down. The goal should be an ideal goal.

Speaking personally, as well as speaking for the board of trade, we are in warm sympathy with the ideas at which you are aiming. Our only quarrel is the implementation of it because, frankly, after 30 years in the business, and consulting lawyers and so on, I do not know how you can make it work. It is too fuzzy. In coming in to criticize the bill to the authors of it, you are a bit like someone going in and criticizing a new baby to its mother. It is like saying this is going to be a prettry nice child, if you get the squint out of his eye and put a lift under its heel.

I do not hope that you think I am being difficult about this subject, but that is the only way I can see it.

Mr. MARTIN (*Essex East*): Mr. Williams, I have just one question to ask at the present time. That question is based upon a suggestion you made toward the concluding part of this brief.

Mr. WILLIAMS: You are on the last page?

Mr. MARTIN (*Essex East*): Page 8, in which you speak of section 33B, and say that the redrafting operations would be so extensive and would involve consideration of so many facets that, assuming parliament will rise shortly for the summer season, sufficient time will not be available to carry out the operation properly at the present session. What would you say about the view that the whole bill has been introduced at a rather late date? You yourself are suggesting so many different amendments that, possibly, in the interests of a thoroughly considered measure, not only should we reconsider withdrawing for this session section 33B, but that we should not proceed with the passage of these amendments at all at this session.

Mr. WILLIAMS: Well, I do not think I am qualified to speak on that. In the first place, I am a soap man and not a legislator. In the second place, the council has approved this particular document, and that is all I can speak on, officially, as president of the board of trade.

Mr. MARTIN (*Essex East*): I am not trying to press you on this. However, you are a man; you are a lawyer, and, no doubt, have given a good deal of thought to this.

Mr. WILLIAMS: I am not a lawyer.

Mr. MARTIN (*Essex East*): Well, I will not discredit you then any further. However, you say you have no hesitation in proposing that we withdraw 33B, and you do not hesitate to propose that we should, at the present time, not proceed, in view of the lateness of the session and the difficulty of giving the matter the care which I think legislation of this matter requires.

Mr. WILLIAMS: Well, if I understand it correctly, most of the legislation in the entire bill C-58 comes from section 412 of the Criminal Code.

Mr. MARTIN (*Essex East*): Yes.

Mr. WILLIAMS: Or, a large part of it. We have suggested only a couple of minor changes, which could be done in five minutes, like the "unduly" and the "tendency" part of it. However, 33B really concerns us, because it is going to take such a committee—and if I would not be considered too bold, I would like to suggest that perhaps a committee could be made up of people from the grocery field, from the major operators in the light goods field, such

as Eatons, Simpsons, and so on, who could put something together that would work. We all want this. We do not like this law of the jungle under which we are living. It ranges from some companies, who pay nothing—they are Simon pure—to the next set which would be a company like my own. We have a records contract.

Mr. MARTIN (*Essex East*): What is the name of your company?

Mr. WILLIAMS: Proctor and Gamble. We have had our system in operation for the better part of 20 years. There have been minor changes. However, it assists the small grocer in Hairy Hill, Alberta—if he runs an ad, he gets the same as Dominion, Loblaws, and so on, and if he only reaches 50 per cent of the goal set, he gets paid that. However, we could not live under this, because there is no way we can proportionately judge the expenditure.

Mr. MACDONNELL: How much policing do you have to do to satisfy yourselves?

Mr. WILLIAMS: We have tear sheets carefully gathered to see that the dealer has run what the contract provides. We sign a contract with him.

Mr. MACDONNELL: Your contract relates wholly to quantity of advertising, and you have to be satisfied merely as to quantity of advertising material.

Mr. WILLIAMS: According to the contract we have signed.

Mr. BROOME: You have an advertising allowance of, say, so many cents a case.

Mr. WILLIAMS: Twelve cents a case.

Mr. BROOME: And if a person sells a lot of soap, they have more money. Your standard is in money. Money is your standard. However, money in Alberta will buy more than the same amount of money in Toronto. You cannot be proportionate in everything, but you are in the allowance and the money allowed.

Mr. WILLIAMS: Yes.

Mr. BROOME: Well, is that not the whole intent of this bill?

Mr. WILLIAMS: Here is one of the difficulties. You are a practical man, and will understand. If this thing was administered rigidly right down to the last word, you would find yourself in a real situation. Take, 3 per cent over the discount and 2 per cent advertising allowance; he cannot offer it because he has not the personnel to offer it to a class of trade. So, he says I will pick out my 28 best customers; and offer this 2 per cent to anybody who buys $100,000 worth of merchandise. The next man says he has a 2 and 3 per cent allowance.

Mr. BROOME: Is that legal? That is not legal under this proposed change.

Mr. WILLIAMS: Yes, it is. It is as legal as it can be. They change it into a quantity discount for reaching a predetermined goal of demand—of so many cases, or any other term. Another man will find himself in the same circumstances, and I say: Charlie, you know we have had this 2 per cent all along; I will change it and give you 5 per cent quantity discount, and I hope you do right by me in the future. That is the end of it. Charlie gives me something, and that is fine. Then, you come to a manufacturer and, despite the suspicions on the part of some—

Mr. MARTIN (*Essex East*): The only person who would have any such suspicion in this committee would be Mr. MacDonald.

Mr. WILLIAMS: He now has left the room.

Mr. PICKERSGILL: He said Mr. Macdonnell.

Mr. WILLIAMS: Now, you come to the third category. This is a little difficult, but I would ask you to bear with me for a moment. You have a man who does a lot of business in an area, where costs of advertising are extremely

low. For the purposes of argument, I will mention a company like Safeway, who buy a lot of our stuff. If they spend every penny of the money—100 per cent of every dollar we pay them—they would have their ad pretty well clogged with soap and shortening. But take a different kind of an operator, say Power stores—he is operating in a terrifically competitive economy in Toronto. He has to put up the same ad in the paper as Dominion stores, Loblaws and A & P, in order to make an impression. He will spend almost 100 per cent of the money he receives in advertising. Yet, according to this law, and the interpretation of it, if the Power store man spends 100 per cent of what he gets, we must go out and expect that Safeway spend 100 per cent of what they get. We have to police it, and we do not know what his legal costs are. It has been suggested that we go out and find out what they are. I suggest the most difficult secret in the world is to find out the actual legal rate being paid by the big advertisers. You just do not get it, and you would be thrown out if you walked in and asked for it. It puts us into a very difficult spot of trying to police customers in an area whether we do not have the authority or knowledge to do such policing.

Mr. MARTIN (*Essex East*): How long would the committee you have in mind take to be collected together?

Mr. WILLIAMS: I think the board of trade could collect a committee in a week.

Mr. MARTIN (*Essex East*): And another week to do your job.

Mr. WILLIAMS: I do not think it could be done in a week.

Mr. CRYSLER: With great respect, sir, it is a major legal operation. I could not put a definite limit on it. However, you would have to assume it would take several weeks—more likely, several months.

Mr. WILLIAMS: Just the conversation we have had thus far this morning is indicative of how difficult it is. It is a very confused situation.

Mr. PICKERSGILL: I have one supplementary question which I would like to put at this time.

What objective do you think would really be served so far as the general public is concerned by having a satisfactory provision of this type rather than leaving the law as it now is.

Mr. WILLIAMS: The thing I mentioned before, if you like—there is some material adjustment and some pressures by large people on little people which should not be there. Just because I play golf with a friend of mine on Sunday, I do not think I should sell him soap on Monday 2 per cent cheaper than somebody I do not like. It should be a fair shake for all in regard to price and advertising allowance. It makes for a better general business situation.

Mr. PICKERSGILL: That is in the field of business; but my question was from the point of view of the great mass of the consuming public.

Mr. WILLIAMS: I think they are bound to come out better with an honest system than they would with a dishonest system.

Mr. HORNER (*Acadia*): Mr. Williams has stated he is all in favour of the motive behind section 33B, but makes no suggestion to implement it.

I think soap companies are the worst offenders in the world, when they advertise gimmicks. No one uses it more than the soap people. You buy a box of soap, and get a coupon. There is a 10-cent price reduction on top of the label which reads "10 cents off this week" and, if you are lucky enough to buy it that week, so much the better. However, the same box of soap may come out in the next shipment without the 10 cents off—the price will be the same, probably 79 cents. The soap companies are the biggest abusers of this. I think the motive behind this is 100 per cent. You say that you would request a longer time to study it. If governments went along with you they might never implement anything.

Mr. MARTIN (*Essex East*): Some governments.

Mr. HORNER (*Acadia*): Maybe that would hold true with some governments, and maybe not. However, the general public find fault with governments in that they are slow in moving along on these things. Here we have a measure which is designed to bring about less money spent on advertising and in narrowing the spread between the sale price for the product and what the actual cost to manufacture it is.

Mr. WILLIAMS: I wish you had a transcript of my conversation with Mr. Oberhaltzer of the province of Alberta, on Wednesday. The point you are speaking of is not germane to 33B. You are talking in regard to advertising in toto, and sales promotion in toto. We are well aware of what you are speaking about, and I am taking active steps to eliminate, to the greatest degree possible, the thing of which you are speaking. If you would come to me later on, I will give you the names of several competitive brands to my own knowledge who, if it was not for prize packs, would not be able to sell their merchandise.

Mr. PICKERSGILL: On a question of privilege, I wonder if the witness can give information privately to one member of the committee which he is not willing to give to all of us.

Mr. HORNER (*Acadia*): If a product can be manufactured one month for a certain price, then it should remain at that price. They should not mention the 10 cents the next week, or whatever the gimmick is. Certainly I do not want to disagree with Mr. Williams, but I cannot go along with the idea that one-quarter of one per cent, or whatever it was, is the figure set on advertising a box of soap. Heavens to Betsy, it is half the price of the box.

Mr. PICKERSGILL: A supplementary question, Mr. Chairman. Do Proctor and Gamble make soft soap?

Mr. WILLIAMS: I knew I was going to get into a little bit of humour this morning. We do not.

Mr. HOWARD: I think there are some members present who participate in that sort of production.

You mentioned that we are liable to be confronted with many problems in connection with the interpretation of section 33B.

Mr. HORNER (*Acadia*): Would you speak a little louder.

Mr. HOWARD: And I mentioned there are a number of problems in regard to interpretation confronting the individual suppliers or manufacturers and, the courts, if it got that far. Would you have the same sort of views with respect to the proposals to change section 32 of the act—that is, the conspiracy combination section dealing with price agreements and so on, and whether it might not allow for the same sort of confusion?

Mr. WILLIAMS: Would you mind if I turned cowardly on that, and turn it over to our legal eagles to answer?

Mr. CRYSLER: Section 32, subject to changes of only a few words, which I do not think have a material effect, is now and has been, if my memory serves me correctly, for 60 years in the Criminal Code. If you read that section, without knowledge of the judicial interpretations, I would agree that one would have a great deal of difficulty in figuring out what the wretched section means, but if you know the judicial interpretation, you know what it means, whether you like that knowledge or not.

Mr. MARTIN (*Essex East*): The courts have decided what it means.

Mr. A. C. CRYSLER (*Member of Council of the Board of Trade of Metropolitan Toronto*): Yes. They have given us a meaning for those words. So, without attacking or defining that section which, as I understand it, is not before the committee—I am just giving the expression of a legal view that there is very very little change made in section 32. It may be that you have in mind

particularly what are the additional two subsections. Now, I would not for the world speak for the minister and the administration, but as a rank outsider trying to determine what they probably are attempting to do, I suggest they may be attempting to state as grounds for non-conviction certain things which never have been offending. What has happened is this: these elements have been involved in questions which have led to conviction. Without belabouring the point I will give this example. To the best of my knowledge no court ever said it was wrong for firms to pool their research and work out costs, it seems to me; but they have said it is wrong for a group of firms with a virtual or actual monopoly to apply a universal cost factor to arrive at their price so that they all offered the same price. When the case goes into court all those, save lawyers who perhaps make a particular or a special study of the subject, are not too sure whether the offence was the rigid cost information which was exchanged or whether it was the uniform mark-up.

As a professional view I give my private opinion that the cost factor never was the offence. I think the purpose perhaps in putting in these other four or five factors in subsection (2) was to clear the air on that point. In my humble opinion it is a clarifying section and I do not think it has any very great interpretive effect on the law.

Mr. WILLIAMS: If I may step outside of my presidential capacity and speak on a purely personal basis I have a little resentment about 32(2)(f). This says to me we can get together in a smoke filled room and say let us just spend so much money per case on advertising. Personally, I do not think that is the way to run a competitive business enterprise I do not think we should have any agreements about anything very important with them.

Mr. PICKERSGILL: May I ask a supplementary question, because I am afraid I have to leave. In your brief you did say something about the omission of the word "unduly" from the last part of this clause.

Mr. WILLIAMS: On page 2.

Mr. PICKERSGILL: Yes. I looked at the words to which the word "unduly" would qualify and those words are conspiracy, combination, agreement or arrangement. That is to say, that a single firm can do its best to prevent somebody else going into business by getting the whole market and so on, and I wondered really what effect the insertion of the word "unduly" really would have. To me it does not seem that it would make any sense at all in there.

Mr. WILLIAMS: We have commented on that. In section 32(3) the word "unduly" qualifies sub clauses (a), (b), (c) and (d), but there is no definition of "unduly".

Mr. PICKERSGILL: I really am defending the draftsmen of the bill. I think the word "unduly" put in here would not make any sense at all, whereas it does make sense in the one place. Surely, we do not want a conspiracy, surely we do not want a combination and agreement or arrangement to prevent somebody else going into business. Therefore, to put in "unduly" would be to take the meaning, if it meant anything, out of the clause.

Mr. CRYSLER: With great respect I do have to disagree. I think the point is the difference between what a lawyer calls a technical sense and a substantive one. Without the word "unduly" there you could make what in essence truly is a harmless arrangement not within the contemplation of the act; but if according to the Oxford dictionary it can be defined as conspiracy, combination, agreement or arrangement you have had it when you get into court and also when you are construing the charge in subsection 1 of section 32. There the word "unduly" is used, and from a lawyer's point of view the courts have told us what "unduly" means. Therefore, whether or not we

like it, when a client comes and asks what this section means if we see the word "unduly" in there we have a certain degree of certainty. If you put the word "unduly" in subsection 1 and do not put it in subsection 3 you can see the dilemma. The court says surely parliament must have meant something different.

Mr. PICKERSGILL: The witness is a learned counsel and I am a mere layman, but it seems to me that the real operative words are "has restricted or is likely to restrict any person". It does not seem to me that by combination, arrangement, or anything else anyone should be allowed to do that at all, duly or unduly.

Mr. CRYSLER: Suppose you had, within the meaning of the act, a conspiracy, combination or agreement or arrangement that affected one per cent of the trade in Canada, the courts have not ruled it is a monopoly position.

Mr. SLOGAN: Would not the word "unduly" be a loophole for people to get out by.

Mr. CRYSLER: I could not agree with you more. My sole point is there have been at least four or five leading decisions of the Supreme Court of Canada, plus twenty odd decisions in the provincial courts, which have told us what that word means in law. They have given us some degree of certainty. Now, it is very disturbing when a lawyer is called upon to advise a client when he cannot give whatever advice he gives with some degree of certainty. We ask that they put that word "unduly" in, so that at least the legal fraternity knows what the clause means.

Mr. PICKERSGILL: Might I ask another question. Could you, as a lawyer, tell me how it would be possible to duly restrict any person from entering into or expanding the business, trade or industry.

Mr. CRYSLER: Mr. Chairman, I do not want to discuss another branch of government, but perhaps discreetly I can say this, that recently there was a decision in the judiciary in which it was held that if you had no more than 60 per cent of the trade it was not a monopoly within the meaning of the law, and I reduced it to the absurd feature of less than 1 per cent, thinking of that case.

Mr. HOWARD: May I ask what case this was?

Mr. CRYSLER: Mr. Chairman, I am subject to your ruling. Do you mention cases here?

The CHAIRMAN: Is this a case which has been before the court?

Mr. CRYSLER: Yes, and the decision has been issued in public.

The CHAIRMAN: Then it is all right.

Mr. CRYSLER: It is the Canadian Breweries case.

Mr. JONES: Arising out of the comments which have been made about the word "unduly", without threshing straw which has already been threshed, it seems to me it has become quite apparent that since the word "unduly" was first printed in this legislation it has been judicially interpreted so that lawyers now know what it means. It seems to me we will be going through the same process with the word "tendency" and that it will receive judicial interpretation as time goes on to make it more precise. When we are using English in law we are met with the difficulty in the language which requires certain words to be turned into words of law.

What bothers me about the comment in respect of this particular word is that you use the word "tendency" when actually it reads "tendency of substantially lessening competition". When you read the whole phrase, would you not agree that it is not as vague as might be supposed from your presentation of the matter in your brief. In other words the words "tendency of substantially lessening competition" are not vague at all.

Mr. CRYSLER: Mr. Chairman, I was given a certain directive and told to draw up that particular paragraph. Perhaps to some extent the phrase should be regarded as a personal venture. Here is what I am very much afraid of with that word "tendency", and the word "unduly"—

Mr. WILLIAMS: "Tendency of substantially".

Mr. CRYSLER: Even with "substantially". The word "unduly" has been interpreted judicially to mean that the offence is in the agreement and not what you do under it. Incidentally, if anyone wishes to look up the cases, the first one is what is referred to as the fine papers case or the case of the Howard Smith Paper Mills. The word is a quantitative word. Already there has been a precedent at the level of the Supreme Court of Canada interpreting that word in its ultimate possibility.

Frankly, gentlemen, I do not want to see another quantitative word put in this act, because I am afraid that you are going to get, on the model of the "unduly" interpretation, another situation in which you are not going to be convicted by what you did: you are going to be convicted on what you might have done under the agreement.

Just to put a little humour into the situation you have people like myself who have come to parliament and said "You are taking too much power to yourself under the provision in the act or under the regulations", and we are told "of course we never would put it to the use you fear we might". But in the interpretation of the word "unduly" that is what has been applied to those who have to live with this act, and I am afraid of any other quantitative word and that it will get the same manner of interpretation. Have I made myself at all clear?

Mr. JONES: Yes. I think the difficulty we are running into here is that the words "tendency of substantially lessening competition" are in relation to a time context. It covers a different aspect of the time problem when we come to the business of substantially lessening competition.

Mr. CRYSLER: You, of course, have a point there, but I think I also have a point too. Maybe I can explain it this way. In the case of Weidman versus Shragg, 1912 Supreme Court of Canada reports it was ruled that the effect of using the word "unduly" was to rule out of consideration not cases under the Combines Act—or really under the Criminal Code—it was to rule out of that the old common law principles that while a restraint of trade is bona fide for a while—you might justify it under certain circumstances, the two main ones being that it is unreasonable and it is not inconsistent with the public interest. Those words were ruled out. I am aware that the word "tendency" is coupled with the word "substantially", but I have to give hard advice now and then, and when I do I have on my mind all of the past jurisprudence which we have.

Mr. JONES: If I may I would like to move on to another question.

Mr. SLOGAN: May I ask the minister to comment on why the word "unduly" was left out of the section?

Mr. JONES: I think we have questioned each one of the witnesses on these points, and after we have heard all the witnesses we will be discussing the matter with the minister later.

Hon. E. D. FULTON (*Minister of Justice and Attorney General*): I do not want to be taken as being reluctant, but I think Mr. Jones' point is a good one. There are points on both sides, and we would be glad to discuss them when we come to the sections.

Mr. JONES: I should preface my second question with this statement. I think this brief does illustrate the advantage of sending these bills to committees. The presentation has been a most worth-while one, particularly in connection with section 33B. This has caused everybody a good deal of anxiety

in meeting the problem which the section tries to deal with. We are very grateful for the opinions of those in the trade as to how the section might work in practice.

In your presentation, Mr. Williams, you mentioned the bad effects that the section is trying to remedy in connection with the situation between the small manufacturer and the very large retail chain. In order to assist the committee, I wonder if you could elaborate on the bad practices which now are being carried out and which the section also tries to meet in connection with the large manufacturer dealing with small retailers. This is a question on which we have received a good deal of representation and perhaps you, from your point of view, may make a few comments.

Mr. WILLIAMS: I have used this illustration before. If I were asked is there any vice on Jarvis street I would say I cannot prove it, because I have never experienced it, but I have a very strong suspicion there might be a little vice on Jarvis street. I only see the end result. I could wonder that an item is being sold below the suggested price by a man with whom I have been doing business for 25 years, but if he has never sold one of mine below cost I might only have a feeling that there has been something in the background.

I know that a number of manufacturers get a lot of pressures. We get them ourselves but we fortunately are in the position where we can ignore them, because of the advertising strength of the brands. I cannot give you specific examples. I think that would be virtually impossible. It certainly would be impossible for me.

Mr. JONES: The representations that we receive, as individual members of parliament, from the small retailers in our constituencies are in respect of large manufacturers who come in to the small retailer and tell him that he is going to give large floor and shelf space to their products, or certain display positions in the store, or else, and by this process they discriminate between one retailer and another. Obviously each shop has a different physical outlook, and a particular retailer is sometimes prevented from handling a manufacturers' product because of the manufacturer's requirements in respect to display and advertising space. This is a very important factor because the little retailer is placed in the position of being cut off from a nationally advertised brand, because it is not convenient or desirable for him to give to that particular manufacturer the shelf space and the store position, or floor space that the manufacturer wants and insists upon.

Mr. WILLIAMS: I would think this is a kind of dream world existence. I think the small grocer, the large grocer, and the middle sized grocer are pretty independent minded people. I do not know of a manufacturer who says to the retailer that he is going to do so and so, or else. I have never seen this happen in my 30 years in the business. This attitude usually results in your being thrown out of the store by the seat of your pants and the nape of your neck.

Mr. JONES: I find that druggists complain particularly about this situation. I have received many complaints about this type of thing happening. This is not a dream situation at all.

Mr. WILLIAMS: I am just not aware of this situation at all. I know that the individual salesmen in dealing with the independent dealer will try to get, if you like, certain space or position on the dealer's floor because there is constant competition between every one of the individual salesmen for every one of the individual lines of groceries and drugs. There is always competition in respect of display and shelf space. This is normal; but it does not involve threats on one side or the other. I will not say to a dealer, that if he does not do so and so, he will not get my product. This is a foolish way of cutting off my nose to spite my face.

Mr. JONES: I am told that the situation exists, particularly in the drug trade.

I take it from the remarks which you have made that you yourself and your association are more interested in the problem of the little manufacturer versus the large retailer in connection with this particular section?

Mr. WILLIAMS: We have taken for granted that this bill is an attempt to help the smaller man, whether he is a retailer or a manufacturer. We are in sympathy with these goals. Our only quarrel with the goal is the fact that you have provided in this particular section a couple of escape hatches which might make it possible for the situation to become worse than it is now, as far as the little man is concerned. I have quoted the three per cent—two per cent situation, where the 2 per cent could be made a 5 per cent quantity discount. This is far more of an advantage to the big guy. There is the 3 per cent-2 per cent, where you do not ask for anything for it. This bill is not a water tight vessel.

Mr. BROOME: On that particular point, if section 33 B (1) had added to it in line 3 the words "or is related to volume sales", which would make it read:

> In this section "allowance" means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes, or is related to volume sales—

Would that help to block the loophole you are talking about?

Mr. WILLIAMS: I think that would help, but I respectfully suggest, gentlemen, that this is not the place to re-write the act.

Mr. BROOME: I was just asking for your opinion.

Mr. WILLIAMS: You see, where you begin to really bog down on this thing is at the next page under subsection 3(3) where it says:

> —the cost thereof required to be incurred by a purchaser is in approximately the same proportion to the value of sales to him as the cost of such advertising or other expenditures or services required to be incurred—

Believe me, I am not a lawyer, but you cannot make that work in any field, and I do not care whether it is soap or undergarments, or what have you. This is impossible, in my humble opinion.

The CHAIRMAN: Gentlemen, may I have the permission of the committee for the minister to ask the witness a couple of questions?

Mr. MCILRAITH: By all means.

Mr. FULTON: Thank you, Mr. Chairman. I think I have only four questions, which I would ask purely for clarity.

I would like to ask Mr. Crysler, or any of the other witnesses, with reference to the brief at page 4 where you are objecting, in fact, that the umbrella of this section 33(b) may be thrown too wide. You point out in your second paragraph as follows:

> Similarly, it has long been the custom for manufacturers to make allowances to retailers in return for such services as storage, transportation, guarantees, warranties, etc. normally provided by the manufacturer. It would not be either possible or fair to expect manufacturers to grant the same allowances to retailers who do not perform these services in the same proportion.

May I ask whether, when you put that paragraph in, you had considered fully and carefully the definition subsection of section 33 (b) which makes it clear that the only kind of allowance that the section is getting at is a promotional allowance, namely a discount, rebate, price concession or other advantage

that is or purports to be offered or granted for advertising or display purposes? Would you not agree with me that those defined allowances with respect to storage, transportation, guarantees, warranties, etc., would not come within the purview of this section? Certainly it was not our intention that they should.

Mr. CRYSLER: I am not too sure that at least you have not got a part of a point there, sir.

Mr. WILLIAMS: I would go a little further than that. I think you have perhaps a valid point.

Mr. CRYSLER: I think your question is well placed.

Mr. FULTON: We could have another look at that to see that it is not too wide.

Mr. CRYSLER: You may have another look at it.

We looked at that as a subsection which was setting out the fact as to what one could do in the nature of an allowance in relation to the selling price. That is what our attention centered on. We thought that was saying that this is all one could do by way of allowances in relation to the selling price.

The succeeding subsections, and in particular subsection (3), are regarded as telling us what we can do in relation to allowances for displaying and advertising; but I must confess that, having had our attention drawn to the interpretation you place on this, I think you are probably pretty nearly right. Can you tidy that subsection up so that other people will not misinterpret it the way we did, but will spot it for what you intended it to be—that is a definition section—so that they will not think that it is merely a substantive section telling them what they can do in relation to the selling price?

Mr. FULTON: Do you see my point?

Mr. CRYSLER: Yes, I do. If you could perhaps just make it a little clearer, I would think that you are substantially right in your comment.

Mr. FULTON: Thank you very much.

My next question arises out of a discussion that Mr. Howard initiated, I think, and that one or two other members followed up.

Would you agree that section 33B, being a new section, is trying to make a start in a difficult branch of the law and, in respect to its interpretation, is about in the same position as section 32 was when it started out?

Mr. CRYSLER: To our horror we would, sir.

Mr. FULTON: Section 32 has, over the years, received an interpretation by the courts which, generally speaking, enables you now to advise your clients with reasonable certainty.

Mr. CRYSLER: That is quite right, sir, but please do not ask us to go through that process again.

Mr. FULTON: We will do our best in the draftmanship.

Mr. CRYSLER: For 50 years we have had the experience that counsel, bona fide, advised their clients—the business corporations who were later prosecuted —that they did not think the section went so far as to reach them; but by heaven it did. Please do not ask us to go through that again. This is really the basis of our quarrel. Give us a little more certainty.

Mr. WILLIAMS: If I may say, it would seem a much less laborious situation to re-write this section, after a couple or three weeks of investigation work, rather than to pound it out in the courts over a period of years with no one undestanding exactly where they stood.

Mr. CRYSLER: You would perhaps realize this better than we do, but these battles in the courts have extended over a period of 50 years.

Mr. FULTON: We do not think this is quite as difficult to interpret, but we will take your points into account.

Mr. CRYSLER: I would agree with you there, but we have had a very very bad time trying to find an interpretation, systematically, of this, more so than we have had in some of the previous cases. It is, with great respect, sir, a bad situation, when counsel advise, to the best of their opinion, men, whom they know to be honourable but who have been subsequently convicted of a criminal offence. With respect, this is not the right way for a law to be provided.

Mr. FULTON: I have one other question of a general nature.

You are no doubt familiar, in general anyway, with the Stewart commission's report, and in particular, that passage of it dealing with promotional allowances.

Mr. CRYSLER: Yes.

Mr. FULTON: Accepting for the sake of argument their point of view that it would be desirable that if, instead of competition being more and more channelled with respect to promotional allowances which, as they said, does not in the long run reduce prices to the consumer, it could instead be channelled into straight price competition. Taking that as an acceptable motive,—I am not arguing about that for the moment—would you agree that this section, in part perhaps because of the difficulty which you have said surrounded its interpretation, might have the effect of discouraging the giving of any promotional allowances, and to that extent contribute to one of the objectives that the Sewart commission report recommended?

Mr. CRYSLER: Mr. Chairman, we have very carefully refrained from saying that in the brief, but that is the way we are afraid it might be used. We are afraid there might be a vague, very dark cloud on the horizon. With great respect I cannot agree with the premise of your question because you must remember the influence of volume production. It is very, very easy, gentlemen, to spend 2 per cent on advertising and save 10 per cent on the cost of production. I know of no other way in which you can produce volume without advertising. If you have a better mouse trap, it may be that over a generation the word will pass around and the people will troop to your door. But, my friend Mr. Williams says he does not believe in that old saying at all.

My simple point is that 2 per cent on advertising can easily save 10 per cent or more on the production cost. So, sir, with great respect I do not want to be recorded as really answering your question, because I cannot agree with the premise.

Mr. FULTON: Of course, the section does not contain, nor is it based on the premise of direct limitation of advertising. It deals with the form and method of advertising—a form and method which, as Mr. Crysler himself has agreed, is in many respects unfair to competitors, and so on. That is its objective.

Mr. CRYSLER: We will agree, of course, that there are some aspects of that form and method which are unfair; but will you please think back to Mr. Williams' remarks and recall that the sum total of advertising is not in national advertising. There must be advertising at the local level; it may be in the newspaper—and that is what I think Mr. Williams deals with mostly—but there may be other methods. There are other methods such as advertising demonstrators, and contests of guessing the number of beans in a pan, or the name of a pretty girl in a car, and so forth. I do not think that advertising can be viewed in the context of only national advertising. When you have national advertising plus local advertising, plus the different forms of that local advertising, then is when you begin to get the country's interest, is that correct, sir?

Mr. WILLIAMS: That is correct.

I would like to say one word to you, Mr. Fulton. You see, we do a tremendous amount of national advertising, using all the media available to us, and primarily at the moment we are concentrating on television. You have national advertising here, talking to the consumer over in the other corner. If

we can link up the corner grocer, the general grocer, with this advertising by the use of advertising in the store with a feature which ties in with whatever current promotion might be on television, then we are strengthening the effect of our national advertising far beyond the one and one quarter per cent that it costs us. If I were to start reducing my own personal advertising, the last thing I believe I would drop out of the line, sir, would be what we call the DCM—dealer consumer merchandise. This is the case of which I speak because it is in fact turning the key in the switch that makes the motor start. We may have the essentials there, but unless you turn that key you do not get that motor to start.

Mr. FULTON: I would like to ask you one final question for information purposes only.

Can you tell where, in your experience—I do not know whether you prefer to speak as president of the board of trade or as president of your own company, but in either capacity, can you tell us where in your experience most of the pressure for this promotional allowance comes from? Does this come from the small distributor or the large general type distributor I am speaking of this pressure to give these allowances.

Mr. WILLIAMS: I will answer you as Proctor and Gamble, because I have no authority to speak on behalf of the board.

This pressure comes from all segments. It is really a question of survival. Where you had the small retailer grocer accounting for 75 per cent of the total business, you now have him down to where he will be doing somewhere under 30 per cent of the total business. In order to protect himself he is forming associations such as the I.G.A. and the Red and White, that kind of thing. When they form these associations they being to operate as nearly as they can like the corporate chain. In order to survive in this fiercely competitive field the pressure from them is exactly the same as from anywhere else.

Where did this start originally? The indications to us are that it started with the large chain distributor. I do not think I can say that completely. I think some of the independents are just as tough as they can be. The bigger the chain, the more, if you like, economical influence they have. I could name, but I will not, three chains for you. I could run the whole gamut of pressure to show you the extremes. On one side a retailer will say: "what do you have? O'k, we like it. We will take it." At the other end a retailer will say: "what do you have? We do not like it. We want more and we insist on more or we will not stock your merchandise." This includes all three corporate chains. They have completely different attitudes.

I speak only for the grocery and drug business because those are the two I know about. I do not think you can lay all the blame on the corporate chains.

Mr. FULTON: Thank you very much.

The CHAIRMAN: Gentlemen, it is 5 minutes to eleven.

Mr. MCINTOSH: Mr. Chairman, I have two questions to ask. I have been waiting for a long time.

The CHAIRMAN: Yes.

I would like some guidance in respect of what we are going to do after this meeting.

Mr. PASCOE: I believe that I am ahead of Mr. McIntosh.

Mr. MCILRAITH: What is your priority list of members asking questions?

The CHAIRMAN: I have first Mr. McIntosh, then Mr. McIlraith, Mr. Broome and Mr. Macdonnell.

Would this be a good time to adjourn until 3 o'clock?

Mr. McINTOSH: I would suggest we adjourn until 3 o'clock and you allow the members to question in order, not allowing supplementary questions, because our questions could be supplementary to practically any subject.

The CHAIRMAN: We had a little trouble this morning in that respect, but for the sake of harmony I let things go a little bit this morning.

Mr. McINTOSH: I do not think it was harmonious.

The CHAIRMAN: I assure you, Mr. McIntosh, you are number one on my list.

Is it agreeable that we come back at three o'clock? These gentlemen have an appointment to leave Ottawa at 4.45. Do you think that we can finish our questions by then?

Mr. McILRAITH: As far as myself and our people are concerned, there will be no difficulty.

Mr. HOWARD: Why do we not meet at 2.30?

The CHAIRMAN: We have had some difficulty in that regard before.

Mr. McILRAITH: The superannuation committee is meeting at 2.30, and we have other committee meetings at one o'clock.

The CHAIRMAN: We have already sent out notice that this meeting will commence at 3 o'clock. Representatives of the cooperative union of Canada are supposed to be here at 3 o'clock. We will hear the present witnesses first and then continue with the representatives of the cooperative union of Canada.

AFTERNOON SESSION

TUESDAY, June 28, 1960.
3 p.m.

The CHAIRMAN: Gentlemen, when we left off before lunch Mr. McIntosh had stated that he wanted to ask a question.

Mr. McINTOSH: I have three questions. First, in the second paragraph on page 4 the brief says this:

> Similarly, it has long been the custom for manufacturers to make allowances to retailers in return for such services as storage, transportation, guarantees, warranties, etc., normally provided by the manufacturer. It would not be either possible or fair to expect manufacturers to grant the same allowances to retailers who do not perform these services in the same proportion.

I do not believe the act is asking that. But you want a formula applied that would cover all retailers like, for instance, so much per square feet for storage and so much per mile for transportation which would be the same to all.

My second question is in respect of the last paragraph on page 4 where it says:

> From the retailer's point of view, it is difficult for a purchaser to have knowledge of allowances granted to purchasers in competition. And from a manufacturer's point of view it is impossible to get the cost of newspaper space from the trade;

I wonder if you have the same difficulty in getting the cost of television and radio advertising that you do in respect of newspapers? I do not expect you do. I understood you to say this morning that you got tear sheets from all newspapers mutually advertised in. I know it is a fact for some manufacturers to get an account of the cost for that.

Then on page 6 you refer to section 33 subsection 3(b) and (c). In the last sentence in that paragraph you say:

> But the number of services that can ordinarily be performed by jobbers, wholesalers, large retailers, small retailers and mail order houses, etc., are very few and far between and may be non-existent.

I wonder what you mean by "services". Would you explain that.

Mr. WILLIAMS: As to the first point, I think we agreed this morning that the minister was quite right in his statement that perhaps we had misinterpreted the paragraph and that they would take another look at it and make an effort to make the language more precise. If that is the case then our paragraph here becomes invalid.

As to the second question, it is impossible to get the cost of newspaper space, but you can get television and radio costs from the stations. Usually it is a public rate card. Up to the present there is very little wheedling and dealing in the price cutting area so far as I know. When you say you get a bill from the newspapers, frequently you do. If I am in the toiletry or Revlon type of operation, frequently a store will send me a bill from the newspaper; but that bill invariably is at the national rate which may be 50 per cent higher, double, or in some cases treble what the account actually is paying the newspaper.

Mr. MCINTOSH: That is the rate card.

Mr. WILLIAMS: Yes; but all of these are negotiated. I would not go on oath on that, but I doubt if there is a national advertizer in Canada which does not have a special agreement for so many pages at such and such a cost with most newspapers across the country. This is just the nature of the beast.

Mr. MCINTOSH: I venture to say the charge by the newspaper to the retailer for so many pages per year or months would be the same.

Mr. WILLIAMS: No sir. I am not being dogmatic or flat footed but—

Mr. MCINTOSH: Perhaps we should include the newspapers in these combines.

Mr. WILLIAMS: That is beyond my province. I know there are a lot of people who pay the national rate because that is the way it has always been. Last week I was told of a case about six months ago where you have an item like Playtex girdles which comes in once or twice a year and still pays the national rate.

Mr. MCINTOSH: If the local stores put in a trailer ad below the national ad they could do so by paying the regular rate?

Mr. WILLIAMS: Yes. They can pay the local rate on their portion but the national advertiser pays the national rate. As to your question in respect of the bottom of page 6, what that sentence should say is the number of services that can ordinarily be performed by jobbers and wholesalers identical in scope are very few and far between and may be non-existent because each branch of the trade has its own means of promotion and its own means of advertising. You have such things as Pinky stamps and Lucky green stamps. You have radio, you have television, you have mass displaying, you have certain cut price features, and you have newspaper space. What I think this paragraph means, and you can correct me if I am wrong, Mr. Crysler, is that this cannot all be done uniformly and simultaneously for all manner of trade. Some perform one, some another, some may have one or two or three, but not all of them meet and mesh in a uniform fashion. Does that answer your question?

Mr. MCINTOSH: Yes, assuming they are identical in scope then that does give a clear picture.

Mr. PASCOE: Mr. Chairman, two of the questions that I was going to ask have since been answered. If I may I would like to ask a very general question of Mr. Williams which to a certain extent falls in line with the questioning this morning.

I would like to ask this for clarification in regard to this presentation before this committee.

The brief refers to the board's constituency, a word with which we are all very familiar, but it also says that the membership of the board is comprised of more than 9,000 persons who represent all types and sizes of business enterprises. I would like to ask Mr. Williams how this brief was prepared, and whether all the 9,000 persons were consulted and asked their views especially in regard to the submission in respect of section 33 (b).

Mr. WILLIAMS: That is a very sound and logical question, but quite obviously we did not consult the 9,000 membership as to the details of it.

The affairs of the board of trade of metropolitan Toronto are in the hands of what we call a council, of which Mr. Anderson, for example, is a member. This council is an elected group and is made up of 24 people. With the combination of the staff we have 68 people who keep their ears to the ground and talk with people. It is an understood thing that the council has the right to speak for the board. The details of this document have been cleared with the members of the council.

One of the reasons we have not got, if I might just continue for a second, sir, into such a matter as resale price maintenance is because of the fact that we have perhaps 4,500 on this side and 4,500 on that side of the argument. In that case the council obviously cannot speak for the membership. We knew of these views and we put nothing in this brief at all, about, if you like, the little bit of weakening of the resale price maintenance stipulations of 1954.

Mr. PASCOE: Would it be fair to ask you then if you considered these views?

Mr. WILLIAMS: I consider this as a fair representation of the views of the board of trade of metropolitan Toronto, yes. Mr. Crysler, do you agree?

Mr. CRYSLER: Yes, and perhaps I could just add a word.

This document was really prepared by our legislation committee, a group of approximately 35 or 40 people. That group is picked, and perhaps consists of more lawyers than any other one group. The lawyers are picked, not because they happen just to be competent lawyers, but they are picked because they are familiar with certain trades and certain lines of businesses. A lot of executives are picked as well. To the best of our ability that committee is so picked as to have a good cross-section of the membership.

Then on top of that I might just add that in a matter like this we have what we call an around-the-board column which appears monthly in our journal. When we get into these subject matters we publish the fact that we are getting into them. If anybody has a strong view, all they have to do is to send their view in and they will probably be invited to the meetings.

Mr. MCILRAITH: Mr. Chairman, my questions have been answered in part.

The CHAIRMAN: Good.

Mr. MCILRAITH: I want to pursue one aspect of the matter a bit.

Your brief has obviously been very thoroughly prepared by men who are experts on the subject. It is related to section 33 in the main, except for one or two references.

Now, coming to a consideration of section 34 of the act, amending the provisions of the bill; the resale price maintenance section, and you have

now given the explanation as to why you have not taken a stand on this subject of resale price maintenance. I am satisfied with that explanation. I want to ask you if you had addressed yourselves to the question of draftsmanship of the amending clause relating to section 34. Have you given it particular study? There is nothing in your brief in respect of it.

Mr. WILLIAMS: Mr. McIlraith, if I could step out of character for just a minute. I was going to put this at the end of the testimonay, but if I could divorce myself from the board of trade now and speak as an individual, I would say that I made a statement at Jasper early in 1954 to the national meeting of the Canadian manufacturers association which had come out very strongly and very flat-footedly for resale price maintenance. I got up and said, that since I was a paid-up member I guessed I was entitled to speak my piece, and I promptly did so. I said that in my opinion resale price maintenance was one of the worst things you could foist on the economy, and I used the phrase, "it holds an umbrella over inefficiency". That phrase happened to catch the newspaper men's fancy, and there were about 30 newspapers represented there. I have not changed from that view a bit. I still think it is a wrong thing. I think it protects the weakest guy of the lot in the industry. I think it violates all the principles of what I consider to be normal trade enterprise. I am through with that statement now and I will come back as a board of trade member.

Mr. MCILRAITH: Your views on resale price maintenance are satisfactory to me, I might add, but I wanted to get at this a little further than that. I was quite concerned with the draftsmanship of the amending clause in the bill. It seemed to me it did not accomplish the objectives set out by the minister and the objectives, possibly, in the mind of the government, when this part of the bill was brought forward. Would you, Mr. Crysler, address yourself to that problem—that is, the legal part, and whether this clause expresses the view—

Mr. WILLIAMS: Before Mr. Crysler answers that question, I would like to point out, as a private individual, when I read something to the effect: supplied by the person charged as loss leaders, as far as I know, there is no definition in Canada of a loss leader.

I go to the next page, which reads:

> (b) that the other person was making a practice of using articles supplied by the person charged not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles.

I submit that almost every ad you read, on the part of any advertiser, has some item in it in which the price has been cut to develop store traffic, which means sales. I say this is a weakening thing. I say to people in the department store business: if you put it in, it is rather fuzzy, because they are shopping around, trying to find special bargains, so they can sell it cheaper and, thereby, getting a lot of people into the store. People make business. I do not like that one very much.

As far as "D" is concerned—that the other person made a practice of not providing the level of servicing that purchasers of such articles might reasonably expect from such other person, I do not know what the level of servicing might be from such other person. I happen to be dealing with a large manufacturer of appliances. I paid the full list price for the merchandise and, on occasions, I have to call the president to get, what I call, a reasonable level of service. It seems to me the service is terrible, and I do not know how you can evaluate that, from a legal point of view.

I am all through with retail price maintenance, if you do not mind.

Mr. McILRAITH: Dealing with 14, sub-clause 5, at the bottom of page 8 what about "no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and anyone upon whose report he depended had reasonable cause to believe and did believe". Have you given any thought as to how that works out in the courts?

Mr. CRYSLER: What is the reference again?

Mr. McILRAITH: The bottom of page 8, clause 14, sub-clause 5.

Mr. CRYSLER: Well now, the first answer, sir, that I have to make to your question is that, as we know very well, we could not get a sufficiently unified view to say anything about this matter, in the formal way. Quite frankly, we did not pay too much attention to it. However, to give you the best answer I am able to, I would merely point out that, as all through this act, you are using a series of quantitative words—"unduly", "detriment", "tendency" and "substantial". I am inclined to agree with you. I do not know what these words mean. If you start taking on that, you will get into other parts of the act. However, we do know what "unduly" means, but it has taken 60 years of adjudication to find out what the darn thing does mean.

Mr. McILRAITH: Well, you have expressed my opposition to the bill pretty well, and pretty fully.

Mr. WILLIAMS: As a private individual.

Mr. ANDERSON: I entirely disagree with Bill.

Mr. McILRAITH: The question of the legal interpretation was what I was concerned with.

Mr. CRYSLER: It is the question of the use of quantitative words, and that is not limited to this section. The whole act is shot through with quantitative words.

Mr. McILRAITH: Turning now to clause 17, have you any views to express as to giving the attorney general of Canada and the attorney general of any of the provinces discretion to institute proceedings either by way of an information in the Exchequer Court or by way of criminal prosecution? Have you considered that?

Mr. CRYSLER: We have looked at it.

Mr. McILRAITH: But, do I take it that you have no views to express?

Mr. CRYSLER: There was not anything about it that sufficiently struck our attention, that we thought we had a view. However, we looked at it.

Mr. McILRAITH: Did you consider the question of making it an offence instead of making it a criminal prosecution, and that you would merely deal with it without any criminal prosecution and by way of a prohibitory order in the civil court—and whether that took away the jurisdiction of the federal parliament altogether?

Mr. CRYSLER: I am not too sure I know the question you are putting.

Mr. McILRAITH: Under the bill as it is now submitted it is possible to bring an action of civil proceedings in the civil court—the Exchequer Court—to restrain a company or issue a mandatory order against a company and you are not required to bring any criminal proceedings at any point whatever. Had you considered whether or not that took away the jurisdiction of the federal parliament because of the fact that the basis of the constitutional right of the federal parliament to legislate on this subject is under the heading of criminal law.

Mr. CRYSLER: Well now, you must bear in mind that I have no instruction on this point and I am speaking entirely personally.

Mr. JONES: What section is this?

Mr. McILRAITH: It arises out of section 17(4) and section 19.

Mr. CRYSLER: I think I would make my answer to you this way. In the most recent judgment of the Supreme Court of Canada on a point of constitutional law it was held that a prohibitory restraining order could be issued as a criminal order, as an order in criminal law. When you get over into the area of injunctions, they are both civil and criminal. I cannot get very, very much excited over the distinction between the type of order you use, because in each case the sanction is the same—in jail for contempt.

Mr. MCILRAITH: The point I am getting at arises a little differently. In those cases, as I recall it, they are dealing with a prohibitory order which is ancillary to criminal proceedings, and in this bill I submit it may be capable of this construction because you are dealing with it as civil proceedings in substitution for criminal proceedings.

Mr. CRYSLER: I see the constitutional possibilities of your argument, but I do not think we will know the answer until the Supreme Court of Canada has told us. For instance, I was a mile wrong professionally on the prohibitory order.

Mr. MCILRAITH: I feel I may be wrong on this point, but whether I am right or wrong it is a matter to be litigated.

Mr. MARTIN (*Essex East*): Are you satisfied that the determination as to whether or not a matter comes under the Criminal Code or an ordinary statute involving property and civil rights is determined by the form of punishment? When I say are you satisfied, I mean are you satisfied that there are cases which establish that point. Are you satisfied that in law the determination as to whether or not a question comes under the guise of criminal law or not is determined by the punishment made?

Mr. CRYSLER: No sir. If you turn to the proprietory article on trade I suggest the Privy Council says crime is what parliament considers.

Mr. MCINTOSH: On a point of privilege, is this a part of the brief from the metropolitan Toronto board of trade—that is, the questions being asked now?

Mr. MCILRAITH: Yes. What I have been questioning on is the reference in the brief criticizing constructively section 33 with reference to its interpretation and its effect in law. However, I have no further questions.

Mr. MARTIN (*Essex East*): I know this is not in the brief, but Mr. Crysler is a man of considerable experience. Having in mind the character of the Combines Act seeking to provide sanctions against combines contrary to the public interest, what do you say about giving the initial jurisdiction to the Exchequer Court, a court which normally has been involved in an altogether different kind of matter?

Mr. CRYSLER: Well, that point came up in our committee when we went over this bill. I can say only that our committee, composed of a number of leading counsel, did not see a point worth raising, and that happens to be my view.

Mr. MARTIN (*Essex East*): You do not think you withdraw the sting by a punitive measure being given Exchequer Court jurisdiction?

Mr. CRYSLER: I do not think necessarily. Can I give you the answer this way. Maybe this is what we are trying to get at. It seems to me that some of the things that are prosecuted really are criminal and should be dealt with as such; they are bad cases, extreme cases. Other kinds are not so extreme. It seems to me that to give those who control the initiating machinery the option, according to their view of the matter, to proceed on a civil or criminal basis is right and proper. I am speaking personally now.

Mr. MITCHELL: I have a few questions I would like to ask Mr. Williams. What percentage, roughly of your Metropolitan board of trade would be in the retail operations?

Mr. WILLIAMS: Certainly all the big ones are, such as Eatons, Simpsons—one of our past presidents of recent years is the president of Henry Birks—all the chains and the department stores. The president of Dominion stores has been on our council for the last five years. We have all the big ones. They are easy to remerber, but there are many others.

Mr. MITCHELL: That is quite sufficient. In your manufacturing distribution policies you have a quantity price.

Mr. WILLIAMS: Yes.

Mr. MITCHELL: In other words a small man would buy a case of powdered soap at a price, another man may buy ten cases at another price, and another man may buy at a carload price.

Mr. WILLIAMS: Yes, but we have worked out what I think is a pretty interesting deal. We have a discount for a carload, which weighs about 30,000 pounds, of three per cent. Ordinarily the little man cannot possibly buy that quantity, so we have what we call a pool-car plan. A salesman goes around and takes an order for ten cases here at one price and twenty cases at another price and 100 cases at another price. The man who buys 250 cases pays one per cent above the carload price, the man who buys 100 cases two percent above the carload price and the man who buys 25 cases three per cent above the carload price. These are delivered to the stores. If you go into a town like Sudbury the salesman goes down the street in Sudbury because the headquarters of these chains are 200 or more miles away they do not attempt to buy a carload at three per cent and pay four per cent for warehouse costs and another six per cent for trucking. They buy it in the pool car with the other retailer across the street at exactly the same price. We do this right across Canada. It is an expensive method, but it is working well and we like it.

Mr. MITCHELL: I commend you on this.

Mr. WILLIAMS: We build the merchandise through a jobber and pay him the difference between the carload price which he normally pays and whatever the somewhat higher price is which we charge the retailer for handling the invoice and so on.

Mr. MITCHELL: You have cooperative advertizing?

Mr. WILLIAMS: Yes.

Mr. MITCHELL: Am I correct in saying that cooperative advertising is based on say the previous year's purchases?

Mr. WILLIAMS: Yes. There is not much variance in our line.

Mr. MITCHELL: Then on the display allowance you were quoting this morning there are certain rules shall we say, or agreements, for the implementation of this display allowance. I believe Mr. Jones this morning mentioned the good locations in the store and so on, and that they would have that priority, shall we say, for a certain length of time. In that length of time you enter into a contract with the retailer and he agrees at the time of the purchase to do this in the form of signing an agreement, or at the end of say one month's period after he has completed his contract or arrangement with you he sends the card in and you rebate the allowance.

Mr. WILLIAMS: That is in essence the way it works, roughly.

Mr. MITCHELL: I am speaking of the toilet field, when I mention this.

Mr. WILLIAMS: You are going to get into a field I do not know much about. We do not handle many drugs. We have two shampoos and one tooth-

paste; they are not overcoming us with their success. So in respect of the drug field I am no oracle.

Mr. MITCHELL: I believe you have indicated that you do not know a definition of loss leader.

Mr. WILLIAMS: That is right.

Mr. MITCHELL: What is your attitude with regard to loss leader selling.

Mr. WILLIAMS: This is not in the brief, but if you wish me to speak as a private manufacture I will be happy to.

Mr. MITCHELL: Loss leader has not been defined, but loss leader selling is taking place.

Mr. WILLIAMS: If you want my personal opinion, I think selling merchandise at below the retailer's actual cost is silly. The mark-up at which you might operate profitably could be five per cent on one item and on the caviar or anchovy type of item the mark-up might be 50 per cent and you still lose money.

Mr. JONES: You have some conception of loss leader in your own mind.

Mr. WILLIAMS: I do not like the concept of selling at lower than the dealer pays for it. If you were to speak to a thousand people about this I suggest you would have a thousand varying opinions. In one case in the United States it is carload cost plus six per cent, not including a cash discount of two per cent. In the adjoining states you can include the cash discount and an advertising allowance. All I can say is that my company has tried about everything in the world at one time or another. We tried to satisfy the resale price maintenance people and the loss leader people.

Mr. PICKERSGILL: The witness has said that he thinks selling an article below cost, which he gave as sort of a definition of loss leader was silly. I would like to ask the witness whether or not he thinks this ought to be made a crime.

Mr. WILLIAMS: No I do not, frankly. The reason I say this is I think the more laws you set up which limit the freedom of people the worse off they are. I do not think this loss leader thing, as I see it, has assumed any huge proportion.

Mr. MARTIN (*Essex East*): You believe in competition.

Mr. WILLIAMS: To the absolute utmost. The minute I do not, I should get off the seat I am on.

Mr. JONES: But section 34 is an intrusion into the right of people to make bargains with each other; it is an addition.

Mr. HORNER (*Acadia*): Mr. Williams suggested he considers a loss leader as silly. Does he consider it a problem in some phases of merchandising, maybe not in soap, but perhaps in others?

Mr. WILLIAMS: I know virtually of no major area in which there is so-called below cost selling. There is a lot of competitive selling where the normal profit level is 33⅓ per cent and someone sells at 10 per cent.

Mr. HORNER (*Acadia*): An example was explained a few days ago by a Winnipeg member in which there is a Dominion store on one corner and next door a shop that sells flowers and another that sells electrical goods. That Dominion store every once in a while has a sale, for instance, of flowers, and practically gives away flowers to attract people into its store to buy other goods. They sell those flowers at below cost and they are used as an attraction to get people into their store, but they pretty near ruin the man next door who is making his business in selling strictly flowers. The next week they come out with a gimmick where they have some electric tool which people use and this has an effect on the other specialized store. Do you think that this system is a problem?

Mr. WILLIAMS: I do not think I am qualified to answer that.

The CHAIRMAN: Mr. Howard, I think you have a question.

Mr. HOWARD: Yes. This matter is not in your brief but it is related to the definition of an article which is right at the first part of the bill in section 1. It defines an article as an article or commodity that may be the subject of trade or commerce. Have you concerned yourself with whether or not the act might be extended to include what we generally refer to as services?

Mr. WILLIAMS: I will have to be frank and say I do not have an opinion. Frankly, I have not studied that first part.

Mr. CRYSLER: That is a high matter of policy. I do not want to get thinking of policy, but I will say this. Your act, in so far as combination, covers, it has been suggested, articles or commodities of trade and commerce.

Mr. MARTIN (*Essex East*): It does not cover services.

Mr. CRYSLER: Parallel with that, the common law has been applying to all other matters, and particularly speaking, services. Actually, gentlemen, if you look at the case books there are more matters being settled in civil law, apparently sufficiently satisfactorily to those concerned, that they do not even hit the headlines. There are three, four, five, six important cases a year.

Until somebody can show where the common law rules are failing with respect to services, the need for protecting them under some legislation such as this is not there. The case has to be made out. At the moment I do not see the case. The common law and the courts seem to be functioning and dealing with it adequately.

Mr. HOWARD: Not being a lawyer I do not follow you too well there in respect of this common law, and civil cases dealing with services. Do you mean in the field of what we normally consider to be practices under the Combines Investigation Act?

Mr. CRYSLER: Sir, the Combines Investigation Act, so far as combines are concerned I am now not speaking of resale price maintenance, mergers or monopolies—but so far as combines are concerned, it covers only articles or commodities of trade and commerce, and insurance. It has always been a great puzzlement to me how that one lone fellow, "insurance", got in there but there it is and there it has been.

Mr. MARTIN (*Essex East*): It is covered under clause 1, subclause A of this bill.

Mr. CRYSLER: Yes. That has been there for, I do not know how many years; 50 or 60.

The question which was put to me was; did I have any view in respect of services. It is actually more than one service that is involved because it covers such things as supply of equipment with a restrictive covenant—which may be walking the consumer within site of a merge—termination of employment with a restrictive covenant, and many other things. There is a wide area of our law on restrictive trades that is handled by the boards under the common law rules with no special legislation.

All I am trying to say is, as to that area of law, I know nothing that is going wrong there. I have not heard it seriously debated that there is anything wrong. A question may be raised, but that does not make out the case that the common law, as administered by the courts, is in any substantial way failing to do its job. I merely suggest that somebody has yet to make a case out, so far as I am concerned, touching the common law side.

Now, in respect to criminal prosecutions; actually unless the offence is stated, of course, you cannot have a criminal prosecution. In particular, since the criminal code was revised in 1953-54, there is a section—I believe it is eight or nine of the criminal code—which you will find in there where it explicitly says you cannot convict a person of anything not specified in the

Criminal Code. That is what the old common law says; the crime of restrictive trade is not specified in the Criminal Code and you cannot convict. You can have a civil action, of course.

Mr. HOWARD: Yes.

The CHAIRMAN: Gentlemen, I have depleted my list of names of members who were anxious to ask questions.

I would like to thank the representatives of the board of trade of metropolitan Toronto.

Mr. WILLIAMS: Thank you, sir.

The CHAIRMAN: I would like to thank you all for coming here today. I would like to congratulate you on being excellent witnesses and being very enlightening.

Some hon. MEMBERS: Hear, hear.

The CHAIRMAN: I would also like to thank you for your brief.

Mr. HOWARD: Just before the gentlemen leave there is one thing I would like to ask. I was trying to catch your attention while you were making these comments, Mr. Chairman. Mr. Williams mentioned three or four instances of situations which existed in various states of the United States, and he appeared to have an extremely wide knowledge of this sort of thing.

Mr. WILLIAMS: No.

Mr. HOWARD: I just wondered if Mr. Williams was an American citizen or a Canadian citizen.

Mr. WILLIAMS: I have to stop and think for a moment. I still am a United States citizen. I do not think anybody works harder at trying to be a Canadian.

Mr. MARTIN (*Essex East*): You have been here a long time.

Mr. WILLIAMS: I have been here a long time. I have been very interested in this country and I love it.

May I express my opinion to the members of this committee? It has been a very pleasant day for us. We have enjoyed it. You have been most fair and most kind. Thank you very much.

The CHAIRMAN: Now, gentlemen, if you will come to order again, Mr. Staples, the president of the cooperative union of Canada, will come forward and we will receive his brief.

Mr. MARTIN (*Essex East*): We have not received copies of this brief as yet.

The CHAIRMAN: I am sorry to keep you waiting. You were supposed to be here at 3 but we have had a change in our rules in that those individuals who appeared in the morning will extend on past 3 o'clock. I hope this has not caused you any inconvenience.

I will call on Mr. Staples to read his brief.

Mr. Staples.

Mr. THOMAS: Before Mr. Staples goes ahead with this brief, I wonder if we could have a statement as to the number of associations that he represents.

Mr. RALPH S. STAPLES (*President, Cooperative Union of Canada*): I would be very glad to do that, Mr. Chairman. There is nothing in this regard. There is no preamble to the brief.

I should like to say, first of all, that we do appreciate the opportunity of coming here to present the views of at least some of the cooperatives of Canada in respect of bill C-58.

The difficulty we often encounter in connection with legislation, both federally and provincially, lies in the fact that cooperatives are different from the usual type of businesses that are organized for the purpose of making a profit. Cooperatives exist to provide a service for their members.

The members of our farm marketing cooperative, for example, can improve, and often do improve their financial position by cooperating. Members of consumer cooperatives, or service cooperatives can, and they mostly do, save money by cooperating. A cooperative itself, as an organization, is not in business to make money. It is in business to provide a service at its cost. Unless that sort of concept is understood and appreciated fully by the people who are drafting and enacting legislation, it then is not possible to provide legislation that is satisfactory from the cooperative standpoint. This is a problem we meet in connection with very many pieces of legislation. Basically this is the problem in connection with this legislation. I am not an expert on legislation or legal affairs. I have come here mainly for the purpose of trying to present to you the viewpoints of my organization, which represents many cooperatives in Canada.

Mr. MARTIN (*Essex East*): Are you the successor to Mr. A. B. McDonald?

Mr. STAPLES: I am president of the organization.

Mr. MARTIN (*Essex East*): He was the director?

Mr. STAPLES: He was the national secretary.

The cooperative union of Canada is a relatively old organization, Mr. Chairman. It was first organized in 1909. It was in the beginning, and for many of its years, a union of cooperatives, of whatever nature and wherever found. During the early 1940's a study was made of this, and to make a long story short, the cooperative union of Canada was organized, taking the same name and having the same general objectives. Since 1945, I think it was, it has been in the nature of a federation of provincial cooperative unions. So the cooperative union of Canada consists largely of the cooperative union in each province, the exceptions being, Quebec and Alberta, at the moment. Thus, those provincial cooperative unions, with cooperatives of very widely varied types, find their membership in our organization; cooperatives in maketing, producing, insurance, transportation, financing. Those are some of the major fields, but the list could be a very long one.

Mr. THOMAS: Could you give us, Mr. Staples, even an approximate number of people or number of individual members of these cooperatives which you represent?

Mr. STAPLES: The best statistics, and the only good statistics are contained in this government publication "cooperation in Canada", published annually by the Canadian Department of Agriculture. Now, very, very roughly the number of memberships in cooperatives in Canada is about a million and a half. This does not include the field of insurance. It does not include credit unions. It includes mainly the other types of cooperatives. It has about a million and a half memberships, and the turnover in total volume of business transacted would be something like one and one quarter billion dollars. That is a very rough indication.

We do not represent all cooperatives in the cooperative union of Canada because there is a sister organization, Le Conseil Canadien de la coopération, with headquarters in Quebec, which represents the French speaking cooperatives in Canada. But, along with this sister organization, the cooperative union of Canada represents the majority of the cooperatives in Canada.

Mr. THOMAS: Does the cooperative union of Canada have any connection with the grain pools in western Canada?

Mr. STAPLES: Yes, the grain pools in Saskatchewan and Manitoba are in our affiliated membership. As I suggested a minute ago, Alberta is undergoing a period of reorganization and is not now in our membership. Cooperatives can become memberships only through a provincial union. There

is no provincial union in Alberta, so the Alberta grain pool is not a member for the moment, but this is another story.

Mr. THOMAS: The one and a half million membership would include both purchaser cooperatives and consumer cooperatives, would it?

Mr. STAPLES: That is right. There will be a good deal of overlapping in this figure. No one knows how many members we have. We can only say "its membership", because some people will belong to more than one co-operative. Some individuals might be members of several cooperatives.

I will then proceed to read the brief, Mr. Chairman.

SUBMISSION TO BANKING AND COMMERCE COMMITTEE RE LEGISLATION RELATING TO COMBINES AND RELATED MATTERS BY THE CO-OPERATIVE UNION OF CANADA

Bill C-59 to amend the Combines Investigation Act and the crimnial code was introduced at the last session of parliament but was deferred until the present session in order to afford an opportunity for further consideration of representations relating to its povisions. The Cooperative union took advantage of this opportunity and made a submission to the government on November 4th, 1959.

The Cooperative union is desirous of making further submissions to this committee regarding certain of the proposed amendments contained in bill C-58 relating to the following matters:

I. Illegal trade practices.
II. Price maintenance.
III. Enjoining commission of offenses.
IV. Combines, mergers and monopolies.

I. *Illegal Trade Practices*

The Cooperative union is pleased to note that one of the requests made last year has been complied with in the new bill. Subsection (3) of section 33A included in that bill recognized and excepted certain co-operative practices from the prohibition of paragraph (a) of subsection (1) as follows: "(3)) The provisions of paragraph (a) of subsection (1) shall not be construed to prohibit a co-operative society from returning to producers or consumers, or a co-operative wholesale society from returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to the purchases made from or sales made to the society".

It was submitted that this saving provision relating to cooperatives should be extended in two respects.

First it was pointed out that because of the development of cooperatives the words "or wholesale" should be inserted in the subsection after the word "retail" and in the new bill C-58, this has been done.

Secondly it was submitted that paragraphs (b) and (c) should also be referred to in subsection (3). This has not been done in the new bill and it is submitted that this amendment should be made for the following reasons:

One of the main reasons why cooperatives are organized and operated is to eliminate unreasonably high prices and many examples of their influence in this respect could be given. With reference to clause (c) "at prices unreasonably low" could be interpreted to mean "unreasonably low" in that they did not include a reasonable profit. Cooperatives, however, aim to conduct business on behalf of their members without making a profit and from their point of view the prices would not be "unreasonably low" if they covered costs. A cooperative would not have or be designed to have "the effect or tendency of substantially lessening competition or eliminating a competitor" as the cooperative is in operation to serve its own members who own and control it on a cost basis and is not in competition with anyone in the sense in which clause (c) should be construed.

With reference to clause (b) the prices fixed by a cooperative in any region are based on cost with a reasonable margin of safety and when the actual cost is determined, the surplus is returned to the members on a patronage basis. As costs differ in different regions, prices will differ. The inapplicability of the provisions relating to competitors has already been dealt with.

It should meet the above objections if subsection (3) is amended to read "the provisions of paragraphs (a), (b) and (c) of subsection (1) shall not apply to a cooperative society that returns to producers or consumers, or a cooperative wholesale society that returns to its constituent retail or wholesale members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales made to the society."

II. *Price Maintenance*

It is submitted that the prohibition provision against resale price maintenance contained in section 34 of the Combines Investigation Act should not be weakened. The new subsection (5) of section 34 which is contained in the new bill is even more objectionable than the proposed subsection against which submissions were made last year. In the former proposed subsection it was necessary for the person charged to satisfy the court that he had reasonable cause to believe and did believe one of the facts set out in clauses (a) to (e) inclusive. The defence has now been thrown wide open by the inclusion of the words "and any one upon whose report he depended".

It is submitted that the new subsection (5) which is proposed would or could destroy the effect of section 34 and is therefore objectionable as it would have the following effects:

(1) make the prohibition of resale price maintenance more difficult
(2) give manufacturer greater control over prices.
(3) make discrimination in supplying goods more easily possible;

Therefore it is not in the public interest.

It is further submitted that clauses (*a*), (*b*) and (*d*) should certainly not apply to cooperative societies as described above.

Particular objection is taken by cooperatives to the provision under which no inference unfavourable to the person charged shall be drawn from evidence that he refused or counselled the refusal to supply articles to a person, if he satisfies the court that he and anyone upon whose report he depended had reasonable cause to believe and did believe that the other person was making a practice of using the articles as referred to in clause (*a*) "not for the purpose of making a profit thereon but for the purpose of advertising" or in clause (*b*) "not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles."

Cooperatives do not use the articles they buy for the purpose of "making a profit" or "selling such articles at a profit". They acquire the articles to meet a demand from their members and to supply their members with goods at cost. In other words the cooperative is simply the instrument which the members use to supply themselves with goods and services at cost and it does not intentionally make a profit. Technically a profit may sometimes be made but its "purpose" is not for "making a profit" or "selling such articles at a profit" within the meaning of the above provisions. However, this significant fact may not be and frequently is not understood by a prospective supplier (or someone who reports to him) and he may, because of this, be held to have had reasonable cause for his belief and to have had that belief. The same considerations apply to the other grounds "advertising" and "attracting customers". Clauses (*a*) and (*b*) should have no reference to a cooperative society described above as they are not applicable and this should be made very clear in the amending legislation.

It is also submitted that clause (*d*) should have no application to cooperatives. Cooperatives are established and operated to serve their members at cost. Very often the members of a cooperative are able and willing, in order to reduce expenses, to go to more trouble individually and accept a different "level of servicing" than that which other purchasers not organized to help

themselves expect and are provided with by business concerns not operated on a cooperative basis.

If subsection (5) is enacted, then it is submitted that a further provision should be added to the effect that clauses (*a*), (*b*) and (*d*) of subsection (5) shall have no application where a person is charged with refusing or counselling the refusal to sell or supply an article to a cooperative society that returns to producers or consumers, or a cooperative wholesale society which returns its surplus to its members as described in section 33A(3) above.

III. *Enjoining Commission of Offences*

It is submitted that the proposed amendment to section 31 of the Combines Investigation Act is not in the public interest. Subsection (2) of this section, according to the explanatory note, is being amended to permit a restraining or dissolution order without a conviction where the offence has been completed.

If the offence has been completed why should the offender not be punished? The proposed change might lead a person to believe that he could commit an offence (and perhaps encourage him to do so) but if detected he would have to discontinue his wrongdoing but would not be punished for the offence he has committed. This is surely a departure from the general rule that where an offence has been committed the offender should be punished. If, however, the intention is that the offence be enjoined instead of punished in cases where there is no detriment to the public, then it is submitted that this should be clearly stated in the amending provision.

IV. *Combines, Mergers and Monopolies*

It is urged that as subsection (2) of section 32, as proposed, substantially weakens the effect of subsection (1) which incorporates section 411 of the Criminal Code and is likely to operate to the detriment of the public, it should not be passed in its present form.

It is further submitted that cooperative marketing schemes, whether government controlled or completely voluntary, are in the public interest and in view of the confusion which has arisen in the past in this matter, the legislation should make clear that they are not included in this section. Cooperative marketing schemes have been considered by the courts. In particular, in the Supreme Court of Canada (1957 S.C. 198) a provision of the Farm Products Marketing Act of Ontario, which enabled a cooperative marketing agency to be set up, was questioned on the ground that it contravened the provisions of the Combines Investigation Act and sections 411 and 412 of the Criminal Code. The language used by the judges in this case is significant (Kerwin, C.J. at p. 206)—"It cannot be said that any scheme otherwise within the authority of the legislature is against the public interest when the legislature is seized of the power and, indeed, the obligation to take care of the interest in that province" and again (Rand, J. at p. 219)—"The provisions of the Combines Investigation Act and the Criminal Code envisage voluntary combinations or agreements by individuals against the public interest that violate their prohibitions" and (Locke, J. at p. 239) refers to the plan as a scheme "the carrying out of which is deemed to be in the public interest" and again at p. 258 "the object of parliament in legislating with respect to private agreements involving monopolies is to protect the public interest in free competition". He then said that the adoption by parliament of an "act to assist and encourage cooperative marketing of agricultural products" does not suggest that marketing schemes devised by parliament or the legislature within their respective fields are prima facie to be held to come within the scope of anti-monopoly legislation.

Surely if a cooperative marketing scheme enforced by law is deemed to be in the public interest, then a voluntary scheme with the same object in view is also in the public interest. To avoid the doubt and confusion which has existed in the past section 32 should specifically except cooperative marketing schemes whether voluntary or under government control.

The CHAIRMAN: Thank you very much, Mr. Staples.

Mr. JONES: Mr. Chairman, I know that all the members of the committee will be very appreciative of Mr. Staples coming here today in order to assist us in our considerations of the effects of the amendments to the Combines Investigation Act, in so far as they relate to cooperatives.

We have listened, with a great deal of interest, to the presentation he has made, and hope, perhaps, during the ensuing questions, he will be able to help us further in our consideration of these amendments.

I would like to ask a number of questions, Mr. Chairman. He has been talking in connection with the illegal trade practices section.

The CHAIRMAN: What page?

Mr. JONES: Referring to section 33A of the bill, wherein the submission is made that paragraphs (b) and (c) should also be referred to in subsection 3, excluding cooperatives from their operations.

Now, first of all, in regard to the remarks contained on page 2 of the brief, relating to clause (c) of section 33A, Mr. Staples is concerned that the phrase "unreasonably low" might possibly be interpreted judicially to include prices at which cooperatives sell to their members. Now, in my opinion, I do not think any judge would take that position and, certainly, it is not the intention, as I understand it, of the legislation to do that.

I would ask Mr. Staples' consideration of the environment in which paragraph (c) would be considered. Paragraph (c) says: engaging in a policy of selling articles at prices unreasonably low—and I am paraphrasing—having the effect of substantially lessening competition or eliminating a competitor. Well, it would be my opinion, and I ask Mr. Staples' opinion on this, that surely the courts would interpret "unreasonably low" as having regard to the nature of the business, and it seems to me most unlikely that a court, when looking at the way the cooperatives carry on their business, would consider that in their normal selling practices, they were selling unreasonably low, having regard to the nature of the cooperatives.

Could I have an expression of opinion on that, Mr. Staples?

Mr. STAPLES: Mr. Chairman, I think I can only say that we hope Mr. Jones is right. However, we would like to see the legislation drafted a little more clearly, and drafted, with the position of cooperatives a little more clearly in mind.

The cooperative operates in a different way, as Mr. Jones understands full well.

Mr. JONES: Yes, we have had a long experience with a cooperative union. I can remember the hands-clasp symbol from my earliest days.

In regard to paragraph (b) of the same subsection, the reference at the bottom of page 2 to the brief, reads:

> With reference to clause (b) the prices fixed by a cooperative in any region are based on cost with a reasonable margin of safety and when the actual cost is determined, the surplus is returned to the members on a patronage basis. As costs differ in different regions, prices will differ.

Now, it seems to me, Mr. Chairman, that would be true of the non-cooperative trade as well, and that merely differing prices is not the crux of this paragraph any more than it is of paragraph (c). The crux of the matter is

pursuing this as a policy designed to substantially lessen competition or eliminate a competitor, and I do not think that is the policy of the cooperatives. Have you a comment to make on that?

Mr. STAPLES: Well, Mr. Chairman, this is a policy with cooperatives. I mean, in some people's view, it would be considered a policy because, while it is true that cooperatives usually sell at competitive prices, the cost to the member may and should be lower because, if the price is higher than necessary and a small surplus arises, it is refunded to the member at the end of the year and, therefore, his net cost is less. Some people—especially those not friendly to cooperatives—do not distinguish between prices and costs to the member, and they look upon cooperatives as some sort of unethical outfit which is selling at a cut rate price. However, mostly, they do not, but this technical distinction is overlooked. We feel we may be vulnerable on this because of the fact that our method of operation and our reasons for it are not clearly understood by many people.

Mr. JONES: Yes, but you do not do that for the purpose of eliminating competitors. Your pricing policies, as I understand it, are designed in relation to your own consumers and in relation to your own patrons, and not for the purpose of eliminating competitors.

Mr. STAPLES: We do not do it to eliminate competitors, but is this a matter of opinion? Supposing competitors get eliminated?

The CHAIRMAN: Mr. Horner, have you a question?

Mr. JONES: I have some more questions, Mr. Chairman. However, if you would rather go on to Mr. Horner now, I could come back later with my questions.

Mr. HORNER (*Acadia*): I am prepared to go ahead now.

My main question, Mr. Staples, is what is the cooperative's principle? Is it to charge whatever is being charged for an article by other retailers, and paying a dividend back to the people who are using the cooperative store, for instance, or the co-op pool?

Mr. STAPLES: Yes, that is the principle, Mr. Chairman. However, one must do two things: first, cooperatives are autonomous, and they do what they like; secondly, it is pretty hard, sometimes, to find out what the going price is in a community. It often varies. So, you claim you are operating on the principle of selling at competitive prices but, sometimes there is a pretty wide range.

Mr. HORNER (*Acadia*): In other words, a cooperative does not start up and then immediately cut prices?

Mr. STAPLES: No.

Mr. HORNER (*Acadia*): Their principle is to sell at or about the regular price, and then return a dividend to those who may have been doing business with them?

Mr. STAPLES: Yes.

Mr. HORNER (*Acadia*): It would seem to me then that they would very seldom be under any danger of being cut off because of operating at a loss, such as you mentioned under section 14 of the bill, at page 3 of your brief. You mentioned that there is a danger, that a cooperative sometimes operates at a low rate of return, or very close to cost, and that you may come under this. But, that would not happen very often. I am a member of two co-ops, I might add. Most of the time I agree with them, but sometimes I disagree. However, it is not too often. However, the principle is to maintain the price, and return a dividend to the person who is doing business with them.

Mr. STAPLES: Well, again we can say we hope that is correct, but you must remember cooperatives have struggled along, and have had a hard and difficult road. Sometimes, rather obscure situations were taken advantage of in order to make the going more difficult than it otherwise would have been. We would like to have them in as clear a position as possible, with respect to legislation.

Mr. HORNER (*Acadia*): You mentioned a couple of cases where coops had been tried, and the judges in the Supreme Court have ruled it does not apply to cooperatives.

Mr. STAPLES: We were dealing there with marketing, which is on the other side, and also statutory marketing—marketing boards and that sort of thing. However, our lawyers think there is doubt about the position of voluntary marketing plants that might combine, we will say.

Mr. HORNER (*Acadia*): Have you heard of any cases where they have been tried under the act?

Mr. STAPLES: As far as I know, there are none in Canada. I am not sure of this. However, we have some in the United States.

Mr. HORNER (*Acadia*): If I am getting the correct impression from your brief, subsection 3 of 33 is a complete new installation in the act.

Mr. STAPLES: Subsection 33?

Mr. HORNER (*Acadia*): The clause that exempts cooperative societies.

Mr. STAPLES: I think it was in the previous legislation. However, I am not sure of that. Someone here will know.

Mr. JONES: It is a new section, put in at the request of your representation.

Mr. HORNER (*Acadia*): That is the one to which I am referring.

Mr. MARTIN (*Essex East*): Could we identify this clearly. Where is it in the act?

Mr. HORNER (*Acadia*): Page 7 of the bill—33 (3). What I want to get clear, in my own mind, is whether this is new provision in the Combines Investigation Act, for the protection of cooperatives.

Mr. MCILRAITH: Mr. MacDonald could tell us that in a minute.

The CHAIRMAN: Would you, Mr. MacDonald.

Mr. MACDONALD: There is an explanatory note opposite page 7 of the bill, which indicates that section, or subsection, was changed slightly, but is not new.

The CHAIRMAN: There is the answer, Mr. Horner.

Mr. HORNER (*Acadia*): I did not see this.

Mr. MCILRAITH: It is at the top of the opposite page.

Mr. STAPLES: It was found in 412 of the Criminal Code. It is substantially the same section.

Mr. JONES: I think the representation you made was that the word "wholesaler" be included in order that they could not be brought under the legislation.

Mr. STAPLES: With respect to what might called a super-wholesale intercooperatives limited, which is an association of wholesalers. We were afraid, because it was mentioned, as it is now, this might be used against that organization.

Mr. MCINTOSH: On page 2, Mr. Staples makes this statement:

> . . . as the cooperative is in operation to serve its own members who own and control it on a cost basis and is not in competition with anyone . . .

Do I understand from that, Mr. Staples is trying to say they restrict their sales just to members, and that their sales and their retail outlets are not open to the general public?

Mr. STAPLES: This is true of some cooperatives and some types. However, generally, it would not be true—sometimes, for practical reasons. Say, you have a cooperative service station, and somebody buys gasoline. So, you sell to all, in that case.

Mr. MCINTOSH: But, you have cooperative general stores—grocery stores, and they are open to the public.

Mr. STAPLES: Yes.

Mr. MCINTOSH: And you also have manufacturing wholesalers and retailers. Are you asking for a special concession for cooperatives, when you do service the general public—and not just your members, as you state in your brief?

Mr. STAPLES: A correction, please; we do not serve the general public at cost—at list; not usually. For one thing, we do not know who the general public is. You cannot pay patronage dividends if you do not know who they are. Buying from a cooperative store, for a non-member, is really no different from buying any place else. However, we would like to say that our service is better, but perhaps it is not.

Mr. MCINTOSH: Do you not think you should be under the same restriction as others in the same position?

Mr. STAPLES: No, because the cooperative is different. It is set up for a different purpose. It is set up to serve its members, at cost.

Mr. MCINTOSH: But it is not just serving its members at cost; they are selling to the general public also. If you restricted your sales to your members, I would agree, but when you sell to the general public, I do not agree.

Mr. STAPLES: If we were selling at lower prices, I would agree with you, but we are not selling at lower prices.

The non-member will pay the same in the cooperative store in theory as in any other store. There is no benefit to him by buying from a coop. I may be overstating the case a little bit, but for the sake of this discussion I think I am right.

Mr. MCINTOSH: If you were not restricted by certain acts the practice would be open to you to sell any way you want whether you are controvening the Combines Act or any clause in this amendment. You are asking for special concessions so that you do not come under the clauses as do the other retailers, manufacturers or wholesalers, but you still want to carry on the same practice they do plus selling to your own members.

Mr. STAPLES: This is the kind of thing I was attempting to deal with. It is not a special concession. It is different. A cooperative is a different kind of animal, requires a different legal background and environment, and there is a great deal that is not right in legislation in Canada from the standpoint of cooperatives.

Mr. MARTIN (*Essex East*): May I ask if the prices to a person who is not in the cooperative are the same as to those in the cooperative.

Mr. MCINTOSH: I understand they are the same.

Mr. STAPLES: Yes.

Mr. MCINTOSH: But they do not get the same benefits from them unless they are a member.

Mr. MARTIN (*Essex East*): So far as the price of the article is concerned they do, but they do not share the dividends because they are members.

Mr. STAPLES: The membership in most cooperatives is open to the non-members if they wish to join.

Mr. HALES: My question was asked by Mr. McIntosh. My thinking is the same. When the cooperative deals on the open retail market and sells to the general public then they should expect to fall under the same legislation as the other retailer down the street.

Mr. MARTIN (*Essex East*): I assume that is put in in the form of a question. Would I be right in saying your answer to that is they would not be the same because you are not selling under your own cost. In other words the public is not in any way discriminated against because of the prices you charge.

Mr. STAPLES: The public is not discriminated against so far as purchasing from a cooperative is concerned. The position of the public is not effected at all. It is no better nor worse than if the cooperative were not there.

Mr. JONES: I think something Mr. Staples has said really illuminates this when he said the position of the cooperatives is not to eliminate competitors but to provide service to their own members. That is a real distinction.

Mr. NUGENT: It seems to me the cooperatives conflict primarily depending on how each cooperative itself is managed. Certainly I can see the principle that a cooperative sets, in order to provide service at cost to members. There are two ways in which this can be done; either by setting your prices in price competition with others and refunding to your members, or get an idea of your cost and then add to your price sufficient to meet the cost of operating the store and have your price set in that way. In the instance where you are providing it at cost to your members it seems to me there is a real possibility of a tendency that since the costs are kept down by dividends to the members that if a great many customers can be attracted to the store at competitive prices—persons who are not members of the cooperative—then you will have a great deal of dividends to pay back to the members and then they will be getting goods at a very low cost. I am wondering if the witness can give us any idea of how many of these cooperatives actually pay the dividends on an annual basis and what percentage of them now really operate at about cost price so that seldom if ever do they have to pay the dividend.

Mr. STAPLES: I am afraid I cannot answer it in any statistical way. We are very weak on statistics. However, there is no doubt in my mind about most cooperatives following the practice of charging competitive prices, and administered prices—if I might use that term. Certainly, I think if the cooperative movement were as large or influential as it is in Sweden or in some other countries this could happen because they would be setting the pace. Here the cooperative movement is small and a competitive price is certainly the rule. As to how many pay patronage dividends, I cannot answer that. In some years cooperatives are in trouble because they cannot even meet their own costs let alone pay any dividends. Others are in a much better position and pay high dividends. I do not think you should give the impression that cooperatives are profitting from non-member business by distributing the surplus arising from that business to members. There may be some instances of that but every cooperative I know makes very vigorous attempts to recruit members and in that way everybody would receive any dividends.

Mr. MACDONNELL: You have said in the brief that the cooperatives are based on cost with a reasonable margin of safety. The statement was made that there was no profit, but that is not right because you do have dividends which you pay back.

Mr. STAPLES: We would prefer to call it surplus rather than profit.

Mr. MARTIN (*Essex East*): I can see the difficulty we get into by this line of questioning unless we make certain assumptions. In an earlier statement you said that the cooperative was a different kind of organism—that was not exactly it.

Mr. STAPLES: That is close enough.

Mr. MARTIN (*Essex East*): I want to develop that, because if we pursue this particular line we do run into great difficulty and inconsistencies which are hard to reconcile in a free economy where the only concern is the private sector.

Mr. STAPLES: Yes.

Mr. MARTIN (*Essex East*): Would you agree with me that the acceptance of your position depends upon the recognition that in our economic system there is a private enterprise sector, a public enterprise sector and a third, a cooperative sector.

Mr. STAPLES: Exactly.

Mr. MARTIN (*Essex East*): And it is on that assumption you present your case.

Mr. STAPLES: Yes. That is exactly the concept we have of the economy of Canada. We want to enlarge the cooperative sector, but certainly we will never be eliminating either of the other two important sectors in our economy.

Mr. NUGENT: Why would you want to enlarge the cooperative sector.

Mr. STAPLES: Because we believe in democracy. We want to see the principle of democracy applied to business as well as our economic life. A cooperative is organized by people who serve themselves. It is not set up by a body to make money in accordance with the investment. I am not quarreling with that. That is all right; but a cooperative is different. There is a statutory limitation on the dividends which can be paid.

Mr. NUGENT: You said there is a limitation on the dividends paid. You are speaking about your cash dividends.

Mr. STAPLES: Yes.

Mr. NUGENT: Dividends paid to the people in your cooperative.

Mr. STAPLES: Yes.

Mr. NUGENT: And the dividend made on the sales of the articles going to the same people.

Mr. STAPLES: Well, yes—

Mr. NUGENT: The difference between an ordinary shareholding company and a cooperative is it is more likely the shareholders are getting dividends only once.

Mr. STAPLES: The main portion of the surplus is paid out in proportion to the sales in a marketing cooperative.

The CHAIRMAN: A shareholder could get a larger amount than five per cent.

Mr. STAPLES: Yes, but it has no relation to the store.

Mr. THOMAS: Would it be safe to say that in a cooperative there is no common stock.

Mr. STAPLES: Technically that would not be true because in some provinces practically all the cooperatives are set up on a share capital basis.

Mr. THOMAS: It would not be common stock.

Mr. STAPLES: The first share a person would buy would qualify him for a vote.

Mr. JONES: If I might get on to part II, there is an element of confusion in respect of the interpretation of the addition to the act. The brief says:

> The new subsection (5) of section 34 which is contained in the new bill is even more objectionable than the proposed subsection against which submissions were made last year. In the former proposed subsection it was necessary for the person charged to satisfy the court that he had reasonable cause to believe and did believe one of the facts

set out in clauses (a) to (e) inclusive. The defence has now been thrown wide open by the inclusion of the words "and any one upon whose report he depended".

It would be my opinion—and I would like your opinion on that—that the addition far from weakening the act strengthens the act because it is not a disjunctive addition. On page 8 in the bill there is the following:

Where, in a prosecution under this section, it is proved that the person charged refused—

and then paraphrasing: refused to supply an article to any other person, no inference unfavourable to the person charged shall be drawn from the evidence if he satisfies the court—that he had reason to believe and did believe. The addition not only means that he believes it but also that anyone upon whose report he depended. Here you are not in a position where the person can have a report manufacturing something by a person who wishes to have an investigation. Have you considered this aspect of it.

Mr. STAPLES: Cooperatives have had a long and bitter experience with discrimination. We know quite a bit about this kind of thing.

Mr. JONES: By this the other person also can be called in in addition.

Mr. STAPLES: Maybe it is a matter of opinion whether there is reasonable cause to believe that a cooperative is selling at competitive prices by paying a substantial patronage return and lowering the price to the member. Maybe it is a matter of opinion.

Mr. JONES: But does this not strengthen the act to make it necessary for that person to be called upon also to show that he had reasonable cause to believe.

Mr. STAPLES: It is an explanation which did not occur to us.

Mr. MACDONNELL: I do not believe that this strengthens anything.

Mr. JONES: In connection with the submission on page 4 of the brief that clauses (*a*), (*b*), and (*d*) should not apply to cooperative societies, I would like your further help on that. With regard to (*a*)—this is on page 8 of the bill—the subsection reads:

that the other person was making a practice of using articles supplied by the person charged as loss leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising.

It strikes me, Mr. Staples, that there are two wings to that particular clause and I wonder if you have considered both wings of it. It is not just a question of not making a profit but also using that for the purpose of advertising. Would that not meet your objection because in my experience cooperatives would not engage in that.

Mr. STAPLES: The difficulty is that it is a matter of interpretation. There is not any clear definition of loss leader, but cooperatives certainly could be said to be in business not for the purpose of making a profit. We are not in business for that purpose.

Mr. JONES: I am reading that section in connection with the presentation that it is not applicable to cooperative practices and therefore the cooperatives would not be affected by that section because cooperatives simply do not do these things.

Mr. STAPLES: If this is not applicable to cooperatives, then there is no reason why that should not be made clear in the bill.

Mr. JONES: But you agree that it is not applicable and that cooperatives do not do this sort of thing?

Mr. STAPLES: Well, cooperatives do not operate for the purpose of making a profit, so they do that.

Mr. JONES: I think we must realize that they certainly do not try to lure people into the stores, to buy other articles, by selling goods as loss leaders for the purpose of advertising. Cooperatives exist to provide services to their member patrons, so it would not come under the section.

Mr. STAPLES: This supplier may have reasonable cause to believe, and does believe that the cooperatives were doing this. The cooperative method may give him that opinion. It is not my opinion or yours, but it may be his opinion.

Mr. JONES: That is what you are fearful of?

Mr. STAPLES: That is what we are fearful of.

Mr. JONES: In connection with paragraph (b), you have the same general argument applying on both sides?

Mr. STAPLES: Yes, that is right.

Mr. JONES: And in connection with paragraph (d) you have set forth your objections on page 5 of your brief.

The CHAIRMAN: Mr. Jones, will you speak up please?

Mr. HORNER (*Acadia*): I cannot hear you.

The CHAIRMAN: The members at the back cannot hear you at all. You are talking down into the table, there.

Mr. JONES: In connection with paragraph (d), your objections are set forth at page 5 of your brief.

Mr. STAPLES: Yes.

Mr. JONES: Wherein you submit that very often the members of a co-operative are able and willing, in order to reduce expenses, to go to more trouble individually and accept a different "level of servicing" than that which other purchasers not organized to help themselves expect, and are provided with by business concerns not operated on a cooperative basis. There again I would like to direct your attention to the actual paragraph which reads:

> That the other person made a practice of not providing the level of servicing that purchasers of such articles might reasonably expect from such other person;

This paragraph deals with what customers may expect by way of services from that particular provider of the services. Could that be in fact the situation, as is set forth in your brief? That is, a number of cooperatives, in order to reduce expenses, are willing to accept a different level of servicing? If that is so, then they can hardly be caught up in this section, because their customers would not expect any other level of servicing than what the cooperatives provided.

Mr. STAPLES: Maybe we are wrong in this, but our interpretation of the level of servicing led us to something like this situation, and this is the best example I can think of offhand; as an example, take the bulk gasoline service stations, bulk gasoline outlets selling gasoline to farmers. In the ordinary case these businesses will deliver the gasoline to farmers tanks and pumps in the farmer's backyard. I know of at least one cooperative that has no truck, and does not deliver to farmers with tanks. All the members of that cooperative come in with tanks of their own on their trucks, buy gasoline and take it away. That was our interpretation of the difference of the level of servicing.

Mr. JONES: I do not think, with respect, that this is within the contemplation of that section.

Mr. STAPLES: It may not be, but perhaps this indicates that it is open to various interpretations.

Mr. MARTIN (*Essex East*): I would like to ask a question for clarification. This is not a supplementary question.

Mr. Jones' line of questioning suggests in my mind that he does not feel that any portion of this act really touches the group on whose behalf you speak. I think I am right in that.

Mr. JONES: I think you are dealing with things that we have not yet come to in the brief.

Mr. MARTIN (*Essex East*): Yes, that is right.

Mr. JONES: So that I think remarks should be confined to, "what is made applicable to".

Mr. MARTIN (*Essex East*): Yes.

Mr. JONES: I think to generalize would not be fair.

Mr. MARTIN (*Essex East*): It would not.

Mr. JONES: There are other points and suggestions made by Mr. Staples in this brief that I think we should take very seriously into consideration. That is why he is here.

Mr. MARTIN (*Essex East*): You are quite satisfied that the loss leader clause does not cover this group?

Mr. JONES: That it does not affect this group.

Mr. MARTIN (*Essex East*): Yes.

Mr. JONES: Does not cover them deleteriously.

Mr. MARTIN (*Essex East*): Yes. Are you satisfied with that point, Mr. Staples?

Mr. STAPLES: No, not exactly. If this does not apply to cooperatives, then it should be made very clear that it does not apply to cooperatives. In the absence of some such clause there is no reason to think it does not apply.

Mr. MARTIN (*Essex East*): I certainly do not think it applied, in reading this, and that is why I was interested in what Mr. Jones was asking you. I do not think this could possibly apply to cooperatives; but maybe I am wrong. If it does apply, then I would agree with you that it should not.

Mr. STAPLES: We think we see the possibility of its being applied by suppliers to the detriment of cooperatives under some circumstances. We have to keep in mind the widely varied range of circumstances and situations in Canada.

Mr. MACDONNELL: If by "competitive prices" you mean, as I understood you to mean, that you sell at the same prices as other people, then would you not be in the same position as they are? I mean, if in fact you are selling for the same price, are people going to be able to say; while you are selling it at the same price, you are doing it as a result of very high-minded motives, while these other people are doing it merely to make a profit? This is what bothers me.

Mr. STAPLES: This is not devoted to price, Mr. Macdonnell. The difference is, what is done with the profit or surplus afterwards. This is the point that some people object to. They suggest that since we make refunds to customers, patrons and members, of the surpluses, this is unfair competition.

Mr. NUGENT: You refund to only some of the customers, do you not? I would just like to clarify this. It is possible for you to have a cooperative with perhaps 100 members, but due to your very nice merchandising, the ability of your manager, or for any other reason; perhaps convenience, or location, it would be quite possible for you to have a thousand non-members buying from you, and thereby realizing a substantial profit, with the same kind of prices as the other stores are charging. The refund is not made to all your customers, but merely to the one hundred members. Obviously then if you could attract a great many people, to your cooperatives, buying at competitive prices, you are likely to get a very large refund for your members only. Therefore, to say that

this is not a profit to your own members, would be saying something that other private merchants in the town would find hard to swallow.

Mr. STAPLES: If that were the situation, and a one hundred member co-operative had 1,000 non-member purchasers, and they were making money out of the business in terms of high patronage, then I would suggest that in respect of our principle of open membership, it is likely that the 1,000 non-members would be clamouring at our door to join, and all they would have to do is to fill out an application and pay the $5 fee, or whatever it amounts to.

Mr. NUGENT: That is true, provided they are aware of the nature of the profit that is being made; but how many of the customers are generally made aware of this, or look into the matter to that extent?

Mr. STAPLES: Cooperatives of all kinds live in glass houses. They hold annual meetings which are open. The press is usually in attendance, and financial statements are made available to the public. I do not think that is a very big problem.

Mr. NUGENT: Certainly you can see the objections that other merchants might take to this situation. You can understand why they should say that just because it is a cooperative, this is no reason why you should have a blanket coverage so that this sort of thing does not apply to you at all?

Mr. STAPLES: Now we are seeing some of the reasons why we are here.

Mr. NUGENT: I think the wording of the section perhaps would indicate that so long as these natural rules are taking the effect, that you are operating as a cooperative with profits that are substantial, and which are turned over to your own members, you do not have anything to worry about, but when the cooperative becomes a profit making venture, for the members, out of a large percentage of the buying public, then perhaps you might find that you come within the ordinary merchant's rules.

Mr. STAPLES: I agree entirely, but I do not agree that this happens very often.

Mr. HORNER (*Acadia*): Mr. Staples, much has been said about the co-operatives not making a profit and not having a desire to make a profit. Would you term such a venture, a cooperative, when it makes $5 million a year and pays out in cash dividends $1 million of it, but keeps the other $4 million as reserve dividend, which the members cannot receive until they are retired from the business, or until they reach the age of retirement? Would not that reserve dividend be considered a profit, to some extent?

Mr. STAPLES: I wish we had more cooperatives in the $5 million category.

Mr. HORNER (*Acadia*): I just used that figure as an example. You might have a cooperative that does that amount of business, but I used that 5-4-1 situation as an example. It may be that the cooperative makes $500.

Mr. STAPLES: Unless a cooperative pays its surplus out in patronage dividends to its members, it pays income tax. If the cooperative retains this money as a reserve, then it pays income tax on it the same as any other business.

Mr. HORNER (*Acadia*): Are you saying that actually income tax is payable twice on those reserves? You see, as a shareholder of a cooperative, I must pay income tax on my cash dividend and on my reserve dividend. You are saying that the cooperative itself pays income tax on the reserve dividend? Are you saying that on this $4 million, which I used in my example, income tax would be paid twice?

Mr. STAPLES: We are getting confused in our terms here. I do not understand what you mean by "reserve dividends". I think you mean the portion of the patronage return that is allocated to the members.

Mr. HORNER (*Acadia*): Yes.

Mr. STAPLES: When that happens, that becomes your property. It is not taxable while in the hands of the cooperative. If you receive patronage refunds from a marketing cooperative or a farm supply cooperative it increases your income and you pay income tax in respect of it. If it is a consumer cooperative, which reduces your cost of living then, of course, it does not enter into your income tax return. In neither case is it taxable in the hands of the cooperative.

Mr. HORNER (*Acadia*): We are getting far afield in this income tax discussion, I agree; but my question is: if you take a marketing cooperative, to clarify the income tax position, for example, which holds back the dividend and keeps it in reserve, then it is called a reserve dividend, and the shareholder or the member of that cooperative does not receive it until he either retires from the business or reaches the retirement age. Would that not be considered, in some light, as a profit?

Mr. STAPLES: I am not familiar with the term "reserve dividend", but it would not be a profit. Cooperatives operate in accordance with the provincial act, and in accordance with its own by-laws. If the surplus is not paid to the members, within the terms of the constitution and by-laws, and if it is reported by the cooperative as reserve, then it is taxable in the hands of that cooperative.

The other point I would like to make for the record is that the clauses of the Income Tax Act apply to all business, but cooperatives are not even mentioned.

Mr. HORNER (*Acadia*): I am not worried about the income tax situation at all. I want to know if you feel that when a cooperative keeps the reserve to build up its organization, or build up its warehouses, or whatever it may do, that that is in a sense a profit on its business?

Mr. STAPLES: You could call it a profit before it was distributed to the members, but it is not a profit afterwards.

Mr. HORNER (*Acadia*): You say that, even though the member does not receive this reserve until—and in the one case of a cooperative which I am familiar, it is age 74—he reaches the age at which he can collect that reserve dividend?

Mr. STAPLES: This situation varies widely from one cooperative to another. Many cooperatives run a revolving fund over a period of maybe four, five or six years, on the part of the dividend that is retained. This is always a profit to the member and it is usually withdrawable by him under certain circumstances.

Mr. HORNER (*Acadia*): In respect of the cooperative with which I am familiar, the only circumstances under which a member can withdraw this reserve is when he retires from the business or reaches the age of 74.

The CHAIRMAN: Mr. Horner I would like to ask you if this is relevant to what we are investigating here.

Mr. HORNER (*Acadia*): It is, in a sense.

The CHAIRMAN: It probably is relevant, but we are really not investigating the income tax picture of cooperatives.

Mr. HORNER (*Acadia*): I have no intention of doing that.

The CHAIRMAN: We are dealing with this Combines Investigation Act.

Mr. HORNER (*Acadia*): Mr. Chairman, I have no intention of dealing with the income tax of cooperatives. This is a side issue. I agree that it is not relevant

to what we are discussing here, but I wanted to clarify in my own mind what Mr. Staples considered a profit or surplus. I think that perhaps I have clarified it.

I would like to agree with what Mr. Macdonnell has said, in that, if the cooperative principle is to charge the going price for their products then it is entirely correct to say that paragraph A of subsection 5 would apply to them, and if this applied to them, it would apply to everybody else in business.

The CHAIRMAN: Gentlemen, if we have exhausted the questions, perhaps we can thank Mr. Staples.

Mr. JONES: We have exhausted the questions in regard to that portion of the brief. However, I have some questions in regard to the other portion, Mr. Chairman.

The CHAIRMAN: Oh, I thought you were finished.

Mr. JONES: In connection with that portion of your brief entitled "enjoining commission of offences" I notice you say:

> It is submitted that the proposed amendment to section 31 of the Combines Investigation Act is not in the public interest.

You refer specifically to subsection (2) of the section. You go on to say:

> —is being amended to permit a restraining or dissolution order without a conviction where the offence has been completed.
>
> If the offence has been completed why should the offender not be punished?

I was wondering if your attention had been drawn, Mr. Staples, to the statement of the Minister of Justice when he said that it was not intended that this injunction procedure would replace the conviction procedure?

Mr. STAPLES: No.

Mr. JONES: The minister said that this part was merely placed there as an alternative in respect of the borderline cases where there was not a deliberate attempt to combine, creating a type of prohibition. The Minister of Finance definitely stated that this procedure of injunction would not replace the procedure by conviction.

Mr. MCILRAITH: We are only concerned with what the bill says.

Mr. JONES: I was wondering whether Mr. Staples' attention had been drawn to that statement made by the Minister of Justice.

Mr. STAPLES: No. The concept here seems to be that there are good combines and bad combines from the standpoint of public interest. If it is a good combine, then it is an injunction, but if its a bad combine there is legal action. We think, if this is the concept, it should be spelled out more clearly, as we suggest in the last sentence at the bottom of page 5.

Mr. JONES: Certain practices are objectionable because they are bad types of combination, per se, the act itself.

Mr. STAPLES: Yes.

Mr. JONES: There is no question but that those are the ones that will be pursued to conviction. In those types, of exchange of information, which do not come under the per se ruling, and where there is a question as to whether or not there would be a combine at all, I wonder if it has been drawn to your attention that this section would permit in fact a declaratory decision being reached by way of requesting that an injunction be made in order that the people who are involved in this series of transactions might know whether or not whatever they are doing is a combine. Has that been drawn to your attention?

Mr. STAPLES: No.

Mr. SOUTHAM: Mr. Chairman, Mr. Jones has just asked the question which I was interested in, in respect to the statement:

> It is submitted that the proposed amendment to section 31 of the Combines Investigation Act is not in the public interest.

I thought that was a very comprehensive statement. However, Mr. Jones has gone into this.

Mr. STAPLES: Our objection is one of principle. We tried to describe it in general terms in the following paragraph.

The CHAIRMAN: Have you any further questions, Mr. Jones?

Mr. JONES: Yes, but please continue with the questions of other members of the committee.

The CHAIRMAN: Everyone else has exhausted their questions, I am quite surprised that they have.

Mr. JONES: I do not wish to exhaust them, but the submissions by Mr. Staples are very interesting and, while we have him here, I think we should take advantage of his advice.

On page 6 of the brief, there is a section dealing with combines, mergers and monopolies relating to subsection 2 of section 32 where, again, it is thought by Mr. Staples that the amendments substantially weaken the effect of subsection 1. Now, I wondered if the suggestions that were made in the brief were followed in this connection, would this not very materially weaken the combines law—and here I am thinking of events which have happened in companies "which cooperate" to use a phrase, in some selling agency—not in the cooperative sense as you and I understand it, but in the sense of getting together and establishing a cooperative selling agency, which they have done, and by that very means attempt to defeat the Combines Investigation Act. Now, that is a serious problem and, if we adopt the amendments as suggested here, that result may very well happen.

Mr. STAPLES: That is a good point, and one that had not occurred to us when writing the brief. However, we were using the word "cooperative" in its formal sense as applying to an organization set up on a cooperative basis, which is established by federal and provincial legislation throughout Canada. It is not difficult to know what a cooperative is in Canada. Only organizations which are incorporated under certain legislation in the provinces can use the word "cooperative" in their name.

Mr. JONES: It is relatively easy to define what a cooperative is, but it is difficult to do so with such precision that you make sure it is the spirit of cooperation that is retained because, in the example I have given you, that sales organization could operate on approved cooperative principles, and still be in contravention of the act—and it would have nothing of the spirit of cooperation about it at all. It might be a combination of wealthy companies, say, getting together under the guise of a cooperatively named selling agency, and having one member vote one share—and they have done this to defeat the Combines Investigation Act.

Mr. STAPLES: I do not think it would get a charter in your province.

Mr. JONES: No.

Mr. STAPLES: And, perhaps, in any other province—and it should not call itself a cooperative in the sense we are using it. It would be open to legal action, if it called itself a cooperative and was not, in our technical sense of the term.

Mr. JONES: But it would still be able to carry on according to the cooperative principles, just missing the spirit, which is the essential point.

Mr. STAPLES: I am not using the name.

Mr. JONES: I hope it will be possible some time for you to give us your additional views on this problem, in order that the committee might consider them.

The CHAIRMAN: Well, Mr. Staples, we thank you very much for coming here and answering our questions. You have brought a new angle to this committee, in cooperatives. I think you have answered all the questions very well, and I hope you can go back to your association and be satisfied that you have had a good hearing.

Mr. STAPLES: I am well satisfied with the hearing, and now we look forward to the results.

The CHAIRMAN: The next meeting will be on Thursday, June 30, when we will have Professor Skeoch. The meeting will be held in this room at 9.30.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament
1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 7

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

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THURSDAY, JUNE 30, 1960

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Antoine Chassé,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

HOUSE OF COMMONS, Room 253-D.

THURSDAY, June 30, 1960.
(20)

The Standing Committee on Banking and Commerce met at 9.30 a.m. this day, the Chairman, Mr. C. A. Cathers, presiding.

Members present: Messrs. Asselin, Baldwin, Bell (*Saint John-Albert*), Broome, Brassard (*Chicoutimi*), Cathers, Crestohl, Hales, Howard, Jung, Leduc, Macdonnell (*Greenwood*), McIlraith, McIntosh, More, Mitchell, Morton, Pickersgill, Slogan and Tardif—20.

In attendance: Dr. L. A. Skeoch, Professor of Economics, Queen's University.

The Committee resumed consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

Dr. Skeoch was called; he read a brief in regard to the said Bill, copies of which had earlier been distributed to members of the Committee; he was questioned thereon.

During his examination Dr. Skeoch read certain extracts from a document entitled *Resale Price Maintenance in the Grocery Trade—Questionnaire to Manufacturers and Suppliers.* It was agreed that the said document be printed as an appendix to the proceeding of this day. (*See Appendix "A" hereto*).

The questioning of Dr. Skeoch still continuing, at 10.53 a.m. the Committee adjourned until 2.00 p.m. this day.

Eric H. Jones,
Acting Clerk of the Committee.

AFTERNOON SITTING

(21)

The Committee resumed at 2.15 p.m. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Allmark, Bell (*Saint John-Albert*), Cathers, Crestohl, Hales, Hellyer, Howard, Jones, Jung, Leduc, Macdonnell (*Greenwood*), Mitchell, Morton, Pickersgill, Robichaud, Southam and Tardif—17.

In attendance: Same as at morning sitting.

The Committee continued and completed consideration of the brief submitted by Dr. Skeoch who was questioned thereon.

The Chairman and Mr. Bell (*Saint John-Albert*) thanked the witness for his presentation.

At 3.30 p.m. the Committee adjourned until 9.30 a.m. Tuesday, July 5.

M. Slack,
Acting Clerk of the Committee.

23428-6—1½

EVIDENCE

THURSDAY, June 30, 1960.

The CHAIRMAN: Gentlemen, I believe we have a quorum.

Mr. PICKERSGILL: Mr. Chairman, I move that the committee rise, report progress, and ask leave to sit again.

The CHAIRMAN: You did that before, did you not, Jack?

Mr. PICKERSGILL: No; I think it was a different motion last time. Perhaps the member for Prince Albert could come and help us make a quorum.

The CHAIRMAN: As you know, gentlemen, we have today Professor Skeoch of the economics department of Queen's university. He has forwarded us his brief, which I have circulated to every member on the committee.

I would like to say to Professor Skeoch that we welcome him here today to give us his views; we appreciate the time he has taken to prepare his brief, and for coming here.

You would like to read your brief, would you, Professor?

Dr. L. A. SKEOCH (*Professor of Economics, Queen's University*): I think I would, Mr. Chairman. I will read parts of it, at any rate.

The CHAIRMAN: Gentlemen, I brought down copies of the judgments in the Electrical Contractors' Association of Ontario case in Toronto, and the Abitibi Power and Paper Company, Limited case in Quebec. They are over there, on the table.

There are only so many, so the members who have come to the meeting this morning will be entitled to take them with them.

Mr. BALDWIN: Mr. Chairman, will you give us a brief digest of them?

The CHAIRMAN: I will do that right now. I have had plenty of time to read all these judgments.

Mr. HOWARD: You read in your sleep, do you, Mr. Chairman?

The CHAIRMAN: I am afraid I am reading something in my sleep; but it is not combines.

Mr. HOWARD: Mr. Chairman, I wonder if, before Dr. Skeoch starts his formal presentation, it might not be helpful to the committee if he would give us a sort of biographical background of his activities in the economics field, and especially in the field of combines legislation, in order to sort of round out the committee's understanding of his knowledge in that field.

Mr. PICKERSGILL: I think that would be very helpful.

The CHAIRMAN: Before we start on that, I think this would be the best time to mention one other matter. I have received a letter from the group of the economics department of Queen's university, which I think I should read:

> We, the undersigned members of this department have read the statement to be made before the House of Commons committee on banking and commerce concerning the proposed amendment to the Combines Act by our colleague, Dr. L. A. Skeoch. We are definitely and decidedly of the opinion that in the main this proposed legislation is undesirable and offends the main principles of the Combines Act which have been built up over many years. We would like our concurrence and warm support of Mr. Skeoch's statement to be indicated to the committee.

It is signed by C. A. Curtis, head of the department; M. C. Urquhart, professor of economics; David W. Slater, associate professor of economics, and George R. Post, lecturer in economics.

Mr. CRESTOHL: Is that going into the record, Mr. Chairman?

Mr. BALDWIN: Oh, yes. It was read, and should be in the record.

Dr. SKEOCH: I should like first to express my gratitude to you, Mr. Chairman, and to the members of this committee for granting me the privilege of appearing here to express my views on the proposed changes in the combines legislation.

That pleasure is somewhat diminished, I suppose—not only for a Scotsman—because of the expense involved in any such private presentation. But in spite of that rather minor problem, I deem it a very great privilege to be here and to be able to express the views of myself and, certainly in my brief, at least, the views of my colleagues.

With reference to the question as to my qualifications and experience in this field: I studied at the university of Toronto for my master's degree, and at the university of California for my doctorate. At California I worked for Professor J. S. Bain, who is perhaps one of the leading authorities on industrial organization policy in the United States.

I lectured at the university of Manitoba, the university of Toronto and the university of California; and I am now professor of economics at Queen's university.

I have contributed articles to the professional economic journals in both Canada and the United States on combines and anti-trust matters.

Mr. MACDONNELL: Could we have the dates of those, please?

Dr. SKEOCH: Offhand, it would be just a little difficult.

Mr. MACDONNELL: Well, do not bother now.

Dr. SKEOCH: I could give them to the committee, if they were interested though. I was senior economist in the combines branch of the Department of Justice for about seven years. Prior to that, I was a senior economist with the Canadian wheat board. During my period with the Department of Justice, I was responsible for preparing the so-called green book on loss leader selling, and for writing the report called *Discriminatory Pricing Practices In The Grocery Trade.*

Since leaving the government service and joining the faculty of Queen's, I have acted as consultant to certain private corporations and other private groups in combines matters. Also, I have acted as a consultant to the government.

I think that, perhaps, is about the most I can say. If there are any specific questions, I will be glad to try to answer them later.

Perhaps it would be simplest if I just read through some of the major sections of my brief. There are two or three misprints in it—minor misprints—and perhaps it will cover it most satisfactorily if I just read it.

A number of the major sections of my submission on Bill C-59 are, in my view, still essentially valid with respect to Bill C-58. Hence, parts of that earlier submission have been incorporated into this statement. In the interest of brevity, however, the basic but lengthy section headed "Why competition is important" has been omitted. It would be of assistance in explaining the considerations underlying the present submission if that section were regarded as background material.

Then, to say a few words about what I consider is the basic problem of combines policy:

Market power, growth and development

In a fundamental sense, combines policy should be concerned with the questions of the limitation of market power and the promotion of growth and development. If these two considerations never came into conflict the task of anti-combines policy would be much simpler than it is. What we require as a beginning, is to identify those types of restrictives arrangements which increase market power without contributing anything of significance to growth and development; and, then, to examine those situations in which an increase in market power may contribute to growth and development. In these latter cases, we would then have to develop criteria for determining how much growth and development is required to justify how much market control. Problems of the identification and measurement of market power would require consideration, and so on.

Instead of adopting this, or a related, approach to the problem of combines and restrictive practices, there is an unfortunate tendency in Canada for many groups to take up a highly-charted emotional position which leaves little scope for rational analysis. For example, there are those who claim that they are being tagged with the label of criminals if they are investigated or prosecuted under the act. And there are those who demand "punishment" in the form of fines and jail sentences for those involved in breaches of the legislation. Now, clearly, there are breaches of the legislation which should call down the condemnation of society—certain conspiratorial and predatorial types of conduct, for example. Businessmen who persist in flouting the clear prohibitions of the law on these matters should be labelled as anti-social. In the more important areas of combines policy, however, what we should be concerned with is how an undesirable degree of market power can be effectively curbed and what the significance of various correctives will be for growth and development. Here we are not concerned with questions of "crime and punishment" but with complex questions of economic analysis. The fact that the procedure employed apparently, must, for constitutional reasons, be carried out under criminal law should by now be regarded as merely incidental.

However, it is distinctly disturbing to read the submissions of certain business groups with respect to bill C-59 which are devoid of any awareness that there exist complex questions relating to market power and its significance. Instead, they take refuge in platitudes about the accused having the right under British justice to be assumed innocent until proved guilty—as if powerful corporations were private persons in danger of being imprisoned or even hanged. They are also apparently unaware that under the British legislation on restrictive practices it is assumed that restrictive practices are generally against the public interest and if anyone wishes to maintain that his particular restrictive practices are not it is up to him to prove it. There is also a good deal in these business briefs about the "rights" of free enterprise to do as it wishes unless its conduct can be proved beyond a reasonable doubt to be specifically deterimental to the public—as if we were in a regime of perfect competition with small operators free to enter the industry of their choice.

As a matter of fact, frequently the accusation is made that this is what the combines branch is trying to do, that is, to establish a regime of perfect competition, as if there were no such thing as restraints of entry; and as if it were possible to read the future to determine the "effects" of eliminating effective competition. Surely the time is long overdue to abandon such specious arguments and deal with the realities of modern industrial structure and behaviour in meaningful terms.

Determining the Effects of Restrictions on Competition

Before turning to the detailed consideration of Bill C-58, I should like to refer to the argument that before any combine restricting competition is condemned, the prosecution should prove that the restriction "is accompanied by effects that are detrimental to the public interest" with respect to prices, output, and certain other specified matters. This is the formulation adopted in proposed section 32 and it is a position taken up by certain business briefs on Bill C-59. This is a plausible argument but, for the reasons developed in my submission on Bill C-59, it is unconvincing: it is the "general" rather than the "specific" effects of competition that are important. Competition is both an "organic" and "historical" process. It is "organic" in the sense that what happens in one industry affects the costs, investment and output in a number of related industries—just as if disorder in one organ of the body not infrequently infects the whole body. Thus, a restriction on competition in a domestic industry may have its most important effects on an export industry. Competition is also an "historical" process, in that the costs and rate of growth today affects the efficiency of industry in the future.

It is for these reasons that Dean Mason of Harvard university has remarked: "Must we not agree with Schumpeter that, since we are dealing with an economy in process of development, a judgment on the consequences of any particular part of it—say a combination of hitherto independent firms—can only be an historical judgment, as these consequences 'unfold over decades', and a partial judgment, since these repercussions reverberate throughout an economy whose development is 'organic'?

"An attempt to push enquiry into effects very far is clearly an invitation to non-enforcement". (*Economic Concentration and the Monopoly Problem*, p. 394.)

To suggest, as the brief of the Canadian metal mining association on Bill C-59 did, that our courts are capable of determining the effects of interferences with competition because they "deal with complex subjects, such as those relating to income tax, customs and patents, and weigh technical evidence submitted to them by specialists and experts" is to fail to understand the nature of the issues under consideration. The courts are *not* required to assess the incidence of the income tax, to determine its effect on the level of savings and investment and the like, all of which would be involved in determining the effects of the income tax. Nor are they required to determine whether our patent laws promote or hinder innovation and development, either in general or in a specific case.

It might be added that if parliament were to enact legislation requiring the courts to forecast the trend of stock market prices, the hilarious reception such an enactment would receive can easily be imagined. Yet to determine the specific effects of combines restricting competition would be a far more complex matter.

The fact is that there is a completely adequate basis for a prohibition of a combination of hitherto independent firms having the power to substantially eliminate competition in a properly defined market, without any attempt to assess whether the combination resulted in "effects that are detrimental to the public interest". The character and the necessary market consequences of such combinations are to increase the degree of market power enjoyed by the members of the combine. Such combines can have no purpose and no market influence other than to impose severe limitations on price competition or the market opportunity of others. They do not make possible larger and more efficient scales of operation nor do they make possible innovations. But to prove beyond a reasonable doubt that they lessen competition unduly so as to have detri-

mental effects on specific matters such as prices, output and the like is impossible in any meaningful sense.

Now, I turn to some comments on the mergers and monopolies section.

Mergers and Monopolies

There are two basic questions about those parts of Section 1 of Bill C-58 which define "merger" and "monopoly". The first is why, since a "merger" could very well result in a "monopoly" as defined in the Bill, the test to be applied to each should not be the same. They can both be manifestations of "undue" market power and both should be judged on the same general criteria. It is not clear what are intended to be the differences between the tests provided under the proposed amendments but there is no basis in economic analysis, at least, for making any difference.

Secondly, the way in which a "merger" is defined makes it very doubtful that the sub-section would apply to what are known as "conglomerate" mergers; that is, mergers between firms in different trades or industries. Such mergers present problems in public detriment that are often of a subtle, long-run character, particularly in a country such as Canada where "economic power" tends to be concentrated in fewer hands than is the case in larger economies.

Mergers, by their nature, may involve long-run considerations of efficiency in production or distribution, of market control, short-run profit advantages associated with the sale of securities, or of the establishment of strategic positions conferring generalized economic advantages. The essence of a successful public merger policy is a strict evaluation of mergers in their formative stages so that situations which may give rise to public detriment can be clearly identified.

So you cannot adopt a single rule with refernce to it. You cannot make a source of assumption about mergers that you can about hitherto independent firms. They may be highly advantageous.

Little can be done to re-create a competitive entity after company assets and organization have been taken over or dispersed by the absorbing firm. Perhaps more serious, the progressive merging of firms in an industry (or group of industries) makes new entry more difficult and renders the survival of individual firms of diminishing economic significance. Particularly in an economy of moderate size which must rely on its competitive vigour to maintain its position in an international economic environment, mergers should be permitted only if they can pass a strict test of economic justification. A great many of them can pass such a test. There is little evidence to suggest that the combines administration has adopted this view of its role.

A final word should be said about the definition of "trade or industry" provided by sub-section (*h*) of the first section of the Bill. " 'Trade or industry' ", it states, "includes any class, division or branch of a trade or industry". Does this mean, as seems to be the case, any class, division or branch of a trade or industry in the whole of Canada? If so, the definition is unwise. The words of the present section, "throughout any particular area or district in Canada or throughout Canada", should be added.

I have some comments about section 3 of the bill, but I think the words I referred to were only omitted by inadvertence.

Section 3 of the bill relating to the circumstances under which the director shall undertake an inquiry limits him to those situations in which "he has reason to believe that any provision in part V has been or is about to be violated". The expression "is being", which is now included in the Act after "has been", has been omitted. It should be restored to both sub-sections (*b*) and (*c*).

Section 9 of the bill relating to the findings of the Restrictive Trade Practices Commissions to be included in its report, requires the commission, when the conspiracy, combination, agreement or arrangement has to do with certain types of cooperative behaviour under proposed sub-section (2) of section 32 of the Act, "to make certain additional specific findings" as to whether the combination unduly lessens competition with respect to prices, quantity or quality of production, markets or customers, or channels or methods of distribution or is likely to restrict any person from entering into or expanding a business in a trade or industry.

This is an undesirable limitation of the scope of the Commission's report. The significant issue is whether the specified forms of industry cooperation result in the lessening of competition to the detriment of the public. The proposed amendment limits this inquiry in two ways. First, forms of industry cooperation relating, for example, to the restriction of innovations (which would not ordinarily be included under "quantity or quality of production" since they would relate to entirely new products) would not be the subject of report by the commission. Indeed, so long as the conspiracy did not relate to forms of industry co-operation in prices or the other elements listed above, it appears that the commission would not be required (or permitted?) to assess its significance for the public. This is merely dragging in "specific detriment" by the back door.

Second, and of basic importance, once the commission is required to assess "the effects" of any interference with competition it is given an impossible task. The essence of this argument has already been set out above.

Section 32

This is the basic section of the proposed legislation insofar as agreements restricting competition are concerned. Section 411 of the Criminal Code has been transferred to Section 32 of the C.I. Act and section 2(a) of the Act which now defines a "combine" is to be repealed. In transferring Section 411 of the Code some changes have been made in the wording of certain subsections, notably by the insertion of the word "unduly". This may merely reflect the character of the established jurisprudence, although, if this is the case, it is not clear why it was necessary to alter the legislation.

The explanatory notes accompanying this section are somewhat misleading in that they state that the accused cannot avail himself of the immunity provided by sub-section (2) "if these practices are accompanied by effects that are detrimental to the public interest". The note is correct in stating that the court must look at "effects" but *not* all or any effects that are detrimental to the public, only that limited list of effects set out under (3). All other "effects" are excluded from consideration by the final clause of section (2), as was pointed out above.

There are two major aspects of this formulation which are gravely suspect. First, as was pointed out above, there is no known technique for determining what are the specific effects of restrictions on competition. That argument need not be repeated here.

Second, this test of detrimental agreements will, at best, require a reconsideration of the jurisprudence that has been established in dealing with restrictive agreements in Canada. For example, in the decision handed down by the Supreme Court of Canada in the Fine Papers Case (1957), Taschereau J. remarked:

"It has been argued on behalf of the appellants that the offence is not complete, unless it has been established by the Crown beyond a reasonable doubt, that the agreement was detrimental to the public, in the sense that the manufacture or production was effectively lessened, limited or prevented,

as a result of the agreements entered into." He then goes on to demonstrate the inconsistency of this position with the established jurisprudence.

And yet the proposed amendments would require that a conviction should be handed down in the case of a variety of industry-wide arrangements only if it could be proved that the agreement or arrangement has lessened or is likely to lessen competition unduly in respect of, among other things, "quantity or quality of production" (*cf.*, Taschereau's statement above).

If it is desired to maintain the same tests of restrictive agreements as are now in effect, the simplest and most direct means of doing so would be to omit subsections (2) and (3) from the proposed amendments. A somewhat similar result could be achieved by deleting everything after "unduly" in line 43 of page 6.

Now, turning to clause 4 of Bill C-59.

Clause 14 of Bill C-59

Clause 14 provides a defence in the case of a prosecution under section 34 of the Combines Investigation Act. Section 34 prohibits the practice of resale price maintainance.

Our views on this section of the bill have been set out in an earlier memorandum. For convenience of reference, that memorandum is reproduced here:

The proposed amendments to section 34 are apparently based on three assumptions, (1) that the ban on resale price maintainance is fundamentally sound and desirable but (2) that certain practices have developed under section 34 which have been damaging to the small distributor and others, and (3) that the manufacturers should be given the power to restrain such practices by refusing supplies to dealers engaging in them.

In fact, however, it can be demonstrated that the proposed amendments will effectively eliminate the ban on resale price maintenance, will provide no effective protection, either short-run or long-run, for the small dealer, will open the door to discriminatory practices, will strengthen the position of the large distributor who controls private brands, will place in the hands of the manufacturer a degree of control over the final price of his products that is denied to other groups in the economy, and finally, is based on a profound misunderstanding of the way in which business is conducted.

I expect there will be a few questions under that.

Under clause 15 of bill C-59, the supplier merely has to satisfy the court that "he had reasonable cause to believe and did believe" that certain things were being done, and he can then refuse supplies to the parties concerned. We are given to understand by competent legal advice—I trust that the members of the Queen's law faculty are competent in this regard—that the test "had reasonable cause to believe and did believe" is a very vague one and will permit action to be taken by suppliers in such a variety of circumstances as to effectively enforce a thorough-going policy of resale price maintenance. Indeed, it seems probable that, in effect, parallel—but not collusive—action to enforce resale price maintenance will be legalized under this amendment which would have been questionable under the combines legislation before Section 34 was enacted.

But, whatever may be the legal implications of the amendment to Section 34, there can be little question that it is based upon a profound misapprehension of the way business is carried on. Under proposed 5 (a) and (b) of section 34, a supplier is, in effect, empowered to refuse supplies on the ground that "he had reasonable cause to believe and did believe" that the seller was persistently using the article "not for the purpose of making a profit *thereon*" but for the purpose of advertising or selling other articles. This suggests that business operates, or should operate, in the short-run in such a way as to

obtain "a profit" above cost on each individual item it sells. On this issue, Howard Clark Greer, vice-president of the Chicago, Indianapolis and Louisville Railway, financial officer for several other corporations, as well as a distinguished accountant, has commented,

"Costs influence prices but do not control them . . . Goods sell for what buyers think they are worth, whether this price is more or less than cost. Business must recover from its total revenues its total costs, but not every sale will show an adequate individual profit. A contribution to overhead is all that can be expected from some classes of business". (*Harvard Business Review*, July-August, 1952, p. 45).

Mr. Greer continues, "Among the most popular of the notions about *fairness* in pricing is the idea that a seller is 'entitled' to a price which will cover his cost, plus a 'reasonable' profit". He then demonstrates the "unsoundness" of this position and adds, "It is extremely dangerous to assume that the existence of a cost justifies the establishment of a price". (*Harvard Business Review*, September-October, 1952, p. 192). Yet it is precisely this "unsound" and "dangerous" principle that the proposed amendment empowers a supplier to impose on his distributors.

Even if the principle were sound, the practical difficulties encountered in attempting to compute costs and profits for an individual item in the array of items in a distributor's stocks would be sufficient to rule it out. The problem is made clear in the following quotation from the Green Book on Loss-Leader Selling, a publication of the Combines Branch.

"In some places we have to sell some lines such as butter and shortening with about a 3 to 4 per cent mark-up. Most of our lines are priced at 16 4/16 to 25 per cent, and to tell you the truth I am not able, for the life of me, to tell you what percentage it costs us to handle a pound of butter as against a can of peaches or a dozen of oranges. I know these items represent three different costs in handling, but I do not know, even if we broke our turnover down into each one of the 2,000 items we handle, how we could arrive at a cost for each item". (p.80).

In the United States where they have had considerable experience under the Robinson Act, it has been pointed out that they have simply encountered insuperable problems; and what usually happens, when a charge is laid under the cost justification section of the act, is that business will strive to collect information to justify the prices which are charged.

If, despite its unsoundness in principle and in application, this approach were enacted into law, it seems not unlikely that Canadian courts would follow the same procedure as certain American courts have adopted in determining when a sale was made below "cost". In these cases, statistics compiled by trade associations on the average mark-up for the field in question have been accepted as the "cost" to be applied to the full range of products in that field. The consequences of such an interpretation would be extremely serious, since it would result in a widening of the distribution margins and probably, also, in an increase in the numbers involved in distribution—in a word, in an increase in costs to consumers.

It would also appear to be quite legitimate under the proposed amendments for a seller to spend millions on advertising "for the purpose of attracting customers to his store" but it would be illegal to pursue a continuing policy of offering "specials" to do the same thing. The big stores can afford to spend such millions; the small stores cannot.

The small store would also suffer under the proposed amendments in another way. The owners of private brands—again the larger stores and chains —would be free to cut prices to any level they chose, whilst the small store handling nationally branded lines would be in danger of having his supplies

cut off if he sold at a reduced price which the supplier "had reason to believe" did not yield a profit on the item in question.

On the matter of enforcement of the legislation, it seems clear that those businesses in which "trade-ins" are common present special problems. In fact, if I might just digress again, before section 34 was enacted one of the most common ways of promoting the sale of electrical appliances was to offer tremendous trade-in-allowances, sometimes for quite trivial matters. When I was with the combines branch we had at least one drawer in a filling cabinet which was pretty well filled with these advertisements that were collected. I visited the city of Montreal in connection with certain discussions with businessmen about loss leader selling and the like. As I say, this was before the legislation was enacted, and there was at this time also the requirement you had to pay one-third down. You will remember there was a credit control on then. This one store on St. Catherine street had refrigerators advertised for sale at $300, and they had ten $10 bills taped across the front. I asked, "What are these bills for?" They said, "You buy the refrigerator, and you get the ten $10, except we take them back. This accounts for your down payment and gives you a one-third reduction in your price."

In other cases we collected advertisements which offered various things. These instances are factual, and they may still be in the file. In one case there was $150 for an old model on the purchase of an expensive refrigerator. In another case there were $150 for a tea cup and saucer—ridiculous things; and this sought to promote sales. That is why I add here that unless some "standard" system of valuing "trade-ins" is employed and enforced by costly system of supervision, the legislation is likely to prove unworkable.

Although we consider the legislation unsound in principle, it is manifestly unfair to adopt legislation which will prove to be enforceable only in certain trades. This consideration raises the wider issues as to why the Government should empower certain sectors of the economy to enforce prices which will yield a profit over cost whilst denying the same right to other groups, such as farmers. Again, we consider the principle of requiring sales at cost plus a reasonable profit "unsound and dangerous", but we do not see how the principle can be adopted in one field and denied in others.

There is nothing in the proposed amendments which requires the supplier to enforce his refusal to supply uniformly against all dealers. He may take action against Smith and at the same time permit Jones to continue to sell at the same or even at a lower price. This is subversive of equity and fair dealing. If restrictions are to be enforced they should apply equally to all; they should not be capable of arbitrary and capricious application. Even if a supplier did enforce uniform resale prices based on trade-association average mark-up data, the results could still be arbitrary and unwarranted in the case of an individual seller, since the price need not be related to that seller's business experience.

We are fully in agreement with the principle that misleading advertising should be discouraged. Whether such a matter, as well as that of disparaging the quality or price of a product, is not better handled by such organizations as the Better Business Bureau is to a considerable degree a matter of opinion. But, if legislation on these matters is considered desirable, it is a fact that provision is already made in section 306 of the Criminal Code to deal with misleading advertising at least, and the Section could easily be expanded to include the aspects of disparagement that it is desired to prohibit. It would be preferable in every respect to make the Combines Branch responsible for enforcing this section rather than to leave enforcement to the arbitrary decision of suppliers.

We would also question whether "loss-leader" selling (in the sense of selling below net invoice cost) is sufficiently widespread to justify extreme

measures of the sort proposed in these amendments. The information available in the report of the Restrictive Trade Practices Commission on "loss-leader" selling disclosed an extremely limited number of authenticated cases of such sales below "cost". No further general survey of the situation has been made available to the public to establish that the situation has undergone any substantial change.

I might add that as part of a graduate research program at Queens university we have undertaken a survey. This was begun quite a long time ago, a few months ago, and certainly had no relationship to the legislation. The survey was on resale price maintenance, particularly in the grocery trade. We sent out a six-page questionnaire, and some of the questions had as many as seven parts. These were sent to a very large number of suppliers, and if the committee is interested I would be glad, not to go through all the answers, but to give two or three answers as to the frequency of loss leader selling, the effect of it, and whether these suppliers would prefer to go back to resale price maintenance and the like. I have that information with me.

For these reasons, as well as for the more general considerations relating to resale price maintenance which have been fully discussed in the Reports of the MacQuarrie Committee and the Restrictive Trade Practices Commission, we respectfully request that the proposed amendments to section 34 be not proceeded with.

Finally, I would like to say a little about price discrimination, and two or three other matters.

Price discrimination in Canada is a matter that can assume serious proportions. In many sectors of Canadian industry the size of the market is such as to support only a few firms; and if they are going to be efficient, they have to be fairly big. In such industry structures discriminatory practices are likely to be encountered much more frequently than in more competitive markets. This is not to say they should be condemned, because although these practices can be used in a restrictive fashion, they can also be used to improve economic performance. There is, unfortunately, a tendency to approach discrimination from the public policy point of view almost exclusively with respect to its effect on "competitors" (rather than on competition), and, particularly, on small business. This is a legitimate concern where the interests of small business coincide with those of the public at large, but experience with such legislation in the United States provides a clear warning that there is no *necessary* relationship between the two.

As has already been noted, discriminatory practices can, like other forms of monopolistic behaviour, affect the allocation of resources unfavourably; they can also in special circumstances contribute to the strengthening of competitive forces and to the breaking down of rigid market structures. Hence, legislation should be designed to prohibit discrimination only when it is "detrimental to the public, whether producers, consumers or others".

The present legislation dealing with discrimination (section 412 of the Criminal Code), which the proposed amendments would incorporate into the Combines Investigation Act as section 33A, is—as is indicated by the rare occasions on which it has been used—poorly designed to deal with the detrimental aspects of discriminatory practices. Indeed, it is impracticable to specify in detail not only the types of discriminatory practices that may give rise to public detriment but also the settings in which such practices should be prohibited. Hence, as already suggested, the provisions of this section should be generalized so as to prohibit discrimination that is detrimental to the public. The Restrictive Trade Practices Commission could perform a useful role in analyzing a series of cases and thus clarifying the circumstances in which detriment is likely to occur. It is also suggested that until the Commission has the danger spots in this area properly posted with warning signs, prosecutions should not be proceeded with.

The addition of section 33B, which requires that "allowances" be granted on proportionally equal terms to competing purchasers, should have the effect of reducing the amounts spent for promotional purposes or of diverting differentials to selling prices, with, I should guess, the probable emphasis on the latter. Most qualified observers in the field would consider this a desirable step. It should be clear, however, that, insofar as 33B does place an emphasis on price reductions which can be made available to large buyers without any necessary relationship to their availability to small buyers, to that degree the position of the small purchaser is in no way improved and may be worsened, although the consumer should gain some advantage.

It appears that there is a basic inconsistency between 33B—which is designed to reduce promotional expenditures and increase price competition—and subsection (5) of section 34 which will have the effect of increasing the amount spent on advertising and of restricting price competition.

Exemptions from Combines Legislation

A number of areas of economic activity are exempted from the reach of combines legislation, either explicitly by the combines legislation itself or implicitly as being subject to regulation by governmental agencies or as being creatures of the crown.

Both the Combines Investigation Act and section 411 of the Criminal Code provide that their prohibitory sections shall not apply to "combinations of workmen or employees for their own reasonable protection as workmen or employees". Where monopolistic industries are subject to regulation by governmental boards or where monopolies are established as part of government policy (e.g., the setting up of compulsory marketing agencies), it is assumed that these restraints on competition are in the public interest and hence that such industries are not subject to investigation as combines.

Recent investigations into the operation of "regulated industries" in the United States, as well as studies such as that of Adams and Gray (*Monopoly in America, The Government as Promoters*), raise serious questions as to the validity of the latter position. There is nothing inconsistent in assigning to the combines branch responsibility for ascertaining that the restraints imposed on competition by the firms in the controlled industries are not "undue" in relation to the expressed governmental purpose. In the first place, the regulatory bodies do not always possess the requisite powers or the competence to carry out the inquiries necessary to this end.[1] It is also an unfortunate fact that in many instances the regulatory agencies become the "captives" of the industries they are regulating; more, it should be added, through adopting an industry outlook than through any form of direct influence. I think we have been particularly fortunate in Canada in not having to worry about that latter.

Hence, if the combines branch were given the added responsibility suggested above, the result would probably be more alertness on the part of the regulatory agencies as well as a more strict self-examination on the part of the firms in the regulated industry.

As to the exemption from combines investigation granted organized labour for its own "reasonable protection", it is suggested that the combines branch should initiate a number of inquiries to establish with some certainty the limits of restriction beyond which the proscriptions of the legislation would apply. So far, the only investigation that relates to this question in a strict sense—others have involved joint action by unions and private firms—is the Winnipeg Bread Case, which involved a very crude attempt by the union to fix prices at

[1] *E.g.*, certain regulatory bodies in Canada have failed to inquire into the corporate, or other, relationships between telephone companies and their suppliers and into the possible consequences of such relationships for the prices of supplies.

which retailers would be permitted to sell. There are, however, other cases which would appear to justify investigation by the combines branch, such as, for example, union restrictions on the introduction of new machinery or methods of production and distribution. The tendency of unions in many major combines cases to support the restrictions imposed by industry also gives much cause for concern.

It is obvious that an economy characterized by powerful, industry-wide unions and large firms is one in which restraints on competition are relatively easy to impose and to perpetuate. This is not to recommend the "atomizing" of either labour or industry. We should, at the same time, recall Professor Fellner's comment: "Economic power groups are manageable by democratic methods only if there is a variety of them and if their activities partly neutralize rather than reinforce one another".

Finally, the exemption of groups concerned with the provision of "services" should be subjected to critical examination. In a fundamental sense, everyone supplies services: in some cases they are applied to materials; in others they are supplied more or less directly to a person. If the over-all supply of services is to be allocated among its uses in an economic manner, the pressures of competition should determine that allocation. Furthermore, considerations of equal treatment would require that public policy should not be different for one category of person than for another.

Thank you very much for hearing me in this rather lengthy submission.

The CHAIRMAN: Thank you very much, Professor Skeoch. Are there any questions?

Mr. CRESTOHL: So as to differentiate between a submission to the committee by a trade, industry or marketing organization and one of an academic nature, without any specific axe to grind, would you tell us, Professor, whether you have any direct interests, commercial or industrial, which might affect your presentation or which might be affected by your presentation; or are you making the presentation purely on an academic basis and as an objective study of the problem?

Dr. SKEOCH: Well, I have some investments, Mr. Crestohl, but I do not think this would affect my judgment of these matters because, as far as I know, some of the firms in which I have investments have resale price maintenance and some of them do not.

Consciously, this is an analysis that proceeds solely from an academic—I do not say "academic," because I have attempted over the years to acquaint myself as closely as possible and to talk to as many businessmen as possible about problems in this area. As far as I am consciously aware, this is an objective, careful and, I think, responsible analysis of the issues; and it is certainly not dictated by any personal interest of my own.

Mr. CRESTOHL: The reason I ask the question is this. We have had presentations from those whom I, at least, as a member of the committee, felt had a direct interest in presenting a certain point of view; and I think the committee is pleased to have a wholesome presentation by one with your experience, without any direct interest in the organizations that might be affected by this legislation.

Mr. BELL (*St. John*): Mr. Chairman, could I ask Professor Skeoch if he did not have certain opinions on loss leader selling, for example in his brief, which would go back quite a while and would have prejudiced his consideration of new amedments that might have come up in the meantime?

Dr. SKEOCH: I would say, sir, that my views on loss leader selling are based partly on this exhaustive inquiry which we carried out when I was in the combines branch, which investigations went on for at least two years and which involved, I may say—or so I understand from my colleagues in the United

States, Professor Oxenfeldt of Columbia, and others—as elaborate an inquiry into this topic as has been made in any country; and also from my study of the effect of loss leader selling—or, perhaps, I should put it this way, resale price maintenance in other countries, including the United Kingdom, which, in those cases, is based on secondary sources and not primary sources. But so far as Canada is concerned, my views are based primarily on these direct studies and on this recent inquiry we have conducted at Queen's university.

Mr. PICKERSGILL: Professor Skeoch said there were one or two questions directly related to this in this recent inquiry which Queen's university carried on. Could you tell us what they show, very briefly?

Dr. SKEOCH: I think, perhaps, there are three questions which might be of interest. We sent this out to one hundred of the suppliers. We had extremely good response.

Mr. MACDONNELL: As to your use of the word "supplier", does it include both the manufacturer and wholesaler?

Dr. SKEOCH: No, the manufacturer and somebody who is the agent—take one of the British biscuit companies—of a firm in Canada. In other words, they would either be the manufacturer or an agency of the manufacturer. It did not relate to distributors at this stage. We hope later to carry it on and get our graduate students working on this.

Mr. MACDONNELL: The reason I asked was, in some briefs we have had, I think this word "supplier" must have included the wholesaler.

Dr. SKEOCH: It does not in this case, anyway. We sent this questionnaire to one hundred manufacturers and suppliers in the grocery trade—not just in the grocery trade, but covering drug companies, tobacco companies, soap companies and the whole range of these people. We got a surprisingly large response, even when compared to sending out questionnaires from the combines branch, where we can say, "Please give the required information by such-and-such a date." As I say, we still got a surprisingly large response, and about 45 firms answered the questionnaire in detail. We got about another 40 answers from firms who said, "We do not practice resale price maintenance. We have had no experience with loss leader selling, so we are afraid we cannot help you very much"—and they did not answer in detail.

I am reporting only on the detailed replies here. The first question, (a) part, said:

> Please indicate whether your firm practised resale price maintenance before 1952.
>
> Some products; or all products—Yes or No.

Then part (b)

> Do you feel that your experience since 1952 supports your earlier position? Please explain.

There were 42 who answered that question. Of those, 14 had practised resale price maintenance before 1952—14 out of the 42; that is, one-third of them.

Then, part (b):

> Do you feel that your experience since 1952 supports your earlier position?

Of these 14, six said, yes, they would like to have resale price maintenance again: eight said no, they would not. There were 28 who did not practise resale price maintenance before 1952, and they were asked whether their experience since 1952 supported their earlier view. Twenty-seven said yes,

and one said no. One, out of the 28, said that he would prefer to adopt resale price maintenance.

Question 7 had four parts. Part (a) was:

> Do you feel that the intensity of competition has increased; decreased; no change; since 1951?

There was a very, very high proportion here: there were 42 answers here on the question of whether competition had increased. Thirty-nine said it had increased, and three said it had shown no change.

Then section (c) said:

> Do you feel the banning of resale price maintenance influenced this result?

Forty-one said no, and one said yes. Regarding the one who said yes, I will quote his answer:

> I think it has made for a more competitive situation and probably helped keep prices from increasing more.

So out of the 42, only one—and that is qualified in that way—doubtfully thought that the increase of competition was due to resale price maintenance. They mentioned many other things. You will all remember, of course, that this is the manufacturer I am talking about: I am not talking about distributors. Distributors might give you a quite different picture. But I noticed in one of the briefs, at least—at least, in the newspaper report: I have not seen the brief—that certain retailers were saying the manufacturers were suffering severely as a result of loss leader selling, and they should have the right to protect their goods. At least, this group of manufacturers did not indicate that.

The twelfth question, part (*a*) said:

> Although there is no set definition for the term "loss leader", please give your interpretation of the term and indicate whether your product is used as such.

We got a great variety of definitions here. I cannot undertake to read them all; but we got a great variety of definitions, all the way from laid down cost, acquisition cost—more properly speaking, perhaps—to the acquisition cost plus the cost of operation.

Then the (*b*) part said:

> Has the use of your product in this way increased; decreased; no change; since 1951?

There were 39 who answered that. Twelve said, yes, that the use of their product as a loss leader had increased; two said it had decreased; 18 said it was unchanged; and seven said that their products had never been used as such and were not being used as such today.

Finally, the fifth part of that question said:

> Do you feel that "loss leaders" affect the sales of your products beneficially; adversely; not at all?

There were 37 who answered that. Eleven said that loss leaders affected the sale of their products beneficially; five said that loss leaders affected the sales of their products adversely; and 21 said it did not affect the sale of their products at all.

In a number of cases there were qualifications to that answer, in which they pointed out that if loss leaders were used consistently, they were afraid

that it might affect them adversely; but they had had no experience of this: their products were only used occasionally, and they had actually found them to be beneficial among those groups—but they were only used occasionally.

Every now and then people in Canada get sort of discouraged about the extent of competition, and so on, and say, "Well, we are becoming a monopolized economy". I believe there is a great deal of competition in the economy, and it is only a question of trying to keep it that way.

There were two answers here. They do not give clear-cut support to resale price maintenance, or against it. One of them is fairly strong against it; the other gives a qualified position. I thought it rather heartening to those who think we are bound to end up with a highly monopolized economy. The first answer is from a medium-sized firm with sales of $600,000 to three quarters of a million dollars. This is in reply to question 1.

> Do you feel that your experience since 1952 supports your earlier position on resale price maintenance? Please explain.

This is the explanation—and this was a person opposed to price maintenance:

> Price maintenance is difficult and expensive to control for all parties involved. When business is confronted with controls, especially government ones, they very seldom work, and they generally create considerable amount of detail work that filters out later on and becomes useless.

I am not quite sure what he had in mind there; but I have my suspicions:

> We also find that in all walks of life and in trade, there are people who are considered a little unethical, and they delight in finding ways to circumvent and cheat. Price maintenance offers these people a protective umbrella for this unethical approach. The consumer is no better off with price maintenance, he is generally worse off. Competition is stifled. Individuality and application of energy are frustrated.

The other one comes from a very large manufacturer whose sales run to a great many millions of dollars. This firm had practised resale price maintenance; but dropped it, as will be explained.

> Our company freely discontinued the practice of resale price maintenance as far back as 1948, three years before 1952. Since then the only negative result of the 1951 legislation appears to be the practice of so-called "loss leader". Under the definition to be found in our answer to question 12, we certainly must admit that this practice does exist in the distributive sector of our industry, and such practices, we feel, are undesirable. The provisions of section 412 of the Criminal Code dealing with such practices should be enforced, and with such legislation the role of policing the trade would become the responsibility of the government and not of the manufacturers.
>
> The abandonment of resale price maintenance meant for our company the establishment of a fundamental most basic to the acceptable requirements of a fluid free enterprise system. Increased competition at both the jobbers' level and the retail level has contributed significantly to increased efficiency and, in many cases, the consumer has benefited by lower retail prices.

This, of course, is not final. All I would plead is that as a result of this limited inquiry that we have undertaken ourselves privately, and in which industry has cooperated, as I said, amazingly well, before anything drastic is done about loss leaders a very careful and searching review should be made of it.

Manufacturers are put in a very awkward position, of course, under pressure from distributive groups. You all know the story of Pepsodent in the United States and its experience—and the company whose reply I read last, although it dropped resale price maintenance in 1948, also reported that there was no price cutting on its products until after the legislation was passed. In other words, people were free to cut prices; but the distributors were opposed to price cutting and there was no price cutting.

Mr. PICKERSGILL: Mr. Chairman, I wonder if I might interrupt Professor Skeoch. I am not a reader of advertisements, and I do not know anything about this Pepsodent story.

Dr. SKEOCH: I do not know that you would get it in advertisements; you would have to read the federal trade commission report in the United States on resale price maintenance. The federal trade commission undertook this exhaustive inquiry, which was published in 1945 or 1946. Mr. MacDonald may correct me here; but I think it was 1945. They looked at the way resale price maintenance had developed in the United States in various fields, and what was responsible for its development.

The Pepsodent Company decided it could sell more toothpaste if it left to the trade the choice of the price at which it would be sold, so they declined to price maintain their product. Immediately the pharmaceutical association adopted a program: they put advertisements in the pharmaceutical journals advising the druggists to put Pepsodent under the shelf. They even went so far —and you will find this all documented in detail in the report of the federal trade commission—as to throw Pepsodent out on the garbage heap and take a picture of it, and put this up in the stores to indicate what they thought of it as a toothpaste.

This was done in the state of California. A nation-wide campaign was adopted against Pepsodent, and as a result Pepsodent sales fell really drastically. The consequence was that Pepsodent not only very quickly announced it was going to price maintain its product; but it also made a contribution of $25,000 to the bureau of education on fair trade, so-called, for the protection of resale price maintenance; and it had a picture of this cheque taken and published in all the pharmaceutical journals in the United States, to be sure the druggists were aware of its conversion. They took away rights of individuals to dispose of their products as they may wish. This, I think, is denied in the very fundamental way, this very important right, if we are going to talk about that sort of thing.

Mr. BELL (*Saint John-Albert*): Mr. Chairman, may I just ask a question here?

Mr. HOWARD: Mr. Chairman, my question was supplementary too.

Mr. BELL (*Saint John-Albert*): Would it be possible to have all these questions that were asked placed on the record by the professor, in his inquiry; and, where possible, answers, if they were short ones, such as a "yes" or "no" answer? I believe you just skipped around with some of them.

Dr. SKEOCH: I just took the ones that I thought were relative to this matter. Here is a copy of the questionnaire, and I will be quite happy to let you have that. It is a six-page questionnaire.

The CHAIRMAN: Does the committee wish to have that?

Mr. PICKERSGILL: I think it would be very desirable to have it.

Mr. MCILRAITH: Put it in the evidence, instead of as an appendix.
(*For complete questionnaire, see appendix "A" hereto*)

Mr. HALES: Mr. Chairman, is it the doctor's intention to carry this investigation through to the retail level?

Dr. SKEOCH: Yes. This is the first study. As soon as we get enough graduate students, we will.

Mr. HALES: I wonder if it would be presumptuous to ask you what you expect in the retail trade on that same clause?

Dr. SKEOCH: I do not like to pre-judge results. All I can say is what happened before in our inquiry into loss leader selling. At that time we received literally hundreds of complaints of loss leader selling—literally hundreds.

We asked everybody—and we reiterated this question two or three times—to give us specific examples. We asked trade associations; we asked everybody; we broadcast the articles in the newspapers, and every way we could get at these people.

After an exhaustive analysis we discovered exactly eight cases—they are reported on page 72, I believe: I used to know this better. Yes, they are reported on page 72—eight cases of products being sold below net purchase cost. That, of course, is only one definition of loss leader sales, below net purchase cost. Other people might adopt others.

Four of those cases were large chains, and four of them were independents. This was out of many hundreds of complaints.

The situation may have changed. I have no way of knowing. And I would not want to pre-judge it by saying it has not changed. All I say is that we should look first.

Mr. HOWARD: With respect to this, I believe you referred to it as the green book on loss leaders—

Dr. SKEOCH: Yes.

Mr. HOWARD: As you indicated, this was a most exhaustive work that has been done in this field. Do you know of anything of a similar nature that has been done since that time?

Dr. SKEOCH: No, Mr. Howard, I am afraid not.

Mr. HOWARD: Apart from your own inquiries?

Dr. SKEOCH: Not apart from our own inquiries. At least, I am not aware of any; and I try to keep up with what goes on in this field.

Somebody told me—and I suppose this is purely hearsay—that one of the trade associations appearing here had indicated that some sort of a survey had been undertaken. This was asked among distributors—at least, that is what I was told. You gentlemen will know that.

The CHAIRMAN: This was the one presented by Mr. Gilbert, you remember.

Mr. HOWARD: I would like to ask a question about that. I do not know whether or not Dr. Skeoch has read the evidence of the committee hearings; but the retail merchants' association did appear and presented a brief on this question of the effect of loss leader selling upon industry, or upon manufacturers. They presented some statistical information. I have not it here with me; but it showed the trend of business failures from 1945 to date, part of which they indicated was taken from Dun and Bradstreet, and part of which was taken from the dominion bureau of statistics. So there were two sorts of things in that particular one.

Do you think it is possible, or do you know of any work that has been done in this field of compiling a pretty exhaustive statistical analysis of business failures over those years preceding the 1951 amendments, and after, to show business failures, the volume, the reasons for failures, entry of new firms, and the increase in the economy, and all that sort of thing, to give a clear picture as to the effect?

Dr. SKEOCH: I have been trying to follow this for some years myself. I am not too sure how meaningful it is. The only statistical material I saw with

reference to the retail merchants' association brief was in these two compilations that were apparently made available to the committee, and one of my colleagues got a copy of these when he was over visiting the chairman of your committee one day. All I saw here was simply a list of the number of failures and the amounts involved—the money involved—from 1945 to date.

Mr. HOWARD: That is the same table.

Dr. SKEOCH: That, I am afraid, would show relatively little. In the first place, there was no distinction made between areas in which resale price maintenance was important and areas in which it was not important. So the mere fact of a general increase, particularly since it went on from 1945 pretty steadily, although there have been very serious fluctuations—I have seen this compilation here, and I cannot make any pattern out of it at all. I have studied it exhaustively, and I have had one of my colleagues—who is a statistical wizard—turn what we call a maniac machine, which we have there, loose on this stuff, to see if we can find any significant correlations; and we could not find any.

In the nature of things, conceptually, this is a very difficult thing to handle, because according to those who practise resale price maintenance themselves—and I refer to Mr. Johnson-Davies, the secretary of the British motor trade association—what ordinarily happens when you have resale price maintenance is one of two things: you either get an increase in the level of services, since people cannot compete in price, and this increase in the level of services raises cost, and presumably this carried on long enough would bring about bankruptcy or, alternatively, you get some people coming into the field, if the field is one where entry is possible. In other words, this occurs where entry is not controlled. This also reduces the volume of turnover; and between the two things of increasing cost of services and increasing numbers in the field, you might very well get bankruptcies even under the most general form of resale price maintenance.

So conceptually it is a very difficult thing to figure out—that is: do you get more failures after you ban resale price maintenance than before you ban resale price maintenance?

I think this would be very, very difficult to say; and to just draw a line like this, and say that after such and such a date all the failures that took place are attributable to resale price maintenance is, it seems to me, a pretty meaningless process.

Mr. MITCHELL: I would like to ask the doctor, Mr. Chairman, if he is prepared, or can he give a clear-cut definition of his interpretation of the word "cost"?

Dr. SKEOCH: This is something that I just would not care to do. I think that once you get into trying to determine costs, then, as I tried to point out—I was probably over-brief about it—you run into this whole problem that they have in the United States, of trying to allocate costs. What are costs for one firm, and what are costs for another, are different matters. So certainly I would not be so brave as to try this. And this is a thing which keeps coming up in combines debates.

I recall in the 1910 debates, some brave member got up and said that he thought it would be a comparatively simple matter to make tests as to whether prices were reasonable or not. It would be easy to compute costs, he thought, and this should be the test.

Another gentlemen said that if he knew how to do this, he knew a number of large concerns who would be happy to pay him a large sum of money, and that as far as he was aware, this was something impossible to be done.

Mr. MITCHELL: If you cannot define the word "cost", then how can you arrive at an interpretation of "loss leader"?

Dr. SKEOCH: We circularized the trade, and you will find a great many pages in this book Loss Leader Selling, which are devoted to a definition of loss leader.

There are in these 64 pages endless attempts to identify "loss leader". This was not our attempt. These were attempts made by businessmen and business people, to try to identify what a loss leader was. But there was no general consensus; there was no consensus at all. Therefore certainly I would not attempt to be so brave.

The CHAIRMAN: May I interrupt? It is now ten minutes to 11, and we shall adjourn at 11:00 o'clock. I have the names of three people on my list who wish to ask questions. We shall reconvene this afternoon at 3:00 o'clock.

Mr. MACDONNELL: Shall we have Professor Skeoch with us again?

The CHAIRMAN: I hope so.

Dr. SKEOCH: I was planning to go back on the 4:30 train.

The CHAIRMAN: Would it be agreeable to the committee then to meet at 2:30?

Dr. SKEOCH: I do not want to press you, so I could stay for a little longer.

The CHAIRMAN: We shall reconvene at 2:30 o'clock if it is agreeable to the committee. Would that suit you?

Dr. SKEOCH: I am completely at your disposal.

The CHAIRMAN: Then what about 2:00 o'clock? Would that not be much better? All those in favour will please signify. Very well. Will you please circulate this information to the other members of the committee as much as you can, because we cannot get out notices in time.

Mr. CRESTOHL: Shall we continue until 11:00 o'clock now?

The CHAIRMAN: You may, or would you prefer to adjourn now?

Mr. PICKERSGILL: I think we should adjourn now, because we have to get ready to go into the house.

The CHAIRMAN: All right, the committee is now adjourned to reconvene at 2:00 o'clock this afternoon in this room.

AFTERNOON SESSION

THURSDAY June 30, 1960.
2 p.m.

The CHAIRMAN: Gentlemen we have a quorum. Thank you Mr. Jung.

Mr. JUNG: I will be leaving again very shortly.

The CHAIRMAN: I would like to state, and probably most of you know, that the estimates of the Department of Justice are being dealt with this afternoon at 2.30 in the House of Commons. Perhaps you will bear this in mind as well as the fact that Professor Skeoch must get away, when you are asking your questions.

Mr. Crestohl, I believe you appear first on my list.

Mr. CRESTOHL: Dr. Skeoch, this morning on two or three occasions you referred to your students. Would you tell this committee where these students obtain their information, and in what manner they work?

Dr. SKEOCH: We have certain graduate students who work under our direction. We cooperate with them and assist them in the preparation of this material. We supervise them, and so on, and generally direct the course of their studies.

Mr. CRESTOHL: You are referring to the students in the schools?

Dr. SKEOCH: I am referring to graduate students.

Mr. CRESTOHL: You are referring to graduate students; and of course, they submit their theses to you on these subjects?

Dr. SKEOCH: Yes, that is right.

Mr. CRESTOHL: The reason I asked that question was so that it would be pointed out to this committee that this is really an objective study made by the students in an academic form, and by people who really have no bias one way or another.

Dr. SKEOCH: We try to make this study as subjective as it is humanly possible.

Mr. BELL (*Saint John-Albert*): At the same time these people have no practical experience in the trades.

Mr. CRESTOHL: Yes, I am not going to pretend that they are industrialists. What is the source of their information?

Dr. SKEOCH: The information in this case, as I pointed out this morning, was obtained from a group of manufacturers. You rely upon them from your raw material, and you analyze it to see if there is any pattern of type of behaviour that they indicate they favour or are pursuing. So that the basic material certainly comes from the people who are presumably experts in their fields. In other words, these people are industrialists and businessmen. We do not try to speak for them. We try to discover if there is a pattern in the type of replies they give, or if there is not a pattern, for that matter. This also becomes important.

Mr. CRESTOHL: Could you tell us approximately how long your study of this subject—not yours personally—has lasted? Could you tell us how long the faculty and students have worked in connection with the study of combines investigation legislation?

Dr. SKEOCH: I think that would be a very difficult thing to say, Mr. Crestohl. The department at Queen's university has maintained an interest in this field for quite a few years, for that matter. I am afraid I would not be able to answer that question in any adequate way.

Mr. CRESTOHL: From your experience you would be satisfied that this is as comprehensive and as objective and independent a study of the material which is before this committee as it is possible to make?

Dr. SKEOCH: Certainly to my knowledge, yes.

Mr. CRESTOHL: Thank you.

The CHAIRMAN: You do not send the same questionnaire to the retail distributors?

Dr. SKEOCH: No. Of course, you would perhaps require a somewhat different questionnaire, dealing with similar topics. This would require more time. It depends largely on a matter of getting manpower or womanpower to do these jobs. It was really fortuitous that we happened to have this one at this stage so that I could make reference to it.

Mr. HOWARD: Mr. Chairman, Dr. Skeoch has reference in his presentation to parts of the bill itself. Without referring specifically to the brief, I would like to deal with service industries in respect of the present exclusion from the provisions of this bill. I wonder if you have given thought to a manner by which services—banking institutions, if they are services, and so on,—might be covered by the provisions of the legislation?

Dr. SKEOCH: I would doubt if I could suggest anything in the way of a formal amendment at all. I just did not see that it was necessary to have that exemption in there. In other words, I did not see how you could simply

limit this to articles. I think as long as we have the matter of trade, or commerce, that combines with reference to services can be just as detrimental to the public interest as combines with reference to articles.

Questions as to the qualifications of people in service industries and so on would not necessarily be interfered with, but only those types of restraints that would be detrimental to public interest.

I feel that this is a very broad question, of course, and that you did not want to deal with it in an off-hand fashion.

So far as service industries themselves are concerned, I just felt that there is definitely a disadvantage in limiting the prohibition only to articles rather than making it more general.

Mr. HOWARD: Would it be your thought that while perhaps they may not come within the ambit of the legislation in so far as a merger with respect to services, that it would be possible, for argument sake, for a merger to take place in the banking industry, as has occurred in recent years, and that that might properly come under the act at the moment, within the present definition of "merger" that is in this bill, and that this might properly come within the field of a merger that is likely to operate to the detriment of public interest, even though the service that they have to offer is not as such covered by the conspiracy section or other sections.

Dr. SKEOCH: I would think that would be one aspect of it, and I would see no problem there.

Mr. HOWARD: They are covered for some activities, but may not be covered for others.

Dr. SKEOCH: The position of the banks is, as you know, one of some uncertainty and, certainly, there is the Bank Act that deals with their operations. But, the question as to whether or not banking services should not come within the prohibition of mergers that are detrimental to the public interest, I think really does not seriously require much debate—not in my view, at any rate. I would consider it to be desirable to apply it to all sectors of the economy.

Mr. MORTON: I wonder if Dr. Skeoch would mind commenting on this. He has suggested that the amendments would weaken the principle of price maintenance, which we hope to retain, in that the supplier can discriminate and abuse the privilege of withholding the sale of his articles to certain merchants. Does he not think, with the competition, for example, among the tobacco and electrical trades, that it would tend to prevent these companies using that privilege indiscriminately, only in the case where they feel there is a need to protect their goods?

Dr. SKEOCH: I think that you have to look here at the way resale price maintenance has operated, in practice. If the companies were free themselves to decide whether or not they would choose to price maintain their products, and if this were a genuine freedom then, I suppose, one would feel less concerned. The difficulty however,—and this is shown up in resale price maintenance in operation,—is that it is the association of distributors that pretty well— not always, but in many cases— determine whether or not a product will be price maintained. Now, a manufacturer who is faced with this sort of demand from a distributor's association has to have exceptional courage simply to defy it, as say, for example, as demonstrated in the Pablum case we had in Canada.

Mead Johnson and Company decided they did not want to maintain the price of Pablum. They did not want to limit its distribution, but wanted to spread it from drugstores to supermarkets. However, they had a visit from the board of commercial interests of the Canadian pharmaceutical association, as it was then known, and they were told quite bluntly, according to

the evidence before the joint parliamentary committee on resale price maintenance in November, 1951, that if they took the Pablum out of the drugstore they might as well take all their other products out of the drugstore. They withdrew, and they limited it to the drugstore. It was only after the legislation prohibiting resale price maintenance was passed that Pablum moved into the supermarket.

So, you have to look at the way in which various association of distributors have put pressure on manufacturers to adopt resale price maintenance when, very frequently—I would not say always—they were opposed to doing so, to qualify this idea that the manufacturer would simply pursue his own interest. I think it gives a very powerful weapon to self-interested groups and, for myself, I would be opposed to their having that degree of power.

Mr. MORTON: May I make the comment that, perhaps, during that period, there was a more limited supply of goods. Today, with the competition and the growing of industry, and also the imports, do you not think that would have an effect which would make it harder for these people to force resale price maintenance?

Dr. SKEOCH: I may not quite understand it, but it seems to me it would make it easier.

Mr. MORTON: If they have more competition and more goods on the market from other people, the manufacturers and distributors are going to want as many outlets as possible in order to compete with the new people who are bringing these goods on the market.

Dr. SKEOCH: And if these distributors are hostile to price cut merchandise, they will say they do not need yours, that there are plenty of others.

Mr. MORTON: They are not going to be able to keep the price up, but there would be a tendency to keep it down in order to compete with the market.

Dr. SKEOCH: You have to get distribution before you can sell your product, and it does seem to me that the more alternatives there are—in other words, the more manufacturers there are, the easier it is for the distributors to play one off against the other. And, even in the case of Pablum, as you know, at that time particularly, they had a very, very high percentage of the consumer market. I do not know whether babies like Pablum, but their mothers seem to; and, at any rate, in the case where such a high proportion was in the hands of one firm, it did not dare defy its distributors.

Mr. MORTON: That is, of course, where you have one item; but I am thinking in terms of manufacturer "A" having a certain line of goods—and he may have been predominant in the market, but manufacturer "B" comes along with some pretty strong competition. Manufacturer "A" is going to hesitate before he is going to stop an outlet, just because someone may have gone out of line temporarily, because manufacturer "B" might use that outlet as competition against him.

Dr. SKEOCH: In other words, you are suggesting that the manufacturer will not enforce his power under this section. That is what you are suggesting?

Mr. MORTON: Following along that line, you have more or less underestimated the affect of the loss leader today. We have had evidence from the Sunbeam people as to the effect it has had on their products, because fewer outlets have developed because of the loss leader effect, and people would not sell their products because it would spoil as merchandise. That is one example.

And if you talk to various merchants in our streets, as some of us do, about the effect of certain loss leaders—we are not talking about special sales, annual sales, clearance sales, or the odd sale, but of the continual use of loss leaders, which have been detrimental to certain products.

Dr. SKEOCH: This case was advanced before by the Sunbeam people, who are some of the most aggressive supporters of the principle of price maintenance, not only in Canada but also in the United States.

Sunbeam executives appeared before the restrictive trade practices commission in its inquiry into loss leader selling, and they made essentially the same allegations they are making now. They were asked what had happened to their sales.

Mr. Fitzgerald, the general sales manager at that time, said that it presented them with a rather embarrassing problem, because in spite of their banning resale price maintenance, their sales had increased steadily.

The restrictive trade practices commission in its inquiry, or in its study of loss leader selling, found the same thing to be true both with respect to the General Electric small appliances, and with respect to the Sunbeam appliances. The situation, of course, may have changed; I have not seen the evidence.

But in the United States they made a similar allegation as to what had happened to their sales in the District of Columbia, before the restrictive trade practices commission. We approached the assistant attorney general of the Department of Justice in the United States to ask if he could tell us anything about it.

He gave us the picture with respect to the evidence about their sales of appliances in the District of Columbia, which was quite at variance with this evidence.

I am not saying who is right or who is wrong. I am simply saying there is a conflict between their evidence before the restrictive trade practices commission; but they did concede that their number of distributors had been reduced, while their sales had been increased. But the situation may have changed. I have not seen the evidence.

Mr. MORTON: The fact that their sales may be increasing while their outlets are decreasing is going to put them in the hands of a few large distributors, and eventually their price would be dictated by that distributor. Is that not a danger?

Dr. SKEOCH: I think there would have to be pretty large distributors to dictate to a firm like Sunbeam, or most others. And I would have genuine reservations about that. I have not seen any sign that it does.

Mr. HALES: I think we have had a very thorough and comprehensive theoretical discussion of this, but I would like to see it applied to more practical appliances, and I would like to ask Dr. Skeoch how he would substantiate or condone the sort of practice that is going on every day.

For instance, a furniture store will use a non-related article, a brand name product, and sell it below its normal price, or even just at its selling price in order to provide an attraction. How can you relate a practical situation to the theoretical situation you presented to this committee this morning?

Dr. SKEOCH: I am not clear as to what the supposed detrimental consequence is.

Mr. HALES: Suppose a furniture store should advertise a carton of Players cigarettes at $1.50. It has no relationship to their furniture business, and they are purely offering it in order to attract persons to their store, and that sort of thing.

Dr. SKEOCH: They sell it at that price in order to get somebody to come in who, by chance, might buy some furniture?

Mr. HALES: That is right.

Dr. SKEOCH: Surely; there are all sorts of odd things happening in the distribution of goods, no doubt. Personally, unless I could trace some real detrimental consequence in it, I would not be seriously concerned about it.

In other words, I think that consumers are competent enough that they are not going in to buy a carton of cigarettes at $1.50 and at the same time be enticed into buying a chesterfield at an excessively high price.

I have a certain amount of confidence in the consumers, in that they would not allow that sort of thing to become too serious.

Mr. HALES: Well, let me take another example. Let me cite the case of a supermarket which is next door to a flower shop. The supermarket uses flowers as a loss leader item, and thereby they put the florist out of business. The supermarket is using flowers as a non-related product, and they are selling them as an attraction.

These are practical problems. These are the kind of problems we are confronted with.

Dr. SKEOCH: Well, unless you want to restrict the sort of product that any one distributor can handle—I am not sure; I have not seen this type of thing you are referring to, of a supermarket selling flowers on an extreme loss leader sort of basis. But assuming this is the case, I would doubt that it would be very effective as a loss leader. This would be my own opinion.

Furthermore, unless you are willing to say that this category of distributor can handle certain products, and nobody else can interfere in that line; and that this category can handle certain products in this line, I think you are going to have very great difficulty in dealing with this type of invasion of one distributor into the area of another; and I think it would be undesirable to do it, quite frankly.

This is what has been happening in the history of distribution. As a matter of fact, it is a rather interesting thing, if you look at the history of distribution. As Professor McNair pointed out, there almost seems to be a rule of life about distributors. They come in on a low-cost basis; they build up their services and facilities and become high cost. Department stores are an example. Originally the department stores of today were a low-cost type of distributor, and they were coming on, driving the independents out, and so on. If you look back at the literature on this sort of thing, you find this all explained. Now, they are very high-cost operators, and after a while somebody else comes in and cuts under this umbrella that these high-cost operators have set up. This just seems to be a way of life in the field of distribution.

I should not be greatly surprised if the supermarkets are on their way to becoming fairly high-cost institutions. I should not say this necessarily will happen, but there are indications from places that it will, and sooner or later somebody may come in with a different combination of goods and services and undercut them. I think it would be most undesirable to set up any rigid system of who can handle what, and how they can handle it.

If you really feel that loss leader selling is a serious problem—and, as I say, I am afraid I am not convinced, on the evidence I have seen, that it is; but if you are really convinced of this, then some of the loss limitation procedures, I think, are less dangerous in an approach to this sort of thing than handing over to private groups the power to restrict competitive behaviour within this area.

I am not enthusiastic about loss limitation procedures; but I am much less enthusiastic about this interference with the evolution of a structure. In other words, I would like to see a fluidity maintained.

Mr. PICKERSGILL: In other words, you believe in a free economy?

Dr. SKEOCH: Yes, this is true.

Mr. JONES: Just to pinpoint this particular part of your observations: surely section 34 of the Combines Investigation Act is an interference with the free economy? That is the purpose of section 34, and the purpose of the

amendment to section 34 is to make that amendment effective in order that it may, with additional interference, protect small retailers against abuses.

Dr. SKEOCH: I would disagree.

Mr. PICKERSGILL: Mr. Chairman, since we are going to have speeches, I would like to reply to that. I do not see why the member for Saskatoon should be allowed to make a speech, and no member from the opposition should.

Mr. JONES: I was not making a speech; I was asking for his comments on this thing.

The CHAIRMAN: It was supplementary to the question of Mr. Hales.

Mr. PICKERSGILL: I asked to ask a supplementary question also, quite a while ago, and I was ignored by the Chair.

The CHAIRMAN: You did not state that yours was a supplementary question. I signalled to you that you were third on the list. Mr. Hales, will you continue.

Mr. HALES: All right. I disagree with one part, that you do not think loss leader selling is as serious as it is.

Dr. SKEOCH: I just say that I have seen no evidence of this.

Mr. HALES: I have only seen the practical evidence up and down the street in my community and in my part of the country.

Dr. SKEOCH: I think we have all seen that.

Mr. HALES: Aside from that—I think that is our difference on that viewpoint. The other point was this: you suggested, or you thought that possibly the manufacturer should not police this, should not be asked to more or less police it, and that the department should. How would you recommend that the department could police such an act?

Dr. SKEOCH: If you are going to have an interference with competition, I think it should be done only under public supervision. This is a basic belief that I have.

As I say, some of these loss limitation procedures do offer one possibility of doing this. They simply—in the United States for example, in many states; it is all summarized in here: I could read it at some length; but I will not—they have laws prohibiting sales at less than, say, 6 per cent above net acquisition cost, and they simply prohibit it. They have encountered difficulty in enforcing this type of legislation. But nonetheless, if I were to make a choice, I would much rather see something of that sort involved than I would the freedom of groups to interfere—I will repeat, interfere—with free competitive behaviour.

Some Hon. MEMBERS: Hear, hear.

Mr. PICKERSGILL: I now have two questions. My first question is, I have gathered from what the witness has said—and I would like to have this confirmed or corrected—that he does not believe in a planned retail economy where one person is excluded from a trade in which another person now is engaging, more particularly by private interests.

Dr. SKEOCH: You are asking me if I believe that?

Mr. PICKERSGILL: Yes.

Dr. SKEOCH: Of course.

Mr. PICKERSGILL: The other question, which arises out of the intervention of Mr. Jones, is this: does the witness think that the banning of resale price maintenance was an interference with private competition?

Dr. SKEOCH: Well, this always leaves me with a feeling that there is some problem of semantics involved here. This matter was argued a short time ago in a case in the United States. It was argued that the owner of a brand name

has a right to name the price at which his product will be sold at all stages of distribution. The court of appeal had this to say:

> The consequences of accepting the argument almost take one's breath away. It is perfectly true that a trade mark is entitled to protection. Nor does it require any fair trade act to give such protection.
>
> A patentee is given a monopoly by legal grant. But even a patentee, who can exclude everyone else from making his patented article, cannot control the prices at which others may sell his articles to consumers. The protection given to the owner of a trade mark certainly should not be greater than that given to the holder of a legal monopoly, the patentee.

I am not a lawyer, but I understand that restraints or alienation and so on have been dealt with for a long time, and that if one buys something one is entitled to resell it. This seems to me to be one of the elements of freedom to buy and sell in ways which you think are more profitable than perhaps somebody else thinks. So I have always felt, when I get into this discussion with anybody, that perhaps we just are using words in a slightly different way, and I really do not think we are very far apart in our basic beliefs.

Mr. PICKERSGILL: I take it from what you have just said that you feel if there are to be any restraints, which you do not favour—or so-called loss leader selling, those restraints should be imposed and policed by the state and not imposed and policed by any private interest whatsoever.

Dr. SKEOCH: Yes.

Mr. MACDONNELL: I listened with a great deal of interest this morning to the paper and the argument made which, I take it, was against a continuance of price maintenance. I would like to ask Professor Skeoch if he knows of the submission made to us by the distributive trades advisory committee, which body purports to represent a wide variety of organizations, beginning with the retail merchants association of Canada. I will read briefly from this brief:

> Our purpose today is to re-affirm our position in respect to section 34 and to state that it is the carefully considered opinion of all the distributive industries forming this delegation that everyone, including the consumer, would be much better served by the outright repeal of section 34 rather than by amendments.
>
> On the other hand, we realize and appreciate the fact that the government is well satisfied, as the result of enquiries and investigations which have been completed, that the amendments contained in bill C-58 will adequately meet the situation in respect to unfair and unethical trade practices which are damaging to the consumer interest and the distributive industries.
>
> It is, therefore, the wish of our delegation to convey to the banking and commerce committee, in unmistakable terms, our complete support and endorsement of the provisions of bill C-58, exactly as they stand, in respect to "Offences in relation to Trade".

In other words if they could not have the complete repeal they would be prepared to settle for what we have here. I am not one of those who does not believe in standards of business and so on; but what are we to do if it is the fact that those who primarily are concerned here—and among those there is a long list—apparently are in favour of this bill as it is.

Dr. SKEOCH: I should not doubt that in the least. I think they are in favour of some form of resale price maintenance.

Mr. MACDONNELL: Do you think they are wrong in believing it will benefit them, or do you believe they are asking for something they should not ask for.

Dr. SKEOCH: I think it is a combination of the two things. If I might just take a moment or two I would say there is a tendency, I think, among the people who work in this area to look at shortrun results. In other words the problem very frequently is that they think in the short run there will be advantages to them; and very rarely do they look beyond that. However, there have been some people—and some students within the associations which represent resale price maintenance—who have raised very substantial doubts about the protection that the retail trade does get, or any distributor, from resale price maintenance. I would like to quote from an article by Mr. K. C. Johnson-Davies who for years was secretary of the motor trade association of Great Britain, an organization which operated a strict price maintenance scheme.

> If, however, the functions of the association are limited to retail price maintenance in the narrower sense, this object will, for this very reason, be defeated.
>
> It seems reasonable to assume that a static policy of rigid and effective price maintenance will ultimately destroy itself, because the increase in numbers under the price protection umbrella will eventually produce the same low profit and no-profit conditions which arose under price-cutting.
>
> Profit margins, adequate at present when no longer seriously prejudiced by price cutting, may easily lose their virtue as a source of livelihood when volume is whittled away between the overabundant dealers. Increased margins offer no solution, for they merely germinate a similarly destructive cycle of reactions.
>
> The control of numbers in the trade is the crux of the long-run aspect of price and profit protection, and therefore demands the attention of all trade associations.
>
> It follows, therefore, that some form of limitation is to be advocated whereby a control may be exercised on those seeking to enter the retail side of a protected industry. This is by no means novel.

I think very few of us would tolerate a situation in which any trade is given the right to determine who should get into it and who should not get into it, not if we are believers in any sort of free, competitive economy. This is part of the reason, I think, these businessmen make a mistake: they look at the short-run aspect of it and not at the long-run aspect of it. They do not seem to see there will be this increase in dealers, and yet they do occasionally. I would like to quote one thing more, and that is from the *Hardware and Metal and Electrical Dealer* of July 18, 1953. This is a Canadian publication. They said there:

> Premiums, trade-ins and price cutting are such familiar features of appliance retailing that it might seem unnecessary to bring up the subject again, but from a recent survey conducted among dealers across the country it appears that there has been a change of opinion as to the causes of the chaotic conditions prevailing in the trade. Not so long ago the government's repeal of resale price maintenance was generally considered to be at the root of the trouble...In reply to a hardware and metal questionnaire little or no reference is made to resale price maintenance, the consensus being that, if anything, manufacturers, for one or another reason, must accept the main responsibility for the retail trade's plight.
>
> "Every appliance dealer, or hardware retailer selling appliances, who responded to the request for opinion stated emphatically that there are too many dealers."

That is the direct result of maintaining a very high margin, which attracts them in. Then, when they get in, they find there is not enough business to support everybody, and the demand is for a wider margin. It is the excessive margin at the beginning which is causing the difficulty; and this is recognized here. I do not blame these people, and I suppose if I were in a trade that was hard-pressed I would look at my own short-run interests and say, "Look, I want protection." If we asked farmers what they would like to have, they would like to have parity prices; and if we asked university professors what they would like to have, they would like to have their salaries doubled, because we are worth it, but we do not get it. However, I do not think this is the basis upon which you could determine what anybody is going to receive. Though I can understand why these people want resale price maintenance, this is no reason why public policy should be designed to give them what they want, because it will only result in more people going into the trade, each of them doing less business, and soon you are getting into difficulty. For example, you see what happened in the drug trade, where the mark-up used to be 33-1/3 per cent and, in the forties, under pressure from distribution it was brought up to 40 per cent. I do not know whether this answers your question, as to why these people want it, but these are the two points: (*a*) they were looking only at the short-run consequences of its application; and, (*b*) they are looking at their own personal interest and this is a perfectly justifiable thing for them to do, but it does not mean I have to accept it.

Mr. MACDONNELL: Could you give me that reference to the quite long quotation you made from the English situation?

Dr. SKEOCH: I will give you the reprint.

Mr. HALES: Supplementary to what the doctor just said: what you just expounded there, in theory, does not seem to fit our present-day application to the motor car industry.

Dr. SKEOCH: They restrict it.

Mr. HALES: You state that the resale price maintenance which we have on cars, more or less—

Dr. SKEOCH: It is not effective, I do not think.

Mr. HELLYER: You do not have it now.

Mr. HALES: Pretty much so; they have a protected price.

Dr. SKEOCH: Might I intervene? At the time this legislation was being considered the motor companies were contacted by myself to see what policy they were pursuing, and most denied they pursued a policy of resale price maintenance.

Mr. HALES: With this protected price that car manufacturer dealers have, according to you, at that protected price there would be more go into the business?

Dr. SKEOCH: If they could get in.

Mr. HALES: That is not the case?

Dr. SKEOCH: No, because the car manufacturers will not accept them.

Mr. HALES: There is no reason why the manufacturer of tobacco could not do the same thing?

Dr. SKEOCH: In the United States, where this came up in a number of cases, they have drawn a distinction between exclusive dealerships for automobiles and for some other products. In the case of automobiles, the argument is it requires a high degree of specialist servicing, and that sort of thing, which justified some restriction on the number of dealers they are willing to accept. So there they have said, "Exclusive dealerships in automobiles are acceptable,"

—but if all you are doing is handling cigarettes over a counter, it seems doubtful as to whether exclusive dealership has any public advantage.

Mr. HALES: Would there be any statistics to prove the statement you have made on protected prices, that you have more dealers who want to come into the business?

Dr. SKEOCH: I think this quotation from the Hardware and Metal and Electrical Dealer is one example of it, and K. C. Johnson-Davies is another, when he is talking about it, and I will give you the exact title. It is, the Motor Trade Association. He is talking about firms handling tires and things of this sort. They cover not only automobiles, but tires and tubes, and all the accessories that go along with them, and this I think is a practically accepted doctrine even among trade association people. However I am not suggesting that it is anything novel. There is nothing novel about it.

The CHAIRMAN: On that point which you quoted in 1953 about the electrical appliance dealers, were they not attracted there because of the shortage of appliances after the war, when a great many of them jumped in? And in addition, a great many people wanted to get into business for themselves. It was not so much the margin of profit that was attractive, but the fact that anybody could sell stoves and refrigerators because there was a great shortage.

I wonder what they would say now in 1960, having regard to their statement in 1952.

Dr. SKEOCH: I do not know, but in 1953 it was not very long after the war, and there were the factors involved of a great shortage of electrical appliances, and also a very substantial share of the market. This was an advantage too, at least an equal advantage to the other.

The CHAIRMAN: If you read the brief that the Canadian electrical manufacturers presented here the other day, it would be pretty nearly the opposite to what they said in 1953.

Mr. HOWARD: I wonder if Dr. Skeoch is familiar with the experience of the national association of retail druggists in the United States, and in many of the individual states, where they have been responsible for getting resale price maintenance legislation, only to discover the same thing, that the high margins that they were able to get through resale price maintenance attracted many into it, and they discovered that they were no better off than they were in the first place.

Dr. SKEOCH: That does not surprise me.

Mr. SOUTHAM: I was not present this morning, and possibly the question I am about to ask has already come up. But it comes under the heading in the brief of Market Power, Growth and Development. Under that heading you say:

> What we require as a beginning, is to identify those types of restrictive arrangements which increase market power without contributing anything of significance to growth and development; and, then, to examine those situations in which an increase in market power may contribute to growth and development.

How did that start? What would be your opinion of the trade practices, in so far as Canadian companies are concerned when selling in export markets, or in wanting to have the exclusive right to get into export markets, without interfering with local or Canadian markets?

Dr. SKEOCH: I have always been sympathetic to that position. I am not so particularly confident when it comes to dealing with American markets. They have their own act over there which makes it legal for a firm to form an association and to agree on prices and sales in export markets.

The difficulty you encounter is how far there is this sort of osmosis, as it were. In other words, how far may such types of agreement be reached with respect to export markets, and how far do they tend to shift over to domestic markets?

Here I think you have to proceed with considerable caution. I think it is difficult to generalize here. It is like so many other things; it is all right to have a rule of general application, but then you have to look very hard at the individual cases.

But if it were thought desirable to legitimize some form of arrangement among competitors for sales in export markets, I think I would become extremely suspicious about any restrictive practice whatsoever in the domestic market. In other words, since there is always this danger with agreements in the export market, they could very easily be transferred to the domestic market, and I would sort of redouble my guard in many cases where this exemption was given in reference to export markets.

But as I say, I think there is a certain logic about this position. What you have to worry about is your logical decision getting in the way of your facts. The facts may show that there is a tendency to transfer agreements in one field to another, to an unjustifiable extent. But you must look at the individual cases.

The CHAIRMAN: Now, Mr. Mitchell.

Mr. MITCHELL: Mr. Chairman, I would like to ask Dr. Skeoch this question: a few minutes ago he mentioned that under R.P.M. the attractiveness of the schedule of profit created too many outlets at the retail level, and as a result eventually there were failures as far as too many of them were concerned, and a dropping back to a few.

With that in mind, do you think that at present, at the retail level, that goods and services are getting into too few hands of distributors?

Dr. SKEOCH: This again is a factual matter. Let me put it this way: I am not aware of any information which would suggest such a tendency.

Retail distribution in most fields is a relatively easy field to enter. So that if you did temporarily get a reduction in the number to an undesirably low level, I would expect that new entries would come in fairly quickly.

If not, then this is a case for the combines branch. They should be keeping a weather eye cocked on these things, and check on them.

Mr. MITCHELL: Going further on that line: you have not a special reason to feel that such is the case?

Dr. SKEOCH: I do not know the material.

Mr. MITCHELL: Supposing it should get into a few hands of distributors at the retail level, would that lead you to suggest that the power of purchasing from a manufacturer would have a reflection on the manufacturer as to the demands of these large purchasers for a reduction in the manufacturer's price to them, and which would in no way affect their retail selling cost?

You have types of merchandise being handled in an increasing number of items, or articles which at one time you would not have expected to see in a supermarket. But they have their own associations too. We realize that. And it could happen that when they get together at their monthly meetings, that among the four or five—whatever the item may be—it would be realized that they are purchasing, let us say, from 70 to 75 per cent of the total sales across Canada of one certain article.

Now, they, in turn—and I am not saying that they do—but they could go to the manufacturer of that particular article and say to him: "We are selling 75 per cent of this article of yours across Canada, and we want an extra five per cent on our purchases".

Now, if that should be the case—and I have reason to believe it is,—a number of manufacturers are worrying as to the power that the purchasers

of their product can put on them, and thereby put them into the position where they can say to him: "If you do not grant us that extra discount, we will no longer handle your product."

Have you any evidence to show that that is going on, or have you ever heard of it?

The CHAIRMAN: Were you in the room when Dr. Skeoch spoke of the Pablum case? That was pretty close to your drug business.

Mr. MITCHELL: I was not thinking of any particular article, but that would be a good example.

Dr. SKEOCH: I think that is not quite the same issue. What I gather that Mr. Mitchell is concerned with is rather that the buyers, if they become too large, can exert an undue pressure on the manufacturer. That is the gist of his question, I take it.

Mr. MITCHELL: Without affecting their resale or retail price; in other words, supposing that they did receive that extra five per cent discount, they would not in turn pass it on to the consumer?

Dr. SKEOCH: They would get an increase in retail power, and they would exercise that increase and use it to extend their products. That essentially is the position you are taking. I cannot say that I know specifically of any such case. Manufacturers have told me that they were afraid that they were selling too large a proportion of their output to one firm or another.

But I think in such a case the appropriate remedy lies—and is provided for in the act; and it is now provided for a little more effectively than it was previously. I suggest it is up to the combines branch to take action simply to break up some of those large buyers, if it should get to that stage. But that is what we want to discover.

Mr. MITCHELL: Who is to designate the largeness of an operation?

Dr. SKEOCH: It has to be a matter for each individual, a growth study of each individual case; how far is the market power in that field required by conditions of efficiency, of growth, and of expansion? If it is not required, and a merger takes place, then I would say there was a certain responsibility on the combines administration to step in and take action there.

Mr. MITCHELL: I think that the members of the committee have received two letters, of June 22 and June 27, from the Canadian retail federation. I think you will recall speaking about them.

The CHAIRMAN: Yes.

Mr. MITCHELL: I wonder if it would be in order to have those letters printed in our report?

The CHAIRMAN: I have several letters, and telegrams that I was going to bring to the committee when we do not have a representative here, and either read them to the committee, or have them inserted in our evidence.

Mr. MITCHELL: Very well.

The CHAIRMAN: I was going to cover that before we finished the job. Are there any other questions you wish to ask Dr. Skeoch?

Mr. BELL (*Saint John-Albert*): I want to ask Professor Skeoch if they would comment on the Exchequer Court provisions in so far as they might apply to merchandise?

Dr. SKEOCH: I am not at all clear as to the exact purpose of them. I think it is correct certainly in my experience in working in one or other of these cases; it was suggested that the criminal courts are a difficult place in which to handle mergers, because you have to bring in market data on the share of the market, and other things of that sort, and the criminal courts seem to be very cagey. I dare say this is the result of their historical development, and properly so; but they appear to be rather cagey with respect to the introduction of such evidence.

I am not a lawyer, and I am not sufficiently well acquainted with the operations of the Exchequer Court; but since they have the duty from time to time to adjudicate on the evaluation of land, I presume they might also have a look at market problems and things of that sort. Whether this makes them an adequate forum for consideration of mergers, however, is another question. It seems to me it would be more a matter for the criminal courts in a way, but beyond that I am afraid I would not care to venture an opinion.

Mr. HOWARD: With respect to the question of mergers, would you suggest that perhaps the definition of merger as opposed to monopoly should be uniform, because one could lead to the other very easily? And might I ask if you do not think it would be more advantageous merely to say in the definition what a merger is, and that it is the acquisition by one or more persons of the control over somebody else?

And then leave in the section—I think it is 33 if I am not mistaken, where the penalty is imposed, the further definition so far as the effect of a merger is concerned?

Dr. SKEOCH: This would certainly be congenial with my approach. I rather favour general prohibitions rather than particular prohibitions. If you can define a merger and then just prohibit things that are detrimental to the public interest in a broad sense, then I think you are not so likely to get trapped, where you are unfair to the companies merging, because they may be caught on a technical aspect of your prohibition.

I think it is also fair to the public in general. I am a great believer in this field, at any rate, of general prohibitions, and leaving it to the combines branch and to the courts to work out the specific circumstances in which these influences may be undesirable.

Mr. HOWARD: I have one other question in that regard. The proposed definition now, as you know, says "whereby competition"—and then it makes three specifications there. Perhaps I should put it in a question: I was going to say that to me this means something. But to you, what does this indicate—that there may be mergers that take place whereby competition in some areas other than those three specified might take place? I was wondering as to whether these are restrictive.

Dr. SKEOCH: I think so. I think, as I suggested in my comments, that conglomerate mergers—you probably could not get at them here. You may there; I do not know; but you never can tell. And if you can draft it in a general way so you can deal with such a situation, I think you should do so.

I really do not feel that those three sub-headings are sufficiently general to take in all possible cases.

Mr. HOWARD: I wonder if you would, with the benefit of your experience, comment on the difference that might exist between the proposed definition of "merger" and the definition of "merger" that is in the act at the moment?

I understand we have only had one court case arising out of mergers—that is the recent breweries case—and I wonder as to whether, if a different definition were in there, the problem might have been tackled in an easier manner.

Dr. SKEOCH: I do not know, Mr. Howard. I would be inclined to feel that, with the merger section particularly, the effectiveness or otherwise of your policy depends primarily upon the effective administration of it; and that the definition in Bill C-58 as it presently exists would probably not be a major consideration. I do not know, so far as the beer case is concerned. I suppose—at least, I do not think it would have made any difference. I would rather feel that it is the skill, the insight, with which the combines branch looks for the real sources of detriment that will make the difference in your merger policy.

In other words, questions of: how do you define a merger? This is an extremely difficult, complex thing; and I just do not think this perhaps has been

effectively done in a number of cases. And under what circumstances would you think that the merger would be detrimental?

Here you have to look at all the possibe effects of the merger, and this requires a very sophisticated and imaginative—you cannot just go at it in a plodding way—analysis of the industry structure, the history; the whole series of issues.

Myself, I would prefer a sort of common sense definition of merger and prohibit those to the detriment of the public, and then leave it to the skill of the combines branch and the good sense of the courts I do not think you can do much more, really.

Mr. HOWARD: Perhaps this is an unfair question: do you think in the breweries case the skill of the combines branch operated at its peak efficiency?

The CHAIRMAN: No, no.

Dr. SKEOCH: I should not answer that. I was retained for part of the proceedings.

Mr. MACDONNELL: To what extent is the situation affected if, in fact, a merger is being made because one of the companies is afraid it is going to the wall and has to sell out?

Dr. SKEOCH: This is always a consideration that has to be taken into account. This is the so-called doctrine of failing companies in the United States; and as long as the other company did not bring it, in the circumstances, to the brink of failure, I would be inclined to say there is a good deal of good sense in this.

The CHAIRMAN: Gentlemen, we promised to let Dr. Skeoch away in time to catch his train; and I have not any demand here for further questions. I think it will be in order if we adjourn.

Mr. HOWARD: Mr. Chairman, I wonder if I could ask Dr. Skeoch to explain, from his point of view as an economist, this so-called price leadership approach —whether he thinks it is in existence to any degree, as compared with combinations, or conspiracies, to uniformly adjust prices.

Dr. SKEOCH: I think this is a dangerous question to ask me. I have just recently finished an article on the kinked oligopoly demand curve, and I am just likely to recite the whole thing. This has to do with something like price leadership. This is a very intricate sort of business.

As you probably know, in the United States they have had cases in which they have tried to condemn what they call conscious parallelism of action—they coin these round phrases. They have not really enjoyed much success. I am always a believer that there is a good deal of competition, as long as you do not overtly try to eliminate it. You cannot force businessmen, as one Swedish industrialist said in an article, to tear at one another's throats like wolves—and I do not think you have to. But price leadership practice, the whole range of these intermediate problems, the oligopoly behaviour—that is what we call it technically—this conscious parallelism, as the Americans have it, and so on, are, I think, on the borderline of anti-trust. We have plenty of other problems to keep us busy, I think, for quite a long while before we have to turn our attention to that.

Mr. BELL (*Saint John-Albert*): Mr. Chairman, I think we should go on record as thanking Dr. Skeoch for taking time to come here and deliver his informative and experienced brief, and answering the questions that he did.

Mr. HELLYER: I would like to second that.

Some Hon. MEMBERS: Hear, hear.

The CHAIRMAN: Thank you very much, Dr. Skeoch. You have been an excellent witness; very interesting, and I hope you will come again soon.

Dr. SKEOCH: Thank you, Mr. Cathers. You have been an excellent host, and I have enjoyed the experience very much.

APPENDIX "A"

RESALE PRICE MAINTENANCE IN THE GROCERY TRADE

Questionnaire to Manufacturers and Suppliers

1. (*a*) Please indicate whether your firm practised resale price maintenance before 1952.

	Yes	No
Some Products	( )	( )
All Products	( )	( )

(*b*) Do you feel that your experience since 1952 support your earlier position? ..... Please explain.

2. (*a*) Do you currently suggest a resale price? .....

(*b*) In your opinion, what percentage of distributors follow your suggested price? .....

(*c*) If your suggested price were not followed by, say, at least 50 per cent of the distributors, would you consider it advantageous to continue to suggest and/or quote and advertise a suggested resale price? ..... If so, why?

3. Trend of Sales:

(*a*) With sales in 1951 as 100, please indicate as precisely as possible the level sales had reached in 1959.

1951 — 100
1959 — ...

(*b*) Was this increase (decrease) spread fairly evenly over the years 1951-1959 or were there particular years in which major changes occurred? If so, please specify.

Year	*Index*	*Cause of Variation*
1951	100	
195		
195		
195		
195		

4. Changes in Market Organization:

(*a*) With reference to 1951, do you deal directly with:

	Wholesalers	Retailers
More	( )	( )
Fewer	( )	( )
Same Number	( )	( )

(*b*) Have the functions of (1) wholesalers and (2) retailers undergone any significant change? Please specify.

(*c*) Have brand names become more ( ) (less ( ), no change ( )) important in influencing sales?

(*d*) What factors have been important in bringing about the above changes?

5. Service:

(*a*) Have the services which you provide for your customers (for example, delivery, restocking, credit, etc.) increased ( ) (decreased ( ), no change ( )) since 1951?

(*b*) In your opinion, what factors have accounted for this change?

6. Structure of Industry:
   (a) Since 1951 has the number of your competitors increased ( ) (decreased ( ), no change ( ))?
   (b) Since 1951 has the size of your competitors increased ( ) (decreased ( ), no change ( ))?
   (c) Do you consider that your share of the market has increased ( ) (decreased ( ), no change ( )) since 1951?
   (d) In your opinion was the banning of resale maintenance a major factor contributing to the results noted in (a), (b) and (c)? If so, please specify.
   (e) Please indicate other important factors accounting for these results.

7. (a) Do you feel that the intensity of competition has increased ( ) (decreased ( ), no change ( )) since 1951?
   (b) Since 1951 has there been any significant change in either production ( ) or distribution ( ) methods?
   (c) Do you feel the banning of resale price maintenance influenced the changes in (a) or (b)? Please specify.
   (d) If the banning of resale price maintenance was not, in your opinion, a major factor accounting for the above changes, please indicate what were the important factors.

8. Quality of Product and Packaging:
   (a) Has the quality of the product improved ( ) (diminished ( ), no change ( )) since 1951?
   (b) Has the quality of the packaging improved ( ) (diminished ( ), no change ( )) since 1951?
   (c) Did pressure resulting from the banning of resale price maintenance influence the changes noted in (a) and (b)? If so, please specify.
   (d) If the banning of resale price maintenance was not, in your opinion, a major factor accounting for the above changes, please indicate what were the important factors.
   (e) Since 1951 has the cost of packaging as a percentage of the total cost of the product increased ( ) (decreased ( ), no change ( )?

9. Advertising:
   (a) Has the percentage of the selling price devoted to advertising increased ( ) (decreased ( ), no change ( )) since 1951?
   (b) Please indicate major changes in the type of advertising employed by your firm since 1951.
   (c) Did the pressure resulting from the banning of resale price maintenance influence the changes noted in (a) and (b)? If so, please specify.
   (d) If the banning of resale price maintenance was not, in your opinion, a major factor accounting for the above change, please indicate what were the important factors.

10. Cooperative Advertising:
   (a) Do you enter into cooperative advertising? Yes—— No——
   (b) If so, does it materially and consistently increase the volume of sales? Yes—— No——
   (c) Do you offer the same deal to all customers? Yes—— No——

(*d*) Has the percentage of your yearly budget which is generally applied to cooperative advertising increased ( ) (decreased ( ), no change ( )) since 1951?

(*e*) Do you feel the banning of resale price maintenance influenced the change noted in (*d*)? If so, please specify.

(*f*) If the banning of resale price maintenance was not, in your opinion, a major factor accounting for the above change, please indicate what were the important factors.

11. Private Label Brands:

(*a*) Did you market a larger ( ) (smaller ( ), same ( )) proportion of your product(s) under private label brands in 1959 than in 1951?

(*b*) In your opinion was the banning of resale price maintenance a major factor contributing to the result noted in (*a*)? If so, please specify.

(*c*) Even if you have not marketed a larger proportion of your product(s) under private label brands have you experienced increased ( ) (decreased ( ), no change ( )) competition from private brands?

(*d*) If private label brands are competitive with an item(s) you produce has the percentage of shelf space which they occupy increased ( ) (decreased ( ), no change ( )) versus your own position since 1951?

(*e*) In your opinion was the banning of resale price maintenance a major factor contributing to the results noted in (*c*) and (*d*)? If so, please specify.

(*f*) If the banning of resale price maintenance was not, in your opinion, a major factor accounting for the above changes, please indicate what were the important factors.

12. Loss-leaders:

(*a*) Although there is no set definition for the term "loss-leader", please give your interpretation of the term and indicate whether your product(s) is used as such.

(*b*) Has the use of your product(s) in this way increased ( ) (decreased ( ), no change ( )), since 1951?

(*c*) Please specify the regularity of use of your product(s) as "loss-leaders(s)": continuous ( ), seasonal ( ), occasional ( ).

(*d*) Please indicate the type of outlet involved in the "loss-leader" selling of your product(s).

(*e*) Do you feel that "loss-leaders" affect the sales of your product(s) beneficially ( ) (adversely ( ), not at all ( ))? Please explain.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 8

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

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TUESDAY, JULY 5, 1960

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WITNESSES:

Professor G. Rosenbluth, Ph.D., Associate Professor of Economics, Queens University; Professors H. E. English, H. Scott Gordon, and T. N. Brewis, Department of Economics, Carleton University.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23430-2—1

STANDING COMMITTEE
ON
BANKING AND COMMERCE

Chairman: C. A. Cathers, Esq., M.P.

Vice-Chairman: E. Morissette, Esq., M.P.

and Messrs.

Aiken
Allmark
Asselin
Baldwin
Bell (*Saint John-Albert*)
Benidickson
Bigg
Brassard (*Chicoutimi*)
Broome
Campeau
Caron
Creaghan
Crestohl
Drysdale
Fisher
Hales
Hanbidge
Hellyer
Horner (*Acadia*)
Howard
Jones
Jung
Leduc
Macdonnell (*Greenwood*)
MacLean (*Winnipeg North Centre*)
MacLellan
Martin (*Essex East*)
McIlraith
McIntosh
Mitchell,
More
Morton
Nugent
Pascoe
Pickersgill
Robichaud
Rowe
Rynard
Skoreyko
Slogan
Smith (*Winnipeg North*)
Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams.

Antoine Chassé,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

TUESDAY, July 5, 1960.
(22)

The Standing Committee on Banking and Commerce met at 9.30 a.m. this day. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Aiken, Bell (*Saint John-Albert*), Benidickson, Cathers, Drysdale, Fisher, Hales, Howard, Jones, Jung, Leduc, Macdonnell (*Greenwood*), McIlraith, Mitchell, More, Morton, Pascoe, Robichaud, Rynard and Southam—20.

In attendance: Professor H. E. English, Department of Economics, Carleton University; Professor G. Rosenbluth, Ph. D., Associate Professor of Economics, Queen's University and Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act), Department of Justice.

The Committee resumed consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

Professor Rosenbluth was introduced and he read a prepared brief. He was questioned on the contents of his brief and on related matters.

At 11.00 a.m. the Committee adjourned until 3.00 p.m. this day.

AFTERNOON SITTING

(23)

The Committee resumed at 3.00 p.m., the Chairman, Mr. C. A. Cathers, presiding.

Members present: Messrs. Bell (*Saint John-Albert*), Benidickson, Broome, Brassard (*Chicoutimi*), Caron, Cathers, Drysdale, Fisher, Howard, Jung, Macdonnell (*Greenwood*), McIlraith, McIntosh, Mitchell, More, Morton, Nugent, Pascoe, Robichaud and Southam—20.

In attendance: Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act), Department of Justice; Professors H. E. English, H. Scott Gordon and T. N. Brewis, Department of Economics, Carleton University. *And also:* Professor Maxwell Cohen, Law Faculty, McGill University.

The Committee resumed consideration of Bill No. 58.

The Committee agreed that Professor Cohen would be heard following the completion of Professor English's examination.

Professor English was called; he introduced his colleagues and then read a prepared statement, together with a letter from his associates in support of his brief. The witness was questioned on his submission and on related matters. Professors Gordon and Brewis also supplied additional information.

The witnesses were thanked and permitted to retire.

At 5.50 p.m. the Committee adjourned to the call of the Chair.

E. W. Innes,
Acting Clerk of the Committee.

23430-2—1½

EVIDENCE

TUESDAY, July 5, 1960.

The CHAIRMAN: Gentlemen, will you come to order: we have a quorum. It is not a very nice morning; but it is a good day to work, so let us go to work.

This morning we have with us Professor Rosenbluth and Professor English. We were going to follow the procedure of these gentlemen reading their briefs, during which time you would make note of your questions, and then when both gentlemen had finished reading their briefs you would ask them the questions; but Professor Rosenbluth has an engagement, and he is anxious to get away as soon as possible; that is, before 12:00 o'clock. Therefore, with your permission I would suggest that we hear Professor Rosenbluth first, and then ask him any questions. Then Professor English is agreeable to coming on this afternoon.

Mr. HOWARD: Mr. Chairman, before we proceed, I wonder if perhaps we might not follow the same approach as we did with Dr. Skeoch; that is, ask both professors Rosenbluth and English, initially, when they start on their remarks, to give the committee their professional status and background, the specific phases of the economics field in which they have participated, and any sort of empirical studies they have made, and so on.

The CHAIRMAN: The copies of the brief have all been distributed. As a matter of fact, we have over-distributed: we have not enough for the press.

Dr. G. ROSENBLUTH (*Associate Professor of Economics, Queen's University*): Mr. Chairman and gentlemen, I am very grateful for the opportunity to speak to you here. I am an associate professor of economics at Queen's University, Currently, I am lecturing in the field of economic theory. I was reading through the minutes of the committee some days back, and I noticed that there were some remarks about theorists being theoretical, and I am afraid I must plead guilty on this count.

I have a bachelor of arts degree from Toronto university, and a Ph.D. from Columbia. I have spent some time in the federal civil service, and have taught at various American universities as well as at Queen's.

I have done some empirical work in the field of industrial concentration, mainly statistical studies, and I have had published a book and some articles in this area.

I have also taught courses in monopoly, competition, and government regulation in the United States. I have been keeping an eye on the goings on under the Combines Investigation Act the last couple of years, and am working on a study of the administration of the act, together with a colleague at Queen's.

I do not think I can claim to be as much of a specialist in this field as Professor Skeoch.

Now, with your permission, Mr. Chairman, I should like to read my submission, which, fortunately, is fairly short.

Mr. BELL (*Saint John-Albert*): Mr. Chairman, may I just ask this question here? Professor Skeoch said, I think, that you were one of the ones who endorsed his brief.

Dr. ROSENBLUTH: Yes.

Mr. BELL (*Saint John-Albert*): But the same is not true of yours; this is just your own presentation?

Dr. ROSENBLUTH: I should have said this: I do not represent anybody, except myself, though I think it is no secret that the general opinions I have are shared by a good many others in the profession.

I think there are on record presentations that were made by quite a large number of professors last year when bill C-59 came up, which is similar in a number of important respects to this one, and there were a number of letters that came, I think both to you and maybe the Prime Minister, from various other universities. This is not just Queen's imperium, I do not think.

The CHAIRMAN: Mr. Bell was referring to a letter that was read to the committee, and it was signed by Professor Curtis, head of the department; Professor Urquhart; Associate Professor Slater; and Mr. Post. That letter stated that those gentlemen were supporting his brief.

Are you verbally saying that you support his brief? Your name was not included on this.

Dr. ROSENBLUTH: My name was not included, only because I was coming to make a presentation of my own. I support his brief in principle. I cannot say that I support it in every particular, because I have to confess that I have not read it all. But I have talked about this matter a great deal with Professor Skeoch, and I support his views.

Mr. MORE: Mr. Chairman, are there any copies of these briefs? I have neither Professor English's brief nor this one.

The CHAIRMAN: Here is a copy of Professor Rosenbluth's brief. How did you get missed?

Mr. MORE: I do not know.

Dr. ROSENBLUTH: With your permission, Mr. Chairman, I will read my brief now.

The purpose of the Combines Investigation Act is to keep private business as competitive as possible. It is designed to protect the public against restrictions of competition that occur when business firms act in concert, when they merge, or when they exploit a monopoly position.

Such a law is necessary because business men usually find it profitable to restrict competition. This tendency is as old as business itself, as suggested by Adam Smith's much quoted comment that "people of the same trade seldom meet together, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices".

Thus, when business men suppress competition they are just "doing what comes naturally". Two conclusions follow that are of importance for this investigation: First, business men who violate the Combines Act do not think of themselves as criminals and are not generally so regarded by the public. This, I think, is a fairly general statement; there are one or two exceptions to it. They are like motorists who violate speed limits or parking regulations. Anti-social behaviour is, however, involved in both cases, and few would disagree that regulations are necessary and should be enforced.

Secondly, to accept the advice of trade associations on how the Combines Investigation Act should be amended is a little like asking burglars to amend the law on theft or basing liquor control legislation on the advice of alcoholics.

I may interject here, Mr. Chairman: I was not, of course, meaning to suggest that the officials of trade associations are in any way like burglars or alcoholics. Perhaps a better analogy, that occurred to me later, would be to say that it is like professors permitting students to set the examinations.

The major provisions of Bill C-58 are evidently based on the suggestions of trade associations, and it is therefore not surprising that their effect is to make it easier to suppress competition and more difficult to enforce the act. There are two such provisions.

Combines

The first major amendment permits firms to consult and agree with one another as long as this relates only to the exchange of statistics, the defining of product standards, or some other "harmless" activity. Now, the suppression of competition under the guise of, for example, an "exchange of statistics" is one of the oldest weapons in the trade association arsenal. The bill appears to meet this difficulty by stating that the agreement or combination is still illegal if it lessens competition unduly in certain specified respects—and these are price, quantity—quality also—markets, channels of distribution, and the entry of new firms. No one can know for sure how the courts will interpret this new wording if it is enacted, but one can make a good guess. At best it will make it much more difficult to prove a violation beyond any reasonable doubt. But the chances are that the situation will be much worse. Defence counsel in combines cases have always argued that the prosecution must demonstrate the specific injury to the public arising from each particular agreement or combination. The new wording will make this interpretation much more plausible, and if the courts accept it, there will be an end of effective enforcement. A requirement that "specific detriment" be proven is unreasonable in principle and impossible to meet in practice. It is like a requirement that driving on the wrong side of the road should be an offence only if—and only *after*—an accident actually occurs, and then only if there are no other contributing causes. The parallel is exact, because competition must constitute the rule of the road if a private enterprise system is to operate in the public interest.

The second major point relates to resale price maintenance. The second major weakening of the Combines Act concerns the ban on resale price maintenance. Bill C-58 would in effect remove this ban. A supplier could prescribe resale prices and withhold supplies from a dealer violating the prescribed price. If charged with resale price maintenance the supplier can avail himself of any of the easy defences provided in the amendment. I have not enumerated them; but you have seen them all.

Many of those who approve of this amendment in fact argue that resale price maintenance should be permitted. However, nothing has been said on this subject that was not said nine years ago, when the MacQuarrie Committee reported against resale price maintenance, a parliamentary committee came to the same conclusion, and the Combines branch published its enquiry into loss leader selling. This later publication was not actually nine years ago, but five or six years ago—1954 or 1955. Resale price maintenance eliminates competition from the distributive function and thus leads to waste and excess capacity in the distributive trades.

Those who favour resale price maintenance expect it to eliminate practices or effects that they consider harmful. We may group these practices or effects in three classes.

First, some are not in fact harmful but rather socially desirable. An example of this is the sale of goods by a competitor at a margin that the complainant considers inadequate.

Others do not in fact occur to any significant extent. Examples are the sale of goods below actual cost or genuine injury to the supplier's reputation; or, for that matter, his sales.

The third group consists of cases of price discrimination. A chain store, for example, may be able to sell a product at a lower price than a smaller competitor because it has received a discriminatory discount or allowance from the supplier. These cases should be dealt with by an effective rule against price discrimination, not by permitting resale price maintenance.

Now I came to price discrimination.

There is widespread agreement that suppliers should not be permitted to discriminate in favour of large distributors if this discrimination is based on the distributor's market power and not on a saving in cost. Since Bill C-58 is advertised as doing things for the small man, it is somewhat surprising that nothing has been done to eliminate price discrimination of this sort. Suppliers are quite free to sell at much lower prices, secret or open, to some distributors than to others, as long as the quantities involved are different. This is still permitted under the act as it stands now or as it would stand if improved by Bill C-58.

Bill C-58 does indeed ban discrimination that takes the specific form of promotional allowances. But such a partial ban is not likely to reduce the extent of discrimination, it will only ensure that discrimination does not take a particular form. It therefore provides no significant defence for the smaller distributor. If a boat has several leaks and you stop up one, it will still sink.

Combines legislation is by no means perfect, but it is not likely to be improved by Bill C-58.

Thank you, Mr. Chairman.

The CHAIRMAN: Any questions?

Mr. MORTON: Mr. Chairman, on your first premise you seem to suggest that all the trade associations have the same interest; that is, the manufacturers, the retailers and the distributors. Do you think that each group in itself has a different interest which it is trying to protect?

Dr. ROSENBLUTH: I think that is perfectly true, Mr. Morton, but I think, looking at the Combines Investigation Act as a whole, there are certain general attitudes to the legislation that are common to a good many of them. In the main, all groups of businessmen like to be exempted from competition. Now, it is perfectly true and natural that all any businessman wants is to be exempt from competition himself, and not have his suppliers or customers exempted. But the general tenor of trade associations' submission is always to try to move in the direction of restricting competition. This leans in the direction of rendering the Combines Investigation Act more difficult to enforce. In saying this I am not just speaking from theory, though it would follow from theory. I have seen a good many of the briefs that were submitted, going back to the MacQuarrie committee and, more recently, under bill C-59, and this one this year.

Mr. MORTON: May I again put it in this way: the amendment to the act, of course, is still based upon the premise that the maintenance of resale price is prohibited, and that under certain circumstances, though, the manufacturer may wthhold selling to certain distributors—under circumstances which the act considers may be detrimental to their goods.

Do you not think that under those circumstances, at the present time—when the supply of goods is, perhaps, more or of a greater amount than they were at the time that the Combines Act was first passed—that the volume and variety would tend to keep the prices down with regard to competition?

If you take the electrical trade, they have more competitors and they are not going to be able to set prices arbitrarily, even if they were permitted to, because they know they have to compete not only with other electrical associations in Canada but, now, with competition from outside, such as that from Japan. Perhaps, that is one way that might be offset?

Dr. ROSENBLUTH: I am not quite sure I understand the question, but I think it may relate, in part, to the problem of what aspect of the price is it that would be fixed under resale price maintenance.

I think it is perfectly true that if you have a number of manufacturers competing in the sale of, let us say, toasters and you, on the one hand, prevent these manufacturers from combining together and, on the other hand, permit

them to practise resale price maintenance, then it is quite true that the competitive element might have the effect of lowering the prices both to the retailer and his, on resale, by the retailer. But the objection is that what will not be subject to competition is the retailers' mark-up. In fact, to the extent it is subject to competition it will be working the wrong way, because each manufacturer, in trying to get the retailer to push his toaster and not his rivals' toaster, will tend in the direction of guaranteeing the retailer a higher mark-up on the particular toaster. It is not competition among the manufacturers but the competition among retailers that is being eliminated by resale price maintenance. I think this is undesirable because the retailer who comes along with a better method—not a better toaster, but a better method of retailing,—will not be able to reap the benefits and pass on the benefits of it to the public in the form of a competitive lower mark-up.

Mr. MORTON: But in that particular case, your retailer cannot keep his prices set if he is going to compete, in turn, with other retailers. The act prohibits following slavishly these suggested prices, unless they can be justified, in such a case where there has been a loss leader or something has been done to the detriment of the goods concerned. Do you not think that would tend to keep the retailers' mark-up to a reasonable proportion?

Dr. ROSENBLUTH: If I understand it correctly, now you are suggesting that we could enact this amendment and that this would not, in fact, completely remove the ban on resale price maintenance?

Mr. MORTON: Yes, that is the premise.

Dr. ROSENBLUTH: There you have got me into an area in which I cannot pretend to be a legal expert. I read this amendment as it stands, and I say to myself, using my common sense: "The language of this amendment certainly does not remove the ban on resale price maintenance. This is perfectly true, but the practical effect surely must be just that?" I say that, because if I were a manufacturer, say, insisting on practising resale price maintenance, in fact it would be pretty well impossible to prosecute me successfully. I could always say I had reasonable ground to believe so-and-so was going to disparage my goods, or something like that.

Mr. MORTON: But countering that, the manufacturer is not going to take away from one of his outlets lightly, unless his goods are actually disparaged. In his own business the more outlets he gets the better it is for him.

Dr. ROSENBLUTH: While I think it is perfectly true that even if you legalize resale price maintenance completely, a good many manufacturers would not practise it because, in fact, they have no gain from it. The pressure has always come—in the resale price maintenance cases on record—and would continue to come from the other retailers.

What I think would happen, if you put through the amendment as it now stands, is that retailers would exert pressure on the manufacturers to enforce the maintenance of the margin. The manufacturers under pressure from the various retailers who are interested in this, would then have to act and withdraw supplies from one retailer if he were cutting prices, because while it is perfectly true he wants that outlet he would also be under pressure from other retailers and they would be threatening him with boycott.

Mr. MORTON: One other question. On the premise which I state, that each manufacturer wants as many outlets as possible—and it is better as far as the public is concerned that in competition there are as many outlets as possible—many of the things complained about, for which this act is justified to remedy, are claimed to cut out a number of outlets, the use of loss leaders, and so on. Then other retailers refuse to deal with them because that has been spoiled as a marketable product. Have you any comment on that?

Dr. ROSENBLUTH: Basically, I think that both manufacturers and the public are not interested, without qualification, in a maximum number of outlets. The manufacturer is interested in a maximum sale price, or, to be more precise, in a maximum net revenue. There have been many cases and, in fact, there are a lot of them that were investigated by the restrictive trade practices commission in connection with this inquiry into loss leaders, in 1954-55. The sort of thing that happens is that a manufacturer comes up and says, "Yes, we think that since the amendment on resale price maintenance came in our goods have been damaged somewhat by price-cutting." In fact, what happened in all cases, as far as I recall, which the restrictive trade practices commission investigated, is that the manufacturers sales went up. I am inclined to think that the long-run benefit to the manufacturer is to have his sales promoted by more efficient retailing leading to a larger margin.

Mr. MORTON: I think it is fair to say—if you read the other briefs—that some manufacturers claim otherwise, because it then puts them in the hands of relatively few, powerful distributors, such as Eatons, large groceterias, and so on. They feel once having got in their hands, in the long run they are at the mercy of the large distributors and have not freedom of marketing. Could you comment on that?

Dr. ROSENBLUTH: I think certainly there is, let us say, a theoretical possibility of something like this happening—a small manufacturer being tied to a rather limited number of retailers. But as long as there is a fairly large number of retailers, overall this danger is not so great. The problem is very much like the problem in many branches of manufacturing. If more efficient operation leads to large-scale production and, therefore, a reduction in the number of competitors, there may come a point where you have to decide whether you are going to insist on technical efficiency, even though you cut down the number of competitors to a very small number, or whether in the interest of more competition you are going to permit a certain amount of inefficiency. I can see a theoretical possibility of this happening. I would certainly claim—with the statistics, for example, on concentration in retailing, and so on, that we have—they do not show that stage is, in fact, approached or reached at the moment.

Mr. MORTON: We have one example of the Sunbeam Corporation who were complaining of this. I think their overall sales are increased, but they are complaining that they are becoming more and more in the hands of a few distributors, and are very concerned about it.

Dr. ROSENBLUTH: Did you ever hear a figure? I should not ask questions back, but I will say that my guess would be that the Sunbeam Corporation still has a very large number of distributors.

Mr. MORTON: They have claimed it is cut down, but their overall sales have increased. On the evidence they gave it was said it was a detriment to them to have the comparatively small number of distributors they have at the present time.

Mr. HOWARD: I think I should point out that Sunbeam was not subject to cross-examination as to what they had to say, and they were not here as a separate corporation, but merely as part of another deputation.

The CHAIRMAN: They volunteered some information.

Mr. HOWARD: And were unable to go any further.

Dr. ROSENBLUTH: I do not think it is a trivial problem by any means, but the important point is this: Suppose you are cut down from 2,000 distributors to, let us say, 1,000. It is a severe cut in the number of distributors. However, 1,000 distributors is still such a large number that you are, in fact, not under any undue pressure from any one of them.

That is one thing I want to say. The other thing is this: there are, I think, situations—not with Sunbeam, I think—but in some grocery lines where a small packer or canner is under pressure from a large distributor; and what happens is that he is asked to sell to the large distributor at a much lower price than to the small one.

I think this is a serious matter, and I think the way to deal with it is by straightening out the law with regard to price discrimination That has not been done in this bill.

Mr. RYNARD: Mr. Chairman, I would like to ask this question: there seems to be a fear in the opinion expressed by the gentlemen seated on your left, from Queen's, that this maintenance of price to the manufacturer may be a dangerous thing. I would like to know how much goods are sold over our counters in Canada which are not made in Canada and which are not under the control of the manufacturer?

I went through a store the other day, and every rubber was made in Japan that was on sale in that store. Surely you cannot argue that the manufacturer is going to control the price of those rubber goods. If he was attempting to, then he was doing an awfully poor job of it, because there was not a Canadian rubber in that store.

Dr. ROSENBLUTH: I think that is right. In this case I would doubt very much if there is any resale price maintenance of any goods of that kind. And if I may supplement my answer a little bit, it does bring up the point that I believe there was a case in which the combines branch found, in respect of imported English china, that it was the British exporter who said "You maintain the resale price on this china, or else we will not deal with you."

Thus the combines branch found that they could not enforce their ban on resale price maintenance because they could not get at this British exporter.

Mr. RYNARD: In this situation they would not be selling these rubber goods unless they were quite a little below the level of the Canadian rubber. My question is this: does anybody know how much of manufactured goods that are sold across the stores of Canada are made outside of Canada at the present time? I think that has a big bearing on this case—if there are any.

Dr. ROSENBLUTH: You would like to know what the proportion of imported manufactured goods is?

Mr. RYNARD: Yes, that is right.

Dr. ROSENBLUTH: I do not have the figures on this, but my impression is that it has been going up recently.

Mr. RYNARD: I think if we could know this, we would be in a little better position because, certainly, if it is a sizeable amount—and I feel that it is, from going through the stores and checking recently—even if your argument that price maintenance of the manufacturer would in effect be a problem, it would not be, if the goods come in in large enough quantities, because they would have to meet competition.

Mr. HOWARD: I would like to follow up something which Mr. Morton mentioned in his line of questioning, and I ask the witness this question: I take it from reading the brief, in the latter part of it, that your major concern in the field of activities of the retailer, or the difficult position in which he finds himself, arises not from loss leader selling, but from price discrimination that is prevalent in the country.

I wonder if you could indicate to what extent the other thing, that is, price discrimination, exists, or if you understand it to exist, or if you know personally that it exists, and what corrective measures might be taken to deal with that particular problem?

Dr. ROSENBLUTH: Well, all I know about this is what I know from second-hand, like a lot of things.

There was a fairly thorough study of price discrimination mainly in the grocery field—I think almost entirely in the grocery field—done by Professor Skeoch when he was with the combines branch. I do not know whether he spoke of it when he was here; but under this study, broadly speaking, it showed something like this: that there was definitely a discrimination on the part of the supplier, that is the basic manufacturer of goods, in favour of chain grocery stores—mainly the so called popular chains, like Loblaws, and also the so called voluntary chains, like I.G.A.

Professor Skeoch's finding in the main, was that this discrimination took the form, of what he called special discounts and allowances, and that this category included, as he put it, all the discounts that do not appear on the face of the invoice, such as special deals of one kind or another, as well as these promotional allowances that are touched on in bill C-58. There were these discounts figured on the selling price that are not touched by bill C-58, as well as promotional allowances that are.

Professor Skeoch's study did not break these down in any way, as to how much was promotional allowance and how much was special discounts. But the report of the royal commission on price spreads of food products contained a statement to the effect—that is, they reported—that it is about half and half. That is to say, these special discounts and allowances are about half in the form of promotional allowances that would be tackled by this bill, and half in the form of discounts figured on the selling price.

The American approach to this problem in my view happens to be a fairly good one. They say that you can make special discounts, or any sort of discounts related to different quantities, just so long as you can show that the amount of discount reflects a real saving in cost.

A saving in cost can occur from having a process in which you have one order, or in which you get a longer run in your manufacturing, or a saving in your packaging and shipping, or anything like that.

So their law states that you are not allowed to discriminate, if you are charged with discrimination to the different buyers selling in different quantities, and then it is a defence to show that the discrimination represents a real saving in cost.

Another defence they have is that you are discriminating in good faith to meet competition. This means that it is not standard practice, but occasionally just to meet competition.

I think something like this line would be very appropriate in Canada. At the moment the law simply says that you cannot discriminate, if you are selling to different people in like quantity and like quality. But this obviously does not get at the problem, because the whole point is related to the difference between chain stores and the small stores, and that the quantities are different.

Mr. MACDONNELL: Is that the reason why we are informed that the retail price maintenance people, having small margins, are in favour of this act? They would have liked to have resale price maintenance done away with altogether; but failing that, they accept this act.

Am I exaggerating the desirability of helping the small manufacturer? This has been very much in my mind, and I am sorry to interrupt.

Dr. ROSENBLUTH: My impression is that a lot of the small retailers have been issuing these promotional allowances that are supposed to be given, and that are given on unequal terms to the chain stores, and they have complaints about this. So the bill says: all right, we are going to do away with these promotional allowances. And the small retailers say: this is fine; this is what we want.

But what they do not realize is that they have stopped up one leak, but not another; and what is going to happen, if you implement the bill, is that the chain stores will continue to give advantages, but they will take the form of special discounts figured on the selling price, and not the form of promotional allowances.

Mr. JONES: Did Dr. Rosenbluth say that Mr. Skeoch was in the combines investigation branch?

Dr. ROSENBLUTH: Yes.

Mr. JONES: Was he employed by them?

Dr. ROSENBLUTH: Yes; he was employed by that branch before he came to Queen's.

Mr. JONES: And were you employed by them?

Dr. ROSENBLUTH: No. I said that I was in the civil service. I was in the wartime prices and trade board, and then in the dominion bureau of statistics; but I was never in the combines branch.

Mr. JONES: How long ago was it that you left?

Dr. ROSENBLUTH: 1948.

Mr. HOWARD: Professor Rosenbluth made reference to the fact that the United States law dealt with the price discrimination question, and he said that it permitted discrimination if it reflected a real saving in production and distribution. Can he give us the reference to what law that is?

Dr. ROSENBLUTH: It is called the Robinson-Patman Act, and it amends the Clayton Act, and brings in other clauses.

Mr. HOWARD: I have a question which is different to those we have been dealing with, namely, price discrimination and the relationship between supplier and retailer, but I do not want to embark on a new subject unless this one has been exhausted.

Mr. AIKEN: I have one question on the same subject. I notice that Dr. Rosenbluth takes the same objection to the phrase "like quantity and quality" in respect to special discounts. I wonder if he feels that you cannot do away with special prices or with quantity buying?

Is it not a basic matter of commercial business that if you sell a large quantity of goods to a certain person, then he is entitled to receive a better price? I do not think there has been any objection to that, from anyone.

Dr. ROSENBLUTH: No; and if I seemed to be objecting to quantity discounts in principle, then I did not make myself clear.

The position that I would accept is that quantity discounts are all right if they reflect a real saving in cost. Or, I would go further and say they are all right even if they do not reflect a real saving in cost, but if they tend, or have the tendency of insuring competition among buyers. And that is the position which the American law takes.

Mr. AIKEN: I take it that in your opinion this sort of cancels out the effect of this subsection (*a*) of section 33-A, and that it does not help to have the phrase "like quantity and quality", because it does not help.

Dr. ROSENBLUTH: That is right. What you need to do is to spell out the conditions that make quantity discounts legitimate.

Mr. AIKEN: Would it be possible to spell these out in reasonably simple terms?

Dr. ROSENBLUTH: I do not know about "reasonably simple terms", but the Americans have done it. I do not think it is in simple terms, but it is there.

Mr. HOWARD: Do you know if the American law, the Robinson-Patman Act, has gone before the courts to be interpreted?

Dr. ROSENBLUTH: Yes, there have been a lot of cases.

Mr. MACDONNELL: May I pursue one step further the position of the retailer? When I asked you about the position of the retailer vis a vis resale price maintenance, you said this was a case of stopping up one leak, but not stopping up another. There has been discount for quantity, is that correct?

Dr. ROSENBLUTH: Yes.

Mr. MACDONNELL: Looking at it from the point of view of the retail merchant, one of our objectives, as I understand it, is to keep him in business; and looking at it from his point of view, resale price maintenance would enable him to get a certain price for what he sells. What you say, on the other hand then, is that the effect of the discount for cash merely means that the man who get the discount for quantity will surely make a larger profit thereby; but that does not affect the fact that the supplier will fix the price for the ordinary retailer at a figure which will enable him to make a profit, though not so large a one as the man who is able to buy larger quantities. Is that a fair statement of the case?

Dr. ROSENBLUTH: No; I think the quantity discount, of course, can have two effects. It can either enable the chain store to make a large profit, or enable the chain store to lower its price.

Mr. MACDONNELL: But can it do that, if we have resale price maintenance?

Dr. ROSENBLUTH: I think that with resale price maintenance the effect would simply be to give the chain store larger profits, and probably larger expenditures on promotion.

Mr. MACDONNELL: That is my point. But still, looking at it from the point of view, at the moment, of the small merchant—who is one of the people we are concerned about—he is right in thinking that it does strengthen his position?

For instance, Professor Skeoch the other day, I think, when I asked him this question, said, "Yes, it will help him for the moment; but he is taking a short view, and in the end it will hurt him". That is my recollection of what he said.

Dr. ROSENBLUTH: This is on the assumption that you permit resale price maintenance?

Mr. MACDONNELL: Yes: it is on the effect on the small retailer.

Mr. BENIDICKSON: Are you saying what the bill does?

The CHAIRMAN: They want that; but they are not getting it.

Mr. MACDONNELL: Let me read what they say.

Mr. HOWARD: It is just a matter of argument.

Mr. BELL (*Saint John-Albert*): The professor admitted it by his last statement.

Mr. HOWARD: Which professor?

Mr. BELL (*Saint John-Albert*): The professor who is a witness here now.

Mr. MACDONNELL: Let me read from this submission of the retail merchants association. They say:

> Our purpose today is to reaffirm our position in respect to section 34 and to state that it is the carefully considered opinion of all the distributive industries forming this delegation that everyone, including the consumer, would be much better served by the outright repeal of section 34 rather than by amendments.

Then they go on later to say:

> It is, therefore, the wish of our delegation to convey to the banking and commerce committee,—

They recognize, apparently, that they cannot have that:

> It is, therefore, the wish of our delegation to convey to the banking and commerce committee, in unmistakable terms, our complete support and endorsement of the provisions of bill C-58, exactly as they stand, in respect to "offences in relation to trade".

Mr. McILRAITH: Mr. Chairman, supplementing the letter which Mr. Macdonnell read, which was dated June 16, from Mr. David Gilbert of the distributive trades advisory committee of the retail merchants' association, there is a letter to you, Mr. Chairman, which was circulated, dated June 22, from Mr. Northway, the president of the Canadian retail federation, in which he quotes the explanatory notes on section 33B as printed in the bill, and then says:

> The Canadian retail federation does not oppose the objective outlined in the above-quoted explanation of section 33B;

Then he goes on with several paragraphs, and says:

> Our two main criticisms of section 33B are:
>
> 1. that its impact upon a wide variety of retailers has not been sufficiently considered; and
> 2. that the wording employed produces serious doubts as to what retailers must do to conform with the provisions of this section. The above would seem to suggest the importance of further consideration of the effect of the bill on all retailing and the necessity for clarification, which is definitely required since the present wording is most confusing.

Then they go on. There is a good deal more to the letter; but I wanted to make it clear that Mr. Macdonnell was speaking about the retailers, and here we have one organization taking one view—the Canadian retail federation—and another association, namely, Mr. Gilbert's group, taking another view; so that it is not quite fair to say that the retailers want this, or that the retailers want that. I think that should be on the record.

Mr. JONES: Mr. Chairman, there is one question I would like to have cleared up. I am referring to the brief, at the bottom of page 1, where it is said:

> Secondly, to accept the advice of trade associations on how the Combines Investigation Act should be amended is a little like asking burglars to amend the law on theft—

I wonder why the witness put that in there. For example, if we are investigating the working conditions of professors, does he not agree that we should seek the advice of professors?

Dr. ROSENBLUTH: Yes, certainly.

Mr. JONES: And if their advice was sound and in the public interest, should we not accept that advice?

Dr. ROSENBLUTH: I should like to make my position here perfectly clear. I do not think it would be wise or proper to proceed to amend the Combines Investigation Act without hearing from all parties concerned—and this, of course, includes the trade associations and it includes the consumers. But I do not think it would be wise to take the trade associations' interpretation of what is in the public interest and be guided by it.

Mr. BENIDICKSON: That is because of your phrase here, where you say that such a law is necessary because businessmen usually find it profitable to restrict competition?

Dr. ROSENBLUTH: Yes.

Mr. BELL (*Saint John-Albert*): Are you suggesting that we have taken the interpretation of the retail merchants' association in this legislation, in view of Mr. Macdonnell's reading of their representations?

Dr. ROSENBLUTH: In the briefs that I have seen, a number of themes have recurred. One of them is the view that price fixing agreements should not be regarded as offensive of themselves; but that the courts, or the combines branch should be required to show the specific effect of each agreement. As I have said in my brief, I think one of the major amendments of the bill moves in that direction.

The other is that a good many of the representations from merchants—though, as was pointed out, not all—have attacked the ban on resale price maintenance and have used a variety of arguments; and the other major provision that I see, in my view, is an undermining of the ban on resale price maintenance.

Mr. BELL (*Saint John-Albert*): There is one question I would like to ask. On the first page, again, you say:

> Business men who violate the Combines Act do not think of themselves as criminals and are not generally so regarded by the public.

And Professor Skeoch said:

> For example, there are those who claim that they are being tagged with the label of criminals if they are investigated or prosecuted under the act. And there are those who demand "punishment" in the form of fiines and jail sentences for those involved in breaches of the legislation.

Those two statements, or general remarks, are in conflict with each other—they are just directly opposite.

Dr. ROSENBLUTH: Whose statements are in conflict?

Mr. BELL (*Saint John-Albert*): Yours and Professor Skeoch's:

> Business men who violate the Combines Act do not think of themselves as criminals...

That is your statement. And Professor Skeoch said:

> There are those who claim that they are being tagged with the label of criminals.

Mr. HOWARD: There is a vast difference.

Dr. ROSENBLUTH: That is the whole point: they are complaining because they do not think of themselves as criminals, and they complain that somebody else is tagging them. That is how I read that section. Do they not say it is an unjustified tagging; is that not the point of the complaint?

Mr. BELL (*Saint John-Albert*): You say that they are not generally so regarded by the public.

Dr. ROSENBLUTH: I think that is correct.

Mr. BELL (*Saint John-Albert*): And Professor Skeoch says that they are tagged with the label of criminals. It is just directly the opposite.

Mr. HOWARD: No: he says they claim they are being tagged.

Mr. BELL (*Saint John-Albert*): Those are directly opposite statements, in my humble opinion, Mr. Chairman. I am prepared to read them again.

Dr. ROSENBLUTH: May I comment on them as they stand. I think the question is how much validity attaches to my statement that the public generally does not regard these business men as criminals, even though they claim that when the Combines Investigation Act investigates them, they are tagged as criminals.

My view, in brief, is this, that except in rather flagrant cases the tag that attaches to the manufacturer, even when he is convicted by the court, does not make much impression on the public. Mr. Mackenzie King, when he first brought down this legislation, certainly had the view that this public pillorying of the business man was going to be very effective in keeping them alive. In fact, as far as we can make out, the reports of the restrictive trade practices commission get next to no publicity; and I may say, incidentally, that they are not printed, or presented, in such a way as to invite publicity. They look extremely dull, and a lot of them are a little dull, starting with the grey cover and going on to the way the contents are drawn up.

Mr. BELL (*Saint John-Albert*): Keeping costs down!

Dr. ROSENBLUTH: So I think the business man is pretty safe; the tag is not a very spectacular one. However, this does not get at the important point I am trying to make here. What I really think is the case is that it is a lot more important in this law to get compliance than it is to attach labels to people, to fine corporations, or to send people to prison. I do not think these procedures make sense any more than it makes sense to, let us say, send people to prison for a parking violation. The important thing is to get compliance and agreement. I would welcome anything that moves in that direction.

Mr. MITCHELL: Mr. Chairman, I would like to ask the witness this: in his brief, to the best of my knowledge, he has not mentioned or commented upon loss leader selling. In your opinion, professor, do you feel it is rampant or increasing and, thereby, could become dangerous?

Dr. ROSENBLUTH: Like a good many of these other practices, loss leader selling is something I do not think should be discussed in terms of citing one or two examples. what we really need to know is, as you say, whether it is a wide-spread and important practice. There was one attempt in Canada really to investigate this. I forget whether it was on the recommendation of the MacQuarrie committee or the parliamentary committee that investigated resale price maintenance, but the recommendation was that the combines branch should make an investigation into loss leader selling. The combines branch then proceeded to make this investigation, and the restrictive trade practices commission held hearings also and published a report.

Mr. MITCHELL: What was the date of that.

Dr. ROSENBLUTH: 1954 or 1955.

Mr. MITCHELL: I am speaking of it as of today, and there must have been a difference in the last four or five years?

Dr. ROSENBLUTH: You will recall, perhaps, the general conclusion that emerged there was that it was a very exceptional practice; that is, loss leader selling—we have to keep our definition straight here—in the sense of selling below cost.

Mr. MITCHELL: I have asked this question of other witnesses too: what is your interpretation of "cost", thereby suggesting a loss leader?

Dr. ROSENBLUTH: I think you can talk about a loss leader in the way that it makes sense to me,—if somebody is selling a commodity at less than the cost at which he bought it.

Mr. MITCHELL: You mean, the invoiced price?

Dr. ROSENBLUTH: The purchase price. I am remembering there are special discounts that do not appear on the face of the invoice.

Mr. MORE: Having no regard to his overhead?

Dr. ROSENBLUTH: Yes, having no regard to his overhead. If you try to introduce into the definition of "loss leader" some arbitrary allocation of

overhead, I think you are in trouble. You are free to make these distinctions, but it is extremely difficult for an outsider to say somebody in a particular business has allocated an inadequate proportion of overhead to the particular item, because there are too many things to be taken into account.

If I may finish answering your question: As far as I know, since 1955 there has been no comprehensive inquiry of this kind into loss leader selling. So that I suppose, theoretically, it is possible for all we know, that loss leader selling is a lot more rampant now than it was then. Myself, I am inclined to believe this is not very likely, because I do not see anything in the structure of the situation which has changed very much since that time. The trend towards chain stores and groceteria stores was well under way by that time. The role of loss leader selling in that was pretty thoroughly investigated.

I have the impression that every time a case of loss leader selling comes up, or an alleged case of loss leader selling comes up, and you begin to investigate it, it sort of comes to pieces under your hands. I think there is one recent example of this in the report for the last year of the director of investigations under the Combines Act. If I remember rightly, there was a complaint about loss leader selling in small household appliances. When they investigated this they found, if I remember correctly, that all the appliances that were being sold by this alleged price-cutter were being sold at mark-ups of from 8 to 35 per cent above his acquisition cost. Therefore, you could not say he was loss leadering. I think in nine cases out of ten this is what you find. If somebody is managing to sell at low mark-ups he still manages to make on that.

Mr. MORE: He must have been able to buy it cheaper, to sell at those discount prices, than a person who had the same article and was not able to—in other words, the job lot, shall we say, at the end of a season from a manufacturer. Therefore, a manufacturer, in my opinion, is letting down his other outlets very definitely.

Dr. ROSENBLUTH: If that is the case and the investigation did not get far enough to really determine what was at the base of the quantity discount this man was getting, then, again, that is a case of price discrimination.

Mr. MORE: Then, again, you go back to the actual definition of what is "cost." If there is so much fluctuation in the cost, the net cost—including invoice discount, and so on—therefore, it would be very hard for this act or any other act definitely to suggest it is a loss leader?

Dr. ROSENBLUTH: Yes.

Mr. MORE: That is what I am getting at.

Mr. MACDONNELL: I am not clear about this yet, and I want to see if I can get it clear.

There are three parties involved. I am a manufacturer or supplier—and let us assume there is no question of my combining with other people. In other words, I am wanting to put an article on the market, and I am competing with other people. I select a certain number of people to sell that as my agents, —retailers. No question of combination arises yet at all, but it is purely a deal between me and my retailers. I am telling them the price at which they may sell. Now, the security the consumer has is that I am competing with other manufacturers and am, presumably, keeping my price as low as I can in order to sell as much as I can. The retailer comes in, and as I have understood it, he gets supplies, in for a price, acting as agent, so to speak, of the manufacturer. Now, is there a fair deal for the supplier, the manufacturer, the selling agent, whom I call the retailer, and the consumer? Where is the weakness in that, assuming the situation is as I have set it out?

Dr. ROSENBLUTH: The weakness is there is not a fair deal for the consumer, or if you like, the public generally. The consumer, or the public, is entitled to have the greatest amount of efficiency promoted by competition; that is to say, to have all the steps in the process of producing the goods and putting them into the hands of the consumer carried out with the greatest possible efficiency.

What your scheme would do would be to remove the incentive towards increased efficiency in the distributive function and not in the manufacturing function, because the distributors are guaranteed a mark-up between the price at which they buy and the price at which they sell.

Mr. JONES: How would that be accomplished, under your definition?

Mr. MORE: Would he not push that article in comparison to any others of a similar type of merchandise?

Dr. ROSENBLUTH: Yes.

Mr. MORE: The manufacturer would not complain?

Dr. ROSENBLUTH: No, but the consumer would have a complaint.

Mr. MORE: Not if it was at the same price?

Mr. MACDONNELL: Surely we begin by saying the consumers' protection was that this manufacturer, who is in competition with several others, will be wanting to sell as much as he can?

Dr. ROSENBLUTH: Yes.

Mr. MACDONNELL: Surely that is not to the injury of the consumer? In other words, he would be keeping his resale price down as low as he could to compete with his competitors?

Dr. ROSENBLUTH: Suppose you have this structure set up, and the spread between the buying and selling price—

Mr. MACDONNELL: Might I just add this: as a matter of fact, do you know of a case which either proves or disproves that fact?

Dr. ROSENBLUTH: Yes, I know of lots of cases. All modern developments in retailing, the increased efficiency in retailing that has come about in many lines of business, have always come about on the basis of reducing the cost of retailing and, correspondingly, reducing the spread between the buying and selling price.

Mr. BELL (*Saint John-Albert*): Eliminating servicing too?

Dr. ROSENBLUTH: Yes, to some extent eliminating servicing, but rather giving the consumer the choice as to whether he wants the service or not. It is this increased efficiency in retailing, under the spur of competition, that would be discouraged by guaranteeing the spread between the buying and selling price for the retailer.

Mr. MACDONNELL: I do not follow that either. Why is not the manufacturer astute to keep his price down in order to increase his sales; and would he not be scrutinizing carefully the efficiency of his retailers and reducing his price?

I ask, again, whether there is evidence to show that is so or not. I am theorizing at the moment, and I have not facts to support what I am saying.

Dr. ROSENBLUTH: Let us envisage this situation. The manufacturer has maintained a price and the retailer comes along with a new method of retailing which is much cheaper than the others, and says to the manufacturer, "Look, I can handle your goods for a smaller spread, and I can sell more of them."

Suppose now following your theory that the manufacturer says: "Okay, in that case we will cut down the resale price". That would be all right, but in that case the manufacturer is simply removing the protection from his other retailers, and he is doing through an administered price what would come about automatically through competition.

Mr. MACDONNELL: Is the manufacturer not entitled at any time to reduce his selling price? He does not guarantee to the retailer that he will always get his price.

Dr. ROSENBLUTH: That is correct; but if the manufacturer in fact uses resale price maintenance as if there was competition in retailing, the whole object of resale price maintenance would be thrown out of the window.

These retail foundations would not be coming here demanding resale price maintenance if they thought that the manufacturer was always going to reduce the squeeze whenever a new retailer comes in and offers to handle his goods at a lower markup. They want to be protected against that.

Mr. MACDONNELL: The supplier will want to sell every dollar's worth of goods he can, and surely, if he is wise in his business dealings, he will be reducing prices. We will not have the case of every retailer cutting the throat of the next one; but we will have the case of orderly marketing, with the strongest impulse on the supplier to keep the prices as low as possible.

If that is not correct, then my argument is not good. But I hope it is correct.

Dr. ROSENBLUTH: I am sorry, but it seems to me that under resale price maintenance you can count on the manufacturer not maintaining the retail margin at the level which will protect the small and the inefficient retailer. In that case I say you are not going to have resale price maintenance, because nobody is going to want it.

Mr. MORE: We have been dealing with theoretical ideas, and now I would like to ask a general question. I take it you prefer the present combines legislation to the new proposed legislation?

Dr. ROSENBLUTH: If I have to have all or nothing, then I would say yes.

Mr. MORE: I gathered that. Now, what advantage has the present legislation been to the consumer? As I read the reports there has been no price benefit to the consumer at all.

The monopolies that are going up are giving the services, and new posh stores, and they are adding to this in their cost of handling and packaging the goods. But there is no benefit to the consumer that I have been able to find; not one. This would eliminate the small retailer who never made a large profit, but who did give service, and who through credit; carried his customers in time of stress, when they did not have money; and who took his full part in community activity.

But I take it from your remarks that you consider the small man to be inefficient; and I disagree violently with you.

Dr. ROSENBLUTH: Your first point is: has the consumer has any benefit from the ban on resale price maintenance? I think if you will look at the degree of competition that has been introduced in appliances, particularly, and automobiles, you will see that it is quite clear that the consumer has benefited.

Mr. JONES: It is largely a question of supply. When resale price maintenance was investigated, it was largely a question of supply.

Dr. ROSENBLUTH: It is perfectly true that that factor is there, too. But we certainly do not know enough to separate out the various factors. There has not been a careful study, and I do not think it would be possible to make one, to demonstrate the special effects of one particular tenet in the legislation, in a situation where everything is changing.

The only way we can really demonstrate it is on theoretical grounds.

Now to answer the second part of the question about the squeezing out of the small retailer: the small retailer is not being squeezed out. He is not multiplying as fast as the business of the chains. That is one thing. But in the grocery trade, what the small retailer is doing is that he is joining the socalled voluntary chains in which he is associated with a wholesale organization.

In other fields, as far as we can gather from the statistics, the number of small retailers has certainly been increasing in an absolute amount. And in looking at the retail field as a whole, there has not been very much change in the degree of concentration.

But in the grocery field there has been this very striking increase of the chain stores taking over; but it has been a matter of chain stores taking over the bulk of the increase in business, and not one of squeezing out the small retailer.

Mr. JONES: We had a situation in the west a number of years ago where a large chain came in and reduced the price of bread, and thereby put the local bakeries out of business. But once they had gone out of business, the chain shifted up the price of bread to a point higher than it was before.

That does not seem to be a contribution towards efficiency.

Dr. ROSENBLUTH: No. I think that is a practice which should be watched. You have a safeguard against price discrimination, and you could resort to administering the clause which is in the law already, and which says that a man cannot sell at an unreasonably low price for the purpose of, or with the effect of eliminating his competitor. Your situation sounds as if this could have been demonstrated—and I think they could take care of an extreme situation of that sort.

Mr. MORE: If you are talking about the appliances field, what benefits have come to the consumer in that field? I am thinking of people I know who bought appliances cheaper than it would have cost them under price maintenance; but when something went wrong with those appliances, they had no guarantee, and no service; and they ended up with it costing them a great deal more than if they had purchased them from a legitimate distributor at a fair price, and one who would have guaranteed service for his appliances.

That is happening still, as I read the statistics and the information which comes to me. Certainly I cannot conceive that it is a benefit to the consumer.

The CHAIRMAN: Gentlemen, I must warn you that it is now five minutes to 11 and that we must adjourn. I have Mr. Howard on my list here, but we will have to cut this off. Professor Rosenbluth, unfortunately cannot be here this afternoon.

Mr. MORE: I defer to Mr. Howard.

Mr. HOWARD: May I just indicate my question to the witness so that he may see the gravity of it? As you will recall, initially I stated that I wanted to ask a question on another matter which was not in the retail distribution field.

The CHAIRMAN: State your question.

Mr. HOWARD: Take it easy, Mr. Chairman. You will get ulcers that way, from being so impatient.

The question I wanted to pursue was that of the growth of monopolies, or the effect of mergers, which was something on which Professor Rosenbluth indicated he had done a considerable amount of work. I mean concentration in industry, or concentration of control in industry; and I would like to proceed with that question which I think is pretty important.

But if the witness says he has to leave, I would like to know whether or not we might tackle that subject at another time.

Mr. BELL (*Saint John-Albert*): Why do you not ask your question? You have three minutes left.

Mr. HOWARD: Do you think I could get an answer to it in only three minutes?

Mr. BELL (*Saint John-Albert*): Dr. Rosenbluth seems to be a fairly intelligent witness.

The CHAIRMAN: I stated the situation, that Professor Rosenbluth has to leave. You were quite aware of that.

Mr. HOWARD: Oh yes.

The CHAIRMAN: I cannot solve that problem.

Dr. ROSENBLUTH: It is not I who has to leave, but rather you, because you have to break off at 11. I could stay until 12.

The CHAIRMAN: We have to go into the House at 11.

Dr. ROSENBLUTH: May I have one minute in which to answer Mr. Howard's question?

The CHAIRMAN: Yes.

Dr. ROSENBLUTH: I think this matter of mergers is extremely important, because I suspect that if we proceeded vigorously against mergers among leading firms in various industries, we could pretty well count on an increase in the degree of competition as the economy grows, and as there is room for more firms.

I have a general impression which, I am afraid, it would take too long to document, that at all levels—the courts, the commission, and the director of investigation and research—there has not been enough of a vigorous check on the merger problem.

One of the results is that at the moment we only have a very poor idea as to what the law on merger actually says, because it has not been in court often enough to receive interpretation. Therefore I would be a lot happier about either changing or not changing the legislation on mergers, if there were more of a history of this law being interpreted in court, so that we would know exactly what the law means, in the same way that we had it with price agreements.

We really have no idea. The beer case is somewhat discouraging to people who want to attack major mergers. On the other hand, in the beer case there was a very important, even complicated issue, in which the judge thought that the price of beer was controlled by the provincial authorities. Therefore the beer case is really not a good decision on the merger clause in connection with combines investigation.

The CHAIRMAN: Well, gentlemen, we shall adjourn now until 3:00 o'clock this afternoon in room 253-D.

AFTERNOON SESSION

TUESDAY, July 5, 1960.

The CHAIRMAN: Gentlemen, we have a quorum.

Before we start I may say that I had contact this morning with Professor Maxwell Cohen of McGill university. He is not a professor of economics but I believe is in the law school. He has a contribution which he would like to make. I have contacted individually the members of the steering committee to obtain permission to hear him. The understanding is that we will hear Professor Cohen when we have exhausted Professor English, if it is agreeable to you. Is that agreeable?

Mr. MCILRAITH: Mr. Chairman, the matter has not been dealt with by the steering committee. Professor Cohen is available on Thursday as well as today. Why could we not hear him then, unless we finish with the other witness early today?

The CHAIRMAN: That is exactly what I said.

Mr. MCILRAITH: I found great difficulty in hearing.

The CHAIRMAN: I did not know Professor Cohen was available on Thursday, although I think in an earlier conversation with my secretary he said he would be. However, he wished to be here this afternoon. I thought we would hear him this afternoon if it is at all possible, and if not we would hear him on Thursday.

Mr. BELL (*Saint John-Albert*): Mr. Chairman, I do not object to hearing Professor Cohen this afternoon, but I think we should note that it should not be a precedent for any person at this late date to come along now and want to be heard, because we have lined up everything in advance now for two or three weeks and it should be about time that we considered ending the hearings.

Mr. MCILRAITH: The steering committee have that whole question to deal with in respect of what should be done from now on. They have made up the program until July 5. The point raised by Mr. Bell has to be dealt with by the steering committee.

The CHAIRMAN: We will proceed with Professor English.

Professor H. E. ENGLISH, (*Department of Economics, Carleton University*): Mr. Cathers and members of the committee, I wish to say that I welcome the opportunity to appear before you today. Before beginning the formal part of my brief I wish to adhere to the suggestion set down this morning, that I identify myself a little more fully and introduce you to my colleagues who are with me. Perhaps I will do the latter first.

On my immediate right is Professor Scott Gordon, professor of economics at Carleton university. Beside him is Professor T. N. Brewis, associate professor of economics at Carleton university.

As you will see from the frontispiece of this brief, these gentlemen have approved and concurred with my views in general. Also they have asked me to present to the chairman a letter detailing somewhat further their feelings on my brief. I think I can safely say that this also expresses general and specific concurrence with most of the brief. I do not know whether or not you would like this to be read into the record.

Mr. MACDONNELL: Is it very long?

The CHAIRMAN: It is about a page and a quarter.

Mr. DRYSDALE: Perhaps Professor English might read it in after he reads the brief.

Dr. ENGLISH: I will be happy to do that.

My own background in this field stems mainly from my time at the graduate school, when I had the good fortune to study under one of the most eminent United States authorities, Professor Bayne of the university of California. Subsequently, I have done further research in the general area of industrial organization, partly on matters relating to import competition which is a subject of particular interest to me. More recently I have served as an adviser on occasion to the restrictive trade practices commission. In addition I have completed a section of a forthcoming book, a portion of which deals specifically with the combines law. This book will be out this fall. I am sorry not to be able to present you with copies on this occasion.

The gentlemen with me also have had some experience in this field. Professor Gordon also served as an adviser to the restrictive trade practices commission, particularly on a case concerned with discrimination. He has served in other capacities as well. Professor Brewis has taught a course on the economics of distribution in which he dealt with the question of resale price maintenance and the related issues.

Now, I will turn to the main brief.

I shall begin by highlighting the ends and means of the existing law; and by relating the proposed amendments to them.

Our society leaves most economic functions to private enterprise on the grounds that decentralization of decision-making is likely to contribute to economic efficiency and the dispersion of political power. Most people think that what is good for private enterprise is also good for the majority in a political democrary. In fact much of our law and public policy is concerned with subjects about which there is relatively little conflict of interest between businessmen and other people. This is true for example of policy for the promotion of full employment, for the control of inflation, and for the encouragement of a desirable rate of economic growth.

Anti-combines laws however are unusual in that they have as their objective the guarantee of as high a degree as possible of decentralization of economic decisions. When combines cases are before the courts, the self-interest of the dominant members of the business community, or of some industrial sector of this community, often collide head-on with the interests of the democratic majority. There is no use denying this. Any attempt to achieve a form of combines legislation which will serve the public interest as it should be served and which at the same time gives the business community all that it asks for is headed for frustration because we are dealing with a kind of law where the business interest in a secure profit and escape from the uncertainties of competition must be frustrated if the public interest is to be regarded as paramount. I do not mean to say that the conflict between the business community and the political majority should deliberately be sharpened or that efforts should not be made to reduce the area of conflict embodied in the law, but I do think it is important to be realistic about one's expectations in this respect.

The amending of the legislation at the present time and by the means indicated in Bill 58 reflects the kind of unreality to which I refer. There has been a flow of criticism of combines legislation by private enterprise over the years, and the Minister of Justice has now responded to this by proposing to amend the law in ways which would satisfy the critics in the business community. I submit that to a considerable extent criticism of existing legislation in this particular field is an indication of the success of the law, and always will be. Such criticism should therefore bring a response in the form of amendments only when it is abundantly clear that those who are in a position to interpret the public interest in this matter feel that amendments benefiting business will do no harm to the public interest. I am confident that he great majority of those economists who are most familiar with combines legislation and its role will find that the proposed amendments do harbour significant dangers for the public interest. They offer few if any benefits to the business community which would not involve a cost to consumers.

My view that the most substantial provisions of Bill 58 are unnecessary and undesirable is strengthened by the fact that less than ten years ago there was a thorough study of the combines legislation by a committee (the McQuarrie committee) including two highly respected economists as well as legal authorities. The Canadian economy has not changed during the past ten years in any way which is significant for the application of this legislation. The government claims to have taken a clue from the McQuarrie committee report in drawing up bill 58 (in that the McQuarrie committee supported consolidation of the criminal code provisions with the rest of the legislation and made statements which are compatible with the new proposals respecting the use of the Exchequer Court). On the other hand, it has gone directly against this advice of the McQuarrie committee in the most substantial sections of bill 58, those amending sections 32 and 34 of the law. Furthermore since 1952 decisions in the courts and the loss leader study, conducted by the Department

of Justice (1955), reinforce the impression that the judgment of the McQuarrie committee was sound. The basis for amending sections 32 and 34 has therefore been the amount of complaint from the business community and not the judgment of disinterested students. Since as I have already indicated the complaints of businessmen on this subject are not per se an adequate indication of the need for changes in the law, I must conclude that the most substantial provisions of Bill 58 are based on unnecessary sensitivity to the interests of part of society and (or) a failure to understand the unusual and unavoidable conflict of interest which even the most perfect combine laws necessarily involve. At a later point I will also argue with reference to specific provisions that only a part of the business community is likely to benefit from the new amendments, and that small business in particular is likely to enjoy few if any relative advantages if these amendments are enacted.

I am leaving out a part there.

(Section of brief not read is as follows):

> I now wish to turn from ends to means, and to evaluate the amendments as they affect the traditional method of attack on restrictive practices.

Professor ENGLISH: The more one studies this law and its application in the courts the more one recognizes the central importance of the problem of translating economic criteria into legal terms. There is a range of administrative procedures extending from carefully worked out series of prohibitions administered by the Courts to a general proscription of restrictive practice, subject to the interpretation by a special tribunal which treats individual cases on their merits. Most European efforts to deal with restrictive practices have tended toward the second alternative, like the British Restrictive Practices Court.

Canadian and American law has fallen between the two extremes.

I shall now omit the first part of page 4.

(Section of the brief not read is as follows):

> Our law specifically prohibits certain undesirable practices where there is general agreement concerning their detrimental character but relies basically on a prohibition of restriction of competition per se. No government has attempted to draw up a comprehensive list of undesirable practices.
>
> The argument about these alternatives may be summed up: On the one hand any attempt to set down precisely what practices are to be considered illegal introduces rigidity into the law and invites the danger of extended litigation which concerns details of wording and loses sight of the intent of the law. The business community whether through a desire to eliminate uncertainty concerning the legality of business practice or through a desire to discover legal loopholes has often favoured the proscription list, possibly without appreciating the extended litigation such a list might generate. On the other hand, the use of an administrative tribunal also has its shortcomings. Flexibility and increasing expertness may enable such a court to develop quickly an impressive body of case law. But such courts may not be readily assigned the same penalty powers as those which the traditional criminal courts possess. Canada adopting a middle ground between these two practices has banned certain of the most general practices including all combinations, resale price maintenance, and discrimination but no attempt is made to

be more specific within these categories or to define specific circumstances under which practices are detrimental. There are as a result two characteristics of Canadian anti-combines law:

Professor ENGLISH:

(1) The provisions of the law itself have been kept as simple as possible so as to ensure that the judicial process will not become bogged down in legalistic dispute. Thus the law prohibits only those practices concerning which there is general agreement, and which are sufficiently common so that the advantage of including them in the law is not over-balanced by the difficulties of judicial interpretation to which their specific inclusion gives rise.

I will illustrate this point later on in the discussion. For the same reason the law makes no effort to distinguish particular practices in accordance with their effects. That is the specific detriment.

Such distinctions would be difficult to make in a way which would satisfy the courts. In any case, economists do not feel that it is necessary to prove "specific detriment". They are satisfied the existence of certain practices introduces rigidity into industrial behaviour and thereby actually or potentially interferes with the benefits of competition. As for the allegedly harmless or even beneficial effects of cooperative action among firms, the law as it stands does not specifically exempt agreements resulting in such benefits but depends upon administration discretion.

(2) This leads us to the second characteristic of the method of attack provided in our present law. There is considerable room for discretion on the part of the director of investigations of the combines branch in the choice of cases. He may single out those where the undesirable effects of collusion are not balanced by useful results of cooperation. This, I might say, is a way of dealing with some of the situations in the export markets, which have been referred to in the course of your discussions.

There is also an opportunity for the restrictive trade practices commission to point out the beneficial effects of any combine on which it is reporting and to recommend no action against the combine, or selective action enjoining the combine from those parts of their activities which adversely affect the public.

Finally the minister has the power to exercise discretion in the question of a prosecution.

The proposed amendments move in two opposing directions from this present mode of attack. On the one hand, some of the amendments involve attempts to specify those undesirable restraints which merit conviction and to separate them from specified harmless or beneficial activities. On the other hand, the bill also introduces appeals to the exchequer court and extended powers of injunction which it is said, are intended to widen the powers of discretion within the law. Each of these moves will be discussed in my later examination of particular provisions. It is important now only to point out the inconsistency involved to emphasize that these moves are to some extent alternative means to the same end and that any value to be derived from the increased flexibility of court proceedings may be more than counter-balanced by the rigidities introduced into the statement of offenses.

We come now to the major substantive provisions of bill 58. These are, of course, Sections 32 to 34 of the act.

Four groups of practices are declared to be offenses under these sections—combines, mergers and monopolies, discrimination, and resale price maintenance. The amendments with respect to three of these spell out in greater detail the nature of the offenses covered, while the section on mergers and monopolies purports to leave the law unchanged. There is a curious inconsistency about this, particularly when the recent decision in the Breweries case

suggested that it is the mergers and monopolies section of the law which is in need of strengthening. Something more will shortly be added on this subject.

The alterations to sections of the law dealing with discrimination are the result of recent evidence concerning the use of promotional allowances as a basis of seller discrimination among buyers (in the report on discriminatory pricing practices and the report of the royal commission on price spreads of food products). While there are uncertainties arising from the wording of these provisions, at least they are based in principle from economic investigations. In any case, since the discrimination provisions of the law have not been tested in the courts—for reasons which will not be altered much by the new legislation—they are probably of little practical importance.

In sections of the law dealing with offenses which *have* been important in past litigation, the sections on combines and on resale price maintenance, the amendments proposed go against the recommendations which have emerged from the economic investigations of recent years. The amendments respecting defences in the case of combines are directly counter to the 1952 report of the committee to study combines legislation. This, of course, is the MacQuarrie committee. The loss leader and like provisions qualifying the prohibition on resale price maintenance neglet the advice in the report of an inquiry into loss leader selling. These amendments therefore seem to be entirely the result of the advice received from the business community and its legal representatives. There has been no answer given to argument frequently reiterated and generally shared amongst economists concerning the legal tangle into which an effort to spell out offenses in this area is likely to lead.

I quote from the MacQuarrie report:

> One of the main complaints about the present legislation is that it is vague and uncertain. Businessmen claim that they are unable to tell, in view of the generality of the wording of the act, what practice may be lawful and what may be unlawful. To meet this criticism, it was suggested that a list of permitted and prohibited practices be included in the legislation.
>
> Uncertainty and vagueness are no doubt present in our legislation, but to a lesser degree than is sometimes asserted. As cases brought before the courts accumulate, uncertainties inherent in this type of legislation are reduced to a moving zone composed of borderline cases resulting mainly from the evolution and the changing character of business practices. The courts, in Canada, have certainly helped to minimize vagueness: their interpretations of the Act have been precise and consistent.
>
> It is true that our legislation is couched in general terms and is subject to the interpretations of the courts. There is therefore some uncertainty but it is not unfair to say that it is uncertainty as to whether particular variations of doubtful practices will be permitted. Any gain in certainty by the device of specifying permitted and prohibited practices would be more than outweighed by loss of range and flexibility.
>
> If such a list were substituted for the broad definitions of our present legislation, undesirable consequences would follow. Such a suggestion ignores the very nature of monopolistic practices and their ever changing character. As we have attempted to show in defining the monopoly problem, the list of monopolistic practices is never complete and the arrangements themselves are always susceptible of further refinements. To include such a list in the legislation would thus encourage the discovery of new devices in order to avoid the law. Moreover, it has also been shown previously that almost all the monopolistic

and restrictive practices have a common feature: they *may* lead to monopoly, but they do not *necessarily and always* bring about such result.

In order to know if they are *in fact* monopolistic and restrictive, it is necessary to consider the concrete circumstances peculiar to each case. Thus it is undesirable and almost impossible to base anti-monopoly legislation exclusively on the principle of specific prohibition. On the other hand, it would be possible to supplement general prohibitions by a list of practices which would be objectionable. However, such a list would not be very useful because it would have to be limited to chose practices which are so clearly restrictive that nobody would doubt that they are covered by the general prohibitions. The majority of monopolistic practices could not be classified and included in the list so that uncertainty would remain.

These statements apply equally well to all attempts to outline specific offenses, specific defenses or specific detriment. The words "uncertainty" and "clarification" have played an important part in discussions supporting this kind of amendment to the law. Two kinds of uncertainty can arise in the application of this law—uncertainty arising out of the wording of the law and uncertainty arising out of its interpretation. The essence of my criticism on this point is that an attempt to correct the alleged uncertainty arising from the wording of the law by spelling out in more specific terms what is or is not an offense is likely to increase the uncertainty of the law in the courts. Cases will be decided on inconsequential points, and because there are so many such details in any more elaborate formulation of the law it will take a very long time to develop case law covering the whole field. Furthermore, it is not necessary to change the wording of the law in order to remove most uncertainty. Numerous judgments have over time made it clear what the courts in Canada consider to be an offence under the combines section. If business is uncertain as to whether a practice is illegal it can ask an opinion of the combines branch, and in the past many businessmen have taken advantage of the opportunity to do this. The Reports of the restrictive trade practices commission provide further evidence of the government's interpretation of the law—including, I might specify, the section of the annual reports which records those cases dropped after initial investigations. These particular parts of the report, I think, are most instructive as to what circumstances are not likely to lead to a court case. Mere definition of terms, exchange of information on credit practice, and the other sorts of activity listed in the proposed Section 32 (2) have seldom if ever been an important consideration in a conviction. But to put in a specific section listing allowable cooperation of this kind is to invite prolonged courtroom debate over features of the law that have no relation to its main purpose, but which may be used to frustrate this purpose. These comments apply generally to Sections 32, 33A and 34. The particular provisions of Sections 32 and 34 require some additional examination.

On the defenses listed in Section 32 (2) much could be said. I limit myself to one specific example. Apparently the most unassailable form of cooperation is that concerned with research and development. There are two points to be made about this. On the one hand, no cooperation purely on this basis has ever been subjected to prosecution under the act. Private enterprise has often engaged in cooperation and in some cases, for example in the pulp and paper industry, institutes have been founded to serve the whole industry. Bill 58 adds nothing to the freedom of research.

On the other hand, although there has been plenty of incentive, more than nine-tenths of patents taken out in Canada are held by persons not living in Canada and the percentage has been increasing. Thus Canadian industry chooses

to employ American and other techniques of production, usually because they are appropriate to Canadian circumstances and rights can be acquired at a fraction of the cost of independent development. Clearly the mild and redundant provisions of Bill 58 can do little to alter this situation, which is in any case largely favourable to Canadian industry.

I turn now to the specific provisions of the resale price maintenance section. Here we have provisions alleged to be in the interest of small business. The picture one conjures up is that of a small corner druggist—I have deliberately picked the most hypothetical of examples—reporting to the Manufacturer of drugs—who are not famed, I may say, for their low prices on this continent, as follows: "This big chain is selling your products at cost in order to attract customers away from me. Furthermore, the big chain doesn't provide delivery service to which customers are entitled. You shouldn't supply them." If the manufacturer acts on such a complaint it is difficult to imagine circumstances under which the results could be favourable. In the first place, he will not be likely to act unless a considerable group of small retailers puts on sufficient pressure to make it worth while for him to interrupt his relations with a large chain. If it does become worthwhile the action will amount to the administration of a private law based on hearsay. The effect can only be to raise or maintain prices to consumers and what is most important it may, if effective, remove from the consumer his freedom of choice between retail outlets. Whether the consumer wants a low priced product without services or a higher priced product is surely not the business of the manufacturer—or, I might add, of the government. In particular the idea that the manufacturer should be permitted to determine "the level of servicing that purchasers might reasonably expect" is an intrusion upon their freedom. I am quoting from the law there.

As for the small retailer who is supposed to be aided by the Bill, the maintaining of prices will only help them if entry of new firms into retailing can be prevented. This is most unlikely since the capital and other obstacles to entry are not as high in this sector. Thus if prices are kept high the small retailers will lose on volume what they gain from price since more new retailers will be encouraged to come in. There is plenty of evidence for this characteristic of retailing, both in the United Kingdom and the United States, and also some in Canada.

The fundamental issue is whether or not small business can survive against the larger chains and discount houses. The answer is clearly yes. There is no evidence that small outlets are necessarily less efficient. Thousands continue to survive in spite of the existence and success of larger retailers. There is normally a considerable rate of bankruptcy among them but this can be attributed to the problem of attracting sufficient managerial talen to this sector of the economy. If retailing gets added protection in the form of resale price maintenance or its equivalent in this Bill, it will therefore at best be enabled to maintain inefficiency at the management level but more likely it will be forced to contend with the influx of more marginal retailers probably further diluting the average quality of managerial talent in the sector.

I want to insert, because of the interest that has been expressed in the loss leader question, a reference to this particular issue. I hope it will serve to round out some of the earlier discussion on this question. The reference I have in mind is simply to the conclusions of the 1955 loss leader study, and to the section which summarizes the situation as it was with respect to this practice. I shall quote from page 265 of the loss leader study as follows:

> The evidence indicated that at least up to the time of the inquiry, instances which could be considered as suggesting the possibility of grave loss-leading had been quite exceptional and sporadic in nature, clearly insufficient to warrant new legislation for suppression or control.

> Nor have we found proof that the abolition of resale price maintenance has led to practices or conditions such as the MacQuarrie committee had in mind when it spoke of loss-leaders as a monopolistic device detrimental to the public interest.

I am compelled to discuss at this point another kind of principle involved. The section of Bill 58 which is concerned with mergers and monopolies is not intended to represent any substantial change in the law. It represents a rewording of the existing law. I am compelled to digress on this point although it may have little substantial importance because there is another kind of principle involved. The government has stressed desire to clarify the law. One means of clarifying any law is surely to use words it contains in a way which is as close as possible to common dictionary meanings. The effort to improve on the previous definition of "merger" and monopoly has not been a conspicuous success. The common definition of a merger corresponds roughly to what is contained in the proposed Section 2(e) up to and including the phrase "or any other person" and the definition of monopoly should end with the word "engaged". The remainder of the definitions proposed by the government might be included in Section 33 but they have no part in definition of these two words. As long as government alters the meaning of ordinary words in this way it is difficult to treat seriously their claim that they wish to remove the uncertainty or ambiguity in the wording of the law.

The substantial issue affecting mergers and monopolies is this: how large should a firm be allowed to grow before its growth is no longer in the public interest. Economists are able to argue quite convincingly that when a firm grows beyond a certain size it achieves few additional real economies benefitting the consumer. If a firm is able to duplicate production facilities that is, to build two or more identical plants, and thus to become a leader in the industry, able to set the standard in pricing and other selling policies it may thereby reduce the vigour of competition significantly. Price leadership, which is one of the common results of the success of a leading firm, has not been successfully prosecuted under conspiracy sections of combines or anti-trust laws. The only way in which such practices can be controlled is through limits on the growth of the leader. As a firm may need to control only a minority share of the market to be a leader (perhaps 20-30% when other firms supply 5-10% each) this means that a limit to growth might well be imposed long before the virtually complete monopoly demanded by the judge in the breweries case.

The amendments make no effort to deal with this problem. While it must be admitted that there are great difficulties in finding a legislative solution the important point for a critic of Bill 58 is that the amendments proposed neglect the one area of Canadian legislation where recent judicial interpretation has shown a possible weakness in the law.

Section 7 of the Clayton Act in the U.S. (introduced in 1950) may provide a clue to both wording and interpetation of anti-merger law. This Section makes illegal acquisitions of stock or assets "where in any line of commerce in any section of the country the effect...may *be substantially to lessen competion or to tend to creat a monopoly*". In the Pillsbury Case in 1953 the company was held to have violated Section 7 when it raised by merger its share of the market for a product from 16% to 45%. Bethlehem Steel in a 1958 decision was found to be growing too large when it sought to increase its share from 15% to 20%. The judge then emphasized that Congress in passing the law "made no distinction between good mergers and bad mergers",—only mergers that lead to substantial lifting of competition, or a tendency towards monopoly. While the Canadian law and the wording of

the new amendments is not very different from that of Section 7 of the Clayton Act, it appears that another wording might encourage a reinterpretation of merger law more in keeping with the economic objective here detailed.

I note in passing that there is no effort made to strengthen the law as it affects restrictive practices in the service industries and professions. While it is not clear that these are excluded from attack under the present law failure to apply the law in this area probably indicates a need for more specific inclusion of services.

I have little comment about the procedural proposals of Bill 58. In so far as the reference to the Exchequer Court may increase expert judicial treatment it is clearly a desirable move. The only reason for anticipating such an outcome is however the expectation that more cases will henceforth come to this court. Since the accused parties will have the right to decide whether they want to be tried in the Exchequer Court the popularity of the Court will depend very much on the reputation for leniency it achieves in early cases. It is by no means clear under these circumstances that the court will either gain much experience or if it does, that it will serve the interest of the public better than the criminal courts. The Restrictive Practices Court in the United Kingdom has the advantage of greater flexibility in procedure (e.g. it can admit statistical data as evidence).

I might add that it may be possible for this to be done in the Exchequer court. Perhaps the legal advisors would inform me of that. But that is only one example of the flexibility, of course, of a restrictive practices court.

Further, it has gained much experience in a short time because of the possibility of considering a number of like cases simultaneously. While within our legal system it is necessary to sacrifice some of its power in order to give it these advantages,—it could, for example, only enjoin the practices, and not penalize the guilty—it can only enjoin practices but cannot penalize the guilty, —the latter may be found in contempt of court and severe penalties imposed if an injunction is ignored. The establishment of such a court would represent a much more substantial change (than the provisions affecting reference to the Exchequer Court) in the direction of making possible judgments on restrictive practices which will ensure the benefits intended in all anti-combines law. A careful study of the applicability of such a court in Canadian circumstances is warranted, especially in the administration of the mergers and monopoly provisions of the law.

In addition, I wish to emphasize again that while reference to the Exchequer Court may encourage the development of applicable standards which are reasonable on economic grounds, this objection will be frustrated by the attempts in other parts of the Bill 58, notably in Sections 32 (2) and 34, to spell out defenses in the law. These provisions will in all probability distract the court from the main purpose of defining over time what is and is not in the public interest, and will divert its attention into disputes over details of wording and legal technicalities.

Finally, a few brief comments on sanctions. No significant changes are suggested in Bill 58 in the penalties which follow conviction.

First, while there is now scope for judicial discretion in the matter of setting fines for offenses covered by the law, there might be a case for suggesting a basis for fines which has some economic significance. I have in mind reference of the setting of fines to the importance of the firms involved and in particular to the nature of benefits enjoyed as a result of restrictive practices. Fines might for example be related to the net operating profits experienced over a relevant period.

Second, it is necesary to call attention to the total neglect of the imprisonment penalty in the application of the law. The unwillingness of judges to impose sentences of imprisonment is interpreted by some people as representing

the application of a different standard to some persons who break the law relative to that applied to others. Under these circumstances it might become necesasry eventually to amend the law so as to reduce judicial discretion in this matter.

Thirdly, there are the remedial economic measures. Section 29 of the law, in which the Governor-in-Council is given permission to alter customs duties where a restrictive practice might thereby be controlled should in my opinion be altered so that tariff action is mandatory where relevant. No factor in Canadian economic life contributes more to the potential or actual restriction of competition than our commercial policy. Action to ensure competition through tariff reduction is potentially a very important deterrent of and remedy to restrictive practice. So long as it is permissive it is unlikely to be used because the power to determine tariff levels is not the responsibility of the government body charged with control of restrictive practices. Experience demonstrates that where conflicting administrative interests are involved, a mandatory provision is the only way of ensuring appropriate remedial action.

The CHAIRMAN: Do you want to read that letter? Or would it not be sufficient to have it read into the record, and just to state the names of those who are supporting it?

Mr. ENGLISH: Yes. As I mentioned earlier, I have here a letter signed by my colleagues, indicating their support in general of my brief. They also indicated in a bit of further discussion about loss leaders indicating that it could be used in our discussion if you wished; but it is agreed that it would be sufficient simply to request that this letter be put into the record.

Mr. CARON: If it is not a very long letter, why not read it? It is only a two page letter.

Mr. ENGLISH: Very well, I will read the letter. It reads as follows:

CARLETON UNIVERSITY

July 4, 1960.

The Chairman,
Standing Committee on
Banking and Commerce,
House of Commons,
Ottawa, Ontario.

Dear Sir:

The undersigned members of the department of economics at Carleton University wish to support the views expressed by Professor H. E. English in his brief to the Standing Committee on Banking and Commerce, July 5th, 1960.

In particular, we regard the proposed changes to the legislation on loss leader selling contained in Bill 58 as detrimental to the public interest. As has been observed on innumerable occasions, the concepts of cost are varied and complex. Attempts to define them in one way rather than another for purposes of price determination restrict that freedom of managerial decision necessary to reduce consumer prices to a minimum. Inevitably, moreover, there are many occasions when it is advantageous for a business man to sell goods below the price he has paid for them, where, for example, he has misjudged the market, changes having occurred in either supply or demand.

Aside from this, inasmuch as prices are reduced below those paid to the supplier as an advertising device, there is no reason to suppose that such action will be any more detrimental to the public interest than

expenditures incurred on other forms of advertising. Indeed there is reason to expect the exact contrary. The assumption that high price suppliers must try to protect the public from its folly in failing to discriminate between real and spurious bargains is surely naive. To the extent that such protection may be considered necessary, it calls for action quite different from that involved in the prohibition of loss leader selling. It might be desirable, for example, to strengthen the penalties for misrepresentation of goods.

In spite of the expressed intention of the framers of Bill 58 that the prohibition of loss selling shall not be regarded as a reinstatement of resale price maintenance, we believe that such prohibition will in fact have this effect, and in our opinion the public interest will not be served thereby.

In general it seems to us that the net effect of Bill 58 will be to weaken the legislation against private restraints on competition in Canada. In our view, this is an area where stronger and better enforced legislation is called for and we would regret to see the present amendments carried.

Yours very truly,

H. S. Gordon,
Professor of Economics.

T. N. Brewis,
Associate Professor of Economics.

The CHAIRMAN: Mr. Drysdale.

Mr. DRYSDALE: Mr. English, you have stated in your conclusion, along with the professors, your dissatisfaction with bill C-58 at present. Have you given any consideration to attempting to redraft the bill in language which you think would be satisfactory, having in mind your collective experience as economist and also your suggestion on page 10 that one basic way would be to get a dictionary and use the words in it.

Dr. ENGLISH: My response to that would be, to avoid a trap,—

Mr. DRYSDALE: I am not trying to trap you.

Dr. ENGLISH: I am not a lawyer and I would hesitate to do this without a strenuous effort in cooperation with legal advice. This is one of the reasons why I have not engaged in this activity. I would only do this if it was my function. I would not mind giving it a try if I had time and appropriate advice from legal experts.

Mr. DRYSDALE: The trouble with lawyers is that we get into abstruse difficulties. Your suggestion is to use the dictionary definition. It occurred to me that as a professor and economist, and with the background which a lot of us do not have it would be of immeasurable assistance to this committee if you could make specific suggestions. One criticism one might have of professors is that they tend to extract and to take a very forthright approach as to what is wrong. The difficulty we are faced with is we have have to put out specific words in our legislation which have to be interpreted in turn by the courts. By just saying that this is not too good, I do not feel you have advanced the cause too much, and I wonder if you have given any consideration to the language.

Dr. ENGLISH: Judging from your discussion I think the important sections of the law about which there would be general agreement are sections 32 and 34. On these sections I am making no suggestion for change and am suggesting merely that you leave them as they are. In respect of the sections on mergers and monopolies I have played with the idea that we might use something like

the American wording. I could, however, make further suggestions. I am not sure this is the place to be specific on this particular question. In the case of mergers and monopolies I feel there are great legal difficulties. It may be that we should have, as I believe the minister has suggested, more experience with judicial interpretation before we make any proposal to change this section of the law. I would be content, so far as mergers and monopolies are concerned, if I were convinced that the interpretation we would get would be very different from the one in the breweries case. I am not sure about that.

Mr. DRYSDALE: One of the difficulties I noted—with respect—is that apparently you do not understand the function of the judiciary in relation to the interpretation of the legislation that we as parliamentarians try to outline, and our attempt to have the judges interpret it; sometimes they do not put the correct interpretations on it. At page 8 you seem to feel the emphasis was on the courts. I think if the courts do not carry out the intent of parliament, then it is parliament's turn to try to clarify the legislation.

Dr. ENGLISH: I completely agree with you.

Mr. DRYSDALE: Two or three times in your brief on page 2 you refer to public interest. What do you mean by that? What connotation has it?

Dr. ENGLISH: I think it has a different connotation in different places.

Mr. DRYSDALE: Could I pinpoint it. What would be the main factor, price or competition?

Dr. ENGLISH: Competition would be the main concern of this legislation, so far as public interest is concerned.

Mr. DRYSDALE: Therefore, if there was a benefit accruing to the public, say through a merger whereby there was a price cut you would still feel that should be an infringement of the legislation, and the economic aspects should not be considered.

Dr. ENGLISH: In the case of mergers and monopolies I think you can start from that point. However, in this area of interest it is very difficult to be as simple in your statement of what the public interest involves. As I have implied, here you may have some reductions in competition which carry economic advantages if there are economies through improvement of efficiency on a large scale; but the function of the legislation and of the administration of the law in this case should be to separate those merger and monopoly situations where the net advantage is very much against the public interest from those where it is not.

Mr. DRYSDALE: In your opinion, then, would it be in the public interest if there was a merger in which there was curtailment of competition but in which a price benefit was passed on to the public. Would that be in the public interest?

Dr. ENGLISH: One could even say that most mergers could be set aside as a means even for the growth of firms on the ground that there are other ways for them to grow.

Mr. DRYSDALE: Would you direct your mind to my specific question. This is merely a hypothetical case in which there is a merger, a reduction in competition and a reduction in price which is passed on to the public. Do you think it is in the public interest due to the price cut.

Dr. ENGLISH: I can say almost unequivocally that I agree on that point. I think any merger which promotes efficiency may be considered desirable.

Mr. DRYSDALE: I have just one more question. In your more specific recommendations on page 14 you suggest that under section 29 of the law these tariff actions should be mandatory. I will take a hypothetical case where there are perhaps six firms in a specific industry, three of whom perhaps combined and

as a result were found guilty of an infraction, and the other three being in the same city had carried on independently. How could you enforce section 29 against three firms which were found guilty which would in effect be inviting foreign competition—how would you protect the other three firms.

Dr. ENGLISH: First of all I feel that is a very hypothetical sort of example. In the first place if there are only three out of six engaged in the combine it is unlikely that there would be charges under the act. The usual situation in which combines are involved is where there is a very much higher percentage of the industry involved in the combination; otherwise a prosecution does not take place.

Mr. DRYSDALE: I assure you that the hypothetical situation is a case which is very close to actuality. Would you give an opinion?

Dr. ENGLISH: Is it a case which has been taken to court?

Mr. DRYSDALE: A case where there are perhaps three or four of the companies found guilty and perhaps one or two companies outside of it. This would cover all of Canada. You say let us make it mandatory under section 29 and cut the tariffs. We will assume in respect of the other two companies that this tariff wall is the only basis which keeps them in Canadian business, and if you cut the tariff wall under section 29 against the four and invite competition from the United Kingdom or the United States, then the effect would be that not only do you increase competition for the four but perhaps wipe out the other two. Have you given consideration to that aspect when you say it should be mandatory.

Dr. ENGLISH: I would say we should start from the point that tariff protection is a privilege and if a privilege is abused then we no longer should grant the privilege.

Mr. DRYSDALE: How do you distinguish between the guilty and the innocent.

Dr. ENGLISH: So far as other firms are concerned, one has to make one's decision, it seems to me, on this basis of whether the interests of the public are served by doing perhaps an incidental injury to a couple of small producers.

Mr. DRYSDALE: Take them as two large producers.

Dr. ENGLISH: Again I may say I cannot conceive of a situation where two large producers which are competitive with the other firms in the industry would be charged under the act, because this is not a situation where competition is substantially lessened if they really are large producers with a significant share of the market. I rather hesitate to deal further with a question in a hypothetical form. If you will tell me more about it perhaps I would.

Mr. DRYSDALE: Take it on the hypothetical basis, that four companies have been convicted and there are one or two outside of the four companies in Canada—six companies, four convicted and two not. How do you enforce the tariff provisions which I presume are directed against the four guilty companies and not the two innocent ones. You suggest it should be mandatory.

Dr. ENGLISH: In view of the fact that the tariff protection is a privilege, the people whom you might say are innocent of a particular charge in this case would, I would think in the public interest, have to suffer the consequence.

Mr. DRYSDALE: Would you expose them to United Kingdom or United States competition coming into Canada.

Dr. ENGLISH: If it is mandatory I would not sacrifice the mandatory feature of the law in this particular instance.

Mr. FISHER: On that point we have the fine papers case. As I understand it, there were one or two firms, according to that report, who were not officially in on the conviction and were not penalized. Is that not right?

Dr. ENGLISH: I am not sure about that particular point.

Mr. FISHER: As I understand it, that is the case. I want to come closer to what Mr. Drysdale is speaking about. Would it not be so, that if that segment of the fine papers industry has been convicted and another segment has not been convicted it would be assumed that either the ones not convicted really were not in competition with the others or, conversely, that the ones who were convicted could be the price leaders in that field. Is that not so?

Mr. DRYSDALE: That is guilt by association; that is all. That is what the courts are for, is it not? If you are convicted, and I talk to you, I am guilty too—that is what you are saying, in effect.

Mr. FISHER: The determinant, surely, in this case is price, is it not?

Dr. ENGLISH: I hesitate to say unequivocally yes to that. Are you talking now about the fine papers case particularly?

Mr. FISHER: Yes.

Dr. ENGLISH: It would be, there, because price is the principal basis of competition in that area.

Mr. FISHER: The reason I am interested in this particular case is this: are you aware that the Minister of Justice has sent letters to the companies that were convicted, asking them to show cause why they should not be prosecuted?

Dr. ENGLISH: Yes—why they should not have the tariff—

Mr. FISHER: Yes. Since that letter has gone out—I do not know whether other M.P's. have received the same number of requests that I have; but I have had I think, four wires and five letters from the unions involved in the firms, demanding that this not take effect.

Would this type of response indicate to you that there is not a clear understanding of what the combines legislation sets out to do?

Dr. ENGLISH: It would seem to, certainly on the part of the labour people involved, yes.

Mr. FISHER: This has bothered me.

Dr. ENGLISH: I would have to qualify even that. If this were not the fine papers industry, but one in which we have less prospect of developing in manufacturing, then the labour people who are specific to the industry would have every reason for supporting tariffs, because there would not be any chance for them on any other basis. But in an industry in which the best policy might be an expanded trade in both directions, they are only seeking their real interest in a very limited way when they make these complaints.

Mr. FISHER: How often, in your experience, has the minister gone to these lengths—that is, sending a letter asking them to show cause?

Dr. ENGLISH: Of course, I would only know about published instances, and I must say that there are no other instances of that particular procedure which I know about. There have been instances where a tariff has been reduced; but I do not know whether they were preceded with by letters of this kind.

Mr. FISHER: You know of examples where there have been tariff reductions in fields where there have been previous convictions?

Dr. ENGLISH: One or two.

Mr. FISHER: But there has been no indication that there has been any relationship?

Dr. ENGLISH: No.

Mr. FISHER: Mr. Chairman, I wanted to ask Professor Gordon a question. I understand he has been interested in discrimination; is that correct?

Dr. Scott GORDON (*Professor of Economics, Carleton University*): Well, in a moderate kind of way.

Mr. FISHER: From your following of the trends in retailing in recent years, do you think there has been a marked increase in price discrimination in the last few years?

Dr. GORDON: I could not answer that directly. I do not know whether there has been sufficient work done in an historical kind of way to indicate whether it is increasing or decreasing the amount of discrimination—whether it is increasing or decreasing significantly. But I do think that the import of the report of the director of investigations under the act, on discrimination in the retail grocery trade, and the subsequent report of the restrictive trade practices commission—the import of the data contained in these reports is that the amount of discrimination, at least in that trade, is very, very small. This is not the conclusion arrived at by the reports: they still find it to be significant. But if you consider, for example, that this is the difference of, let us say, one cent on a jar of pickles, it is a very small amount of discrimination.

Mr. FISHER: It was suggested that you were an economic adviser to the restrictive trade practices commission. Was it on one particular case?

Dr. GORDON: I have acted—I do not know quite what we are called; but on occasion the restrictive trade practices commission asks an outside person to examine the documentation and give an opinion on a case after it has come from the director of investigation—and sometimes after hearing has been held. I have acted in that capacity on, I think, four or five cases.

Mr. FISHER: How much work is involved?

Dr. GORDON: Not a great deal. Do you mean, in terms of days?

Mr. FISHER: Yes.

Dr. GORDON: Well, one case that I was involved in took, I think, three days; and another took six days.

Mr. FISHER: In terms of the insinuation, or the view that sometimes professors are held to be impractical people, or abstract people, is this an indication,—the fact that you were hired by this restrictive trade practices commission,—that they see some practical merit in using you?

Dr. GORDON: I think it would be a very brave consultant who would attempt to investigate the motives that his employer had in hiring him.

Mr. FISHER: Let us put it this way: why do you think the restrictive trade practices commission goes to the trouble of consulting economists in this particular matter?

Dr. GORDON: If I were a member of the restrictive trade practices commission, I think I would be always aware of the fact that I was too close to my work and that I was seeing criminal practices where none existed; and for this purpose I would ask outside consultants. I would ask people who had not done too much consulting, to render an opinion on this occasion.

Mr. FISHER: In your estimate, how widespread is the understanding and knowledge of the combines legislation and its history amongst any particular community in Canada? I am thinking of the academic and legal people.

Has the combines legislation, for example, been followed closely by economists?

Dr. GORDON: In the academic community there are only, let us say, 20 or 25 economists in the country: there are not very many. And of those there are perhaps five or six who have followed most of the cases, and perhaps another two or three who have had a desultory interest in them.

In the legal profession, of course, quite a few people have been actually engaged in the cases themselves; and some have made a specialty of combines law.

Mr. FISHER: I would ask this of any of the three professors: do you know of any professors of economics, or practising economists, who have been hired by any of the groups who have been interested in supporting these amendments?

Dr. GORDON: No.

Mr. FISHER: Do you know of any economists who in the last several years have made intensive studies into any aspects of these fields that would be relevant to the amendments?

Dr. GORDON: Yes. I think, as in many areas in Canada, we can afford only one expert, and our independent expert in this field in Canada is Professor Skeoch of Queen's university. Other aspects of the whole question of concentration and so on, have been investigated by others; but we have not an abundance of professional talent in this country.

Mr. FISHER: I would like to ask my last question of Professor Brewis. It is in relation to the argument put forward by previous people who appeared here, that there has been so much vicious competition in the retailing field that retailers are going out of business in great numbers. I have not been able to find statistics to substantiate this; that is, that there has been a marked increase since the last changes in the combines act which ended retail price maintenance.

I wonder if you have any opinion, or views on that particular point.

Dr. T. N. BREWIS (*Associate Professor of Economics, Carleton University*): I only have statistics for the last two years in front of me at the present moment, and these do not suggest to my mind the failure rate among the retailers and wholesalers is very high.

If you look at 1958, for example, there were 2,125 failures in business right across the country—that is, legal failures, not people who just closed their doors. The total amount involved was $73 million. Retail and wholesale of this accounted for $23 million.

If you think of the total new investment which takes place in Canada in any one year as round about $8 billion, well, what sort of figure is this—this is terrific—in terms of the total economy?

Of course, it is important to the individuals involved; no one can deny that; but in terms of the economy as a whole, this is not a problem of great magnitude. I cannot imagine any economists being unduly worried about this. I think my colleagues would agree with me.

Mr. BELL (*Saint John-Albert*): In your brief you say in relation to small business that there is a considerable rate of bankruptcy.

Dr. BREWIS: In terms of total failure, you have a failure rate of 2,125 firms in 1958; and retail and wholesale account for something over one-third, or 882. Well now, this is considerable in terms of proportion; but it is still a very small number of firms in comparison to the total number of retail firms in the country.

The Dominion bureau of statistics does not have the figures on it, so we must estimate it in our own minds. They had 367 failures, out of the total number of manufacturing firms, so it is not in terms of these figures. But even at that, as a percentage of the total number of firms in the country, it is not large.

Mr. CARON: There are no statistics as to the cause or these failures?

Dr. BREWIS: No.

Mr. CARON: Management could have a lot to do with the failures.

Dr. BREWIS: I agree. As a matter of fact it has been said many times that the retail trade attracts people in many cases with little capital and

experience; it attracts people because they see an opportunity for an independent life; as is the case with barber shops, they do not need to have a great deal of skill. Therefore their failure rate tends to be high.

Mr. FISHER: I was struck in studying the figures of failures over the years to see a rather inordinate proportion that takes place in the province of Quebec. Have you noticed it, or have you any suggestions as to why this should be?

Dr. BREWIS: I am afraid that I have not.

Mr. BROOME: Professor Gordon mentioned that the outstanding expert was Dr. Skeoch, and I wondered if you agreed with him in his brief where he said—and I shall quote:

> However, it is distinctly disturbing to read the submissions of certain business groups with respect to bill C-59 which are devoid of any awareness that there exists complex questions relating to market power and its significance. Instead, they take refuge in platitudes about the accused having the right under British justice to be assumed innocent until proved guilty—as if powerful corporations were private persons in danger of being imprisoned or even hanged.

Would you say that was a platitude?

Dr. GORDON: I think a platitude is a statement that once had meaning, and is then mouthed by people who do not think of the meaning of the words that they are speaking. And I think that is very often done.

Mr. BROOME: In other words, certain people can claim the right to be assumed innocent until proven guilty, while other people cannot claim that right?

Dr. GORDON: Well, I did not think that was what you were asking me.

Mr. BROOME: According to this, certain people can claim the right to be assumed innocent until proven guilty, while other people will not have that right. I just brought this in, because you mentioned Dr. Skeoch.

Dr. GORDON: I do not want to defend his every word, because naturally we disagree on numerous things. But as you read the quotation, I took the inference from it to mean, not that some people are innocent until proven guilty while others are not, but that some people take refuge in the platitude that they are innocent until proven guilty.

Mr. BROOME: I asked whether you thought it was a platitude.

Now, Professor English, I would like to pursue one or two questions. First of all, I refer to a point raised by Mr. Drysdale, that you have given a great deal of study to this submission undoubtedly, and that all parts of it should be taken as a result of significant thought and influence. In regard to the mandatory action, and in regard to tariffs, have you considered our relationship under GATT, and have you also considered not only the effect on the company, but also the effect on the employees? And as mentioned by Mr. Fisher, would you say that we need not trouble ourselves about other companies which are not guilty of an offence? Would you say that was reasonable, and that your recommendation in that area was reasonable, or in line with justice, or in relation to the economic growth of the country?

Dr. ENGLISH: I am glad you included that last phrase, because on that ground alone I feel it is very much in line with the desirable policy for the economic growth of Canada at this point.

Mr. BROOME: So you would destroy the textile industry if three or four firms were found guilty of a merger or monopoly?

Dr. ENGLISH: I think that that is particular practice of the textile industry.

Mr. BROOME: We are talking about a group of companies.

Dr. ENGLISH: All right. I think they would deserve that treatment. But you have asked me to speak about this in the context of policy for Canada. This is a very big study. It so happens that it is one which interests me greatly. And my feeling is that the Canadian economy—and I immediately add that it was not only on the question of combines policy that I held discussions at large in the particular context of this bill—but I do not think it is out of keeping at all with the interest of the country as a whole, because I now feel—and I have done some study to back this up—that we can afford to rationalize our industry by gradually selecting those industries in the manufacturing sphere which we have the right to encourage.

Mr. BROOME: That is not the point, in regard to the industries which we have the right to encourage. That has no bearing on this. It does not say anything about industries which we should encourage. It says industries in which groups of companies are effecting monopolies, or mergers, or practices which are detrimental to the public. Your recommendation is based on that. It could affect any industry, and I just picked the textile industry as one.

Dr. ENGLISH: With respect, I am afraid it does mean what I said the other day, because any industry which loses its tariff can survive if it is strong. But any industry which loses its tariff and cannot survive, because it will encounter significant and destructive competition from outside, will of course go down.

And if we are adopting a policy in this country of encouraging the growth of the manufacturing industry, it undoubtedly in the long run will be to the natural advantage of the people that this feature of combines law should apply in such a policy.

Mr. BROOME: Another question: reading from page 11 of your brief:

> As long as government alters the meaning or ordinary words in this way it is difficult to treat seriously their claim that they wish to remove the uncertainty of ambiguity in the wording of the law.

From reading that I take it that there is a reflection on the wording of this bill. But if you take the wording of the preceding bill which you will find on the opposing page, you will find where the preceding bill limits mergers, trusts, or monopolies—I do not wish to read the whole of it—but to my mind it is not in any way nearly as clear as the proposed, new definitions which actually pinpoint the definition of merger or of monopoly in relation to this bill.

I consider the sentence which I just read out from your brief to be biased and untruthful in its implications.

Dr. ENGLISH: On that point I would agree with you, that the wording in the existing law is equally unsatisfactory.

Mr. BROOME: Then why do you not say so?

Dr. ENGLISH: I would be happy to add it; it was purely overlooked.

Mr. BROOME: Is there anything in this bill which you agree with, or do you say it is entirely wrong in every aspect and in every respect? Is there anything in this bill that you agree with or that you think is any good, or do you say it is entirely wrong in every aspect and every respect?

Dr. ENGLISH: No, I do not. I think, for example, the section in respect of misleading advertising would be perfectly acceptable to me.

Mr. BROOME: That part would be acceptable?

Dr. ENGLISH: Yes.

Mr. BROOME: I have one more question in regard to export industries. They are not covered in this bill, but you did mention in this happy, happy land where you could convict, or not convict as you chose, and you could prosecute or not prosecute, that associations that developed an export trade and

export sales have never been prosecuted under the combines legislation, although their actions have been in contravention of the legislation. These contravening actions have been well known and self-admitted by the companies, who say that in order to compete on the export markets they must operate that way. Do you think there should be a section in this bill which exempts export trade from the provisions of the combines legislation?

Dr. ENGLISH: I think that some consideration to these particular industries is merited. I think that it would be very difficult to find a statement of law which would solve this problem in a way that would be satisfactory both to public interest and to the companies concerned, because I think,—and this was said during the discussions of the briefs presented last week,—that when you are permitting a combination in one part of your business it is very difficult to allow this part to be kept separate from the maintenance of competition in other parts of the business.

Mr. BROOME: Yet your brief implies that that is one of the advantages of the present legislation.

Dr. ENGLISH: I do not think that is incompatible with what I have just said, because what I am implying here is the restrictive trades practices commission, for one, may when it is considering and writing its report, decide whether the public interest is seriously and significantly affected by what is going on in these particular cases. If this case happens to be one in which an export cartel is operating, and if—I want to underline that—if the export cartel is operating in such a way that it does no harm to the interests of Canadians but is merely a contract or a cartel on the buying end, or a central society through an agent at the buying end in some other country, then I think if I were a member of that commission I would not support an attack on this particular activity.

Mr. BROOME: Right. I would like to ask another question on a point stated at page 10. You say there that whether the consumer wants a low priced product without services or a higher priced product is surely not the business of the manufacturer. Professor English, when you buy a motor car,—and that happens to be a very major purchase,—you are aware, of course, that servicing facilities are checked by representatives of the companies, and if they are not adequate services, or not maintained properly in the view of the more reputable companies, they are given time to bring their services up to the standard they want; but if they do not their franchise is cancelled. In regard to major appliances, serviceing is very important. You have taken the case of the aspirin and home delivery, and then from that you have thrown out the whole concept to whether service is a value, or whether service in regard to the manufacturer of the product, where manufactured is something that a manufacturer has no right to decide to what degree of service his product will receive. Is that reasonable?

Dr. ENGLISH: I would submit it is reasonable because the consumer does, we find, decide very often to choose,—in the case of automobiles, those companies who will ensure adequate services for his car. I see no reason why we should not depend upon the consumer judgment in this respect. If anyone wants to try to operate an automobile distributorship on the same basis as the small appliance distributorship through discount houses, let him try it. I do not think they would succeed in this area; but I do not think that we should in any way, in our law, obstruct the course of competition in order to force upon the consumer certain standards of service which the manufacturer happens to want.

Mr. BROOME: Should our law prevent a manufacturer from seeing that his products are properly serviced?

Dr. ENGLISH: I do not think that is true. You start from the end that a better service product is more acceptable.

Mr. BROOME: I say the manufacturer cannot enforce proper servicing of his product.

Dr. ENGLISH: He should not be allowed to do that by restrictive competition.

Mr. BROOME: Any person then should be able to buy a Chevrolet motor car and sell it any place, any time, or anything, for that matter, whatever. If a person wants to buy anything he should have the right to buy it and sell it?

Dr. ENGLISH: Yes, I do, short of misrepresentation of services which can be attacked under another section of the law, and short of other practices which are covered now by law. I think the answer to that would be yes.

Mr. HOWARD: Mr. Chairman, I must apologize for being late, but there is no phase of this that I would like to get the opinion from Professor English on. This is related partly to his reference at pages 11 and 12 with regard to mergers and monopolies, or the use of one to arrive at the other. I am interested in whether or not Professor English has any particular thought as to what has been occurring in past capacity years towards this trend of consolidation or control of industry, or mergers, and what effect, detrimental or otherwise this is having, if it is having any, upon economy, and how we might be able to cope with it in terms of legislation or in terms of a review organization such as the F.D.C. in the States, or something similar to that.

Dr. ENGLISH: This is a question which I think comes quite close to one of the questions that Mr. Drysdale was raising, in the sense that there is this problem of knowing where to draw the line on merger questions. It is a problem which differs in kind, I think, from the problem involved in ordinary combinations and resale price maintenance, because it is not just a question of maintaining competition, but is a question of balancing the advantages of competition with the advantages of plant growth, and to some extent, to firm growth.

There are several attitudes which are taken in respect of this matter. One attitude is that one can often afford to make all mergers illegal, because this is not the only means of firm growth, since mergers occur often by means where competition is restricted. Whereas, other forms of firm growth—that is, internal growth of a firm, the building of bigger plants to satisfy the market through its efficient competition, and even other forms, are not likely to represent restrictive competition and at the same time provide beenfits to society. Whereas, mergers may very well lead to restriction of competition without providing benefits.

Perhaps the merger idea as a whole should be condemned. I would not go this far myself. I point it out as a possible point of view. Too often a merger is treated as though it were the only alternative, but it is not. On the other hand, I think that the difficulty associated with treating mergers on a mere case by case system necessarily makes it desirable in this area to have a body such as the restrictive trade practices commission given certain discretionary power to recommend action in the case of one merger as against another where the net benefit of the merger is clearly against the interests of the public. If you leave the law defined in such a way that it can only be interpreted as it was in the case of the brewers investigation court case, then it would look as though only those mergers which led to 90 or 95 per cent control of the market would be found guilty, and this is, by far, too late, in the process of merging, to stop a merger which restricts competition.

Now, how do you get at it? One possibility would be to put into section 33 something to the effect that any merger or monopoly which operates, or is likely to lead to a condition which operates against the interest of the public, shall be illegal. That would cover those mergers such as are covered by the interpretation of the Clayton Act—those mergers by which an individual firm gains another 10 per cent, not necessarily for efficiency purposes, but it is very helpful for monopolization purposes—that 10 per cent which may put it into the position which will guarantee it will be a price and product leader.

Mr. DRYSDALE: I have a supplementary question. There is one thing that bothers me with this business of, in effect, outlawing mergers—and it involves the same difficulty as your section 29 idea. If we were to abolish mergers in Canada, that would prevent one Canadian firm, perhaps taking over another Canadian firm that may have had difficulties with respect to management, or for a variety of reasons; but if your reasoning was to prevail, that would be encouragement for American, Japanese or outside interests to come in and take over the existing company, which may or may not be a bad thing. However, the difficulty, as I say, with your reasoning, is that it is fine from an economist taking a world wide view, but it is not too good for a Canadian trying to see that Canadian industries develop.

Mr. FISHER: Mr. Chairman, that is a statement I cannot quite follow. I think, in fairness, I should ask Mr. Drysdale to elaborate on it a bit. I do not quite see the point.

Mr. DRYSDALE: Professor English said he thought mergers were bad per se.

Dr. ENGLISH: I said this is one position; it is not a position which I would adopt, because I feel there are too many difficulties in following this through.

Mr. DRYSDALE: But you would put restriction on the number of mergers which, in effect, would have the same effect of a Canadian company that might want to, perhaps—and I have an illustration in mind, which I would prefer not to disclose at this time—but, anyhow, of a Canadian company which would have the opportunity to take over another Canadian company in a similar business, which was having either managerial difficulties or, perhaps, financial difficulties, and because of the fact that under the legislation, they might be taken to be violating the Combines Investigation Act, then they decided not to, with the subsequent result an American firm came in and took over the dying business, because they could not be in the merger position.

Mr. FISHER: Are you thinking of Alaska Pine and Cellulose?

Mr. DRYSDALE: I am not thinking of any particular case. I am not thinking of that one particularly. The point I was trying to raise is that looking at it from your point of view, it is fine; but from a Canadian point of view, I would prefer to see the Canadian firm merge with the other Canadian firm, and see the business develop.

Dr. ENGLISH: Just on this, I think there is some cause for distinguishing between the world outlook and Canadian outlook, on the part of economists, but I do not think I should be charged as guilty of not taking a Canadian view on either of these points because, on the question of mergers, if we are going to limit the activities of people from other countries in our economy, I do not think it should be done in a way that involves a weakening of this legislation, but directly through other legislation which limits their activities. You throw out the baby with the bath water whenever you alter something that is good in order to arrive at some particular objective, which is only a part of it.

Mr. DRYSDALE: My understanding of the original basis of the Combines Investigation Act was that after tariff barriers were set up, these companies had an exclusive interest in Canada, and you were trying to protect the general public so they would not take advantage of the tariff barrier.

Under 29, what you are saying is that one company, as Mr. Broome suggested, or two or three other companies in the textile industry are found guilty, then under your suggestion, boom, down goes the tariff barriers, and it does not matter whether the rest are guilty or innocent. As an economist you say: let us wipe them out, and see if they survive—and wipe out the tariff barrier, despite the fact maybe only one or two are guilty while, perhaps, 15 are innocent. Those two points together gave me the attitude, as an economist, that you were, perhaps, more interested in seeing that our unit stand on its own feet, but I was saying, from the Canadian point of view we are, perhaps, at the infinite industrial argument where we are trying to develop in Canada our own particular trades and reasoning. You are suggesting, if one is guilty, boom, down goes the barrier, and that we should wipe them out.

Dr. ENGLISH: My position on commercial policy generally might affect my position on this particular legislation. I would grant that. But my commercial position on commercial policy does not arise from my desire to be a world citizen; rather, it arises from what I believe to be desirable Canadian policy for Canadian development. My feeling is that the long-term growth of Canada should now be directed through the choice manufacturing industries which we can expect to see survive and compete in the world and Canadian markets. I think we are big enough to begin to do this. There are many smaller countries which do not protect manufacturing industries, and they have no place within their boundaries now. We should begin some day to do this—and I think it is to our benefit to do it, when we are in a period of rapid growth, because an industry, which must eventually decline, will then at that time only relatively, through such a period, and not absolutely. In other words, it will level off while the other industries grow. I would say that is the general view I have concerning commercial policy of the manufacturing industry in Canada, and which I can substantiate, although I do not think it should be done here, because we are not meeting for this purpose. However, that is my view on this particular part of the legislation. I would go that far. It is still intended to be a Canadian decision on Canadian policy and not a decision that might arise as an economist looking at the distribution of industry amongst the various parts of the world.

Dr. GORDON: May I add a comment to that?

The CHAIRMAN: Proceed.

Dr. GORDON: It seems to me that the situation which Mr. Drysdale and Mr. Broome have sketched is a situation in which the Canadian public are being asked to subsidize five firms to maintain two in business. The three you suggested are ones that would maintain themselves in business without a tariff.

Mr. BROOME: This is a punitive measure that was recommended; it is not a question of subsidizing.

If they had not had a combine—

Mr. DRYSDALE: They would still function.

Mr. BROOME: The operation of the tariff is a punitive measure, in the opinion of Professor English and the people who are associated with him in these views. This has nothing to do with tariff structures in general, but has something to do with punishment.

Dr. GORDON: I do not regard it in this light.

Mr. HOWARD: What is punishment?

Mr. BROOME: Well, read the ruddy brief.

Dr. GORDON: If you regard the tariff as a privilege, to begin with—as a subsidy, as it is paid by the Canadian people to a particular firm, then, to withdraw that subsidy, may be regarded as a punishment. However, it is like taking the whipping cream off the cherry pie: I suppose it is a kind of punishment. But I think we again are getting into the area of perverted language.

Mr. BROOME: All the way through, in this brief, you say that discretionary power is the main thing, and do not define these things too closely; and when you come to the end of the brief you seem to take away what you have been lauding to the skies up to that point, and you reverse your field entirely.

Dr. ENGLISH: I think there might be one point I could put in here by way of a concession, if you like. It seems to me the important thing I was getting at here was that the power to determine whether tariffs should be reduced in instances of this kind should not be a power that is in the hands of those whose attitude to the tariff arises from all the other things that determine tariff policy, but rather arises from the point of view of the body responsible for the maintenance of competition. Therefore, I would be content if it were possible—and here I question whether it is or not, and that is a question for the legal experts, again—for the restrictive trade practices commission to make recommendations for tariff reductions which had to be put into effect where there was no discretion left to the tariff board or others whose attitude would be bound to be influenced by their other interests.

Mr. BROOME: You say: take away the powers invested in parliament and give them to a commission?

Dr. ENGLISH: All powers are delegated by parliament.

Mr. HOWARD: I wonder if I could get back to this merger-monopoly question which was started off before Mr. Drysdale got these erroneous impressions.

I take it that one approach to it might be an alteration in the definitions and penalties sections; and another one might be a building up—if we had adequate research facilities within the combines investigation branch—of case studies of mergers, the effect of them and the authority vested in the restrictive trade practices commission, based on that, to make specific recommendations about steps that might be taken to deal with mergers and/or the growth of industry—whether it should be vertical or horizontal, or whatever it is—in order to ensure the public receives the highest possible benefit from the mergers and the least detrimental effect. Might this be another approach that might be advantageous?

Dr. ENGLISH: It seems to me one of the emphases placed on the improvements in the legislation by the MacQuarrie committee has been neglected subsequently—the emphasis upon more research in these areas. I think the effects of mergers and monopolies is one which deserves a lot of particular study and attention.

If it were possible to increase the research activities of the restrictive trade practices commission and the combines branch in this direction, it seems to me to be a very useful procedure. However, this is not the only important consideration. We must have a law which it is possible to interpret in the courts in a way which will serve the interests of the economy.

Mr. HOWARD: I do not have the bill with me, unfortunately, professor, but perhaps you have it in front of you. I would like to ask you a question about the definition section of "merger".

Dr. ENGLISH: Yes.

Mr. HOWARD: There is a reference in here to "merger":

—"merger" means the acquisition—

and so on, and it goes on to say:

—whereby competition

(i) in a trade or industry,—

—and then you have (ii) and (iii), and it mentions the three areas in which competition is or is likely to be lessened.

Do you think this is sort of exhaustive of all the possibilities of mergers; or do you think it is restrictive—those particular references to (i), (ii) and (iii)?

Dr. ENGLISH: I think that would be a very difficult point to make a confident judgment about. It would seem to be a case where, possibly, one should avoid seeking out lists of this kind because it might be restrictive, where the intention is I do not think it should be, or perhaps is restrictive of the scope of the merger or the anti-merger activity. It seems to me the definition of a "merger" is probably one which ends at the word "person," in the fifth line. This is what it always means to economists in the classroom, and I do not see any reason why it should not be defined that way here; and then go on to define, in section 33, I think it is, in such a way that those mergers and monopolies which are against the public interest—or, as I suggested earlier, are likely to lead to conditions against the public interest, should be illegal.

Mr. HOWARD: Have you ever thought this merger section, about the activities of corporations, which may not in a sense lessen competition, although they might likely result in that, but a sort of conglomerate merger as a result of it, is a sort of undue concentration of authority and power in the hands of a small group of people in all sorts of industries, trades or commercial activities? Would this be something that might properly be dealt with here, or in the study at the research end of it?

Dr. ENGLISH: I think this is a question certainly deserving of research. But I see no specific way in which it can be dealt with; nor do I know of any legislation in other countries which handles this situation satisfactorily.

Mr. CARON: Your main complaint is that this word "merger" should be clearly defined?

Dr. ENGLISH: Simply defined. It can be simply defined, and it seems to me both the existing law and the new bill are too complicated in the definition of a merger, and they do not appear to get at the real problem—if the breweries case can be taken as an indication.

Mr. MORE: I did not want to interrupt the discussion on monopolies, but I am interested in the same sort of thing I was interested in this morning, when Mr. English was here. I take it you have made a great study of it. I am interested in knowing what benefits have accrued to consumers under the past legislation, which seems to be so favourably accepted by the other economists I have listened to. What are the benefits to the consumer that legislation has given? I do not know of any cheaper prices, in my experience. The only thing mentioned this morning was the appliance field, and I think many consumers have second thoughts about the benefits they get in that connection. I do not know of anything else.

Dr. ENGLISH: There are two ways, it seems to me, of dealing with this, and I do not want to go over territory that has already been covered. On the one side, I do feel there are benefits in having available to us retail outlets where we get the product without any necessary, shall we say, attractive show windows to pay for or any necessary, even, smiling service behind the counter. I think there are advantages to some consumers and, probably, to

a great number of consumers in being able to buy in discount houses. I have done so myself, and have not felt disappointed after doing so. This is one side of it. On the other hand, I do consider that there are always dangers in restricting competition in the way the resale price maintenance practice would do it, and I see no particular loss of advantages which consumers had before resale price maintenance was prohibited. Therefore, it seems to me now the consumer has a wider range of choice and can enjoy all the benefits which used to be enjoyed, and will be able to enjoy additional choice amongst retail outlets at lower prices.

Mr. MORE: To give you one experience I had which still sticks in my crop: At one time retailers were advertising $199 value, with a trade in allowance of lead pencil, or anything, of $59, and $140 on the sale. One merchant told me, "That is not worth $140, and I can sell it at that and still make my profit". If the manufacturer had the right to discuss a fair price for that article with other manufacturers he was in competition with, this could not happen. Now I merchandise a $140 article, and I am ignoring it. People go across the street, where they advertise it at $199 regular price, $59 trade-in for almost anything, and they are getting the business. There it is, $199 here; but it is only worth $140, and I am making my full markup.

He said, "I have been in business for 45 years. I have been legitimate, and I dislike this". In fact, he got out of it in about three years; he could not take that sort of thing.

Dr. ENGLISH: I think any situation where dishonesty is involved deserves disapproval. But what it seems to me you might be implying is that we should try to solve a situation of that kind by introducing a very general amount of restriction of competition. I do not think this is the way to go about it. In the new legislation we have reference to misleading advertising, and this sort of thing. It seems to me that that deserves our commendation, that kind of provision. But I do not think we want to go after the dishonesties which arise in retailing by rigidifying the whole retailing structure by introducing, either by the front door or the back door, resale price maintenance or the restriction of low-price houses.

I do not think, furthermore, that the consumer is very long fooled by the very sort of situation to which you have referred. There may be cases where some damage is done over a short period of time; but I do not think this goes on over a very long period of time before the consumer becomes pretty well aware of the reputability of one discount house as against another one.

Mr. MORE: In the meantime, some very legitimate people go by the board because they cannot stand the gaff.

Would you agree that the consumer's interest, generally, is in trying to find benefits that will bring about lower prices?

The consumer interest that he is seeking to protect is in bringing about lower priced merchandise?

Dr. ENGLISH: That is one—perhaps the most important—of the economic benefits that may be conferred upon consumers, yes.

Mr. MORE: In the recent report on price spreads, the indications there were that this had not been accomplished, this was not the case. In the competition that existed, greater services, better parking facilities, and things of that nature, were the things that were being done rather than price consideration—as I read it.

Dr. ENGLISH: To the extent that the consumer can be convinced that the amount of service provided by, say, supermarkets—which, of course, is what you are referring to in the case of the grocery trade study—to the extent that

the consumers can be persuaded that these facilities of the supermarket, both the parking facilities and the internal facilities, are desirable, then I see no reason why we should complain about them.

But I do think that the kind of non-price competition which the big chains and others engage in, when it involves disparagement, or misrepresentation, or any of these things, should be condemned. When it is based on discriminatory arrangements with the supplier, then, again, it is a subject for inquiry. What I hasten to emphasize, however, is that the investigations into the alleged practices along this line which have taken place in this country and elsewhere suggest that genuine instances of discrimination are fairly rare: genuine instances of loss leader are even rarer; and we have a whole body of Canadian data on this particular practice in this book.

Mr. MORE: Then you definitely do not feel that there is a practice of loss leadership which is detrimental to the public interest?

Dr. ENGLISH: I think that there might easily be found individual instances of it which might have been detrimental to the interests of particular producers; but I think that they are so minor in occurrence, or infrequent in occurrence, that they are of minor importance, and that any legislative attempt to deal with them would introduce more dangers than benefits.

Mr. MORE: You do not feel that it has resulted in business becoming bigger, and the independent merchant who was the heart and soul of the community in years past being sacrificed because of that attitude?

Dr. ENGLISH: If you are referring particularly to the loss leader practice, I would say definitely no, that it has not contributed to business becoming bigger.

Loss leader seems to have become the practice—or the alleged loss leader practice has become just as common among independents as it has among chains, and for a very good reason. It is one of the easiest forms of advertising in which to engage.

The big chains will engage much more in other kinds of promotional activities, such as newspapers, radio, and other advertising channels; yet some interests in the trade seem to feel that when you come to the loss leader idea and reduce the price of one product, this it is a practice which is found to be just about as common if not equally common, among independents.

I was talking to a druggist I know the other day, and he was toying with the idea of reducing the price of a particular line, not necessarily drugs. He found this to be a perfectly acceptable and reasonable thing to do, and I must say that I agreed with him. It did not seem to me that he was going to do anybody any significant harm.

Mr. MORE: Perhaps we are thinking of two different things. I am thinking of fields where the small operators have built up a business based upon legitimate practice, good service, and community interest in a specific field; I mean one product, together with the complementary services for it.

But then the chain comes along. It might even be a grocery chain, whose main interest was in food products; yet they might use it as a bid to their food store, with the result that it would cut out the independent operator in his specific field. Yet they do not carry on their service at this reduced rate. If they get a department, they soon have legitimate costs themselves. But in the meantime they have wiped out that competition.

It is with things of this nature that the small independent cannot cope, and what happens of course—and I do not think it is bad— is that all these independents have banded together.

When I spoke of the food field, I was merely thinking of the other fellow in other fields.

Dr. ENGLISH: Would you be thinking of cigarettes?

Mr. MORE: Not necessarily of cigarettes. I am thinking of camera products and servicing film, and that sort of thing, that has been done to my knowledge. I have seen the effect of it on the community.

Dr. ENGLISH: It would seem to me—and the general position that I take is—that most of these independents are able to survive in spite of that kind of competition. But they have to have something additional to offer in the form of service, and a wider range of products in their particular area.

You speak of a grocery store introducing camera equipment. I was not familiar with that example, but it would only introduce a particular line of such equipment which was very widely known to have been sold at a particular price. So I do not think it is likely to be of major importance for the specialized photography equipment producer.

Mr. MORE: What it does, it seems to me, is to create an attitude of mind in the consumer, that the independent has taken advantage of him for years, and it creates doubt as to the particular value of that article in legitimate retailing. But I do not say that in the long run it would. You say in the long run that these things are of benefit to the commercial field. In the long run I think they are detrimental to the consumer, because they arrive at the point where there is no sense of value at all in respect of a given product.

Dr. ENGLISH: There seems to me to be quite an open issue as to whether the consumer develops a greater sense of value when prices are held at customary levels, or when they are varied as amongst outlets.

Mr. MORE: I will speak of a specific example which has always been very pertinent to me. I imagine you follow advertising, in your studies. If you take the electric refrigerator as an example, I would say that I have seen them advertised many, many times—Hotpoints or General Electrics, or some other known make—at $339, but selling for $299. Inevitably there will be a 1960 model tag on the frig. If you pick up your Saturday Evening Post you will see the manufacturer advertising in the States a brand new 1960 model. It is obvious that what we are receiving is last year's model, but it is advertised as being a 1960 model. I suppose this has something to do with the fact that dies and so on are extremely expensive and our manufacturers cannot afford them here each year, due to their limited selling field. Nevertheless, this is the case. I have had suppliers tell me that the regular value of this refrigerator was $299 and that the other price is just not right. There was a time when a manufacturer could indicate a fair price without contravening any laws, and the public had some sense of value. I do not think this is the case today.

Mr. CARON: Was this perhaps a Canadian 1960 model?

Mr. MORE: That could be, but as I say, it was last year's model so far as the United States was concerned.

Mr. CARON: Models vary in different countries. Women's styles will start in Paris a year before they come over here.

Mr. MORE: I would agree with you on that. I think you are right in that regard, but I am talking about a parent company and a subsidiary that is Canadian.

Mr. CARON: We have to have a standard in this country.

Mr. MORE: Our standard is a year behind, I would agree, but I am talking about the value that is pinned on the article at this time in the advertisements. I do not think today the public is given a chance to know what a fair price is. I think there was some basis for that situation under the old law. I might say that I am not in favour of price maintenance, but I do say there are some things that are possible under this new law which I think this new bill will correct.

Mr. McILRAITH: Are you suggesting under the old law that we have to pay that price for a refrigerator now?

Mr. MORE: No. I am suggesting that the price might have been $229 because the manufacturer in competing with other manufacturers in the field, indicated that it is a fair price, and the public would be then aware of it, because the retailer could carry this price in his advertising.

Dr. GORDON: I do not think an economist would object to resale price maintenance if he could be shown that the standard price maintained was the minimum price.

Mr. MACDONNELL: I would like to ask a question in respect of what is a minimum price, assuming you had a manufacturer who was not conspiring as to his price with others, but he was selling at the best price he could in order to expand his market as much as he could. I would consider in a certain sense of the word, that price to be the minimum price. How do you define a minimum price?

Dr. GORDON: I do not think that could be easily defined if we want to be very precise.

Mr. MACDONNELL: Would you say that is not a minimum price?

Dr. GORDON: Let me put it this way; you could go to a discount house here in Ottawa and buy a standard brand of an electrical appliance for $17. You could get exactly the same appliance, in exactly every detail, from a non-discount house, through an established retailer, for almost exactly double that amount, or $34, or $35.

Mr. McILRAITH: It is almost double.

Dr. GORDON: I would suggest that $17 is closer to the true value, to use your term, of that article than $34 or $35. If that could be done by resale price maintenance, and you could establish the price at $17, then I think economists would be in favour, or would not be against resale price maintenance. What we have discovered is that resale price maintenance establishes the other value, $35. If you say that this is the true value, I think this is merely convincing yourself that what has steadily been the established price represents its full value.

Mr. MACDONNELL: Would that disparity be right across the board?

Dr. GORDON: Not to that degree.

Mr. MORE: I think what you say is a fact. I do not say that I want to revert to the old price maintenance, but I feel there have been some things happen since price maintenance was disallowed that have not been to the consumer's advantage. My feeling was that this bill, without restoring price maintenance—although it is suggested it might do it by a back door method—I do not think I agree with this, because I cannot see, in the field where you have competitive manufacturers making these things, that any one manufacturer might do that and, in effect, if it happened you would have a combine or an agreement which you could prosecute under the act. So, I do not completely agree that this does make a back door method of restoring price maintenance. But, my own personal feeling is that it does attempt to rule out practices that have happened since price maintenance was disallowed which have not been to the interest of small efficient merchants and the consumer, in the long run.

Dr. ENGLISH: One of the points that seems very much to recur in this kind of discussion is this point about the quality of products, and the fact that price represents the quality. One of the things which, it seems to me, deserves serious consideration in this area is the establishment of a Canadian consumer research organization—if necessary, with public subsidy; but I would prefer it privately

operated. I would like to see it subsidized to the extent that the results of its findings would be spread very wide. It seems to me that by this positive measure you would achieve more than by any measure which rigidifies market structures, to get at the same end. If we want the consumer to be better informed, we should depend on a more independent body than the manufacturer to do it—or, the retailer, for that matter.

Dr. GORDON: I think we ought, also, to recognize that the prohibition of price maintenance has only been applied in Canada in a relatively limited number of fields, the most conspicuous being the electrical appliance industry. In other fields, it exists, but there has been no implementation of the law. It exists, but has not been applied. You can go into any drugstore in Ottawa and buy dozens of products in which the price is stamped on them by the manufacturer, and there is no competition at the resale level. So, the difficulties in the retail drug trade that should have resulted from the application of the law, have not resulted at all. Television carries prices of commodities every evening and, if we really applied the law, there would be no national advertising on prices of commodities. But, we have not applied it.

Mr. FISHER: I wanted to ask about this one phrase or clause which bothers me very much. It is in connection with section 34 of the act, where management is going to introduce the point that where the person charged refused or counselled the refusal to sell or supply an article to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and anyone upon whose report he depended had reasonable cause to believe and did believe—and so on. This reminds me so much of the padlock law I am very much bothered by. Do you see this completely wiping out the abolition of resale price maintenance?

Dr. ENGLISH: I think these benefits in the introductory part of the section would be of great importance in effecting the interpretation of the law. But the specific procedures which follow are all of equal importance in this matter, notably the one concerned with the services, and I think also the one concerned with loss leaders.

Mr. FISHER: From your studies of the legislation in Britain and the United States, have you seen anything comparable to this, to allow someone to have reasonable cause to believe? Have you encountered this in any other legislation?

Dr. ENGLISH: No, but, again, there may be forms of legislation in other fields than that which the economist would be familiar with. It seems very strange to me, but I am not aware and I am not fully informed on the phraseology used.

Mr. FISHER: I am disturbed by the growing size, not only vertically but horizontally, of distributive organizations in Canada. I wonder whether we could keep the act the way it is, or whether with the new amendments it can have any real effect upon these very large organizations that sell in a variety of fields and also control, in so many cases, their own manufacturing. I just wondered what your views are on this development in the distributive trade.

Dr. ENGLISH: While Professor Brewis is considering this question, I will just throw in this; my reading of the price spreads reports and other literature in this area suggests to me that the concentration at the retail level in the grocery trade and elsewhere need not continue to grow. I might add I do not think it is growing very much, or has grown in recent years in other than the grocery trade. In the grocery trade I do not think it need grow at the rate it has been growing. I think a new innovation has occurred in the shape of the supermarket, and it has become consolidated.

But if we have somewhat less favourable economic conditions in the country in the near future, the heavy capital investment involved may cause significant troubles to the big ones.

Dr. BREWIS: Professor Skeoch touched on this point when he said you constantly get innovations in the retail trade; low cost producers, in the course of time, may become higher cost producers; and you get new developments taking place which undercut them. I think there is a tendancy in this direction. This is occurring now with supermarkets, as Professor Skeoch said.

Mr. FISHER: Let me be more specific and take an outfit like Simpson-Sears, which has an enormous buying power when it goes to the manufacturer and is also into the manufacturing field itself, as it has its own factories. It seems to me this would block off the effect of this act anyway, as it stands now and as it is likely to stand in the future. I am wondering, in view of the tie-in almost from the raw material right through to retail, whether it would be worthwhile to consider at some time changes in this act which would break up the stages between primary production and manufacture, and so on.

Dr. BREWIS: Presumably you would only want to do that if there were no technical economies; in other words, if the increased market power resulted in the capacity of the firm to sell at a higher price. There is no objection to an increase in sales which results in technical economies.

Mr. FISHER: Would you go further and suggest that the increases in size that we have had, such as you have indicated, have given us the advance that we might expect; let us say the reduction in price as a result of technical economies and economies in scale?

Dr. ENGLISH: Are you referring to retail only?

Mr. FISHER: Yes.

Dr. ENGLISH: I would say that it is very difficult to give a simpler answer to that question; but from the amount of competition and from the fact that margins in retailing have grown rather than remained the same, and from the fact that the market margins are the same, the impression one gets is that there probably is very little by way of economy in scale involved in this operation. This is what causes me to be encouraged about the prospects for the independent retailer as a geographical dimension. So long as people do not live at one point in space the little retailer will always have a place. I do not see that it is a place which will diminish very greatly.

Mr. FISHER: Do you feel that much more advantage might accrue to small business, not from changes such as this but in sort of a vigilant forthnight policy on the part of a small business bureau which would supply loans and managerial advice to small business?

Dr. ENGLISH: There are many means by which small business can be encouraged to be more efficient, and so long as these means are used in a reasonable way and not against the public interest there would be no reason to object to them.

Mr. FISHER: I bring that up because the retail merchants in their brief felt that these other measures were also important.

The last question I would like to ask has not been touched on by anyone as yet. Several years ago the Prime Minister, when in opposition, expressed the view very strongly that he thought legal actions under the Combines Act should be tried by a jury. He was very strongly in favour of a jury trial. Have you any views in that regard?

Dr. ENGLISH: Again this is a very difficult question for an economist to consider. I can consider it only as a citizen. It seems to me the probabilities are that the perplexity of the subject involved would make it desirable for this kind of law to be handled by a more expert judical method.

Mr. FISHER: Judicial people are no better trained in economics than most people.

Dr. ENGLISH: But they have more chance to become experienced with it over a period of time than does a jury. That is the only advantage they have.

Mr. SOUTHAM: My question has not been discussed in this committee, but I think it is applicable to the question of discriminatory trade practices. This has to do with United States firms which control an industry both in respect of the manufacturing and distribution, where the manufacture or production is wholly situated in the United States and where the distribution varies greatly in Canada to what it does in the United States, to the extent that there have been a large number of complaints from Canadian businessmen in recent years—although there have been no prosecutions. I have had several complaints in respect of motion picture film wholly produced in the United States being distributed in Canadian distribution houses where the trade practice is such that pictures are sold en bloc in Canada, while in the United States they are rented on an individual basis. We find that the problem becomes quite serious in Canada due to the invasion of television and so on. I have had several letters on this. I did mention it to the combines authorities and they said they also have had numerous complaints. I know this situation sometimes encourages the wrath or disgruntled feeling on the part of people in Canada. Would the professor care to comment on the aspect of an American firm having control of something like that and enforcing trade practices which are objectionable to the Canadian consumer when we have no alternative but to trade with these people in this connection.

Dr. ENGLISH: I would imagine since this matter has been brought to the attention of the department that members of the department might be in a much better position to comment on this. It does seem to me, however, unfortunate that block booking, which I believe was attacked directly by the federal trade commission in the United States, has not been cut out in Canada, if it has implications similar to what it had in the United States.

However, I do not know of any means of getting at American practices that effect restrictions on competition in Canada, though it may well be possible to do so by some existing legislation: I do not know.

Mr. FISHER: Supplementary to that, Mr. Chairman. This is, again, something we have not touched on. I have often noticed the similarity, that some of the companies proceeded against in the United States by anti-trust legislation have branch plants, subsidiaries in Canada.

Can you visualize any result coming from this change in "merger" and "monopoly" definition, and anything else, that will enable us to take more decisive action against subsidiaries of these particular American giants?

Dr. ENGLISH: I do not think that one can be too sanguine about the prospects of dealing with the problem of American ownership through anti-combines legislation as a general measure. There may arise particular instances where it is possible to do this. But, of course, again, it is a question of having two different objectives here; and if our objective is to Canadian industry, this should be done so far as possible by specific legislation to that end, and not by other means of legislation, unless that other legislation, such as combines legislation, is being used for its own purpose first and foremost.

Mr. FISHER: You cannot see how this combines legislation could be used in order to stop, say, merging from outside, such as happened with the A. V. Roe Company, or as happened in our area with Marathon Paper which was taken over by American Can? In other words, we are a bi-product, or an end result of mergers that takes place at the international level?

Dr. ENGLISH: Again, I do not know how the law could be made to apply. As it is, it may be possible; but this is a legal question.

Mr. FISHER: Is it, again, a subject for discussion on the part of the economists—or of interest?

Dr. ENGLISH: Not that I know of. There are so many means of dealing with this problem.

Mr. MORE: Just one other field, Mr. Chairman. I take it that there is agreement that the consumer's interest in the prevention of price maintenance is so there will be price competition.

In my experience in the retail field—and I was engaged in it for some 30 years; but times have changed greatly, and one of the changes has been the uniformity of labour contracts. Do you not think that the culmination of labour's effort to have uniformity in conditions and wages in industry has lessened the broad possibility of price competition to a great degree?

Dr. ENGLISH: This would certainly be the case, particularly in industries which are labour intensive.

Mr. MORE: I was referring to clothing, say—my field. Parts of the industry that I used to deal with that were organized stopped competing in a lower-price market and gave you a better product to sell, because of the wage position of their industry which unionization had brought about. On the other hand, we had the product of the scale where sweatshop conditions existed, and they gave a value that gave you a considerable range of product.

Then they became unionized, and their labour position became comparable to the labour position in the better product in cost, so that their costs immediately went up considerably for their product, and it eliminated the very lowest range of decent merchandise to some extent.

I want to preface that by saying that I do not disagree with labour's gains at all; but I am speaking of the whole attitude about price competition, that there have been changes in conditions of employment wages, and the fact that individual industries today do not operate on different scales of wages where unionization exists. You do not have the field for price competition that existed 20 years ago. Would you agree with that?

Dr. ENGLISH: I think that is a factor; but I do not think it is a terribly important new factor because when all labour was very competitive, then differences in wages arose from the same factors, it seems to me, that they rise from now, where differences in wages exist.

There may be instances—and I am sure there are—where wages have been pushed up further than the productivity of the industry would seem to justify.

But I think it is still those industries—notably our export industry—where the highest wages are being paid within the industries, which are strongest on other grounds as well. So while a common degree of unionization may have had the effect of raising wages too far in certain industries, it may also have called attention to the fact that those industries are not really on a strong and serviceable basis, and it may be that those are industries which are not properly associated with our Canadian system.

Mr. MORE: I am not sure that you are getting my point completely. My point was this: we have in the garment industry what are known as hand-filled garments, and we have machine made garments.

At one stage of the game the machine operator was un-unionized in the lower field, and the manufacturer who got an order, let us say, for 1,000 garments would say: "Here are 1,000 jobs. I will give you 10 cents," when maybe they should have had 15 cents for the operation in the industry as a whole.

But today the industry as a whole is unionized with very, very few exceptions, so that the basic rate of union contracts for operations is the same in any plant that exists. You cannot therefore have that spread in price competition within the industry.

Dr. ENGLISH: If we have within an industry costs which are on the same basis, there must be competition because of some justifiable economic grounds; the common basis may have some faults, but at least there is no need of advantages of an undeserving character going to certain firms.

The CHAIRMAN: Well, gentlemen—

Mr. FISHER: I would like to ask a question about the punitive aspects of this thing. This is from your brief where you say:

> Fines might for example be related to the net operating profits experienced over a relevant period.

You mean by "relevant period", a period when the merger or monopolistic practice applied, and when they were making inordinate scales of profit?

Dr. ENGLISH: That is right.

Mr. FISHER: Do I take it that you feel that the fines which have been levied are in a sense minute or pinpricks?

Dr. ENGLISH: Only in very few cases have they been governed by the existing legislation. Most of the fines levied up until the last two or three cases were governed by previous legislation where there was a fine limit. But under the new legislation the cases decided have been groups which have been fined only slightly above the limits set by the previous legislation; so I would say there was not a very significant change.

Mr. FISHER: You do not think that any of the fines which have been levied have been any great economic disadvantage to the firms concerned?

Dr. ENGLISH: I would not like to generalize without looking at the various individual cases; but I would certainly have the impression that they were not of great significance.

Mr. FISHER: On the question of the punitive part, you mentioned the total neglect of the imprisoning penalty. You speak of the unwillingness of judges to send businessmen to jail, who break this law.

Mr. DRYSDALE: How many businessmen can understand it?

Mr. FISHER: Anyone who breaks the law in its criminal provisions should certainly be sent to jail; yet it never applies. Have you any explanation as to why the judges have not imposed these prison sentences?

An Hon. MEMBER: A good question.

Dr. ENGLISH: I think that in some cases the problem is a very genuine one. Corporations are involved in the acquisitions. It is not clear who, in the corporation, should be held responsible for the particular act. However, I think there are other instances which have received the same treatment where it was pretty clear, even where a corporation was involved, that the top executives of the corporation were involved in the cooperative activities which have been found illegal. Again I would like more legal information about just what kind of difficulties you would get into if you put the top corporation official in prison for what was a direct act or decision of policy on his part, and which he also carried out. You could find incidents where this has happened. I could indicate industries where the top president, or top officials have been involved. A lawyer might be able to tell me if this is possible under our system to put this man in prison for this offence, but I do not know. I think it should certainly be fully explored and I suspect that it has not been.

Mr. FISHER: In the political realm the minister accepts the responsibility for any untoward acts that go on below his particular authority. Are you suggesting that the top executive of a firm should accept the responsibility for this type of action in his firm?

Dr. ENGLISH: I think we all recognize that a corporation is a hierarchical organization where the responsibility of the top man is very clearly placed. The responsibility for the whole organization and for the activities of all his subordinates is placed on him ultimately. I think there can be no doubt about this. There is certain logic to the claim that it should always be the top man that is held responsible for breaking the law in any corporation, but I do not know whether this in fact is a legal possibility.

Mr. FISHER: Do you think this act would work much more effectively if we did put a few senior executives in jail?

Dr. ENGLISH: I think quite possibly it would.

Dr. GORDON: I would like to add a point to this, if I may, Mr. Chairman. This is a very important question. There is a very important question involved. We are not now acting as economists, lawyers or experts, but trying to assist in deciding what is the appropriate type of punishment for the appropriate crime. My own view is very strong, and that is that imprisonment is totally inappropriate to this kind of contravention of the law, and as long as our society is of the sort that it is, then judges will simply not impose imprisonment because it should never have been included in the act—just as they would not impose death for a small-scale type of theft, although it was allowed in the act in the early 19th century.

Mr. FISHER: In other words you would suggest that that would be part of the act that should be repealed?

Dr. GORDON: I think the act will never be strong until the actual operative penalty is a fine, and the fine is made large enough and applied with a great deal of vigor, and the inoperative part of the penalty, which is imprisonment, is taken out.

Dr. ENGLISH: I hope you would also agree with the remedial measures such as tariff action?

Dr. GORDON: Yes.

Mr. MACDONNELL: What was that last?

Dr. ENGLISH: I said I hoped Dr. Gordon would also agree with the remedial measures such as tariff action.

Mr. MACDONNELL: I just want to confirm my understanding as to what Mr. Gordon has said. He used the case of the discount house selling an article at $17 and the non-discount house selling at $34. Does he think that is typical and that it was just not a loss leader or an exception? You thought that was normal. Am I correct in thinking that?

Dr. GORDON: In order to establish whether it was normal or not, of course, I would have to make an investigation. Let me put it this way: I would not be at all surprised if this was the typical difference, and if this representated something close to the mean difference in respect of the one appliance.

Mr. MACDONNELL: You attribute that to what?

Dr. GORDON: I beg your pardon?

Mr. MACDONNELL: Could you give us an explanation of it?

Dr. GORDON: Well, I think the explanation is that in certain retail lines, the amount of extra load that is put on to the commodity is very, very heavy. The caustic example is the drug trade rather than the electrical appliance

industry, where the extra margin is so much that it draws new outlets into the drug trade, and, eventually, there are so many drugstores they cannot make money selling drugs so they set up a soda fountain, and that sort of thing.

Mr. MACDONNELL: I have one further question. Could we take it that the instance you gave of $34 and $17—and I must say that shook me—is a case of resale price maintenance?

Dr. GORDON: It is not a case of resale price maintenance, because that is illegal. What I meant to say is that if resale price maintenance existed, you would not know that the article was for sale at $17, because it would not be supplied to anyone who sold it for less than $34.

Mr. BELL (*Saint John-Albert*): But, this is a form of loss leader.

Dr. GORDON: No; this is a discount house, which is not advertised.

Mr. BELL (*Saint John-Albert*): They do not hope to get you in and sell you something else?

Dr. GORDON: I would like to know how many people go to a discount house and buy more than one article, before I answer that question. I suspect a great proportion of those customers go for one particular article.

Mr. BELL (*Saint John-Albert*): Do they not look around at the various other articles?

Dr. GORDON: I would like to know.

Dr. ENGLISH: They may look around but, certainly, the discount house that develops a reputation for giving the customer something are the ones where the majority of the products available there are genuine bargains. People are not fooled by those who do the other thing.

Mr. BELL (*Saint John-Albert*): You are seriously suggesting that the discount houses do not pick up their other operational expenses on other items?

Dr. GORDON: I am suggesting at $17 they are making an adequate profit for the kind of capital and kind of services they are rendering. Also, I am suggesting that, at $34, the other firms are also only making a small profit, but on a very much smaller volume. Nobody is getting anything out of resale price maintenance.

The CHAIRMAN: You said you know he is making an ample profit at $17. Tell me how you know that?

Dr. GORDON: I did not say that exactly; I said I suspected, at $17.

Mr. MORE: I suspect a fair price would be between the two.

Dr. ENGLISH: Again, because you assume a certain minimum of services, or something of that kind.

Mr. DRYSDALE: In following your logic, you would consider price wars as a good thing for the consumer?

Dr. GORDON: If it is for the purpose of eliminating a competitor, no.

Mr. DRYSDALE: I am thinking back to some of my old books on economics. They seem to consider that once you start price cutting—and we have seen it rampant on the west coast in regard to gasoline—there is a temporary advantage to the consumer, where the price goes down, but the subsequent results of the various businesses, or operators, being forced out finally, has a bad effect on the whole economy.

Dr. GORDON: Sometimes that happens. Gasoline is a bad example for an illustration because what happens after a price war is that the old situation is re-established after everybody has had their fingers burned a little bit and

competitors are not forced out. You do not force out competitors in gasoline pricing because the consumer is mobile; he owns a car, and is buying it for his car.

There is the other type of price war which is undertaken for eliminating a competitor and, if it succeeds, you can expect the subsequent price to be greater than before the war started, or there would be some other disbenefit to the consumer. There are many, many cases and, I suspect, in the majority of cases, the price war is the only opportunity the consumer ever gets to get prices below a very substantially inflated mark-up.

Mr. DRYSDALE: But it is purely a temporary benefit?

Dr. GORDON: Yes, purely temporary.

Mr. FISHER: In the work you gentlemen did for the restrictive trade practices commission, did you receive a fee for that?

Dr. ENGLISH: Yes.

Mr. FISHER: Despite receiving the fee you are prepared to come here and say the bill prepared by this particular branch is a relatively poor bill?

Dr. GORDON: We are not suggesting who prepared it, but it is a poor bill.

Mr. MORE: Are there two schools of economists in Canada, by any chance, or one?

Dr. GORDON: There are about eight.

Dr. ENGLISH: I was going to say, if you have 25 economists there are probably 25 schools, but on certain things they are in agreement.

Mr. MORE: All the economists I heard before this presentation belonged to Dr. Skeoch's school.

Dr. GORDON: I think most of the profession are in agreement on this particular legislation.

Mr. DRYSDALE: You were selected by the restrictive trade practices commission as economists, and not to give opinion on the legislation?

Dr. GORDON: No.

Mr. JUNG: Mr. Chairman, may I at last ask the last question? I have sat here and listened to the proceedings this afternoon with sufficient patience, I think. It is obvious that my training in economics has been left with severe gaps. I am looking forward to reading the book which will be published by Professor English. Will there be the necessity of re-writing your book if this particular bill passes?

Dr. ENGLISH: I have already hedged on that possibility.

The CHAIRMAN: Well, Professor English, Professor Gordon and Professor Brewis, we thank you very much for the time that you have devoted to preparing this brief and for coming here this afternoon; and it has been a fairly long session for you. Thank you very much.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 9

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

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THURSDAY, JULY 7, 1960

FRIDAY, JULY 8, 1960

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WITNESS:

Professor Maxwell Cohen, Acting Dean of the Faculty of Law, McGill University.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
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STANDING COMMITTEE

ON

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Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams.

Antoine Chassé,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

THURSDAY, July 7, 1960.
(24)

The Standing Committee on Banking and Commerce met at 9.30 a.m. this day. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Aiken, Allmark, Bell (*Saint John-Albert*), Broome, Caron, Cathers, Drysdale, Fisher, Hales, Howard, Macdonnell (*Greenwood*), Martin (*Essex East*), McIlraith, Mitchell, More, Morissette, Morton, Nugent, Robichaud, Rynard, Southam, Stewart, Tardif, and Thomas. (24)

In attendance: Professor Maxwell Cohen, Acting Dean of the Faculty of Law, McGill Uinversity; and Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act), Department of Justice.

The Committee resumed consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

On the suggestion of Mr. Martin (*Essex East*), it was agreed to postpone this afternoon's sitting scheduled for 3 p.m. until 8 p.m. this day.

The Chairman announced the Steering Committee recommendation that the Minister, Hon. Mr. Fulton, and Mr. MacDonald of the Department of Justice, be heard Friday morning, July 8, and that discussion on Bill C-58 be continued on Tuesday, July 12.

On motion of Mr. Morton, seconded by Mr. Drysdale,

Resolved,—That all correspondence and the brief of the Grocery Products Manufacturers Association reviewed by the Steering Committee in connection with Bill C-58, be printed as a separate document as an appendix to the Committee's proceedings.

Professor Cohen was introduced and he made a comprehensive statement on combines legislation from the historical point of view with particular reference to its legal development.

At 11.00 a.m., Professor Cohen still continuing with his statement, the Committee adjourned until 8.00 p.m. this day.

EVENING SITTING
(25)

The Committee resumed at 8.00 p.m. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Aiken, Bell (*Saint John-Albert*), Broome, Campeau, Caron, Cathers, Drysdale, Fisher, Hales, Howard, Jung, Macdonnell (*Greenwood*), Martin (*Essex East*), McIlraith, More, Mitchell, Morton, Pascoe, Southam, Thomas. (20)

In attendance: Same as at morning sitting with the addition of Messrs. H. H. Hannam, President and Managing Director, and David Kirk, Secretary, both of the Canadian Federation of Agriculture.

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Professor Cohen continued with his statement on combines legislation.

At 8.40 p.m. the Committee adjourned to the call of the Chair in order to allow members of the Committee to hear the Prime Minister address the House on Human Rights and Fundamental Freedoms.

FRIDAY, July 8, 1960.
(26)

The Standing Committee on Banking and Commerce met at 9.30 a.m. this day, the Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Allmark, Bell (*Saint John-Albert*), Broome, Cathers, Drysdale, Fisher, Hales, Howard, Jones, Leduc, Macdonnell (*Greenwood*), Martin (*Essex East*), More, Morton, Pascoe, Robichaud, Southam, Stewart, Tardif, Thomas. (20)

In attendance: From the Department of Justice: Honourable Davie Fulton, Minister of Justice, and Mr. T. D. MacDonald, Director, Investigation and Research, Combines Branch; Professor Maxwell Cohen, Acting Dean of the Faculty of Law, McGill University. *From the Canadian Federation of Agriculture:* Messrs. H. H. Hannam, President and Managing Director; and David Kirk, Secretary.

The Committee resumed consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

Agreed,—That the Committee hear the representatives of the Canadian Federation of Agriculture on Monday, July 11, at 9.30 a.m.

The Chairman read a letter from McFarlane Gendron Manufacturing Company, Ltd., of Toronto in connection with Bill C-58.

Professor Cohen completed his statement on combines legislation and was questioned thereon.

At 11.00 a.m. the questioning of Professor Cohen continuing, the Committee agreed to adjourn until the completion of "Routine Proceedings" in the House.

At 11.55 a.m. the Committee resumed.

Professor Cohen was further questioned and supplied additional information.

The questioning of Professor Cohen concluded the Chairman thanked him for his presentation.

At 1.10 p.m. the Committee adjourned until 9.30 a.m. Monday, July 11th.

M. Slack,
Acting Clerk of the Committee

EVIDENCE

THURSDAY, July 7, 1960.
9.30 a.m.

The CHAIRMAN: Order, gentlemen. I believe we have a quorum.

Mr. MARTIN (*Essex East*): Mr. Chairman, I wonder if I could raise a question which I think is of importance. The bill of rights is coming up in the House of Commons today. I did not anticipate this and I do not suppose anyone else could have anticipated it. I am not criticizing, but we have agreed, I understand, through the steering committee, to hear the federation of agriculture, today. Mr. Hannam, who is spokesman for that body, lives in Ottawa. I wonder if we could meet after the debate on the bill of rights is completed, or at some time when we can all be here. Mr. McIlraith, I understand, must attend the superannuation committee this afternoon. It is a matter that concerns him naturally.

Mr. TARDIF: I must attend that committee meeting as well.

Mr. CARON: I also must attend that meeting.

Mr. MARTIN (*Essex East*): I wonder if, for the convenience of the members, this could be set over as I have suggested. It would be a different matter if we were shirking our duties, but none of us is. In order to do our business properly we must attend during these important considerations, and we cannot distribute our bodies effectively in order to do constructive work.

The CHAIRMAN: This will be difficult for the chairman to rearrange, because originally the Canadian federation of agriculture sent in a brief but made no request to appear before this committee. Out of the blue on Tuesday evening at 5 o'clock a request was received that they be allowed to appear. We were informed that this body had received very many requests and telephone calls suggesting that they appear before this committee. When the steering committee met we laid these plans down, and I hesitate to go back now and tell this federation they cannot appear.

Mr. MACDONNELL: How many individuals are involved?

The CHAIRMAN: I think the same problem will come up on any day that we sit, Mr. Martin.

There is a further recommendation of the steering committee to be placed before you today and that is that, in view of the fact that this is the last request to appear before this committee, we proceed to-morrow morning at 9.30 to analyze the bill.

Mr. TARDIF: The agricultural committee is sitting to-morrow morning.

Mr. MCILRAITH: The steering committee did not recommend that we start our analysis of the bill to-morrow morning. The recommendation was that we hear from Mr. Fulton and Mr. MacDonald.

The CHAIRMAN: Yes, we were going to hear the minister and Mr. MacDonald.

Mr. MARTIN (*Essex East*): I think we must simply take a serious look at the situation. Mr. McIlraith, Mr. Caron, Mr. Tardif and myself are not possibly going to be able to be here due to the fact that the bill of rights is being discussed in the House of Commons. This is an important measure.

There was the general understanding in the House of Commons that committees would not meet in a way that would prevent members from discharging their obligations in the House of Commons.

Now, the federation of agriculture is one of the very important national bodies, and what they say about this measure is of greatest importance.

I am simply suggesting that it is not right for us to do this.

Mr. DRYSDALE: Mr. Chairman, Mr. Martin has already spoken in respect of the bill of rights, but perhaps he is planning on speaking again.

Mr. MARTIN (*Essex East*): That is not the point.

Mr. MCILRAITH: The difficulty arises due to the fact that the House of Commons business was changed without notice; and that is the nub of the difficulty. The House of Commons business was indicated, as you will see if you will look at *Hansard,* and the estimates were to be considered on Wednesday, Thursday and Friday. Suddenly on Tuesday, after the steering committee met—and I am not suggesting that the steering committee had knowledge that the program of business in the House of Commons was to be changed—the business of the house was changed.

The CHAIRMAN: I think that is one of the hazards that we run at all times in parliament. We gave this very considerable consideration the other night. I do not know, Mr. Martin, when we are going to have committee meetings which will not conflict with something important in the House of Commons. I hope there is always something important taking place in the House of Commons. I have the recommendations of the steering committee and I place them before you. I would like now to entertain a motion of acceptance of the recommendations of the steering committee.

Mr. MARTIN (*Essex East*): I do not think that is the proper way to resolve this problem. This question has not been raised in an acrimonious way, it is raised in a constructive way to meet the situation, and it concerns all of us. I believe that Mr. Hannam lives in Ottawa and he will not in any way be inconvenienced by being asked to come here on perhaps Monday or some other day that can be arranged. This ought to be done to enable us to attend to our other obligations.

Mr. MORTON: Mr. Chairman, could I ask if the superannuation committee is meeting this evening?

Mr. CARON: It is meeting this afternoon at 2.30.

Mr. MARTIN (*Essex East*): It is meeting this afternoon at 2.30.

Mr. CARON: Mr. Chairman, you spoke of the decision of the steering committee, but we know that the general committee has always the power to change those decisions of the steering committee. Why not decide, because of the fact that there are so many things happening, and that many of the members of this committee will not be able to be here—I am speaking of the superannuation meeting this afternoon and the debate on the bill of rights in the House of Commons—to hold off this afternoon's meeting until the debate on the bill of rights is completed. Even though some of us have spoken in respect of the bill of rights in the House of Commons we should be there to learn something about the committee work which will be following. Perhaps this evening we could meet to hear the submissions of the Canadian federation of agriculture. I do not think it would annoy any one of the committee members to be here at 8 o'clock in regard to this matter instead of this afternoon.

Mr. MORTON: That sounds like a reasonable compromise, Mr. Chairman.

I was also going to suggest that if that could not be done perhaps we could meet on Monday, when we do not usually meet, and perhaps have an extra meeting to catch up.

Mr. CARON: I really believe that the debate on the bill of rights will be over this afternoon. It will not last very much longer now, so we could perhaps sit this evening at 8 o'clock.

Mr. MACDONNELL: It seems to me, Mr. Chairman, that we are now faced with a new situation which was not appreciated by the steering committee, as I understand it, namely, the fact that we have the bill of rights debate on today. Unless there is great inconvenience to Mr. Hannam, or whoever is concerned, or unless there is some absolute necessity for us meeting this afternoon, I think we should meet at some other time.

The CHAIRMAN: Are you suggesting we meet this evening?

Mr. MCILRAITH: Assuming that the debate on the bill of rights is completed.

Mr. FISHER: As a member of the steering committee I might say that I would be quite willing to go along with the suggestion that has been expressed. I will not be hurt if our recommendations are not accepted.

Mr. MACDONNELL: You are a very magnanimous fellow.

The CHAIRMAN: Is it agreed that we postpone this afternoon's meeting, which was to take place at 3 o'clock, until 8 o'clock tonight?

Mr. MARTIN (*Essex East*): Yes, assuming that the bill of rights matter is over in the House of Commons. This will concern you, Mr. Chairman. The Prime Minister is going to close this debate, and I know that at that point every member of all parties will want to be in the House of Commons. We might as well be realistic about this.

The CHAIRMAN: Would you care to make a suggestion then?

Mr. MARTIN (*Essex East*): I suggest that we, depending on the position of the debate on the bill of rights in the House of Commons, meet at 8 o'clock tonight.

The CHAIRMAN: Shall I pass along that suggestion to Mr. Hannam.

Mr. MARTIN (*Essex East*): Yes. Parliament of the nation comes first; my goodness!

The CHAIRMAN: There is nothing definite planned, then.

Mr. DRYSDALE: Perhaps we should come here at 8 o'clock this evening, find out what is going to happen, and then adjourn until later in the evening.

Mr. CARON: Everyone will know what the situation is by 5 o'clock.

Mr. DRYSDALE: The whole thing is a series of contingencies.

Mr. MARTIN (*Essex East*): I would suggest we meet at 8 o'clock and then we will know if it is necessary to adjourn.

Mr. CARON: That is right.

The CHAIRMAN: The meeting will be held here in this room at 8'clock.

Mr. DRYSDALE: Subject to several contingencies.

The CHAIRMAN: Subject to the weather.

Mr. DRYSDALE: This is a fine way to do business!

The CHAIRMAN: Tomorrow morning, as I stated, we will have the minister and Mr. MacDonald make statements, and then the following meeting, Tuesday, July 12, at 9.30 and at 3 o'clock, to continue our consideration of the bill.

Mr. MARTIN (*Essex East*): Can we all be here on July 12?

The CHAIRMAN: I was worried about that, Mr. Martin, but with great sacrifice I decided I would be here. I am usually on my white horse that day.

It was also recommended by the steering committee that all the correspondence and the briefs of the Canadian retail federation, and the grocery

products manufacturers of Canada, and the other correspondence, of which there have been quite a lot, voicing opinions, and so on, should be included in the evidence of this committee's report.

Mr. BROOME: I would so move, Mr. Chairman.

Mr. MORTON: I would second that.

Mr. MCILRAITH: Could we have the names read off the list? Could you just give us the names of the firms sending in that correspondence?

I should point out to this committee that the steering committee has not seen this correspondence and does not know what correspondence is involved.

The CHAIRMAN: There is correspondence from the following: the Canadian retail federation, the grocery products manufacturers of Canada, and a personal letter from Bennet and Elliott; the meat packers council, the Canadian bar association, and Canada Packers Limited.

Mr. MARTIN (*Essex East*): What did you say about the Canadian bar association? Have they made any recommendations?

The CHAIRMAN: This has just come in.

Mr. MCILRAITH: Surely the steering committee is entitled to see this correspondence.

The CHAIRMAN: We have also received a letter from a Mr. W. R. Patton of Edmonton, and correspondence from the Canadian Photographic Trade Association of Toronto, the General Photographic Products Company, and Garlick Films Limited, and the Hamilton District Photographic Dealers association. We have a letter from Professor Gordon, signed by Professor Gordon and Professor Brewis, who support Professor English.

Mr. DRYSDALE: That was appended to the report the other day, was it not?

The CHAIRMAN: I was not sure whether it should be appended or not.

Mr. ROBICHAUD: Was there not a letter or a telegram from the maritime gasoline retailers association?

The CHAIRMAN: I do not recall it. The only telegram that came in, and I do not see it included in this file, was a telegram in support of one of the briefs.

Mr. HOWARD: I understood that the university of Saskatchewan, headed by Professor Britnell, wrote in indicating that they were in support of the views contained in the bill.

The CHAIRMAN: I think you are quite correct on that. Although my secretary was supposed to have put these all together, I do not see that correspondence. I will look that up, but I recall receiving it.

Mr. HOWARD: Perhaps you might look more extensively to see if perhaps there were other submissions that may have been inadvertently left out of your file.

The CHAIRMAN: I will undertake to do that.

Mr. MARTIN (*Essex East*): Mr. Chairman, I have just been looking over the submission from the chairman of the committee of the Canadian bar association, and I see it is addressed to the chairman. It looks like a very important submission. Perhaps we could have the opportunity of seeing all the correspondence that has been received by the chairman so that we can ascertain whether or not some of these people should perhaps be called. I am almost of the view now, after reading this one, that this group should be asked to come and appear here. I think that the suggestion that Mr. Howard possibly had in mind is one that ought to be followed, and that correspondence should be made available to the committee for examination in order that they can decide what should be done.

Mr. FISHER: Could I just ask Mr. Martin if it is his view that we should have a look at that correspondence before we go ahead with Mr. Fulton's and Mr. MacDonald's statements?

Mr. MARTIN (*Essex East*): I do not want to interfere with the orderly procedures of this committee, but it strikes me that is the rational way of approaching the problem.

Mr. MCILRAITH: I asked about the submission made by the Canadian bar association, and whether or not they made representations, and I think Mr. Fisher will recall that. I now find this brief. This is the first I have heard about it. It is a brief sent to the chairman and the members of the committee. It says, after certain preliminaries:

> The Canadian bar association has decided that the following additional representations should be made to your committee.

So, this correspondence is just the additional representations; I do not know what the originals are.

Mr. MORTON: Would that be last year?

The CHAIRMAN: That would be their presentation for last year, I would gather from that statement.

Mr. ROBICHAUD: Mr. Chairman, I have a letter here from the maritime retailers association; would you accept it as part of the correspondence, if I passed it along to you?

Mr. BROOME: To whom was it addressed?

Mr. ROBICHAUD: To myself, as a member of this committee.

Mr. BROOME: I have received thousands of letters. It has to be addressed to the committee, or else it should not be allowed.

Mr. ROBICHAUD: I think it is addressed to more than myself; I think other members have received it.

Mr. BROOME: They should send it in, addressed to the committee.

Mr. MITCHELL: Mr. Robichaud could send it back and ask that it be sent to the committee, if that is the way you want it done.

Mr. ROBICHAUD: If I asked them to pass it on to you, you could then acknowledge receipt of it.

Mr. MORTON: Mr. Chairman, we are bogged down.

I suggest we get all the correspondence addressed to the committee filed, and then we could have a look at the situation.

I think the steering committee were of the opinion there should be no more witnesses called as they had not requested to be called. If they had been that interested, they would have requested to be heard by this date. We could go on indefinitely, if we started picking and choosing at this late date. We have to draw a line somewhere on this. I think all this correspondence should be filed and, I suggest, today; and if there are others I think the chairman should obtain those and have them filed.

The CHAIRMAN: I think they are all here.

Mr. MORTON: This would give the members an opportunity to study the briefs and the correspondence so that we know what is before the committee before we start questioning the minister and Mr. MacDonald. I would like to follow along that procedure. Now, if anything unreasonable crops up in regard to one of these briefs, wherein the committee considers there should be some clarification, we could consider it at that time. However, Mr. Chairman, I think we should follow the program, as we have set it out. But, we would not be that rigid, if something came up.

Mr. MCILRAITH: Could I ask Mr. Morton a question by way of clarification?

Mr. CARON: We are not asking for anything unreasonable, but I think we should have a copy of all the correspondence, so we can decide on this matter.

Mr. MCILRAITH: I would like to ask Mr. Morton a question, on a point of clarification. He used the term "filed with the committee"; did he mean printed in the evidence?

Mr. MORTON: Yes. What I mean is this—anything that is filed, or sent to the chairman, should be printed in the evidence so that every member could study that correspondence.

I did make the additional suggestion, which goes along with Mr. Caron's view, that if in the study of it, we find something unusual the committee feels needs further clarification then, at that time, we can make our decision.

Mr. CARON: I suggest that we should all have copies. I think it would be easy for all members of the committee to have copies.

Mr. MORTON: All this will be printed in the evidence.

Mr. CARON: But, the evidence will come later; it usually takes a week or two before the evidence is available to us.

Mr. DRYSDALE: I would suggest that we have this material printed. I do not care when it is printed, but I think it should be printed in a separate booklet so it does not get confused with the other evidence where we have had cross-examination. I think, if you would indicate to the printing people involved that we would like it fairly quickly, this could be done. In our railway committee, we get it in a day's time, and I think it should be the same on this committee.

Mr. MARTIN (*Essex East*): Mr. Chairman, have you received a letter from the Canadian congress of labour?

The CHAIRMAN: No, not from memory. I am pretty certain we have not.

Mr. MARTIN (*Essex East*): You say "from memory".

The CHAIRMAN: I am certain we have not.

Mr. MARTIN (*Essex East*): I suggest they indicated their desire to appear in the earlier proceedings.

The CHAIRMAN: The reason I have not this material, as it came in, is for the very reason of what is going on this morning. We have had witnesses here waiting, and then we get into a discussion of things like this. I see the procedure has not been too satisfactory—and, it is at the expense of our witness.

Mr. MACDONNELL: I apologize, Mr. Chairman, but I am not clear where we stand with the Canadian bar association. With all their imperfections, lawyers will feel, in this case, they are entitled to a special hearing. And, even as a reformed lawyer—

Mr. MARTIN (*Essex East*): I think that is a gross understatement.

Mr. MACDONNELL: But, seriously, I am not quite clear where we stand. I think it would be unfortunate if the bar association felt, and were able to make other people feel, that it had not had a full hearing. But, I might be wrong in thinking there was any question of that.

Mr. MCILRAITH: The correspondence which I heard and saw for the first time in the presence of the committee this morning, after I raised the question, indicates or refers to earlier briefs they have been submitting. They have had a special committee dealing with this subject for some years now—two years, at least, to my knowledge—and this letter that is now before us is couched in the terms of additional submissions. I suspect the earlier submissions had to do with last year, but I am not clear on that, because I have not read the letter through.

The CHAIRMAN: Incidentally, this letter just reached my office on Monday.

Mr. MORTON: Mr. Chairman, I move—if it has not been moved—that these letters be printed as a special copy, so we can get them earlier.

Mr. DRYSDALE: Separate from these proceedings.

Mr. MORTON: I think we should follow the procedure as outlined by the steering committee, on the understanding that if any of these briefs indicate a situation where the committee wants to have clarification of certain points then, at that time, it could decide whether they require anyone else to come. I would suggest, in respect of the Canadian Bar Association that, perhaps, they are referring to briefs they had presented to the Minister of Justice direct and, perhaps, those briefs could be brought forward when the Minister of Justice is on the stand. He could file any such correspondence or briefs he has had from the association; but if they are not asking to come, I do not think we should call them.

Mr. MARTIN (*Essex East*): We may want to ask them to come, and ask others to come.

Mr. MORTON: But, we cannot decide that until we all have seen the brief.

Mr. MARTIN (*Essex East*): Yes, that is so.

Mr. DRYSDALE: In skimming the brief, basically this is a reiteration of things we have been hearing in the last few days.

The CHAIRMAN: Does anyone second Mr. Morton's motion?

Mr. DRYSDALE: I will.

The CHAIRMAN: Are all agreed?

Well then, gentlemen, we have with us this morning, Professor Maxwell Cohen of McGill university. He kindly has offered to come and give us, I hope a new angle.

Professor Cohen, would you state to the committee your exact position at McGill, your background and your experience in connection with the combines legislation, and so on.

Mr. FISHER: Mr. Chairman, just before Professor Cohen proceeds, there is one point that bothers me. I thought that anyone who appeared before the committee was required to supply us with a copy of the brief.

The CHAIRMAN: Yes, that is so; but, in this case, I did not get in touch with Professor Cohen until Tuesday morning, and he had not time to prepare a brief.

As you know, he was here the other day, and he did not have sufficient time. However, he has prepared some brief notes.

Prof. MAXWELL COHEN (*McGill University*): Mr. Chairman and members of the committee; I must apologize to you, sir, and to all members of the committee for what is, in a sense, an intrusion. You had your comfortable arrangements all made and, were it not for me and the Canadian federation of agriculture, you could look forward to an early and relatively leisurely adjournment, after Mr. MacDonald and the minister had come to you. Therefore, I come with a certain trepidation, particularly after Mr. Fisher's question: where is my written brief? Since it is, perhaps, better that I have no brief, in view of his ability to read things into a brief, I prefer that the evanescent word be dealt with, rather than the written word.

I shall be glad, if the committee believes it desirable, after I have had my say and been subjected to your views and examination, to convert these imperishable commodities called ideas into words, and distribute them, if the committee wishes.

The CHAIRMAN: That will not be necessary, because it will be printed in the minutes of the meeting.

Prof. COHEN: I do wish to thank the committee for allowing me to come. I regard it as a privilege to be able to attend, and I apologize for the lateness of my intrusion.

I wish to make my own position clear. I am an academic lawyer, which means that I have an interest in the law apart from representing any particular client. This means I am usually unpaid.

Mr. MARTIN (*Essex East*): Surely, McGill pays you.

The CHAIRMAN: This is the first time in history that I have had this experience.

Prof. COHEN: I sat here in awe and listened to my colleagues on the economic side, who came here filled with the objectivity of science, and who at least had the earthiness to be paid now and again by somebody. This seems, to me, to be a lesson I should learn very soon. In any case, I come before you with virtue, unsullied by solvency.

Mr. FISHER: I have a list of your bibliographies and articles over the last few years, and I have some idea of the fields in which you are interested. Were you never paid for any of these articles?

Prof. COHEN: I was never paid for a learned article.

Mr. MARTIN (*Essex East*): I can testify that he works *pro bono publico*.

Prof. COHEN: I have been paid for articles in magazines which the layman regards as worth reading; but, in the professional area, none of us is paid.

Mr. FISHER: I was looking at this article Diefenbaker, and Our Future Abroad, and I was hoping you were paid for that.

Prof. COHEN: Yes. Perhaps, I should explain that. I was paid, not by the government of the day, but by the editor of the magazine. It makes a difference in the point of view I would have.

The CHAIRMAN: Quite a difference.

Prof. COHEN: I am, sir, at the moment, the acting dean of the faculty of law at McGill. I have been, for many years, interested in this field. I was I think, first full-time lawyer ever attached to the combines investigation staff, when I was employed by them back in 1938, when the former commissioner, Mr. F. A. McGregor reorganized his staff—and it was a very small staff—I came on and took part, as junior counsel, in a number of inquiries and prosecutions before war broke out. When war broke out, I left. During the war, combines work was suspended because of its inconsistency with the character of a war economy, and I found myself involved in the economics section of the then department of munitions and supply. Later, I joined the army. I returned in 1946, and joined the staff of McGill university.

Since that time, my interest in the anti-trust field has been continuous. I have conducted a senior graduate seminar in the field, and I think we are the only law school in Canada where the joint effort of the department of economics and the faculty of law, in this field, attempts to maintain this dual view of what is essentially a two-level problem—a problem of law and a problem of economic policy. I have had the pleasure of having my views invited, for free, in some matters by both sides—even from the government, I might say, now and again, in an informal capacity. I find that I am able to retain whatever objectivity I have, under these conditions.

So, for the information of Mr. Fisher, contributions to the learned journals are entirely the work of someone who pretends to be a scholar in a field —while the other articles are paid for sometimes—and not even sometimes—as the case may be.

I came here because I felt, after observing some of the evidence which appeared in the press and after talking to some of my friends who knew of

the work of the committee, that you had, generally speaking, probably two types of view here. You have had the views of advocates for a particular interest. You have had the views of the professional economists, some of whom have had very close relations with the restrictive trade practices commission and some of whom have not. You have not had, however the view of the academic lawyer interested professionally in this field and interested in putting before you the juridical problems against the broad policy problems. Because I believe that in anti-trust matters there are very complex juridical issues I thought it might be advantageous if I appeared here to discuss some of these.

I come here with no dogmatism. I know that what we try to achieve here is a sort of shortrun approach to some problems of the national good which anyone would try to achieve.

My first comment is that there is probably no place in our legal system where the practical problems of the businessman making decisions on economic policy impinge on the law as directly as in anti-trust questions. Nowhere does one see this difficulty of the economic policy translated into legal jargon, impinging on each other more strongly. For here the lawyer has to understand economic policy while the economist has to understand economic policy as related to legal requirements and administrative results. On Tuesday I have listened to the members of the Carleton university staff who appeared before you try to discuss some of the questions put so ably by Mr. Fisher, Mr. Broome, Mr. Drysdale, and others on legal problems. One of the difficulties some economist finds in playing with legal ideas is that it is in a sense presumptuous for one to play in two fields, when it is hard enough to master one. Consequently, I do not have any pretentions to being a professional economist in this field. Let us say that I have had to try to understand what they say.

I think the first thing I would like to say about the legal problems is that there is an essential continuity of ideas in the language of the Combines Investigation Act and sections 411 and 412 of the criminal code, which goes a very long way back in our legal system. While there is a certain degree of "novelty" in the legislation and a certain sophistication, in the way in which we have drafted these ideas in the last thirty-five or forty years, the basic notion that the law shall have some control over the behaviour of the individual entrepreneur goes back to very early ideas.

As I examine the last several centuries of English law, and Canadian law, there are five main sets of ideas one finds which express the nature and content of the legal structure of the anti-trust laws today. These five ideas, in my opinion, are the old medieval offences dealing with hoarding, price fixing and the search for the "just price", and forestalling regrating, which many of you who are lawyers will remember in your law school days was part of an extraordinary problem which was both economic and religious. Some of you may know the fine study made by Tawney in his Religion and the Rise of Capitalism. How do you in fact get a "just" price?

Mr. FISHER: I would hope you are of the same political persuasion as is Tawney.

The CHAIRMAN: That is out of order.

Prof. COHEN: I may say I am impervious to these irrelevancies at this time.

It seems to me that one gets a view that this is a very old complaint when one goes back to the twelve and thirteen hundreds. The second area from which we derive our ideas is the famous struggle over monopoly between the crown and parliament in Elizabeth and James' times. Monopoly is not a new term. Queen Elizabeth gave a monopoly in cards which led to a very

famous case at the end of the sixteenth century. The House of Commons fought with Elizabeth and James over the question of whether or not they had the right to give the monopoly. The whole problem of monopoly became a part of the struggle between the crown, the royal prerogative, on the one hand and the House of Commons on the other. When that struggle was resolved in favour of the House of Commons as against the crown it led to the foundation of monopoly in its modern sense, namely the right, under a statute, which allowed the executive to give a patent, as we do under modern terms.

Mr. TARDIF: The witness is very interesting, but I am worried about the reporter. The witness has slowed down—to exactly the same speed at which he had been speaking.

Prof. COHEN: The third area is a word you all know, conspiracy. The word "conspiracy" in English law also is very old. I always think the Latin derivation is always significant—breathe together—to conspire. This notion is deep in the notion of the Combines Investigation Act, and, in section 411 of the criminal code, to this day. The idea of conspiracy in common law permeated for the last five hundred years much of the notion which you have before you in the present legislation.

The fourth idea is the doctrine of conspiracy in the law of tort. That is to say, a man could be harmed civilly by people getting together to harm him and he could have an action in the courts because of that.

The fifth area is the idea of a contract in restraint of trade. This idea of contracts being in restraint of trade evolved and matured around the middle of the eighteenth century when very able judges in the English courts began to say that certain contracts were not enforceable as being against public policy. Usually they said they were not enforceable because the type of restraint they placed upon a man was the kind of restraint which the courts felt should not be recognized in law. If a man sold out his business and said that he would not continue in business again for "X" years in a given area, the court had to decide as to the legality of that promise. English law evolved the theory of reasonable restraints. What was a reasonable restraint would be decided in two ways, a reasonable restraint as between two parties and a reasonable restraint in terms of public interest.

By the middle of the nineteenth century—when you come down to our own experience—English and Canadian law had some very general doctrines about contracts in restraint of trade, and about tort, and about conspiracy. All or most of these really were concerned with forms of predatory business behaviour. In general by that time the laissez-faire ideas of the right of man to contract, and buy and sell, by the middle of the nineteenth century had reached the stage that where courts were very lenient with all forms of business behaviour. So that, on balance, English law favoured the freedom of the businessman to contract, buy and sell, and get together, as against the view that what he did might be against "public policy". This became essential to the thinking in the common law by the last quarter of the nineteenth century.

One area where this was slow to develop was in the area of the trade union movement. The English common law on the whole was weighted against working men meeting together to solve their problems by cooperation. Legislation going back to the fourteenth century prohibited that.

Mr. FISHER: You say in the area of the trade union movement; it is about it.

Prof. COHEN: Yes. It prohibited action which would have led to a mature trade union movement to bargain collectively.

The major point of departure there in the United Kindom and Canada was in 1875 when the Trade Union Act was passed which legalized for the first time the cooperative effort of working men to achieve what they thought was their own interest without its being a conspiracy in restraint of trade.

Curiously enough, however, this did not take place on the civil law side. At the very same moment when English law and Canadian law at the end of the nineteenth century said it was legal for businessmen to get together to make arrangements which might squeeze out a competitor or prevent a man carrying on business because he sold the goodwill, the trade union movement was having a very difficult time in terms of the law of conspiracy. There grew up what I would like to call a double standard in English law in which there was great tolerance for the businessman and, on the whole, a very restrictive approach towards similar behaviour by the working man in achieving his own form of collective power.

Now by 1900 the situation of English law in the United Kingdom reached the acute point expressed in two famous cases which I will not discuss in any detail, but which some of you may know—the famous Maxim Gun case on the one side and the McGregor Steamship case on the other. One was a case where a man sold out an ammunition and gun making business and promised not to engage anywhere else in the world in the same business. The British courts said that was a proper contract to make, to bar himself from engaging globally in respect of this particular activity. So the courts favored the maximum freedom of contract as against the idea that this restraint of trade might be against the public interest.

On the other side is the case of a group of shipowners who got together and said to their customers "If you ship in Mr. 'X' bottoms we will not do business with you". The court asked the following question: Is the harm caused by that particular agreement a harm which is prohibited by English common law? The test was this: If the intention of businessmen is to further their own interest and not to harm the person who is incidentally and actually is harmed —if that is the intention, the law will protect them. If the intention is primarily to harm the man, the law will proscribe it. Obviously, this kind of a test is highly subjective and very difficult to administer.

Let me come down to what happened in Canada at the same time. What distinguished the Canadian and the American position from the British? There were in North America certain factors that the United Kingdom did not have to face, namely the following: first of all, a major approach to a tariff policy as part of the economic development of North America; secondly a large part of the population being primary producers and depending upon a volatile world market, and being very conscious of the effects of this volatility on their terms of trade. Thirdly, and perhaps in some respects the most important of all, there was the general fear in Canada and the United States, of the concentration of economic power and its political consequence. I think one cannot understand the difference, between the situation in Britain and the situation here, without realizing that we were an essentially egalitarian-minded society. We had a sense of egality. We had the desire to prevent the big from becoming "too big" and eventually expressing themselves in political terms. These differences in social policy and viewpoints, it seems to me, had very important consequences in the development of our law in this field, and they led to the first Select Committee in this House of Commons in 1888 to examine this problem. You are not the first committee, therefore, to look into this question. The tradition of going back goes back to 1888-9 the date that that committee produced its bill.

That bill, as it eventually came on the statute books, is virtually the same as section 411 is today, except that the first draft of it that became law in 1889-1890 in addition to the word "unduly" in (a), (c), and (d) had the word "unlawful" before the word "unduly". It therefore made the entire effort meaningless. Indeed, Sir John Thompson, the then Minister of Justice, in introducing the bill said, that so far as he was concerned this bill was merely declaratory of the then common law of crime in Canada.

I think he was wrong. I think he misunderstood the extent of the English common law. Nevertheless, this particular bill of 1889 in fact by the use of the word "unlawful" made the control of the behaviour of businessmen, by criminal law, virtually unworkable, and by 1900 they took out the word "unlawfully" and left the word "unduly". This critical word remains in this particular legislation to the very present day. Section 411 today is a direct descendent of these efforts of 1889 and 1900; an attempt to develop a piece of legislation which would, do what the common law could not really do, control effectively businessmen in their predatory behaviour that would restrict or reduce competition.

The various prosecutions that took place from 1900 to 1909 showed how difficult it was to run this particular show. Perhaps no one has given you the historical background Mr. Chairman, but you may remember that between these years there were several posecutions undertaken by the attorneys-general of the provinces, not by the federal government, and the problem became a very difficult one because the A.G.'s of the provinces discovered very soon that in these commercial crime matters there was a very sophisticated level of fact finding with which the usual attorneys-general processes were unable to cope. The average attorney general's offices, with its police affiliates doing ordinary police inquiries were hardly geared to the kind of sophisticated business investigation that this particular legislation really demanded. This led to Mr. Mackenzie King formulating his well known attempt in 1909 at a new approach to the combines problem. Mr. Mackenzie King was partly influenced in his thinking—

Mr. MARTIN (*Essex East*): That was in 1908, was it not?

Dr. COHEN: The bill was introduced in 1909 and passed in 1910.

The Combines Investigation Act of 1910 represents a departure from the 1889 bill, and its 1900 variation. They differ in one or two very important ways, and this explains why the bill before you today, sir, in some respects, must be seen in the light of that divergency, because two things happened: the first was that Mr. King developed a new definition for "combine", different in some degrees from the definition that appeared in what is now section 411.

Essentially, these two definitions were the same, except for one very important phrase, and that is that the 1910 legislation, for the first time, begins to use, instead of "unduly", the words "to the detriment of the public". That phrase has since that time influenced a larger part of the debate in Canada as to what the courts ought to do. Because, if you look at the kind of arguments put forward with respect to the judicial processes in this field in recent years you will find that many critics of the judges say: you are not really measuring detriment effectively, and there are very many situations where the words "public detriment" ought to have been defined differently, or ought to have been measured differently. I am anticipating myself, but suffice it to say over the years the word "unduly" in section 411 and the words "public detriment" came to mean approximately the same thing. No major differences in thinking appeared in judicial analyses of these matters.

Now the second aspect of Mr. King's legislation of 1910 that was different from the old legislation was that he recognized that you could rely upon the attorneys general of the provinces to solve this problem. You must have better federal machinery, or machinery of more elaborate character, and he introduced the motion of a judicial inquiry based upon the application of a certain number of persons, which would lead to a judicial inquiry, and upon that investigation and report, a decision would be made whether to prosecute or not.

Only one inquiry of any importance took place on the basis of the 1910 legislation. War broke out and the whole effort was disbanded; but by the end of the war a very interesting experiment took place, Mr. Chairman, which also

has a bearing on your thinking today. That experiment was with the passage of the Combines and Fair Prices Act of 1919, and the Board of Commerce Act, which was an attempt to have the best of both worlds, and an attempt to vest power in a federal body which would not only regulate combinations but which would also regulate prices. You have this curious juxtaposition of two essentially incompatible ideas; the idea of regulating the market by way of price fixing, at the same time as you regulate the competitive behaviour in order to encourage competitive behaviour. Constitutional difficulties, of course, intervened, as you all know, and that legislation was declared unconstitutional by 1922. This led, however, to a re-thinking through of the combines problem in 1923. In that year there was passed what is essentially a modern bill, upon which the present legislation is based, that is the Combines Investigation Act of 1923. That Act eventually underwent some very important changes which took place in 1934, 1937 and 1952. But that bill is the authentic ancestor to the legislation now on our statute books.

Let me just refer very briefly to the main ideas that took place in the development of that legislation.

The 1923 act provided for a registrar—a permanent official—who later became the commissioner. You therefore had permanent machinery which the 1910 legislation did not provide for.

Secondly the process of initiating inquiries was not as cumbersome,—even though it was still not simple—as it was under the 1910 legislation. The definition in section 2 of the 1923 act was a little more clearly elaborated as compared with the 1910 act, but, in spirit, very much the same as the Criminal Code definition of 1900.

In 1934 you may remember that Mr. Bennett made a major experiment with this legislation. What he did, Mr. Chairman, was to say that under conditions of mass unemployment, the economy could not face too much competition. I think the debate over the price spreads initiated by the Stevens report of 1934-35, and the effect of the United States experience under the N.R.A., influenced Mr. Bennett's thinking; so that when he passed the Dominion Trade and Industry Commission Act in 1934-35, what he had in mind was competition—but not too much competition—under conditions of large scale unemployment. The major change he made was to shift very important powers away, out of the combines investigation structure, and into the Dominion Trade and Industry Commission. Under section 14 of that Act, you will remember that he gave powers to that commission to determine that some agreements between producers and distributors could be legal. This, of course, was an extremely important change in philosophy by legalizing certain types of agreements that were now to be accepted as being in the public interest. You all know that, of course, in 1937 section 14 of the legislation went to the Judicial Committee and was declared *ultra vires*, and in 1937 changes by this Liberal administration restored that act to basically what it was, in 1923-27.

In 1951-52, some important events took place. That was the period of the MacQuarrie committee which, I think, achieved two or three significants results.

The first important result, of course, was its attack on resale price maintenance, in its Interim Report, which led to the amendment of the Criminal Code and abolition of resale price maintenance in 1951.

The second significant thing that happened was that, in 1952, its Report led to the foundation of the present structure we have for combines investigation and administration—namely, it separated the investigative functions from the appraisal functions and established, instead of a single commissioner to investigate and appraise, a director of investigation and research, on the one side, and the Restrictive Trade Practices Commission on the other. The restrictive trade practices commission would be the body that would appraise

and make inquiries, of a general nature, and publish a report, and the director of investigation and research would take on the investigative and research functions, and the presentation of material before the commission.

I ought to have mentioned that in the 1930's one further change had taken place. We had been led to believe, again influenced by American thinking (in the Robinson-Patman Act) that there were types of competitive behaviour which led to discrimination on the part of big sellers toward small buyers, and we sought to protect the small man in the event of price discrimination. This led to the passage of section 412 of present Criminal Code, (then 498A).

Now, it seems to me, that during all these years, from 1923 to the present day, there were three main problems of judicial interpretation and administration.

The first was the old constitutional question as to whether or not this kind of legislation was *ultra vires*. This was settled in 1929, by saying it was properly within the competence of parliament, as a matter of criminal law. I am telling you this, because it has a great bearing upon what we may be able to do in the future in this field of government regulation of the economy—government regulation of entrepreneurial decision making because, by placing this particular decision on the rubric of *Criminal Law*. Had the privy council to put this decision in 1929, in the Proprietary Articles Trade Association case, under Trade and Commerce, clause of Section 91, there would have been a broadening to a greater extent, of the scope of potential federal regulation; I believe that if these matters come again before the Supreme Court of Canada, in this generation, we might see a re-examination of this problem by the Supreme Court of Canada. Conceivably, there might be a new view taken by that court, differing from that of the privy council, which narrowed the basis upon which the constitutionality of this particular federal policy was settled. We might see the Supreme Court finding, in the phrase "trade and commerce" or in other parts of section 91, a foundation upon which to approach the regulation of economic policy, in this area, by the parliament of Canada.

The second problem, since 1923, was the problem of the attitude which the courts would take toward agreements, and how they would define the words "undue" or to the detriment of the public the whole question of "how much was too much?" What was the nature of this cooperative collaboration or collusive behaviour by businessmen, and the line at which courts would say: thus far and no further!

I might say, short circuiting what is 30 years of intensive judicial inquiry, that I think it is fair to assert that the courts came to the conclusion early that the purpose of the legislation was not to impose upon them the refined economic task of the measurement of many calculations and factors of what was against the public interest, but to confine to them the main task of saying: has competition, as we understand that conception, been reduced, and reduced to such an extent that it becomes worrisome to us, as a court looking at it? If competition has been restricted to the extent that it seems to be against the public interest, one could say it is "unduly" restricted. One could say the history of Canadian anti-trust interpretation, dealing with multiple firm situations, since 1923, as the courts have approached it, has been a history of avoiding refinements of economic analysis by the courts, and they have rested upon, the simple fact that that collusive behaviour was sufficient, with one qualification—and that is that most of the cases before our courts, where the courts held that a crime had been committed, were cases involving a preponderance of the industry. You have very few cases dealing with only a small geographic or volume sector of the industry. Most of the cases deal with preponderance; and the major cases, such as the paperboard case, the fine papers case, and the older cases were cases where you were dealing with a

substantial part of the industry. So, when one talks about the existence in Canada of an attitude by the courts, which is very tough and simple, and oversimplified, one must remember that this oversimplification, on the whole, is confined to situations where the preponderance of the industry is involved in such cooperative or collusive behaviour.

Now to the third problem. Since 1923, there has been an extremely slow approach to the "mergers". As you know, there were two main anti Trust situations. One was the multiple firm situation, agreements between many firms to either limit prices, or limit whatever may have been the distribution or production practice, or other activities. The other was the merger problem but here we have had so little apparent experience with the question that it is safe to say that up to the present day there are not more than three reported cases of any importance dealing with the merger or monopoly situation. There are not more than six or seven reports by the old commission and the Restrictive Trade Practices Commission in this field also.

Mr. HOWARD: You mentioned that there were few reported cases.

Mr. COHEN: Yes, a few judgments; only three judgments, I think, and they are Rex vs. Staples; Rex vs. Eddy, and Regina vs. Canadian Breweries. There are only three experiences available to us of Canadian interest in this very important question of government regulation of enterprise.

Our problems are increasingly difficult in the merger area, because the type of facts available to the courts in those three cases were so different that it is difficult to evolve any general principle of law that now exists in this field.

At the same time among the recommendations which I hope to make later this justifies me in asking this preliminary question: whether the time is not right to explore with much greater care and sophistication the whole problem of merger policy, and the type of law which ought to apply in that area where we have so little experience, and where the judicial process has been unable as yet to make serious contribution.

Mr. FISHER: Might I explore now the whole problem of merger policy?

The CHAIRMAN: Gentlemen, in starting this meeting we said we would listen to the brief first, and then ask our questions after.

Mr. FISHER: But we have not got any brief.

The CHAIRMAN: Well, this is the same as a brief.

Dr. COHEN: I would be glad to entertain questions at this point.

Mr. FISHER: You say we should explore it now; but I got the idea that now it is more crucial than it has been in the past.

Dr. COHEN: Yes, by far, but I think the facts are different, and that our willingness to grapple with the situation is different.

Mr. FISHER: That is fine.

Dr. COHEN: All of these developments that I have been discussing have taken place in the last 40, 50 to 60 years and amid vast changes in our social and economic thinking, but we still use the language of the nineteenth century. This legislation, while in the social context, is quite different in much of our organization and social objectives. The preoccupations of economists and of economic policy today is quite different than it was 40 to 60 years ago when these anti-trust ideas began to mature.

It seems to me that the main preoccupation of Canadian economic policy —yesterday my economist friend made noises like a lawyer; but today I am going to make noises like an economist: I hope I shall be allowed the same liberty.

Mr. BROOME: I hope you do it better than they did.

Dr. COHEN: I shall surround myself with the buffer of admitted ignorance; but it seems to me that the main preoccupations today are the problems of growth, and the problems of balance of payments, the problems of our trade with other countries, the problems of foreign investment; and the problems of a proper regional and specialized development within our own economy. Now the questions is: what is the role of anti-trust law under these new conditions? Where do we place this approach to the regulation of businessmen in order to maintain as much of a free economy as we have today? How do we place these policies within these new circumstances with which we all now must be concerned? How do the amendments before us to day meet these new challenges on the one hand, or resolve some of the established technical difficulties with the existing legislation on the other?

I do not pretend to be competent to discuss the economic problems in detail, but I do want to discuss at some time some of the juridical implications of some of these new problems before us and the technical implications of some of the amendments themselves.

Dealing first with the anti-trust policy in general in 1960 as I see it, I do believe that the central purpose and idea behind anti-combine or anti-trust policy always has been and is today a two-level policy; one on the level of power and the other on the level of an efficient allocation of resources and in response to a reasonably free market, on the assumption that such a free market makes for an efficient allocation of resources. So we have the power aspect and the economic aspect. I think anti-trust legislation and anti-trust thinking is, as it always has been, geared to these two goals. I think, therefore, we must preserve as much of our anti-trust policies as possible which prevent a concentration of power except where it is publicly authorized power. There is a vast different between power publicly authorized and power privately achieved. I think we must bear in mind these differences and encourage that degree of regulation which prevents the concentration of power in private sectors and at the same time maintain a completely open mind and accept wherever necessary concentration of authority in the public sector wherever public need requires it.

I think we must bear in mind that a great proportion of own economy is no longer a "free" economy. There is control by the provinces over the marketing of milk, the marketing of fruit, the marketing of potatoes—in the marketing of many things. There is control by the federal government over the marketing of wheat. There is the existence of a whole series of government created monopolies, and the existence of regulated industries, such as the railways. All of this has withdrawn from the economy great areas of activity which no longer can be regarded as part of the free sector. We must, therefore, it seems to me, adjust our economic thinking: we may, therefore, have to adjust our anti-trust thinking to this changing character in the structure of the economy itself.

Mr. MACDONNELL: May I ask this question, Mr. Chairman? What do you regard government regulation as withdrawing that section of the economy from?

Dr. COHEN: From the free sector.

Mr. MACDONNELL: If there is any regulation at all, it is withdrawn from the free sector?

Dr. COHEN: Yes, as to price. When the price is fixed by conditions other than the interplay of buyers and sellers, that has been a decision to withdraw, it seems to me, *pro tanto* from he regulation of the market itself.

I do not not say it is bad. I am making no value judgment; I am only describing the phenomenon itself. It seems to me that we ought, nevertheless, to preserve, despite these changes in the structure of the economy, as much as

we can of what the economists now call "workable competition", wherever possible, in order to get the benefits of free initiative and choice. Part of the dilemma we face as students of this problem is how to maintain a balance beween the nature and need of public control and the clear evidences that initiative and its fredom may create benefits to the community in the efficient use of resources.

Mr. DRYSDALE: How do you define "workable competition"?

The CHAIRMAN: We have a rule. You can make a note of your questions, and ask them at the end. We started out on that basis, and I think we should stick to it.

Dr. COHEN: I should be glad to answer that question, Mr. Drysdale.

Mr. DRYSDALE: The difficulty with which we are faced, Mr. Chairman—as has been raised by Mr. Fisher—is that we have not a brief in front of us, and when a person uses a phrase such as "workable competition" in the economists' sense, I do not want to wait till the end to find out what he has been talking about in the mean time.

The CHAIRMAN: That is the rule that was laid down.

Mr. DRYSDALE: But that rule was laid down on the basis of the fact that we had a brief before us—and we have not a brief before us.

The CHAIRMAN: You have a pencil and paper there: you can make a note of your question and come back to it.

Mr. HOWARD: Mr. Chairman, even the reporter is having difficulty in getting all the comments down, so I do not think we should be expected to do so.

Dr. COHEN: And even I am having difficulty in understanding what I am saying, Mr. Chairman.

Mr. BROOME: Now that we have had this interruption, Mr. Chairman, could we not agree about this meeting which we are going to have this afternoon?

Dr. Cohen will not be through by 11:00 o'clock, and I certainly want to have a lot more time with Dr. Cohen. So could we agree now that we will meet at 3:00 o'clock to continue with him?

The CHAIRMAN: That was the intent; but you have already agreed that we meet at 8:00 o'clock tonight.

Mr. DRYSDALE: That was for agriculture. Those interested in the bill of rights are not here now, although the house is not in session.

Mr. MACDONNELL: Mr. Chairman, is there any other hour at which we could go on with Dr. Cohen, because I think a lot of people will want to question him?

Dr. COHEN: I am just coming down to my analysis of the bill point by point. It has taken me an hour and a half to get there.

Mr. BROOME: You see, we have 12 minutes.

The CHAIRMAN: I was going to point that out, sir, but I hesitated. It is most interesting to me especially, as a layman.

Dr. COHEN: It seems to me that it is not possible to be very brief in my comments about it. I just do not think it is possible to have a sensible discussion on these things without realizing their analytical and historical content.

Mr. BROOME: Yes; this is really good.

Mr. MORE: Mr. Chairman, is Dr. Cohen going to be available later?

Dr. COHEN: I am available at any time.

Mr. MORE: At 8:00 o'clock tonight?

Prof. COHEN: Yes.

Mr. DRYSDALE: Let us go this afternoon, without any of this 8:00 o'clock stuff.

Mr. CARON: There was the question of the federation of agriculture, but it is because of the bill of rights coming into the house, and everybody wants to hear what the Prime Minister has to say. As Professor Cohen said he is always at the disposal of the committee, we could have him tomorrow morning.

Mr. DRYSDALE: I would like to hear Mr. Cohen this afternoon at 2 o'clock, and if Mr. Caron and the other people have that much interest in the bill of rights, well, we have been in the habit of carrying on two things at the same time, and I would like to hear Mr. Cohen this afternoon. Therefore, I make a motion that we set a time—

The CHAIRMAN: We have a motion which we passed.

Mr. DRYSDALE: —to sit at 8 o'clock on the agriculture.

The CHAIRMAN: No, we changed because—

Mr. CARON: It is because of the bill of rights coming up in the house this afternoon.

The CHAIRMAN: We changed the regular meeting from 3 o'clock to 8 o'clock because they could not be sure.

Mr. DRYSDALE: It was because, as I understood it, Mr. Martin wanted to hear the bill of rights discussed and he wanted to be here on the agricultural aspect. He did not say that with respect to Mr. Cohen, and that is why I would like to move that the committee sit at 2 o'clock to hear Mr. Cohen.

Mr. CARON: I do not think we can accept that, because there was an agreement with representatives of the Canadian federation of agriculture. There is also the question of the superannuation bill. We want to be able to listen to the Prime Minister before we go to committee, and we want to be able to be there for the superannuation bill.

Mr. DRYSDALE: Where are Mr. McIlraith and Mr. Martin now? We have not been sitting in the house up till now and they are not in the committee.

The CHAIRMAN: Order, please. We have passed a motion, and I do not see how we can alter it.

Mr. DRYSDALE: It was on a certain basis.

The CHAIRMAN: The motion which we have passed—and it does not matter now about the reasons, or anything—is to meet at 8 o'clock tonight. If there is something further and we want to have another meeting with Professor Cohen, that is another thing.

Mr. MACDONNELL: What about 7 o'clock tonight for Mr. Cohen?

Mr. CARON: You will not have enough time, in an hour, and there will be a lot of questioning on that matter; because I really believe this is the best exposition of what we are to study, up to the present time. I believe tomorrow morning at 9.30 would be better.

The CHAIRMAN: We have already made the arrangements, Mr. Caron.

Mr. BELL (*Saint John-Albert*): 7 o'clock sounds good to me, to go on with Professor Cohen and the federation of agriculture.

Mr. CARON: At 7 o'clock the Liberals have a special dinner, and we want to be at that too. We are willing to learn though.

The CHAIRMAN: Who is the authority on parliamentary procedure here? We have a motion to meet at 8 o'clock, and we have another motion to meet at 7.00.

Some Hon. MEMBERS: No, no.

Mr. TARDIF: We do not have a motion, but the motion has been accepted unanimously to meet at 8 o'clock.

The CHAIRMAN: That is right.

Mr. MORTON: Mr. Chairman, I—

Mr. MORE: We have agreed—

Mr. MORTON: Mr. Chairman!

The CHAIRMAN: Order, order. Mr. Morton?

Mr. MORE: Mr. Chairman, I have been sitting here, listening to three or four people speaking at one time, and I have asked for the floor, and there has been no order. We have agreed unanimously to meet at 8 o'clock. That was for the purpose of carrying on the committee. Is it not possible for us to continue with Mr. Cohen at 8 o'clock? Is there anything against that?

Some Hon. MEMBERS: No, no.

The CHAIRMAN: Well, I would like to say this, right offhand, that it would be fair to arrange to have Mr. Hannam here and then have Professor Cohen continue. I know that much.

Mr. MORE: Mr. Chairman, have you arranged for Mr. Hannam to be here?

The CHAIRMAN: That was the motion.

Mr. MORE: That we were to hear these other people today? We have not finished with Mr. Cohen. Why do we not continue as we have done in other cases?

Mr. MORTON: I agree with Mr. More. We "lifted" the afternoon sitting more or less on the understanding that members want to be in the house during the debate on the bill of rights. I would suggest that tonight we hear Professor Cohen, and arrange to have the federation of agriculture at another time. Mr. Hannam is in the city all the time, and I am sure that most of us want to hear Professor Cohen, and we want to give him a fair chance of a proper hearing. Even if he comes and starts at 7 o'clock tonight, I cannot see how we could get through at 8.

The CHAIRMAN: We cannot change that motion.

The meeting is adjourned until 8 o'clock, and that will be on the understanding that I arrange with Professor Cohen to be here, and as to when with Mr. Hannam.

EVENING SESSION

THURSDAY July 7, 1960

The CHAIRMAN: Gentlemen, we have a quorum. We will continue until we get a signal to adjourn.

Mr. MARTIN (*Essex East*): Mr. Chairman, on a point of order.

I understand this morning that at 10.30, when two members had to leave this committee, Mr. Drysdale, commented on the fact that we had come in and we had left the committee. I simply want to observe that we had to leave at 10.30 because of prior commitments, and very important ones having to do with a meeting in connection with our obligation in the House of Commons.

I think it is regrettable that any member of this committee would comment on the fact that we have serious and competing obligations, and it is contrary to the rules of the House of Commons, which rules are transposed to the committees, for any member to comment upon the operations of a committee.

Mr. JONES: I do not think that there is anything in the rules to that effect.

Mr. MARTIN (*Essex East*): I can only say, speaking for myself, that I cannot accept any suggestion that I am failing to discharge my obligations as a member of this committee, or any other committee, or as a member of the House of Commons. I regret that these remarks were made.

Mr. DRYSDALE: Mr. Chairman, on a question of privilege, I wonder if I might put this matter in perspective.

The reason that I made the particular comment was because, originally when we had decided to sit, we were going to sit at 3 o'clock in the afternoon. Mr. Martin then, through a form of motion, prevailed upon the committee to sit at 8 o'clock that night, and it was my understanding that the objective in doing so was that he—

M. MARTIN (*Essex East*): You mean tonight?

M. DRYSDALE: That is right, tonight. My understanding of the objective of doing so was to enable Mr. Martin and other members to be present at a meeting of the agricultural committee which was going to sit here. I pointed out, when it was very close to 11 o'clock, that Mr. Cohen obviously was unable to finish his very interesting discussion, and that I thought it was advisable that we try to sit at 2 o'clock this afternoon. I regretted the fact that Mr. Martin and Mr. McIlraith were absent at that time, since they were the individuals that carried the main point of the suggestion. What I sought to do was to carry on the continuity of Mr. Cohen's statement, and to continue with the subject in the afternoon until it appeared that the Prime Minister would be speaking to the House of Commons on the question of the bill of rights. You, Mr. Chairman, very appropriately pointed out at that time that there had been a motion. My thought at the time was that if Mr. Martin had been present perhaps it would have been possible to revise our procedure, and subsequent developments have indicated that I was right in that thought. I did not intend to make any reflection on Mr. Martin's absence as a member of this committee.

Mr. JONES: You were trying to help him.

Mr. DRYSDALE: No. The only thing I regretted was the fact that he had made this particular motion at this time, and I thought that if he had been here we would have been in a position to discuss it, but there was absolutely no intended reflection directed at Mr. Martin's absence.

Mr. MARTIN (*Essex East*): I accept Mr. Drysdale's explanation, but the fact is that our obligations are so heavy at this time, and some of them are competing, and it is because of the endeavour to meet these obligations that we have been faced with this situation, as we are going to be faced with in a moment.

Mr. BROOME: Can we get along with this discussion?

Mr. MARTIN (*Essex East*): Just a minute.

Mr. BROOME: We have already heard your statement.

Mr. MARTIN (*Essex East*): We are going to adjourn in a few minutes to hear the Prime Minister, and I think that is the proper thing to do, not only because he is the Prime Minister, but because he is discussing a very important matter in the House of Commons. If we can adjourn to hear the Prime Minister we can adjourn to hear any member in the House of Commons who is speaking on a matter which has to do with the bill of rights, or any other important matter. This is a very special matter on which the Prime Minister is speaking tonight. There apparently will be no trouble in adjourning to hear the Prime Minister, but I suggest that when any hon.

member feels that he should go into the House of Commons to hear a particular subject discussed by a particular member he should be able to do that without, in any way, having it suggested that he is not fulfilling his obligations as a member of this or any other committee.

Mr. BELL (*Saint John-Albert*): I would move that Dr. Cohen now be heard.

Mr. MARTIN (*Essex East*): I know that Mr. Bell's contributions are confined to matters of that sort, but this point cannot be overlooked.

Mr. MORTON: I think we can accept Mr. Martin's viewpoint. We all know that people are trying to double-up on committees. I suggest that tempers will now be soothed, and that we can get on with our business.

Mr. MARTIN (*Essex East*): You are a conciliator, Mr. Morton.

Mr. JONES: Let us proceed.

Mr. MARTIN (*Essex East*): Mr. Jones is now chairman of the committee.

The CHAIRMAN: Order, order. We have had enough of this.

Mr. COHEN: I regret that this morning I went so slowly over the ground as to impose upon you a further session with me. I propose to go more slowly now in terms of voice and diction, and more quickly in terms of matter, and thus provide, perhaps, satisfaction all around, if satisfaction really should result from anything I have to say.

I ended my remarks this morning by suggesting the general philosophy of what combines are about, as against the historical background, and as against an analytical background. One could always see it as a two level operation: one, on the level of power, and the other, on the level of efficient use of resources.

The type of legislation which we seek at any given moment, it seems to me, must bear these two goals in mind. But, sir, if it must bear these two goals in mind, it does so in the face of two other major considerations: on the one hand we have a very large part of the Canadian economy removed from the operation of anything approximating a free market, by means of regulatory devices, both provincial and federal, and we do this in the public interest.

On the other hand we have a perspective about the economy as a whole in which anti-trust policy is merely one phase. We must see it as part of a number of devices within our broad social and economic objectives in general.

It seems to me that what has happened in the last few years is that our problems in the Canadian economy are now different from what they were a generation ago, when combines legislation was first discussed. As I said this morning, there are the problems of growth, the problems of full employment with a high national income; the problems of unemployment with a high national income and this new phenomenon we are facing of growing unemployment with a high national income, and new difficulties in our international trading position, where competition may require new forms of Canadian organization to meet it internationally.

We could not have foreseen a generation ago that we might want to gear ourselves in Canada to a different type of institutional arrangement for the purpose of more effective operations internationally.

We always assumed that our policies in the anti-trust field were related to the international scene as much as they were to the domestic, even though we had not fully explored the fact that many prohibited practices were tacitly removed, as Professor English pointed out the other day, from being attacked if they dealt with overseas activity.

But this is quite different from formalizing a position. We may now be faced with the problem of trying to formalize this arrangement so that, in fact, firms may be able to deal internationally in a way which might appear to be improper under the present law.

We also have our new economic relations with the United States, complicated not merely by enormous gaps between our import and export relations; but by attempts to apply their anti-trust and some other policies to Canada. Indeed the attempt to reconcile the two systems of anti-trust law remains as one of the more interesting—problems of U.S.-Canadian relations.

For these reasons it is not possible, it seems to me to regard anti-trust or anti-combines legislation apart from some general conception as to the economic and institutional needs of Canada as a whole.

In a sense, therefore, these amendments before us today are, perhaps both too early and too late. They are too early in the sense that they come before we have had a chance to re-examine completely the general place of anti-trust legislation in this new context.

They are a little too late because they may not be able to deal effectively with many questions of merger and such other concentration questions already before us.

Mr. MARTIN (*Essex East*): Do you want to particularize the sections?

Mr. COHEN: I will come to that in a moment.

Gentlemen, you have before you Bill C-58. I think, unless you are to decide that the issues are too complex for this session and deserve a royal commission inquiry, or some similar device, it may be necessary to deal with these as interim problems.

Let me state my views on these proposals. It seems to me there are in the Bill at least nine main points. I will not deal with all matters of the Bill but, in my opinion, there are at least these nine main questions.

First, there is the changed definition of monopoly in section 1.

Would you like me to go more slowly, as I list these?

Second, the proposed new powers to have a restraining order on the parties before a conviction, and to direct the dissolution of any combination or merger. That is the second point.

Third, the abolition of the old combines definition, and its replacement by section 411 of the Criminal Code.

Mr. MARTIN (*Essex East*): Did you say the abolition of the old combines definition?

Mr. COHEN: Yes, and its replacement by the Criminal Code definition.

Fourth, the listing of new defences under section 31 for certain types of collaborative behaviour among business men, specifying them in a way in which they have never before been specified in our legislation.

Fifth, the strengthening of the price discrimination provisions of section 412 by the use of certain language, and the making of section 412 of the Criminal Code, as now, part of a Combines Investigation Act— absorbing it into the act, and strengthening it.

Sixth, the introduction of a new idea in the availability of promotional allowances on equal terms to all competing purchases, and the legal and administrative significance of these provisions.

Seventh, the prohibition of misleading advertising.

Eighth, the prohibition of so-called loss leader practices.

Mr. MARTIN (*Essex East*): Just a minute.

Mr. COHEN: Prohibition of so-called loss leader practices.

Mr. DRYSDALE: Just like in school.

Mr. COHEN: I hope I am not quite as dull as I am in the classroom.

Ninth, the employment of the Exchequer Court of Canada at the option of the Attorney General as an alternative tribunal for prosecutions or other proceedings where all accused must consent before such proceedings can be undertaken there.

At this time I would be pleased if you would allow me to deal with each one of these nine matters and to refer to the appropriate sections of the Bill.

Mr. FISHER: You are going to come back, are you not, to the point that this legislation is both too early and too late.

Mr. COHEN: Yes, in my concluding remarks, upon which I probably shall be hanged, I shall revert to that.

Mr. MORE: Was point 6 the introduction of a—

Mr. COHEN: No; the availability of the promotion allowances on equal terms.

Mr. MARTIN (*Essex East*): That was not six.

Mr. COHEN: Yes, it was.

Mr. MARTIN (*Essex East*): I thought it was the strengthening of a price—

Mr. COHEN: No; that was No. 5. Should I go through it again?

Some Hon. MEMBERS: No, no.

Mr. COHEN: Now, Mr. Chairman, it may be that this committee, in its courtesy, may rue the day I was directed to come here but, nevertheless, I will carry on.

Dealing with the first one—and I am dealing with each one, and will draw a balance sheet of my views at the end—re the merger and monopoly definitions.

You all have copies of your bill with you. Let us look at it as lawyers speaking around a table.

Mr. MORE: Would you please speak in language that I can understand; I am not a lawyer.

Mr. COHEN: I will speak with the usual and admirable clarity of my profession.

Mr. MARTIN (*Essex East*): Mr. Morton and I agree.

Mr. BROOME: Can we ask questions on each section afterwards?

Mr. COHEN: Yes. I would say that perhaps it might be just as well if you were to let me summarize my views, and then come back to each point as you wish to.

First, dealing with the definitions of "merger" and "monopoly", the changes here, compared with the old act—which you will see on the opposite page of the bill—are not very important. But if one is thinking of the problem of merger and monopoly as the large, unexplored area in Canadian combines law, the area where we have the least experience, it is a very nice question, whether we should start tampering, even in this limited way, with language which already has some judicial understanding, or whether we should not await a much deeper, a much more profound analysis of the problems of mergers, which indeed was implied in bill C-59 last year—when certain specific defences to mergers were set out—as a possible approach to the problem.

You may remember that in bill C-59 last year—those of you who have copies of bill C-59—there the minister proposed that certain matters would be regarded as legitimate defences to merger situations. I am speaking of bill C-59 last year, on page 7 of the bill, and what was then clause 33 (2). Those defences have been removed from the new version, and the removal of them suggests to me what I think is public knowledge, namely, that there was a great deal of uncertainty in this country as to what is a sensible approach to this new development in Canadian industry which will reflect itself shortly in combines problems, and that it may be, therefore, premature to make any amendments unless one has thought the matter through much more thoroughly than one has at this time.

I think that if the proposers of this measure, Mr. Chairman, in comparing last year's proposals with this year's proposals, went so far as to modify the proposals to eliminate those defences to a merger, it is perfectly clear to my

mind that there was this degree of uncertainty—which remains uncertain—as to the direction in which merger law ought to go, and I wonder whether we should tamper altogether with the provisions.

Let me indicate, for example, how difficult even the present language is. Take the language of 2(*e*) on the first page of the new bill:

> "merger" means the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor—

et cetera. Let me tell you this: I was involved in a prosecution that, for the first time, had to interpret that section. Mr. Justice Robertson did it, in Rex v. Staples in 1940. At that time Mr. Justice Robertson, of the Supreme Court of British Columbia, held that if you bought 50 per cent of the shares of someone's business, you did not buy control. When you realize how awkward that kind of decision can be, and you refine such a view as that to what is a more sophisticated problem, you can see that leaving the word "control" here, against the background of that kind of jurisprudence, perhaps needs a good deal more thought and a good deal more consideration—because we know that 10 per cent, 15 per cent, 20 per cent may have controlled very large enterprises, that 50 per cent may not give you technical control, in terms of company law, but it might give you true control in terms of the corporate and business realities of the situation.

Mr. JONES: Do you intend to relate that to your point No. 9, employment of the Exchequer Court?

Prof. COHEN: Yes, I will be talking about that in a minute or two.

In any case, my next conclusions are—and I merely give these by way of illustration—yes, Mr. Broome?

Mr. BROOME: It says "any control" in the previous one, and it is "any control" here. There is no difference.

Mr. COHEN: Yes; but the word "control" was so defined by Mr. Justice Robertson as to let them lie in narrow doctrines of company law—51 per cent allows you to appoint your directors—rather than on the broad doctrines of corporate management and control as we know it in a business sense.

Mr. BROOME: But your point is that jurisprudence has set up definitions—and there is no difference.

Mr. COHEN: It is no different; that is quite right. That is the point I made a moment ago; why make even the small changes you have now when you already have established a certain line of difficulties which you are perpetuating anyway in this language. I would say leave it alone.

In the definition of monopoly, much has been done to explore what we mean by monopoly. Mr. MacDonald was to lend me his copy of the Clayton Act. I was going to suggest, for those who know the United States Clayton Act, that you will see, by comparison, the approach of the Americans to what amounts to corporate interlocking and corporate control which far exceeds in sophistication the meagre approach in this broad language here. So on the merger side I say that clearly we need a great deal more thinking and in my opinion we are likely to face increasing situations of merger. We, therefore, need a legal framework which makes more sens than this particular legal framework does.

If one looks at section 2 of the Sherman Act, which is a similar statute in some respects, even there they have had a great deal of trouble; but in the United States the approach to the idea of monopoly had a curious and not altogether unsuccessful record. The courts there are prepared to say something like the following: the *per se* phenomenon—and section 1 of the Sherman Act is really our combination provisions—said: you get together, and that is a crime. The *per se* doctrine in section 1 of the Sherman Act is much the same as ours.

Their conspiracy doctrine is much the same as our conspiracy doctrine. But when you speak about monopoly, the American courts developed a different view from 1910 and 1920 onward, and from that day to 1945, it always was assumed that if certain kinds of merger or monopoly situations were "reasonable" the courts would buy them. In 1945, one of the most distinguished American judges living, Judge Learned Hand, in the ALCOA case, faced up to the problem of how big you would have to get before, *per se,* there would be a monopoly situation independently of the so-called reason factor, which the courts previously had worked out. He came to the conclusion that when the Aluminum Company got 85 per cent of the business, that was bad and you had a monopoly and were in violation of the Act.

I am not saying that Canadian jurisdiction or Canadian law should go in that direction. I merely am suggesting that this is a very complex and difficult problem and it involves much understanding of what is happening to the modern corporation and it involves a great understanding of the changes in the day to day operation of the affairs of corporations, to problems of vertical and horizontal integration. Therefore I wonder whether there is any reason at all to experiment even in this modest way before we begin to explore this area. May I remind you that one part of the Gordon commission in which no serious work was done was in the field of combines law, except for two studies, one by George Britnell and his colleague and one by the Bank of Commerce group. The studies before the Gordon commission hardly only touched the surface of the complex questions we have before us. The Gordon commission advisedly left the area largely alone on the assumption it is a subject big enough in itself to be worthy of separate exploration. If this is true of the Gordon commission with all its resources, I wonder why we would tamper in a modest way with the existing merger provisions which in my opinion make no novel or useful contribution.

Mr. MARTIN (*Essex East*): You would not compare this committee with the Gordon commission in terms of its effectiveness.

Mr. COHEN: Only in terms of its quality.

In my second point, the problems of the new power under section 31—on page 5 of your copy of the bill—to restrain or dissolve before conviction, in my opinion, sir, this approach is all to the good. I will strongly support the use of the enjoining power here to restrain parties who are either going to engage in practices which are or are thought to be against the act, or to require them to dissolve situations that already have taken place.

This is very much in line with the history of the American experience and American legislation. Under the Sherman Act the equity jurisdiction—I think that is under section 3—of the courts allows the Department of Justice to do something we have never been able to do, and that is to bring the parties together and come into the courts and say, "Here is what you have to do: you disolve the "X" Oil Co. and break it up into eight or nine separate entities.

You have a device here which is not dependent on a criminal conviction, as such, but is part of the equity power of the court to enjoin and compel a general program of dissolution and reorganization. I think this is all to the good, and I support it. However, I question whether or not the government will soon face problems of the constitutionality of this measure.

I do not want to trouble this body with my views on constitutional law in this regard. But I would just like to say this, that it was one thing under the 1952 legislation to provide for this kind of measure when there is a conviction. It is quite another thing, however, to provide for it before a conviction, because as the rubber case pointed out, the Supreme Court of Canada did not have any difficulty saying that though the idea of an injunction may be civil, in its original aspect, as one of the original prerogative writs—and I am again in a

technical area, and I will not go too far in this—though it may be civil, nevertheless in aid of a conviction it is an aid of the criminal law and is, therefore, within "criminal law". But where you proceed before there is a conviction, that is something else again, and I merely give it as my interim constitutional advice that it is likely to raise some difficulties.

Mr. HOWARD: Does "interim" mean there will be more constitutional problems?

Dr. COHEN: Well, it is only "interim" until I find the courts have over-ruled me.

Mr. JONES: Would you elaborate on what you conceive to be the differences between the injunction and the conviction, as to the substantive matters that have to be proved?

Mr. COHEN: In my opinion, it is one thing for the Supreme Court of Canada to find you can have injunctive measures which are in aid of a criminal process where there has been a conviction. It is quite a different thing to ask them for injunctive measures which may be an aid of prospective processes which have not yet taken place.

Mr. BROOME: It is good, but not constitutional?

Mr. COHEN: Yes, possibly not constitutional. I support the idea; I think the principle is a constructive one.

Mr. MARTIN (*Essex East*): What about the question of due process? An action of restriction before a conviction is certainly not due process, is it?

Dr. COHEN: The court has the right to reject it.

Mr. MARTIN (*Essex East*): This is on hand before the court is seized?

Mr. COHEN: No. The procedure, Mr. Martin, surely assumes you come to a tribunal and you say to the tribunal, "Please enjoin companies 'X', 'Y' and 'Z';" —or, "Please have company 'X' dissolved into the five components of which it was composed before the merger." The court can say, "I do not find an adequate basis for your claim." This is not an administrative process but a judicial one.

Mr. MARTIN (*Essex East*): You do not think this would be an interference with the Bill of Rights which is now before parliament?

Mr. COHEN: By even the most remote, academic stretch of my imagination I can hardly link the two together. I would say, Mr. Martin—

Mr. MORE: The question did not add to your stature, Paul.

Mr. MARTIN (*Essex East*): That is what we have been arguing in the House of Commons for the last four days.

Mr. COHEN: I would say the assumption here is that the court could say "no" and the court could say the situation does not justify this.

Mr. JONES: The ingredients would be the same in this case?

Mr. COHEN: That is a very nice question I have been considering since doing my homework this morning—whether or not the quantum of evidence or the nature of the data presented to the court, where you are seeking only this process would be the same as where you are seeking a conviction. I have not made up my mind on that. My preliminary view is, it would be probably less on the general ground that criminal law has a theory and ambit of onus of proof which perhaps may be less relevant, if not entirely irrelevant to this kind of situation. But, I would have to think that through.

Mr. AIKEN: If this is found to be in the nature of criminal processes then there might be no difference in that the quantum of proof would be the same as in a criminal case.

Mr. COHEN: If the courts were to say that this is constitutional, and were to hold it constitutional because it is in aid of the Combines Investigation Act, this is a constitution document under criminal law—under 91 (7), and if the courts were to say that, it very well might be that they regard the material, for the purpose of proving the crown's case, to be of the same nature that they would for a conviction, but I am not sure again. It would have to work out by experience. Indeed, I will come to this again in the exchequer court matter. There may be a double standard emerge now on the evolution of our methods here. Perhaps we can discuss your question when we come to the exchequer court.

Mr. DRYSDALE: Would this action permit ex ex parte injunctions, in your opinion?

Mr. COHEN: You will notice how it appears in here;

> Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the attorney general of Canada or the attorney general of the province for the purpose of this section that a person has done, is about to be or is likely to do any act or thing constituting or directed towards the commission of an offence—

Where am I here?

Mr. MARTIN (*Essex East*): You are at sub section 2 of section 31 at page 5.

Mr. JONES: There is no provision for ex parte injunctions.

Mr. HOWARD: There is no such thing.

Mr. JONES: Ther are such cases, but there is no provision.

Mr. COHEN: It seems to me that section 31 (2) requires the attorney general of Canada to come and ask for this but it would be opposed by the parties; obviously opposed by the parties. I would be very surprised; I would be very surprised if none of the parties came into court. They would be in the same position as in other proceedings where they refused to come into court. They would suffer by default and their own lassitude in the matter. One would always assume this is a two party affair.

Mr. FISHER: Let me get this in language that I can follow.

Mr. COHEN: I thought I was as clear at the high school level.

Mr. FISHER: I am on the high school level.

Mr. COHEN: I know you are.

Mr. FISHER: This is in fact a permanent type of injunction, and as such it is unfair.

Mr. COHEN: Oh, no, no.

Mr. FISHER: It does not follow through; it does not allow the parties to go through to the logical—

Mr. COHEN: Oh, no, no, not at all. I support Mr. Fisher, the notion that there ought to be machinery in the Canada anti-trust policy which allows the government to take these proceedings without conviction. Indeed, one thing it does do; it avoids the opprobrium of conviction, and it allows certain acts to be done which are in aid, it seems to me, of the objectives of the anti-trust policy.

Mr. FISHER: Would not your objective be that it it is unconstitutional, it would be met by some kind of restrictive practices court such as they have in England, which is given the authority—

Mr. COHEN: No, you are raising a different question as to whether or not the ordinary criminal law tribunal—the superior courts—which try these matters are the best places to go for this kind of problem.

Would you let me deal with that when I come to the exchequer court, because that is a novel approach to your particular thought.

The CHAIRMAN: I have been advised that the Prime Minister is speaking on the bill of rights. You want to hear him, Mr. Cohen, and the rest of us would like to hear him as well; so we will adjourn.

Mr. AIKEN: Will we adjourn until after the vote?

Mr. JONES: I think we should have an expression of opinion from the Liberals.

Mr. MARTIN (*Essex East*): Thank you for that concession. Now that we are going to adjourn, I think we are not only adjourning to hear the Prime Minister, but we are adjourning to hear the discussion in regard to the bill of rights. It would be pretty difficult to justify our going in to hear any one member of the House of Commons.

The CHAIRMAN: When will we adjourn until?

Mr. BROOME: Let us adjourn until after the vote and then come back.

The CHAIRMAN: I frankly do not think—

Mr. MARTIN (*Essex East*): Let us adjourn until tomorrow morning at 9.30.

The CHAIRMAN: Is it agreeable that we adjourn until 9.30 tomorrow morning?

Mr. MCILRAITH: Mr. Chairman—

Mr. MORE: Mr. Chairman, it is only half past eight now. Perhaps we might be able to get in another hour tonight.

The CHAIRMAN: I beg your pardon?

Mr. MORE: It is only half past eight now, and perhaps we can get in another hour tonight.

Mr. MARTIN (*Essex East*): The Prime Minister is going to speak until midnight.

Mr. BROOME: I move, Mr. Chairman, that we reconvene after the vote.

Mr. MARTIN (*Essex East*): Just a minute, before you do that, Mr. McIlraith has a point to make here.

Mr. MCILRAITH: There is a meeting of the public service superannuation committee tomorrow morning at 9.30. Why can we not meet after the vote?

Mr. MARTIN (*Essex East*): What is on after the Prime Minister?

Mr. MCILRAITH: The estimates.

Mr. MARTIN (*Essex East*): Mr. Fisher and others will want to be there.

Mr. BROOME: Well, I have made a motion.

Mr. AIKEN: And I second that motion.

Mr. BROOME: All right. I am fed up with it.

Mr. MORE: Mr. Cohen will be just as interesting at 10:00 o'clock.

Mr. COHEN: I have run out of steam, but if you want to come back to listen to my tale of woe, I am willing.

The CHAIRMAN: We are adjourned until after the vote.

EVIDENCE

FRIDAY, July 8, 1960

The CHAIRMAN: Well, gentlemen, I see we have a quorum. This is really an adjourned meeting from last night. I would like to have a little direction for the balance of today and for next week.

My suggestion is that Professor Cohen deal with the subject this morning, and that we meet again at 2:00 o'clock this afternoon with the Canadian federation of agriculture.

Mr. MARTIN (*Essex East*): Mr. Chairman, I feel that will be absolutely impossible. I happen to be the ouly member from our party here this morning, and that is because, the others, as they indicated yesterday, are attending the superannuation bill committee; and Mr. McIlraith and Mr. Caron understandably have to be at that committee.

I have other engagements in the house today so it is not possible for me to be here. Whether or not this committee requires me to be here, it requires somebody from the opposition to be here. That is the situation.

The CHAIRMAN: I quite appreciate your position, but we have a job to do here. We postponed it yesterday, and it threw a monkey wrench right into everything we had planned.

But I have offered you my suggestion. I have spoken to the Canadian federation of agriculture representatives and they are agreeable to it. I apologize to them very much for having kept them on the hook, so to speak, for a couple of days.

I would like to hear some other viewpoints on my suggestion.

Mr. HOWARD: I would be glad to give them to you if I knew what your suggestion was. But please do not repeat it just because I came in late.

The CHAIRMAN: My suggestion was that we hear Professor Cohen this morning and meet again at 2:00 o'clock this afternoon to hear the Canadian federation of agriculture representative.

Mr. MACDONNELL: How about later than 2:00 o'clock this afternoon? Would it be possible thereby to meet the other difficulty?

Mr. MARTIN (*Essex East*): First of all, we have agreed not to meet on Friday afternoons at any time. That was part of our arrangement. You could meet this afternoon, but you would meet without any representative of our party. Is that the way you want to conduct our business?

Mr. HALES: Surely the Liberal party or the opposition could have a member here at 2:00 o'clock.

Mr. MARTIN (*Essex East*): The superannuation committee is meeting. I am sorry, but this is a parliamentary body, Mr. Hales. If we were not all doing our duty, it would be a different matter; but all of us have obligations. These things are being brought in at the last minute, and it is not possible for us to be here.

Mr. HALES: You have 15 members to draw from.

Mr. DRYSDALE: I wonder if it would be possible, in view of Mr. Martin's observations, to hear the agricultural group, if we could have them, on Monday morning?

The CHAIRMAN: There was a recommendation earlier by the steering committee that we would hear these two witnesses on Thursday, and that they were to be the last witnesses, and that we were to go on with our plan and complete the bill.

Personally, I think we have given Mr. Martin every consideration in this case, and I do not think the work of the committee should be held up, and that the people who have come prepared to give their briefs should be kept waiting the way they have been.

Mr. MARTIN (*Essex East*): On the point of order, may I say, first of all, that the chairman has no right to express that kind of thought at all.

I am not asking for any consideration from anyone. That is the phrase you used: "a consideration to Mr. Martin". Forget Mr. Martin, but think of the right of parliament and its committees to do a careful job.

If you think that the course you are now suggesting is one that is calculated to promote co-operation, and to create careful scrutiny, you are completely wrong. I am rather amazed at a chairman of a parliamentary committee—

The CHAIRMAN: Well, Mr. Martin—

Mr. MARTIN (*Essex East*): Let me finish. I am amazed at a chairman of a parliamentary committee in the dying days of the session when we are all trying to cooperate, particularly after we have passed a bill of rights—

An hon. MEMBER: There is only one thing that died around here.

An hon. MEMBER: And he just went out the door.

Mr. MORTON: Mr. Chairman, could I make one observation.

The only meeting that we really meant to finish was the meeting we were to have had this morning to hear the Minister. Following that, I presume, we would have gone back to our regular meetings on Tuesday, Wednesday and Thursday. Now, if we hear the federation of agriculture on Monday we are still going to meet on Tuesday and we will not be that much further behind, but perhaps further ahead as a result of extending the courtesy at this time, providing the federation of agriculture can be here on Monday. I hate to see that they are kept waiting all this time, but I understand Mr. Hannam lives in Ottawa, and if he does not have other engagements, perhaps it will not inconvenience him to that extent, in order to hear him at that time. We have all got a rather crowded schedule, and I think tempers are beginning to get a little frayed at this last stretch.

Mr. MARTIN (*Essex East*): The chairman's temper is.

The CHAIRMAN: Yes, you are quite right, Mr. Martin.

Mr. MORTON: As I see it, with the overall picture, we are not going to be that much further behind if we do agree to meet on Monday. I would go along with that idea which Mr. Drysdale suggested.

The CHAIRMAN: Is everyone in favour?

Mr. DRYSDALE: The other point I made—

The CHAIRMAN: Is this a motion?

Mr. DRYSDALE: I will make it a motion.

Mr. BROOME: Let us take up all our time squabbling over this.

The CHAIRMAN: It is agreed?

Mr. BROOME: That we meeet on Monday morning?

The CHAIRMAN: That we meet on Monday morning at 9.30.

Some hon. MEMBERS: Agreed.

The CHAIRMAN: Mr. Martin, may I register your approval?

Mr MARTIN (*Essex East*): Mr. Chairman, would you kindly observe the rule of neutrality.

The CHAIRMAN: I am asking you a question.

Mr. MARTIN (*Essex East*): I suspect that is a very difficult thing for you to do.

The CHAIRMAN: Mr. Hannam would that be agreeable to you and the federation of agriculture?

Mr. H. H. HANNAM (*President and Managing Director, Canadian Federation of Agriculture*): It is not inconvenient for us, Mr. Chairman. We will be glad to be here.

Mr. MARTIN (*Essex East*): Thank you, Mr. Hannam.

The CHAIRMAN: Now, I would like to read a letter that I received this morning, particularly after yesterday's criticism in regard to not presenting the correspondence. I think it would probably be best for me to read this now.

This is a letter from the McFarlane Gendron Manufacturing Co. Limited of Toronto. It is addressed to the chairman:

> We are manufacturers of baby carriages, juvenile and nursery furniture, and household woodenware for the past 85 years.
>
> From time to time, we have considerable trouble with certain retailers who sell our merchandise at little or no markup; in other words "Loss leaders".
>
> Just recently, one of our carriages which cost $23.20 was advertised as regular $39.95 value, and was sold for $24.99. The facts in the advertisement were incorrect as this carriage, to our knowledge, never sold regularly, or otherwise, at $39.95. In addition, certain features mentioned in the advertisement were not found on the carriage, and the illustration in the advertisement was quite different from the article supplied.
>
> As the regulations now stand, we are almost helpless to control such a dealer. We therefore, are in favour of the passing of bill C-58. We wish to recommend to you and your committee that this bill be passed at the earliest opportunity.
>
> Yours very truly,
> McFarlane Gendron Manufacturing Co. Ltd.

Mr. HOWARD: Mr. Chairman, are you going to read all the other letters you received.

The CHAIRMAN: No. They have all been included in the evidence.

Mr. MARTIN (*Essex East*): Why should you read out one letter that is in favour of the bill and not read the letters that are opposed to it?

The CHAIRMAN: I have read this letter because of the criticism yesterday.

Mr. MARTIN (*Essex East*): Well, do not be childish.

The CHAIRMAN: I am not childish.

Mr. MARTIN (*Essex East*): You are being childish. You should be in one of those baby carts,—my goodness.

Mr. MORTON: Perhaps the explanation is that we have already ordered that the others be printed, and we now have this one read today.

The CHAIRMAN: That is correct.

Mr. DRYSDALE: I would be delighted to hear Mr. Cohen again.

The CHAIRMAN: All right.

Prof. MAXWELL COHEN (*McGill University*): Mr. Chairman, I shall be as quick as I can this morning, knowing how pressed you are.

May I just say that yesterday we discussed two of the nine points that I raised.

The first point was on the weakness, in my opinion, of the existing definition of mergers and monopolies and the need to pay a great deal more attention to that question, and with a far deeper study than we have had a chance to over the years in Canada.

With your permission,—and I do not want to go back over the ground again,—but at the end of my remarks I will return to these, because overnight I thought of one or two points on monopolies that I would like to bring to your attention.

I also brought to your attention point number 2; the attempt under this bill to give the Attorney General powers to seek a dissolution of a merger, or to seek a restraining order before conviction was, in my opinion, all to the good, but there might be very serious constitutional questions which one could not foresee, although I thought the balance of constitutional probability here to view it as in aid of a possible conviction. It was one thing of course for the rubber case to say that an injunction—

Mr. MARTIN (*Essex East*): You did not really amplify that last night. I would have thought there was no doubt that it was *ultra vires*. Would you give us your argument on that?

Mr. COHEN: I would be glad to, Mr. Martin. If one reads the supreme court judgment in the rubber case in regard to the question of the restraining order in aid of conviction, one finds that the court's attitude is this; although the criminal law of Canada has been one of which the application of the doctrine of criminal law under section 9 is, on the whole, a conservative application,—let us say the court has been reluctant over the years, to use concepts of criminal law to intrude into areas which might not really be criminal.

The problem of the court in the rubber case was this: Here, you have a new idea—the idea of saying to firms: you must, henceforth, not do the following because an order of the court could be given to prevent you from doing A, B, C and D, and we can order you to report back on a routine regular basis for a period of years. Now, this is very much like, in its method and content, an injunction, which you and I know in private law. That injunction, in civil law, is very much civil law in its nature, and not criminal law. There is a civil, and not a criminal quality to it.

Consequently, the supreme court had to make up its mind as to whether there was something different about this kind of injunctive process, when it stands alone, or in aid of a conviction, and they crossed that bridge in that case because they had a criminal conviction: here in this bill they will not have a criminal conviction.

Mr. MARTIN (*Essex East*): That is it. Does that not make it entirely a matter that is outside the realm of criminal law and, therefore, *ultra vires*.

Mr. COHEN: I would hesitate to be dogmatic about that. I do not think one could. I think the Supreme Court of Canada is undergoing, at the present time, some very interesting changes in its philosophy.

I think the supreme court is in what I would like to call functionally minded.

Mr. MARTIN (*Essex East*): Well, this matter may not get to the supreme court; a matter of this sort could stop at the appeal court in Ontario.

Mr. COHEN: Yes but, it is very likely, if it is of any dimension, that it will get to the supreme court and, even if it does not—

Mr. BROOME: Mr. Chairman, could we get back to the bill?

Mr. MARTIN (*Essex East*): Mr. Chairman, this is a very vital point.

The CHAIRMAN: I would like the consideration of the committee on this.

We did have an agreement that we were going to listen to Mr. Cohen right through, and then ask questions afterwards. Now, are those the rules of the game?

Mr. MORTON: I think we should try to adhere to them.

Mr. MACDONNELL: Mr. Chairman, may I ask a question here—and I think it is a practical one. It will not take half a minute.

The CHAIRMAN: It is always one question, and it is the exception that breaks the rule.

Mr. MACDONNELL: Let me ask the witness whether we might find ourselves, after a very interesting discussion on constitutional law, which most of us will not fully grasp, in the position that we will not have his opinion on definite clauses of the bill.

Having regard to the time available, I suggest he might consider that himself because, otherwise, we may have a pleasant recollection of an interesting hour, but not very definite views on his part.

The CHAIRMAN: Is it the wish of the committee that we take it clause by clause at this time?

Mr. COHEN: I have my nine points. Could I have the privilege of going through, and illustrating them. Then, if there are any differences concerning my views, and someone wishes to explore them, I could take those inquiries up at the end of my remarks.

Mr. MARTIN (*Essex East*): Well, I am going to try to put a question, because I think it is absurd not to do so at this time. The point that Mr. Cohen is at now concerns a very fundamental part of this bill.

Mr. BROOME: Well, ask your question at the end of the remarks.

Mr. MARTIN (*Essex East*): I think he has to deal with them as they come up.

Mr. MORTON: Let us move on.

MARTIN (*Essex East*): Yes, and act as adults—including myself.

Mr. COHEN: You may remember, that my third point was that the bill proposes to remove the old Combines Investigation Act definition of a combine, and replace it with section 411, and bring section 411 into this act as part V. I am all for this. It is widely known, among studients studying this problem, that of the 30 or 40 major prosecutions since 1923, the indictments have rarely used the Combines Investigation Act definition. They have been laid almost entirely, with one, two or three conspicuous exceptions, under the Criminal Code, and the reason, in my opinion, is that the language of what was originally Criminal Code sections 520, and became 498, and then 411, was more manageable, for certain technical reasons. I have tried, on many occasions, to get my students to compare the two, and to understand how they differ. On the whole, the judges have said that they find no material distinction between the two, except the distinction of simplicity in favour of the Code. I think the department rightly leaned, in the formulation of its procedures, toward the drawing of indictments based on the Criminal Code as against the act.

However, one important change has taken place, and it is this. I am concerned now—and if you look at section 32, the offence on page 6, of your draft bill—particularly with clause D of 32(1)—to restrain or injure trade or commerce unduly in relation to any article, I would say that for 60 years that paragraph, which was clause (*b*) before, never had the word "unduly"; the other three clauses did. That is the celebrated adverb that has been defined by the courts in relationship to the word "public detriment", and they have been equated with each other.

I ask myself this question: why have the draftsmen put the word "unduly" into these clauses, where it has not been for 60 years. I can only conclude that they felt they were bringing a level of equality in the degree of undueness that would apply to all the four clauses in this section.

Let me point this difficulty out to you. In my opinion, it was left out 60 years ago for a very good reason. It was left out because, if you look at the two verbs there "to restrain or injure", they were regarded, by themselves

as sufficiently flexible verbs for the purpose of the measurement as to "how much is too much". Really, at the heart of judicial interpretation, in this whole field, is a simple question: how much is too much—how much restraint is too much restraint—where do we draw the line? Now, the verb "restrain" or "injure", by itself, implies this problem of measurement without the additional adverb of "unduly", and I would respectfully suggest that the committee and the draftsmen reconsider the restoration of the particular sentence to its original form. It has had 60 years of experience.

To my knowledge clause (b) here posed no difficulties that would have been faced if there had been some unfortunate interpretation of it. If it did not pose these difficulties why now add an adverb which seems to weaken the strength of power of the verb to injure or restrain? I put this forward again without the sense of dogmatism but with a feeling that the history of this clause would justify retaining the original clause, but not adding the adverb "unduly" thereto.

My next point, you will remember, was the one defence provided for in section 32 (2). This proposes the most striking, or one of the two most striking features of this bill. I could spend a great deal of time on it.

Let me address your mind to what has happened here. You will notice that against the background of my remarks during the past two days I said that the courts in this country have said that so far as multi-firm behaviour is concerned, where several firms are engaged in agreements, the courts will not ask the question whether these agreements have been good for prices, or have been bad for prices. They will not go beyond the central question; is there an agreement which in effect restricts trade and involves a predominant section of the industry. This has led to what has been called the *per se* doctrine. The courts have not found it necessary to go into all these questions because they say the primary objective of this legislation is to limited restraints upon competition. So, once we see a restraint of any sizable dimension, the refined economic consequences of this restraint are not for this court to decide. They decide the main policy question. They seek to apply the main policy objective, namely to prevent these substantial restraints upon competition particularly where they find a preponderance of industry involved.

Most prosecutions since 1923, where there has been success—and of course, the degree of success has been extraordinary—since the nomber of acquittals has been marginal over the years—most prosecutions have involved these multi-firm situations where the preponderance of industry is concerned.

Those who have objected to the *per se* doctrine have said: there are many types of industry activities which ought to be regarded as legal; there are many types of innovations which ought not to be regarded in this criminal operation; we ought to be able and should be able to exchange statistics, to exchange notions about research, to exchange information on advertising, to exchange ideas about trade terms and credit information without being exposed to the strictures of the law.

Year after year responsible leaders of industry have come forward, C.M.A., and others, and have put forward what certainly to them, and to many other people, seem responsible points of view. This legislation now, it seems to me, accepts the proposition that it is worth while to cast in terms of law these, what may be called, innocent areas, of business cooperation and not merely to leave it to the courts to discover the innocence, but to give the courts specific guidance as to innocence. The best case that can be made for this, therefore—I will come to the other side of the point—but the best point that can be made for this very important policy change, is that it is already sufficiently imbedded in legal ideas about these matters to hold them licit, to hold them legal. Therefore, all we are doing is declaring what in fact is something which the courts would regard as legal.

Mr. MARTIN (*Essex East*): That is right.

Mr. COHEN: One must realize that there is a vast body of experience with respect to what happens when businessmen get together. It is true that the rest of the section—that is the warning clause, because one must go on to see subsection 3—says that Subsection 2 does not apply if the conspiracy agreement or arrangement has lessened or is likely to lessen competition unduly in respect of (a) prices, (b) quality or quantity of production, (c) markets or customers, or (d) channels or methods of distribution. So the section already is aware of the possibility that although businessmen may get together for purposes only of advertising, or only for information, or only on research, it may lead to fixing prices; it may lead to restrictions on production. At that point then the defences of subsection (2) will not operate.

Now, what we have to ask ourselves is this: what is the extent to which experience teaches us that this kind of encouragement will or will not lead to abuse. The real problem is not the juridical aspect so much, because one can argue with some, I think, clarity and force, Mr. Chairman, that clause 2 (a), (b), (c), (d), (e), (f), and (g) includes matters that most of us already regard as licit and as legal. What is important in subsection 2 however, is this: does it provide psychological encouragement to go further? This is the question.

It seems to me that one must look at this in terms of what the people in this field have done for many years, in doing research, and how, in fact, do businessmen behave. Now, of course, there is a large literature on this. I am not going to bore you with it, but those of you who know, there is a very useful study which was made by the Gordon commission by George Britnell and his colleagues at Saskatchewan. I recommend it to you. It is only seven pages and it bears reading because it is a clear statement on some of the problems of competition and monopolies. Dr. Britnell quotes some of the experiences in this field, and particularly he quotes the British experience where under much more lenient legislation, the British monopolies commission in making its studies had no difficulty in coming to the conclusion that when businessmen get together at one level to discuss what appear to be innocent matters, such as the exchange of information, research et cetera, they tended very often to move into other fields. The temptation very often was irresistible. So, I say, Mr. Chairman, again, without, by any means being dogmatic, that I think this language is a temptation. I think its importance is not so much legal: it is psychological. I think it is a danger. The point of view of all of us is that we share the same interest, the interest of preserving as much a free and workable competitive economy as we can, in the face of the pressure of a welfare state. That is the main objective we all have in common. Does this, in terms of our common goal,—you and I have here—does this lend itself to it? Will this give the businessman a kind of feeling of legality that in my opinion he already has with these activities, or will it perhaps induce some of them to go a great deal further than they ought to go? My view is that this particular formulation is a flag of temptation, not a rule of legal importance. This temptation may lead to illegalities.

So much for my views on that section.

I think this is by far perhaps the most important, with one exception, the most important single policy change in this bill. I would, therefore, sir, certainly oppose this particular change. I see no important contribution it could make at this time without much deeper thinking.

The fifth point I made was the incorporation of section 412, dealing with price discrimination.

In dealing with price discrimination, now section 33A of your bill, if you would look at it, I would point out to you that the language of this particular section as taken over from section 412, into part V. Now, one very important advantage the new bill makes clear, is the addition of the concept of a "tendency"

—If you look at the language in 33A(b)—having or designed to have the effect or "tendency" of substantially lessening competition or eliminating a competitor —I think this is to the good. I think this gives more scope to the director, to the commission, and to others, to observe how price discrimination by big sellers in favour of big buyers is operating against small buyers, his provision will operate so as to allow the director and commission to, perhaps, take steps or make appraisals on a little more effective basis than they have now.

May I point out—and most of you are familiar with this field; it is simple—this legislation, which was 498A of the Criminal Code, and now 412, was passed in the middle nineteen thirties parallel to the time that the Robinson-Patman Act was passed, with the same objectives, by the congress of the United States.

The atmosphere in which this legislation was passed is important to remember, because this legislation was passed as part of the concern of the small businessman in a contracting economy, faced with the rise of chain stores and the problem of discrimination in favour of the big buyer. So, one must, it seems to me, cast one's mind back to the period in which this particular legislation took place, in order to get its flavour.

I would suggest a significant reason why there have been, in my opinion, no important prosecutions under 412, and practically no important investigations, except one or two—and you will notice, in the conclusions of the grocery report of 1958, where the Commission discussed it with candor, and said there has been very little activity under 412. I would suggest the reason is that since the passage of 412 it was only a couple of years afterwards that war broke out, and then came the great era which changed our economic outlook in the western world—the era of full employment. This kind of discrimination, while it may be real, is far more real to the small businessman under conditions of a contracting economy than in an expanding economy, where he has all sorts of scope for development, and he does not feel the effects of discrimination as greatly as he would in the middle thirties, when we were dealing with a much different situation.

So, I am all in favour of the incorporation of section 412 into the statute, and the improvement of this language; but I am not particularly optimistic about the extent to which it becomes any more effective than it has been in the past. However, it is a red flag in front of distributors and manufacturers who may, on occasions, in fact, go far beyond, to give a preference by way of a discriminatory price policy to certain kinds of buyers, as against others. It is a good thing to have that on the statute books. That red flag serves as a deterrent in itself, even though the story of this section shows little activity in terms of the courts.

My sixth point was concerned with this new section dealing with promotional allowances. You will notice the notes to your bill at page 7 indicate that this particular proposal, now section 33B, results from the report of the Stewart Royal Commission on Price Spreads of food products.

I have no strong feelings on this matter. It seems to me, as a practical question it may be very difficult to work out some of the technical aspects in applying clauses 3(a), (b) and (c). I will give you an example; supposing the Admiral Radio Corporation is going to give a promotional allowance to Eatons in the amount of $100,000 a year; it must give something proportionate to Mr. "X" at the corner store, say in the amount of $500 a year, in relationship to the size of his sales as compared to Eatons, to "equalize" the promotional facilities on each side. I think this is a very difficult thing to administer. Obviously, this is something of an injustice which the royal commission felt because, yet with the actual situation, it makes the result ridiculous. For example, in the case of Eatons receiving $100,000 a year promotional allowances from the Admiral Radio people and, Mr. Smith, in the corner store, in terms

of his sales, is entitled to $500, that $500 does not give him much promotional opportunity and it seems somewhat absurd. So, the actual relative fairness in that bill may leave you, in the end, with a very great absolute difference between the respective capacities to promote.

I have, as I say, no strong views. I think it has an intrinsic fairness about it. I think it is going to be difficult to administer, and I think some of the results will be disappointing.

My seventh point is the one of misleading advertising—the new section; section 33C.—I am entirely in agreement with this; I think this is a valuable tool. I am not personally acquainted with any studies that have shown to what extent the situation is serious except perhaps for studies by some of the local better business bureaus; I do not know of a paper that has been written in recent years by a serious scholar who has taken the material from the better business bureau to show how much misleading advertising in fact goes on in Canada. I would think there is a certain amount of what might be called "come-ons." But I think this proposal is a useful thing that is worth trying and should be compared with the similar American regulation.

I should remind you that the Federal Trade Commission Act of 1914 had exactly this problem in mind, because it included this important phrase "unfair methods of competition." One of the primary responsibilities of the Federal Trade Commission of the United States was to keep an eye on unfair methods of competition, and many of the rulings of the Federal Trade Commission deal with this question of unfair methods of competition.

When you relate section 33(c) to the new proposals under 31(2), the right to get a restraining order before a conviction, we now may be in the same position as the Federal Trade Commission is in its "cease and desist" orders. Because the Federal Trade Commission can issue a "cease and desist" order to a company that has been carrying on this misleading kind of advertising for years. We could not do that before; but looking at 33C here, in relation to restraining orders before conviction, it seems to me that we are now in this position, that we have virtually the same powers as the Federal Trade Commission exercised, and seems to have exercised quite sensibly since 1914 in the United States.

My eighth point is the loss leader problem, at the bottom of page 8, clause 14 of the amendments, section 34 of the Act. I suppose, next to the new defences I mentioned with respect to loose-knit combinations a moment ago, this is the most controversial part of the bill. What puzzles me about the proposal is this. After all, we have had some major studies in Canada by the director and by the commission, which have shown over the years that though the loss leader question is dramatized heavily by some manufacturers and some associations, the actual number of instances in which you can find persons selling at less than a profit—however you define the word "profit"; and it is not easy to define what is a profit—are so small as not to make it a serious problem for purposes of measurement. You cannot find enough instances to say that this is a serious problem, if one is to take the coast-to-coast surveys that were made on this subject.

Therefore, I ask myself the question: if the objective inquiries we have made, which have been made by responsible people, show that the number of cases in fact are very few, why is there this urgency to put into the bill something which opens doors to a vary large number of new possible abuses?

The abuses here are twofold. First, it is going to be very difficult to administer clauses (a), (b), (c), (d) and (e), in terms of the language itself; not only because words like "profit" are hard to define; but words like, in clause (d) on page 9, "level of servicing" are going to be very difficult to

define. Words like "unfairly disparaging" are going to be very hard to administer. Not only that, but much more significant, I suggest to you, is the introduction to section 14, clause (5), because if you look at page 8, at the bottom, you will notice that the language encourages a whole system of what I would like to call private informers; a whole system of basing a private regulatory mechanism upon gossip, upon subjective impressions, and not upon objective data. Look how the language now reads:

> Where, in a prosecution under this section, it is proved that the person charged refused or counselled the refusal to sell or supply an article to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended—

Not only "he"; but, "any one upon whose report he depended."

> —had reasonable cause to believe and did believe.

Just think of that as a defence! Think of the number of letters that might be written to a manufacturer by an aggrieved retail competitor, by someone who is angry or annoyed because he simply is losing out and claims that disparagement is involved, and who claims that things are being sold at less than a profit. And then the vendor says. "I am going to cut you off." He cannot cut them off now, under 34.

Now he will be able to cut them off, and it is a defence to cutting them off to say, "I had reasonable cause to think I or he had proof." This is, in a sense, a matter of good faith, and since, like all business men, he would be frightened by this kind of charge, he would prefer to have a system of prices he could control if he could—because most businessmen, although they are certainly after profit, are often more concerned with security than profit; and the abolition of resale price maintenance in part was a disturbance of this general sense of security and the management of a price structure in relation to brand names, on which they may have spent a great deal of time, research, advertising and so on.

Now the result will be to allow the cutting off by a vendor of a purchaser on the ground that the vendor had reasonable cause to believe that these events were taking place as set out in caluses (a), (b), (c) and (d); which events in clauses (a), (b), (c) and (d) are in any case extremely difficult to define. So for the reasons I mentioned it does not appear to me to be a serious problem, in terms of any objective inquiry into the loss leader question; and, too, clauses (a), (b), (c) and (d) are extremely difficult to define. Where no urgency why risk this change? To administer the introductory clause suggests, it seems to me, the possible emergence of a system of gossip and informers which will not make any constructive contribution to the business community.

Finally on this question, I might say there has been an expression of opinion by persons more competent than myself in this field, some of the economists who have been here. There seems to me no doubt that having closed the door as we did in 1951 on resale price maintenance, there has developed here in these proposals a partial opening of the door, on the grounds of fairness; but grounds of fairness are not sustained by evidence of objective need.

Moreover, sir, I would remind you that just as we have abolished resale price maintenance, so the breaking down of resale price maintenance in some of the major states of the United States is also taking place today.

From the findings of many students it has been found that resale price maintenance may protect so-called brand names in favour of the manufacturer; but disadvantages, in terms of rigidities do follow in terms of restriction

on scope of the buyer to get rid of all his inventories as he sees fit. Those restrictions on competition seem to far outweigh any possible benefits to the community which comes from a re-introduction of resale price maintenance even in the limited and indirect form proposed here.

On balance, for those four reasons, I can seen no substantial benefit to be made to Canadian domestic trade policy by the introduction of loss leader prevention or protection against loss leaders, or by the assumption there are loss leaders which need this kind of legislation, the type of legislation proposed in these amendments.

I come now to my last point. That is a very interesting and novel idea which comes to us, for the first time, in this country—namely that there should be an option, if all the accused agree, except in one case, to go to the Exchequer Court of Canada for these proceedings under this act.

Now, sir, one has to see this proposal in the light of many considerations. The first consideration is to ask myself what is the nature of the Exchequer Court, and how well equipped is it to deal with these very important business problems.

The Exchequer Court of Canada is the court, *par excellence*, for several kinds of business. This will be old material to some of you; it will be new to some of you. It handles patent matters, trade marks, copyrights, taxation appeals, evaluation questions, and another side of it admiralty matters.

Mr. MARTIN (*Essex East*): Expropriation questions?

Mr. COHEN: Yes, expropriation and evaluations.

The atmosphere of that court—and this is an important thing—is determined, very largely, by the character of its principal business. And its principal business, so far as atmosphere is concerned—apart from questions of, say, taxation, expropriation and admiralty matters—consists of such things as patents, trade marks and copyrights.

Patents, trade marks and copyrights are already in the area of restrictions upon competition. These are special privileges which the public, through parliament, has granted to individuals under very special terms. This, therefore, is a court that is professionally concerned with the understanding and administration of, and is in sympathy with, these main ideas in the area called patents, trade marks and copyrights where monopoly is provided for.

Therefore, I suggest to you that to bring combines matters—which are intended to be anti-restrictive—into a court which already has a generally sympathetic approach to restraints upon trade, may, in fact, do a very important disservice to the interpretation, to the psychology and the attitude which the tribunal would direct towards this particular legislation.

I do not say for one moment that persons as able as the President of the Exchequer Court of Canada—who once taught me evidence, for whom I have a great fondness, are not judges of the highest rank. I am not speaking at all *ad hominem*. I am sure every member of the Exchequer Court would approach this act with as much objectivity, fairness, detachment and skill as they would approach any other piece of legislation. I merely suggest that the atmosphere of the tribunal is an atmosphere which may affect the approach to the kind of problems before them. The atmosphere of that tribunal is partially determined by its major preoccupation, in areas where such matters as restrictions on trade are legal. It is a tribunal without the usual attributes of criminal jurisdiction. It thinks of punishment in terms of other standards, but not in terms of the criminal law and imprisonment. It is accustomed to non-imprisonment sanctions, but not imprisonment sanctions.

My general conclusions, I would say, I could draw now in the form of a balance sheet. In favor of this bill are several important technical matters. I am in favor of changing the confusing definitions and using section 411

instead of the old combines act section, and making it part of this act, except for the elimination of the word "unduly." in the clause to which I have referred.

I fully approve of the strengthening of section 412, and of restraining orders before conviction, even though constitutional problems might arise, which one cannot foresee. I think this is a very helpful device.

I think it is a very important and useful thing to have an approach to misleading advertising which, in conjunction with restraining procedures before conviction, gives almost the same powers as the U.S. Federal Trade Commission has had since 1914 in dealing with unfair methods of competition, in issuing "cease and desist" orders.

On the balance sheet against: I would say, first, there is a totally inadequate approach to the current merger problems which require far greater study in depth, and there is no reason to change the present language until we have thought it through more carefully than we already have in Canada.

Secondly, there is a misconceived approach to the problem of brand name manufacturers, for the loss leader problem, as I have suggested, may not be nearly as significant as is supposed. Indeed this very legislation may raise more difficulties than it solves, particulary the difficulty of administering and defining sub-sections (a), (b), (c) and (d), and particularly too on the level of subjectivity, as to how far a vendor can go to defend himself on grounds that he has information which he has reasonable cause to believe. I would certainly oppose this particular proposal.

Thirdly, I think it is undesirable to resort to the Exchequer Court of Canada. I think we will find that court, on the whole, unsympathetic or not as sympathetic as it ought to be to the general problems of combines, because it is a court which is already familiar with and preoccupied with areas of restrictive activities of trade, in administering the Patent Act, the Copyright Act and the Trade Marks Act. And, finally, two more points. I think that the new defences to collusive behaviour open the door, if not legally, then psychologically by more collusion. I think it is not desirable to open this door, because so many studies reveal that when businessmen get together for these apparent legal purposes, they can easily be led into other purposes. The present law is adequate to give them those defences to which they are already entitled, and one need not spell them out. There is this kind of psychological inducement to illegality which, in my opinion, is suggested here.

Finally, the equalization of the promotional allowances has a certain equity benefit; but as it is now drafted here, I think the absolute differences between the big buyer and the small buyer will still remain. And I think the language of the sections themselves may prove difficult to administer.

Let me now conclude, sir. How urgent is all of this? In my opinion, we do not face, except for the four or five items I mentioned, which I support, and I think could well be passed by this parliament—we do not face a crisis in this field. We do not face a crisis, in terms of the *per se* doctrine; we do not face a crisis in terms of loss leaders; we do not face a crisis in terms of the right court to go to; we do not face a critical merger problem except in so far as it may be a crisis in terms of our lack of knowledge of what is happening.

Therefore, it seems to me that we need far more information than we have on these matters indeed may I suggest five areas where we need a better study by this committee or by other agencies of the parliament or Government of Canada. Such studies could come, either by way of a royal commission, or a ministerial committee. May I remind you that the MacQuarrie committee was a ministerial committee appointed by the last government, and it did very good work. Such a committee need not be inhibited by the

notion of a royal commission, with all rigidities of it and the delaying aspects that surround its name. One could have an advisory committee that could do the job perhaps as effectively as the MacQuarrie committee did in 1951-52.

But there are five areas that need inquiry. I think we need, first of all, a serious inquiry into combines policy in relation to mergers, with a particular examination of the American experience under the Clayton Act and under the Sherman Act, to know how relevant that experience is to our own situation.

Secondly, I think we need to examine combines policy, with particular reference to internationl trade. There may be vast differences between our approach towards cartelization or collaboration and their consequences in the international market when these things are compared with the domestic market.

We may not be able to afford indifference to his question if we are to be effective in the international market in the years to come. And surely with that we need a study of the particular effects of combines policy in our economic relations with the United States. I see my friend, the Minister of Justice here, and he will know far better than I, although I have tried to write, in an inadequate way, on the subject of how difficult for Canada has become the effect of the United States anti-trust law, in relation to their subsidiaries here. Perhaps the reverse also may be true—and I would like to see an exploration of this problem; that is, the effect of anti-trust policy and anti-trust law in the United States on our law and on the economic relations of the two countries.

It is absurd for grand juries in the United States to be issuing writs that are supposed to affect management in Canada and Canadian corporations. Of these are matters which may be affecting the U. S. domestic market—and they regard it as U. S. entrepreneurial responsibility. We should explore that and translate our thinking into some changes that may be needed in U. S. and Canadian law.

Fourthly—and my friends of the C.C.F. are not going to like this—I think we have to examine with some care the relationship of combines policy to trade union activity.

Mr. HOWARD: You are misconstruing what our attitude will be.

Mr. COHEN: I am joshing. I do not believe—

Mr. HOWARD: I am not.

Mr. COHEN: I do not believe—

Mr. FISHER: I think you are joshing the government too.

Mr. COHEN: I do not think for one moment that the trade union movement constitutes anything like a monopolistic threat, that so often attackers of it believe. It is almost shocking to see the ease with which the alleged monopoly over wage policy is compared with business monopoly. They are two quite different things in their origin, and they are two quite different things in their degree of regulation by the other factors, by the factor of collective bargaining, under proper conditions. But I do think there are operations where the trade union movement has to be studied for the effects its behaviour, in given situations, may have upon restraints, upon competition. There is not only the Winnipeg bread case, which so far is *sui generis*, in our experience; but there are many other situations which surely give rise to some thought; and scholars in this field have wondered about it in recent years. I think such an inquiry would be useful at this time.

Finally, I beg to suggest that, although we take for granted the right of a province to set up a tree fruits marketing board, a milk marketing board, or a potato marketing board, and although we take for granted the right of

the parliament of Canada to establish a monopoly in a crown corporation, whether it is for rubber or for uranium, it is impossible not to have a view of these activities in relation to our total policy in respect to restraints upon competition, I think the time is here when we should try to see this problem as a whole, and not segmented simply because the constitutional powers of the provinces allow them to engage in certain regulatory activities, the parliament of Canada, or any advisory agency, should not be deterred from examining with great care into the consequences of these programs on competition as a whole.

These, I would suggest, are five areas in which, in addition to the problems I mentioned before—where I would reject the specific points of this bill—I should like to see some studies made.

So now conclude by saying that I think we are in a transitional period. I think our problems of growth and change in Canadian economy, our international position, our relations with the United States, all press us to find fresh answers to some of these problems. But let us not make the mistake, in the search for fresh answers, of disposing of what has been a valuable law and, on the whole, a profoundly important tradition in our law and in our policy. Thank you, gentlemen, for listening to me.

Some Hon. MEMBERS: Hear, hear.

The CHAIRMAN: Mr. Broome has indicated that he wishes to ask a question; and then Mr. Fisher.

Mr. BROOME: Professor Cohen, you have touched several times on the export industry, and you have pointed out that the combines legislation, when first evolved, was a great deal different than it is now. Do you believe that business should be able to combine in the export market?

Prof. COHEN: Well, let me say, first of all, in the world of fact they already do, in Canada. As you pointed out yourself the other day, there are a number of industries where the director and the commission have taken no action, even though there is public knowledge that they do combine for export reasons. I take it you are asking: Should practice be converted into a law which legalizes that which is now done informally? Like all good lawyers, I have two minds on that subject. On the one side, I feel that the congress of the United States, when they passed the Webb-Pomerene act, they passed it to do precisely what you now suggest. This is a possibly necessary development in a country which has so much of a stake in international competition and where, in the future, that stake may become even greater and more difficult to manage. But there is one asepct of it I would like to bring to your attention and that is an aspect which has bothered the Americans in recent years, too. If you look at the line of American cases that have come to the courts dealing with that extra-territorial behaviour by American companies, you will find the American courts are saying, "Look, some of the things you are doing abroad, that are being done abroad, that are apparently within the scope of the provisions provided by the Webb Pomerene act, are in fact affecting competition in the home market itself. You are setting up a factory in Germany and that factory in Germany is restrained from being able to export lower priced products to the United States, and this seems to us to be wrong."

There are probably innumerable permutations and combinations in the results, taking place intra-territorially, though on the surface they appear to be extra-territorial.

My answer to you, therefore, is: let us give support to those industries which need some consolidated strength to deal with their competition internationally, but let us, at the same time, remember there may be unfortunate repercussions in the domestic market that we shall have to provide for.

Mr. BROOME: I am not a lawyer, but if I could hark back to the prohibition days, is it good law to have a general prohibition on co-operation in any field and yet to turn a blind eye to known co-operation in an export field? Is it not right that that should be faced up to, and should be placed in the statute books, so that the companies involved know where they stand?

Mr. COHEN: As a matter of general legal theory, in terms of creating respect for the law, I think you are right. As a matter of history, concerning Canadian policy, in the particular aspect I would have to look into it a little more to see the adverse effects on public opinion about the law and public respect for the law. My own feeling is there is no substantial adverse effect evinced by turning this "blind eye", but there may be very sound reasons for converting the blind eye into positive law.

Mr. BROOME: I believe you thought section 33B was good, but that it would be difficult to apply?

Mr. COHEN: That is quite right—that is promotional allowances?

Mr. BROOME: Yes. We were talking about the bad psychological effect previously. Would not that same argument apply here, the psychological effect, in section 33B? Although it may be good, it could not be absolutely fair to all purchasers from a company, and a company could not give the allowance in direct relationship, so that there was absolute justice, one to another. Having that in there, the psychological effect would tend to make a company try to do as well as it could. Therefore, if your argument on the one side is valid, I would contend the psychological effect is also.

Mr. COHEN: I think there is a great deal in what you say, Mr. Broome. I think this will encourage the vendors to treat the small purchaser with a good deal more consideration.

Mr. BROOME: Therefore, it is to the good?

Mr. COHEN: The word "good" there requires me—

Mr. BROOME: There is a balance of advantage?

Mr. COHEN: Yes, there is a balance of advantage. It is really difficult for me to be categorical there, because as a lawyer I must ask myself what happens in this situation. If you have promotional allowances it is difficult to measure who is going to be penalized by it.

Mr. BROOME: You are not penalized as much as you are now?

Mr. COHEN: It seems to me we need a little more experience on this. I am on the fence on this, and I am not categorical.

Mr. BROOME: Psychologically it could be a good move?

Mr. COHEN: Yes, psychologically it could be a good move.

Mr. BROOME: Just one final question—because we have not too much time, and I do not want to monopolize the questioning:

In section 32(1)(*b*) you do not like the word "unduly"?

Mr. COHEN: Yes.

Mr. BROOME: But you do not complain about the word "unduly" in (*a*), (*b*), and (*c*). It is in there too.

Mr. COHEN: Yes.

Mr. BROOME: What is the difference between the word "unduly" in section (*b*) and some of the others?

Mr. COHEN: It is no different, but it is the relationship of the adverb to the verbs. It is because of the fact the verbs "to restrain" and "to injure" already have a measurable quantum, with a substantial tradition of jurisprudence behind them. Therefore, it seems to me you are gilding the lily by adding it into that clause.

Mr. BROOME: You also have the verbs "to prevent" or "lessen" in (*b*), and in (*a*), "to limit unduly." Is this not a question of semantics?

Mr. COHEN: Yes, the law is professionally concerned with these problems of semantics, but it is also, it seems to me, concerned with the momentum of a given juridicial tradition. For 60 years this clause has worked this way, and the word "unduly" has been only in the other three clauses. I can see no valid reason for confusing the juridicial tradition by adding the word "unduly" which, I think, does nothing but confuse.

Mr. BROOME: They must have confused the word "unduly" in the other subsections of section 32. Therefore, I cannot follow you.

Mr. COHEN: I think I can make myself clear by putting it this way: in (*a*), (*b*) and (*c*), the verb "to limit", "to prevent" or "to lessen"—not so much "lessen", but certainly "to prevent"—have an absoluteness about them which the word "unduly" was intended to qualify. Whereas the words to restrain or to injure already are relative words and "unduly" makes them more relative. It is the increase of relativity upon the adverb "unduly" which I regard as needless.

If you look at the verbs themselves, the verbs "to limit" and "to prevent" you see that "to prevent" has absoluteness, whereas the verbs "to restrain" and "to injure" have relativeness.

It is a matter of opinion—and I do not want to push this too far; but I do say that one should not change a tradition which is already sixty years old, and is already passed upon and understood by the courts.

Mr. BROOME: You have pointed out that it is a little outdated, that it is thirty years old, and times have changed.

Mr. COHEN: Yes,—but on grounds of policy, not on grounds of technique: and this is technique.

Mr. FISHER: In sum, you would feel that a committee such as the McQuarrie committee could delve into this matter more effectively than a royal commission?

Mr. COHEN: Oh, I did not say "more effectively", no. I said that I know how some governments and some members of parliament feel reluctant to see the appointment of royal commissions, because of their habit of lingering—not malingering—their habit of lingering; but I would be reluctant to make this as a positive recommendation in view of the success in this field of one committee of enquiry, of a highly informal nature, and which as a result did a very good job in its own way.

Mr. FISHER: I am trying to get the alliterative sound of "the Cohen committee" or the "Cohen commission" and I wanted to ask you if—and I would point out that Professors Rosenbluth and English both said practically the same thing; I want to read this sentence and get your reaction, if I may. This is from Professor English's presentation. Professor Rosenbluth used the unfortunate word, "burglar" and as a consequence has been taken up on it publicly.

Professor English had this to say:

> I submit that to a considerable extent criticism of existing legislation in this particular field is an indication of the success of the law, and always will be.

Mr. COHEN: There is a fair amount of truth in that. I do not know if anyone has studied what was said by Simon Whitney for the Twentieth Century Fund, in a study published last year, and which was reviewed at some length in an issue of the McGill Law Journal some months ago.

Mr. DRYSDALE: Paid?

Mr. COHEN: Unpaid. Simon Whitney took 20 leading American cases and asked the following question. He took 20 of the most important cases since 1890

in the United States anti-trust law, and said: can you really say, after 70 years of experience in these 20 cases, which were either prosecuted with success, or where there was a damage action, or where there were injunctions—can you say that the industries and the community as a whole can show measurable benefit as a result? He came to the decision that, on balance, there can be no doubt that (a) the industry does behave more cautiously and (b) that the pervasive effects on the business community were substantial, but these pervasive effects are almost impossible to measure, except in the volume of concentration or of collusive activity that later takes place.

Let me take this in negative terms: if parliament abolished the Combines Investigation Act, would the business community and its behaviour be different within six months?

Mr. FISHER: I may have missed part of your argument. You have made no comment upon the argument that we have had that the effect of making a choice of going to the Exchequer Court or not—the argument has been put forward that his would be unsatisfactory, and that it should be either the Exchequer Court or not. That is, one or the other,—rather than leaving some ambit. What is your view of that?

Mr. COHEN: I have not really thought about this question of choice. I would say, giving it as my initial reaction, that if we in fact over the years had two courts taking these cases, I would be inclined to think that we might say that except for the general supervisory effect of a Supreme Court judgment we might almost get a two-value atmosphere in the operations of these businessmen. The criminal deterrent qualities that took place before the ordinary superior court of criminal jurisdiction, would have a different atmosphere than this essentially businessman's tribunal, which I think the proponents have had in mind.

Now, I do not want to be entirely critical of those who proposed this idea. I see certain important atmospheric weaknesses. It remains true that some types of criminal prosecutions under the Combines Investigation Act may seem unfair to otherwise responsible businessmen who are, for the time being, tarred with having been convicted of a criminal offence.

There is no doubt that a person who has a sense of the nature of criminal behaviour must wonder: should Mr. "X" be called a criminal because he has infringed the Criminal Code or in this area of the Combines Investigation Act? Should we have some less criminally atmospheric, less damaging agencies with which to deal with these so called business crimes.

Mr. FISHER: Atmospheric, but not financial.

Mr. COHEN: Atmospheric. I say that an answer to that is very difficult to give.

I am now in the area of what I would call my professional instinct, and my professional instinct is that the deterrent value of the law would be lessened by recourse to the Exchequer Court.

Mr. BELL (*Saint John-Albert*): I would like to ask Professor Cohen this question: do you not think, in view of the fears you expressed of conflict of interest, possibly, in the Exchequer Court, that it would be fair to give a choice, and then the choice will not be made, if your fears are true.

Mr. COHEN: Conflict?—no, no; I would be willing to book a small bet here that if this law comes into force the options will be eight to one in favour of going to this court and not going to a superior court of criminal jurisdiction. There will be no doubt in my mind, if I were a defence counsel and practising law—and I am not inviting briefs here—but I would certainly think the Exchequer Court would be worth trying. I would be very much surprised if the Exchequer Court, over a period of time, did not try to have a very generally less "criminality" view of what they would regard essentially as business aberrations.

Mr. JONES: Surely the atmosphere of the criminal courts as we have them in this country, is in favour of the accused, on anything; and that any judgment which might be made in this regard would hardly be a lessening of that type of atmosphere which is traditionally in favour of the accused. I do not understand this argument at all.

Mr. COHEN: If I made myself clear, one can appreciate the fact that a tribunal with a long tradition in dealing with the subject matter which also is in the field of legitimate restraints upon competition, in such things as patents, and trade marks, which are legal monopolies of a kind, might have a different approach to combines and monopolies.

Mr. JONES: You must recall that in England they have various divisions of courts which specialize in different types of litigation problems, and that this problem of atmosphere which you talk about is not a factor that they consider a disadvantage at all.

The reason they have these different divisions is to enable the training of judges in the particular branches of the law, so that they may understand them. It is just as dangerous for the prosecution, for example, to go before a judge who does not understand the complex matter of combines, as it is for the defence.

Mr. COHEN: The option is on the accused.

Mr. JONES: It is, but it is just as dangerous for either the prosecution or the defence to go before a judge who does not thoroughly understand this particular aspect of the law.

Mr. COHEN: You are quite right, but it is in the discretion of the attorney general, and wih the consent of the accused.

Mr. FULTON: We cannot force them into the Exchequer court.

The CHAIRMAN: It is now five minutes to 11, and I have a note here.

Mr. DRYSDALE: No, Mr. Chairman, please let me raise it this way: Mr. Martin had to leave, and he asked me if I would act as his counsel in this matter.

The CHAIRMAN: Paid or unpaid?

Mr. DRYSDALE: Unpaid; and he suggested that he had a few questions he wanted to ask Mr. Cohen, and he wondered if it would be possible for the committee to consider coming back after the orders of the day. I think that would present a sufficient opportunity for his questions to be dealt with.

Mr. FISHER: I have no objection, but I cannot come back. So may I place my last two questions?

The CHAIRMAN: Is it approved that we meet at the end of the orders of the day? Is that agreeable to the committee?

Mr. COHEN: Yes, if you can stand me.

Mr. BELL (*Saint John-Albert*): I want to go on record in pointing out that Mr. Martin said he could not come back at any other time today to hear the Canadian federation of agriculture, but here he is willing to come back because he has some particular questions.

Mr. DRYSDALE: I do not know if Mr. Martin can come back or not. He just said that he had some questions.

Mr. FISHER: I am interested in this question of provincial marketing. We had an investigation into pulpwood prices in the east, and one of the consequences has been that Quebec has set up a cooperative marketing scheme.

Now there are pressures in Ontario for the same thing, and one of them is being organized in my part of the country.

Is it your view of the developments here that in a sense there are two combines or organizations of producers to force up the competitive situation and to set up against the same monopoly position? Have you doubts about this tendency?

Mr. COHEN: I would not like to narrow down my answer to the precise question you raised. I would like to make it more generic. I would like to say that no one as yet in this country has dealt with or studied anti-trust policy to the degree of correlating it with the development of a very substantial withdrawal from the sector of the free market arrangement in the provinces, and with monopolies elsewhere, whether they be provincially created or federally created. I simply recommend that this be studied.

Mr. FISHER: You recommend that every kind of example be studied?

Mr. COHEN: Yes, that it be studied for some indication of its results for the maintenance of competition as a whole.

Mr. FISHER: My last question concerns a field which is bothering me: it is the development of mergers in the gold mining areas, where you have a set price for gold, and where there does not seem any way that mergers can be prevented. There is a very lengthly argument for it, that we should have qualifications there.

Mr. COHEN: Certainly we should; there are the discussions in Professor Rosenbluth's study. There is the study made by Mr. L. B. Pearson, in the introduction that he wrote to the Price Spreads Report of 1934, which was a pioneer examination of monopolies in Canada. There are the studies made by Mr. MacDonald's own department, and the data available from scholars or from government officials. But despite these there simply is not enough from which to get a clear picture as the trend over the years toward mergers.

What we have to ask ourselves is this: shall we have a legal policy which encourages mergers up to a point and discourages them beyond a point?

Mr. FULTON: Do you not think it wise to bear in mind the effect of the sugar case in Winnipeg, and its possible bearing on the present law?

Mr. COHEN: I was not thinking of a revision *qua* a revision. Out of that the few Supreme Court of Canada cases, and out of the judgment in the sugar case, it is hoped that we can see mor easily the direction of the law and develop some of the points of view in respect to the merger problem for the next generation, and upon which a policy can be based.

Mr. FISHER: Several small shareholders have complained to me about these mergers. Someone from the combines branch asked for some kind of a block. Do you think it is possible to bring that kind of situation within the scope of combines policy?

Mr. COHEN: The Department of Justice in the United States, I understand, have no hesitation in informing certain industries where there begins to be the appearance of a merger, even industries which are protected by state law, such as banks. I have been impressed at the extent to which even, under a conservative—spelt with a small "c", and Republican administration, the anti-trust division of the Department of Justice, has had no hesitation in being very merger-conscious, and in anticipating mergers in that way. For instance, they prevented a merger of Youngstown and Republic steels by this simple process, and also one in connection with some important banks.

So it should be quite possible for Mr. MacDonald's branch to develop that kind of technique, given the background and a point of view to cover that policy.

Mr. FISHER: Thank you very much.

The CHAIRMAN: The committee is now adjourned until after the orders of the day.

AFTERNOON SESSION

FRIDAY, July 8, 1960.

The CHAIRMAN: Gentlemen, we have a quorum now.

I think when we left off Mr. Fisher wished to ask some questions. He is not here. Mr. Morton is next.

Mr. MORTON: Following through on the line of discussion in respect of the Exchequer Court, I would like to ask Professor Cohen this: I can understand his viewpoint regarding the present, perhaps, atmosphere of jurisprudence at the moment, but I am thinking in terms of a longer run policy. I would ask this question. Would he not think that a section of the Exchequer Court dealing with these matters consistently would develop a more coordinated jurisprudence than could be developed by leaving it to the various supreme courts of the provinces.

Mr. COHEN: I do not think that is a difficulty. The major doctrines in this field have been doctrines crystalized by judgments of the supreme court of Canada. They are not doctrines which have come to us by way of cases at the provincial appellate level. Certainly the most recent cases which have done the major job of clarification have been Supreme Court of Canada cases. I would gather that the Exchequer Court would be faced with the same problems, namely appeals from it to the Supreme Court of Canada. The difficulties in the jurisprudence are not difficulties of the difference in emphasis by courts in various parts of Canada, and I would doubt whether the doctrinal clarity and consistency on that level would be any better in the Exchequer Court than it is today, because of the work of the Supreme Court.

So my argument in essence would be that one would not expect the Exchequer Court to do any better job of clarification or develop a more consistent body of principle than is done by the present courts.

Mr. MORTON: You have the supreme courts of the various provinces dealing with various problems from time to time, and you could have a section of the Exchequer Court dealing primarily with these business problems and especially combines—not necessarily the patent side of it. It would be more conscious of the various problems involved.

Mr. COHEN: I see your point. Well, that is a problem worth considering. Your question really implies the allocation of one or two judges to this work alone.

Mr. MORTON: Eventually.

Mr. COHEN: Really, that is what it amounts to. There would be a chamber of this court and a judge assigned to it. There is one difficulty there. If you take the analogy of the work of administrative tribunals which do nothing else—the air and rail regulations, and so on—a very peculiar thing happens. One of the most interesting books written on this subject was written by Professor Sharfman who wrote the story of the interstate commerce commission around 1937. He came up with the conclusion that after about 2 generations of operation a board tends to adopt basically the views in relation to the interests that appear before it. It becomes almost a reflection of the climate of the interests which come before it, and whatever may have been its original independent regulatory view—and it remains regulatory in one sense—it tends to reflect the particular experts and the particular climate in that particular industry that always is before it.

I am thinking out loud. May I take another line? What happens to the problem of regulating business enterprise in Canada by antitrust laws if you had one or two judges in a single court having jurisdiction over these questions all the time? You would gain on the level of expertise in that they would become more and more familiar with the problems. But would you lose on

balance in other ways in their narrower social and economic perspectives? Would they tend to become so technically involved that in the end there might be a net social loss in the administration of this law?

Mr. BROOME: May I ask a supplementary question. Could that be done by giving either party the right to appeal to the Supreme Court of Canada?

Mr. COHEN: They always would have that in any case. There is no expectation in this legislation, or in anything else that has been said, that trial court judgments of the Exchequer Court could not go to the Supreme Court of Canada and, to that extent, you have a rectifying instrument there.

But even there you have to ask yourself if the Supreme Court of Canada, like all other appellate tribunals, would not be quite reluctant to change judgments based on fact even though this is a fiction, to some extent, because every time an appelate court reverses the trial court they always find a reason in law.

To a large extent this whole doctrine of appellant tribunals not disturbing the findings of fact is, to some extent, in my opinion, a very dubious doctrine. But nevertheless, I think you would run the risk of having businessmen's courts, and a judge too, who would become so immersed in that branch of the law and in that particular point of view, that though they would gain expertise in it, they might lose perspective.

Mr. MORTON: Would they not have both points of view presented to them?

Mr. COHEN: Oh yes, but they would always be doing antitrust work.

Mr. JONES: Would you consider that to be criticism of the criminal courts?

Mr. COHEN: Yes, but there is an enormous range there.

Mr. JONES: Oh yes, and that is illustrated by the many divisions in which these courts have been set up.

Mr. COHEN: Yes, but bear in mind, when you say that, that you are not, it seems to me, drawing a true analogy here.

In the superior courts of Canada, and in the provinces, the judges sit both on crimes and on civil matters. But the lower courts—some of the lower courts, such as special courts, magistrates courts, recorders court, and justices of the peace, where we have them, sit more on criminal matters, and I include family courts; so there is a degree of expertise there which they actually reach.

Mr. MARTIN (*Essex East*): I have a supplementary question: you have said that the court would be inclined to become expertise, and on that account you would prefer that the proposal with regard to the determination being made in the Exchequer court in this field should not take place.

Mr. COHEN: No. But I recognize that is one of the difficulties whenever you have expertise.

Mr. MARTIN (*Essex East*): But is there any consideration here which has not yet been mentioned that would act as a safeguard to your basic view about the Exchequer Court under this amendment, and that is, that if the matter is sent to the Exchequer court in the manner proposed, we would be taking away some of the power of the limited sanctions which exist in this act? In other words, if there is a combine contrary to the law, that is something which should receive punishment, which should occasion punishment, but the Exchequer court has not been a court designed for the hearing of cases involving either corporate or personal punishment.

Moreover, the opportunities for providing sanction under the Combines Act are very limited, such as the use of the tariffs, and fines in the case of large and wealthy corporations, which really do not mean too much, and that, in an effort to reduce the punitive aspects of this thing, is not to be accepted.

Mr. COHEN: I think that is certainly a very arguable position. I think you could stand on that with some strength. On the other hand, bear in mind that there is nothing in the proposed amendment which in any way limits the Exchequer Court from holding, precisely as to the superior courts and the courts of criminal jurisdiction—holding to the idea of fines and imprisonment, except that of the atmosphere.

Very experienced counsel told me in the hallway after our meeting that he thought I was dead wrong on the frequency with which businessmen would resort to the Exchequer court. He felt that they would avoid that court because they would feel that their chances would be better in a court which had the atmosphere of a criminal court, where the onus is laid heavily on the crown, and where the crown would have to prove up to the hilt. Whether this might be the case—or theoretically be the case—it would not be the attractive atmosphere that I expected. Therefore he said that he would always recommend to his clients to choose the criminal courts. He said also than in criminal court of Canada their regional organization means that a court in Winnipeg really understands the Winnipeg situation and the Winnipeg accused, and knows them, and gets a feeling for the problem, whereas the exchequer court, even though it may be ambulatory, moving from province to province, has not that local feeling, and therefore, there might be disadvantages to going to the exchequer court.

These are again all guesses, Mr. Chairman, one can only base on experience of analogous situations; and there are very few analogous situations of this kind, because it is one thing to have had a court of equity where you are dealing with certain matters, and there is no option but to go because it has a certain kind of jurisdiction over hundreds of years, or to have had a court of admiralty where there are certain particular matters, But again you are not trying to create in a court of admiralty a deterrent policy.

I think I can follow Mr. Martin's remarks by saying that what you are really worrying about is the loss of deterrence here. This is the problem.

Mr. MARTIN (*Essex East*): Yes that is it precisely.

Mr. COHEN: Will deterrence decline with this machinery, this is the problem.

Mr. MARTIN (*Essex East*): Yes, there is a great danger.

Mr. COHEN: This is the problem. I am not prepared to be categorical, but I merely raised it as a possibility.

Mr. DRYSDALE: Could I ask a supplementary question, Mr. Chairman.

One thing that perhaps bothers me, Mr. Cohen is, first of all in examining exchequer court, the complainant has a judge with a particular background.

Mr. COHEN: And a particular professional interest in his work.

Mr. DRYSDALE: A particular professional interest, yes, in this particular type of work; and yet on the other hand the answer would seem to be fairly simple. But I wonder if you had also considered the fact that if the accused, which he has not got now, had the alternative to either appear in the exchequer court rather than its being a choice of the attorney general—that is in the exchequer court or in the supreme court of the particular province, and whether that might not be a refreshing influence on the exchequer court, assuming it did get the predominance of cases before it. Secondly, have you considered, something which I realize might not be a consideration, you living in Montreal—

Mr. COHEN: Where there is no crime at all.

Mr. DRYSDALE: Hardly. I was thinking of the situation in British Columbia where,—and you mentioned the exchequer court being ambulatory,—

under the particular amendment you might have an interim application, which would involve a great expense with regard to filing of documents, and the bringing of lawyers from British Columbia down to Ottawa every time there was an interim application to be made.

Mr. COHEN: Yes, there is no doubt that there might have to be either some regionalization of the court, as such, in this work, or face the problem of cost in some matters of an interim nature as you suggest. That is your second question.

On your first question, and again I am really back to where I was with Mr. Morton, it is just difficult to say what the results will be. My instincts as a lawyer, is to look at courts with a fairly realistic eye—what do you do when a court of appeal judge comes to your classroom and says: one of the most important lessons in life as a lawyer is to choose your judge, and thereby dissolves three years of legal education, when we thought we were teaching them "objective" law. Here is a realistic judge who comes down and says, in all honesty, that men make their minds up in the context of their personal philosophies and against their background, and honestly admits this, which we all know, but with a candor that is infrequent in the judicial traditions of this country.

Mr. MARTIN (*Essex East*): That happens to politicians.

Mr. COHEN: Yes. Well, politicians cannot afford the luxury of objectivity.

Under these conditions, what do we do, Mr. Drysdale, when there is this problem when judges develop a certain philosophy? Will there be as much tough mindedness about this problem by the tribunal which constantly deals with these business matters, as there will be in the generality of the superior criminal tribunals now? I will not be categorical. I just ask the question.

Mr. DRYSDALE: I think the discussion has been a greater revelation about Mr. Cohen than, perhaps, about the particular legislation, because you have analyzed the psychological aspect of this matter of the judges and the Exchequer Court. I notice, with regard to section 32(2), again, you analyze—

Mr. COHEN: —the psychological problem.

Mr. DRYSDALE: —the psychological aspect. I think, in looking at the legislation, we still have to take the objective approach, despite that.

Mr. COHEN: I thought I was being objective in recognizing psychological attributes as a fact of life. Surely, nothing can be less subjective than saying that you behave the way you do because of certain psychological factors?

Mr. DRYSDALE: You are applying your subjective analysis to these psychological factors?

Mr. MORE: Are we on psychology or the bill?

Mr. COHEN: I am prepared to admit that everybody in this room, including myself and yourself, are making, at any given time, subjective judgments, but we all try to be objective about them.

All I am saying is, with all the humility I can muster, that, "I am not prepared to be very tough on any of these problems, but my instincts are against it for the following reasons...

Mr. MORE: Mr. Drysdale has talked about the accused having the alternative. Is that not a matter for the crown rather than the accused?

Mr. COHEN: The A.G. has the option.

Mr. DRYSDALE: I suggested, if that change was made.

Mr. MACDONNELL: I want to revert to the situation which seemed to me to be the result of questions asked by Mr. Broome of Mr. Cohen with regard to external trade and the attitude of the department which, apparently, has been for 50 or 60 years that people have been combining with regard to

external trade, and nothing has been said about it. We seemed to have reached a stage this morning where it was at any rate on the cards that that was a situation which could not be tolerated, was illogical and, perhaps improper; and therefore that there ought to be a tidying up of it.

That leads me to ask this question: From the remarks I have heard throughout the discussion, I want to know the attitude of the department, whether they wait till they think there is some trouble somewhere before they start raising any questions? In other words, whether they consider it any part of their duty to be astute, to go around with detectives and, perhaps, find a little combination here and there; or whether they adopt what I regard as an attitude of convenience and say, "Look, we will wait till there is a little smoke before raising any questions." Have I made my point?

Mr. COHEN: I am not as familiar with departmental practice today as I was when I was on the staff 20 years ago; I am not so familiar as to the way they behave. When you have Mr. MacDonald on the stand you can ask him about his "snooping" proclivities. These impressions I have been gaining from my own experience as a student of the problem. I think there is a general impression among responsible students that the director and his predecessor, the commissioner, behaved with great responsibility. I had a student of mine, some years ago, do a graduate thesis on the administering of the act, not the legal side but how it is administered and how the commissioner behaves. In general, I think there is a very great deal of caution and a very great deal of responsibility. So far as I know there is no reason to believe there is a wild seizing of documents or an initiation of charges before the most careful steps have been taken to ascertain the grounds.

Mr. MACDONNELL: That seems to me to be eminent good sense.

Mr. COHEN: This, I think, is the policy.

Mr. MACDONNELL: I suppose I am condemning myself as being a conservative Conservative, if I say I feel like leaving well enough alone. At least, I put that forward as a possible view.

Mr. COHEN: I think most students of the problem would agree with you, that the director and his predecessors have behaved as responsible men in their investigative functions.

Mr. JONES: On the question of loss leadering, Professor Cohen, do you know of any survey undertaken in recent years of the incidence and effects of loss leadering to a greater extent than that conducted by the retail merchants?

Mr. COHEN: There were two studies: there was the study conducted by the director, and the study conducted by the commission itself.

Mr. JONES: You are speaking of the—

Mr. COHEN: The green book and the blue book.

Mr. JONES: You are speaking of the 1954 studies?

Mr. COHEN: Yes.

Mr. JONES: But I am asking as to whether there has been any survey undertaken in recent years.

Mr. COHEN: I do not think there has been one undertaken more recently, except by the association. In fact, what you raise is a very good fact-finding problem. This ought to be a kind of continuous thing. I would be surprised—I hope I am not speaking out of turn—if the director himself has not in some way got an eye on the situation. Whether he has the staff to do it on the detailed level that your question implies, I do not know.

Mr. JONES: The point I make is that the retail merchants, when they were here, said that they had been right across the country, and this problem of loss leadering had been of serious concern to their members from coast to coast.

Mr. COHEN: Yes.

Mr. JONES: And that they had gathered this information as a result of these inquiries that they had made. Therefore, my question was: has there been any such inquiry by any other group?

Mr. COHEN: Not to my knowledge. May I just make one comment. The retail merchants association, of course, is a very responsible group. Nevertheless, one must appraise their information from their point of view. And their point of view, necessarily, must be the point of view of those who comprise the membership.

If one takes into account all the complaints they might have received at their central office from all over the country, one must also imagine that many of those complaints arose out of circumstances which were healthy, competitive situations. If somebody in a neighbourhood felt that his neighbour was selling at a price lower than he, and that this competition was having an effect on his business, the only question is: did he sell at a loss, or did he not make a profit? After all, there is good competition that sometimes hurts.

Mr. JONES: This was the very point that they made, that this was in fact going on and that it was in fact causing them concern. Therefore, it is, in their view, at least—and we have to be governed in our opinions by what information we can get—a situation that has not been exaggerated: it was not a matter of little significance to them.

Mr. COHEN: I would seriously question the wisdom of parliament basing so major a change of policy on the advocacy of a group that has a very special and restricted area of interest. Not that they are irresponsible; but that their focus is narrow, narrower than the focus in this room must be—which, after all, is a much broader focus.

In 1951-52 there was a major change of policy when R.P.M. was eliminated. In 1954-55 there was a series of studies of the problem, and it was found that there was no loss leadering situation of real urgency.

I would hesitate before I would make a change in the law, unless I made a much more serious inquiry. It seems to me the logic of your question is this: not that you change the law, but you ask yourself, "Where can we get better facts?"

The CHAIRMAN: I have a question here, Professor Cohen, on really the same thing—because you seem to think that this is not a serious situation, this loss leader business, and from all the evidence we have had, from the electrical manufacturers, wholesalers, retailers, they think it is a very serious situation. And personally, from my contact with retailers and from the correspondence I have got, I think it is most serious.

Mr. COHEN: But, Mr. Chairman, you must appraise what the lawyer calls the probative value of evidence. What is the probative value of evidence that comes from a manufacturer who is angry because he cannot have resale price maintenance and wants to have it, because he had it for a long time? Is there any objective value to his evidence? What is the value of the evidence of a retailer who was comfortable with resale price maintenance? He may have been a marginal operator in the first place and could only survive in business in a particular area because he had the security of a high fixed margin under resale price conditons. If you want to say it is the business of Canadian economy policy to subsidize marginal operators by providing a legal pricing structure made for them by vendors, which protects them from competition—if this is what you want to say, it is exactly the opposite of our policy. Our policy surely is to encourage competition. You are saying there are persons who cannot stand the gaff and we have to shore them up by law. You have a right to say some types of competition are unfair—and that is the permanent headache of these problems, namely, how much is too much. It is a permanent problem, and there is no final answer to it. However, I suggest to you: is it not significant that

resale price maintenance, and variants of it, of which this legislation proposed now is simply a modification of it in a special case, is losing ground in a country where it had a very strong support from the whole durable goods consumer industry for so long namely in the United States. The constitutionality has been attacked. The economics of it have never been supported. You can hardly find a serious-minded economist who does not regard resale price maintenance as being restrictive and doing, ultimately, more social harm than good. You must ask yourself, are you for the store on the corner which says: I am hurt in the sale of Hotpoint or Admiral because Eatons sell them for less, and therefore I want to restore a system in which I can be protected? Is this an objective of policy in this area, or is it the objective to say that the mark of a successful economy is one which involves the taking of some risks. One of the risks is that you can survive competition and, if it is fair, you ought to be able to face up to it.

Mr. JONES: Before you proceed, Mr. Cohen, I hope we do not get confused in developing this line of argument by comparing, shall we say, a large firm like Eatons, who can sell something for less, with the store on the corner. That is not the question at all. The complaints we have received are instances of loss leadering. We had an example, in this committee, of a supermarket which, at regular intervals, used electrical appliances as loss leaders, as well as flowers. It just happened that store had placed itself adjacent to an appliance shop and a flower shop. Now, it has just ruined these two small people who were giving efficient service to their customers, supplying them on a year round basis, whereas this supermarket did not stock these appliances on a regular basis, and did not stock the flowers on a regular basis. They did not provide the year round service but, every once in a while, came along with these loss leaders in order to get people into their store to sell them other things. It has proved very distressing to these chaps.

Mr. HOWARD: This bill does not cover that.

Mr. COHEN: I am aware that you would have individual cases of that kind and although, perhaps, they should be researched with some care, I have not seen a modern study done objectively. However, I do not see how you translate these individual and quite distinct instances into a matter of major social policy.

Let me take an example. Take the supermarket which is next door to the appliance shop, and which occasionally offers an appliance as a so called loss leader, or an occasional sale of flowers.

I have two immediate reactions to that: first, that this use of an appliance is probably occasional, so that anyone would have to look very carefully into the total profit structure of that store—of that little appliance shop—to know if in fact over a 12 month period there was any real diminution of its profits which had taken place.

Mr. JONES: They said that it had.

Mr. COHEN: All right, but you would have to find out if there were other reasons for the diminution in their profit structure; for example, it might have become inefficient, or it might have become obsolete in its business practices, or there might be any number of reasons.

And similarly, in the case of the flower shop. So I would be very reluctant to see a major step involving the introduction of new criteria, or of rigidity in our economy, which this would result to, merely on the ground that you have evidence of what appeared to be an occasional hardship, one which we do not fully understand, one which we have not explored, and one for which there might be more than one reason.

Mr. JONES: I think the other ground of complaint was that these people could not get services because of the confusion; that they could not get

the service which would ordinarily be supplied in connection with a television, for example.

Mr. COHEN: What do you mean? Do you mean that a store which is a discount house will sell a television set and not render good service afterwards?

If that should happen, let the buyer go to the place where they do render such service.

Mr. JONES: But he does not know.

Mr. COHEN: Then that particular store has lost a customer. I do not think you can base a general social policy upon a single instance of a buyer or seller not eventually being satisfied. The real sanction here is not the legislation. The real sanction is that the customers will not go to that store again.

Mr. JONES: But this instance is not a single one, according to the evidence presented to us. It is something which is happening in very considerable quantity.

Mr. COHEN: I beg of you to remember that yours is the responsibility of thinking about the evidence, in the best sense of the term; and the best sense of the term of evidence here is that this committee should seek an objective inquiry before it makes a major change in the legislation. I would be reluctant to see a committe, composed of all these able people sitting around the table—taking a stand and assuming a certain set of facts without asking themselves: "Do we have enough facts, specific facts, to enable us to put forward a remedy to meet this special objective"?

Mr. JONES: That is something we must decide for ourselves when we come to make up our minds.

Mr. COHEN: Yes.

Mr. JONES: Naturally, in any discussion we have we take that into consideration, and we would not want to make a hasty judgment. I have one further question.

Mr. AIKEN: I think we should also consider the fact that neither we nor anyone else seems to be able to arrive at an accurate figure as to the causes of this situation.

Mr. COHEN: I do not want to be put into a dilemma by saying that you should first get a complete and perfect study; but I am quite sure, though, Mr. Aiken, with our quite reasonable methods of research and resources that we could get far better information than we now have; far better!

Mr. AIKEN: But to come to a conclusion, one way or another, on the facts which you have before you—do you think we could do that?

Mr. COHEN: You would then have to appraise the recommendations of the men who gathered the facts for you; but you would be at least in this position that you would know, from a sensible sampling of the various parts of Canada, that there has to be something called selling for a loss, which damages some competitor in the neighbourhood.

That is something we do not know through any objective study, to date, in the way of quantum. Indeed so far as there is a responsible body of scholarships, it is all against accepting such allegations.

Mr. JONES: What you are saying is that we should not pay any attention to their cry, or to any other group which comes before parliament?

Mr. COHEN: No, I am not saying that at all. Please allow me to misinterpret myself in my own way.

I am prepared to go along way with you, that as parliamentarians you have got the job of being evaluators even without the kind of detail research tools that I am talking about. I am really asking you to be aware that you are now

really now making a 90 degree turn on policy. There was a 180 degree turn in 1951. You are now making a 90 degree turn, or at least a 65 degree turn in this field of resale price maintenance. I ask you, do you really know enough about it to make so responsible a decision, when you do know, from a lot of experience, that the consequences will be new rigidities. Sometimes there are rigidities governmentally made. We have got rigidities in our wheat policy. We have wheat control. We have rigidities on B.C. fruits, because we found that the open market was unhealthy for that economy; therefore we had to control the economy of selling and marketing tree fruits and apples. So we have balanced the considerations in many in this country. We say an open economy is not good for that kind of industry. But, are you prepared to say that an open economy is not good for the corner retail store, except by this kind of shoring up?

Mr. JONES: On that point, Mr. Cohen, this has been a mistake that witnesses, I think, in my view, have made on a number of occasions when they came before us in respect of this open economy business. Section 34 of the Combines Investigation Act itself is an interference with open economy. The question that is bothering us is a modification of that interference.

Mr. COHEN: Why is section 34 an interference with the open economy?

Mr. JONES: Well, if it is not an interference, why is it there?

Mr. COHEN: Section 34 represents a choice between two values in our social and legal system. The two values were, freedom of contract and freedom of competition. The whole history, which I am sure I laboriously and perhaps not very successfully tried to put forward, represents in part the competition between those two ideas. Shall the individual businessman have the right to make any kind of contract he likes, or are there some types of contract which shall be unlawful? One contract which we said for a long time he could make, up to 1951 was: I will sell you only if you resell on my terms. We said in 1951, as between the two social policies, the social policy of allowing full freedom to contract, and the social policy of saying that some kind of contracts are against public interest—resale price maintenance. We choose to limit freedom of contract. We decided that out on broader social grounds.

Mr. JONES: But that does not alter the fact, Professor, that it is an interference with open competition.

Mr. COHEN: No, no, it is shoring up the open area.

Mr. JONES: It is an interference with contracts.

Mr. COHEN: That is what it is an interference with, yes, but what you have done is, chosen to interfere with one of two possible areas. Do you want to interfere with competition or contract; you chose to interfere with the law of contract.

The CHAIRMAN: May I interject at this point. You said you are limiting competition when you have an orderly marketing, and where a distributor or manufacturer can make a deal with a retail store, and if he is not satisfied with the way that man services the product he is selling, or the price he is selling it at, I think that is freedom, and the distributor should be allowed to deal with that man in the way that he thinks is best.

Mr. COHEN: No, quite right, and so do I, except—

The CHAIRMAN: Well, that is what this bill does.

Mr. COHEN: Not at all. There is one very big difference. The manufacturer or distributor has the right to say, "I am going to choose my customers. Your credit is no good. Your record of servicing is no good; your general attitude toward your customer is no good and I do not want to do business with you." That is fine, but when he wants to introduce a private price regime of his own,

that is where social policy enters, and then he has gone beyond the ordinary and proper limits of the vendor-buyer relationship, because he is not saying to the buyer; "I am not going to deal with you because you are obviously an irresponsible fellow", he is saying, "I am not going to deal with you because you will not maintain my price structure".

Mr. AIKEN: This is exactly what the bill prevents—

Mr. COHEN: Why?

Mr. AIKEN:—in its present form. It prevents this sort of price—

Mr. COHEN: That is correct. I say leave section 34 alone, because the rest of the buyer-purchaser relationship from a manufacturer to a distributor is free. The manufacturer is not committing a crime, under the present Combines Act, by stopping to deal with "X" on other than price-fixing grounds. If the manufacturer has a suggested price and the buyer refuses to obey that price, and the manufacturer then does not supply him, that is illegal under the present act. So I say, let us keep that because a manufacturer or distributor has many other reasons for stopping to deal with "X", but he ought not to be able to have a private regime of price of his own. Otherwise, if he had a private regime of price, you would introduce rigidities which the economists who have presented briefs, I am sure, have explained to you at far greater length and far more successfully than I have been able to do.

Mr. JONES: The economists who dealt with that also admitted those moves were taken in context with the shortage of supply of goods—

Mr. COHEN: In 1951-52?

Mr. JONES: And when that was pointed out they did modify their views.

The CHAIRMAN: I have Mr. Macdonnell on the list. Did you have one question?

Mr. MACDONNELL: One short question. Mr. Chairman, I am terribly anxious we should find some way of helping the retailer. I cannot fail to be impressed by the difficulties that Professor Cohen has put forward. It seems to me we are getting awfully near the point where it is a crime to sell cheap. In one of his books, Stephen Leacock once said, "Drinking a glass of beer is not a crime, and all the legislators in the world cannot make it so."

I wonder if there is any other way of helping the flower shop and the appliance shop which is next door to the supermarket? Has the economist suggested any other way—by taxation, by taxing the big unit—or are we right up against the situation which is so hard to face, that in which you have the smaller man being put out of business by the bigger man? How much of that there is, is what you have said we ought to find out.

Mr. COHEN: I think no one could be more sympathetic than I am, in human terms, to the individual, small retailer, whatever he is.

If I may say so, I think a large part of the spirit of these amendments is designed to meet that problem, but I hesitate to admit that the problem is of the dimensions which it has been alleged to be, which would warrant this 90 degree shift in our legislative policy. That is why I strongly urge the committee consider obtaining a much more extensive source of information than the information that you now have.

Mr. MACDONNELL: Have you seen the various briefs that have come before this committee?

Mr. COHEN: I have not seen the retail merchants' association brief. I am sure it is a very extensive one, and I will be glad to read it if I can get a copy.

Mr. HOWARD: It is two pages.

The CHAIRMAN: The first one they presented was a large one. That is the one the fuss was made over.

Mr. COHEN: May I make a comment that has been bothering me for some time? I just wonder whether this committee does not do itself a great injustice. Here you are, a lot of very busy and a lot of very experienced men, who have to divide your minds between Combines one day, bills of right, defence policy, etc. Do you not think, in view of the fact you have some major policy questions here, that apart from my suggestion this morning there ought to be either a royal commission or, at the very least, a ministerial inquiry, and that this committee, in future, ought to be serviced by a research assistant or counsel which would help to gather some of the data and guide the chairman and the committee in its work?

Mr. JONES: The American type of system?

Mr. COHEN: Some committees have been provided with that kind of system.

The CHAIRMAN: We considered that.

Mr. COHEN: I wonder whether many of the matters you are raising with me would not, perhaps, have been better raised earlier, when you could have had some research done on them of this type.

Mr. JONES: So that you will not get the wrong impression, Professor Cohen, we are raising these points for your opinion. We have already had evidence from other people.

Mr. COHEN: I know that, but to come back to your own specific point, you have obviously had no scientific work done in recent years on loss leaders, it was not done.

Mr. MORTON: Supplementary to that, perhaps I might outline to Professor Cohen the dilemma in which some of us find ourselves. I appreciate his view, but I have been startled with the view of the economists in not recognizing the problem.

As a representative in my own area, I do not get complaints from merely one corner store, but rather from many stores in the whole area; and there are businessmen in the whole area saying the same thing, that they have noted the activities of certain business organizations, which have been actually affecting them.

And when they talk about costs, they are not technical costs, but merely the fact that these people are selling things below what they could normally buy them for, and therefore ruining that article as a marketable item, as far as their stores are concerned.

These things come to our ears, as they come to the ears of other members across the country, who receive similar problems and complaints. So that gradually there is building up a volume of consistent complaints, which has been added to by the representations from national groups which have come before us and said the same thing.

What disturbs me is this: that there is such a gap between the grass roots problem, and those who are studying it from a scientific point of view.

Mr. COHEN: I think your question is a most interesting one.

Mr. HOWARD: I want to deal with something else.

The CHAIRMAN: What is the nature of your question?

Mr. HOWARD: The chairman has asked me what my question is about, so I think I should explain. I would like to indicate what occurred the other day with respect to questions that followed a particular line. It was the idea that we should follow a particular line of questioning until the subject matter of it had become exhaustive.

The CHAIRMAN: That has been what we have been trying to do. It is very difficult to run the thing on a definite line. But I know you have been waiting for some time. You said this would be a supplementary question. That is why I asked you if your question was supplementary to the matter before us.

Mr. HOWARD: I would like to know if we are to follow the original understanding.

The CHAIRMAN: Under the original understanding we were going to ask one question, and then go on and take our turn. But I think we have changed that rule.

Mr. MORTON: At our second meeting we tried to follow the trend of supplementary questions stemming from the main question.

Mr. HOWARD: That is different from the way I understood it.

The CHAIRMAN: Gentlemen, I think we should adjourn at 1:00 o'clock and I am going to ask you to make your questions brief, and to try to ask questions which have not already been covered. I think there has been repetition creeping in here, and I hope we may close our meeting fairly efficiently and rapidly.

Mr. HOWARD: And you are to be a participant yourself?

The CHAIRMAN: Yes, with permission.

Mr. BROOME: I would like to lay some groundwork. Most of our members are in very close contact with the people in their ridings, and I know that we do get a terrific volume of mail, including letters from responsible people and from organizations representing almost every kind of group; and I think that the members of the committee do represent pretty well a cross-section of this country. So we are much closer to the problem than are the economists with due deference to yourself, Mr. Cohen.

Now you have said that this clause or change would make a 90 degree turn; but in the explanation it says that section 36 prohibits resale price maintenance, with a proposed new subsection, and it says that it provides a definition in the circumstances, and the circumstances are in regard to loss leaders. But that is not a 90 degree turn.

This is merely a specific example, and only where there is a definite case of resale price maintenance.

Now, if we never had a murder, we would still have to have a law punishing murder. So do you believe that loss leaders are injurious, per se, themselves, to the economy?

In other words, if we never did have any loss leaders, and if there had never been a single case of loss leaders, would it be comparable to the situation where we never had a murder, but where we must have punishment provided for murders? Would you not agree? It would be the same thing if you never had a murder. You have a punishment for murder and you have a defence. In regard to loss leaders would you not agree that loss leaders, as defined in this, are not good economics?

Mr. COHEN: Well, I would be—

Mr. BROOME: Forget the incidents.

Mr. COHEN: I would be inclined to think that the extent to which competition can be abused by selling items below cost is a matter of concern. I am prepared to admit that. The selling of items below cost can, under some circumstances, be a matter of concern, but, Mr. Broome—but, but—there are several "buts" here. You, at the same time, must have the other side of the balance sheet in your mind. A man may sell an item below cost because he has a legitimate inventory problem.

Mr. BROOME: That does not come into this.

Mr. COHEN: Why does it not come into this?

Mr. BROOME: This is habitual selling below cost.

Mr. COHEN: You show me how; show me how this cannot be used in that way?

The language in section 34, as amended here, is extremely broad in many ways. Bear in mind, as I tried to point out this morning, the introductory clauses at page 8, making the person complained against very vulnerable indeed.

Mr. BROOME: Yes, but it could be that the other person is making a practice. You do not make a practice of selling your inventory goods, but you are making a practice of using articles—

Mr. COHEN: You must read that in relation to the preceeding four lines.

Mr. BROOME: Yes, not for the purpose of making a profit, and so on, but for the purpose of advertising.

Mr. COHEN: Read it in relationship to the introductory paragraph—

> —refusal to sell or supply an article to any other person, no inference unfavourable the person charged shall be drawn from such evidence if he satisfies the court that he and anyone upon whose report he depended had reasonable cause to believe—

Under those conditions, even though it may not be a habitual practice, the vendor, the manufacturer, may think it was a practice and may think he had reasonable cause to believe, and then cut off the supply, and then defend himself in the courts that this one instance, from his point of view—he thought it was a practice. Now, what you have done is, you have laid the basis for a wide variety of decisions by the vendor or manufacturer to say, "I honestly thought I had cause to believe".

I would say that, judging from experience, Mr. Broome, a good number of manufacturers, particularly of durable consumer goods, would like to restore, in many cases, the price maintenance structure, and I would be very surprised if this would not lead very early to very substantial abuses.

Mr. BROOME: There would still be inventory sales.

The CHAIRMAN: Mr. Howard

Mr. HOWARD: I want to deal with two entirely different matters.

The CHAIRMAN: Go ahead.

Mr. HOWARD: Mr. Cohen, with respect to the definition section, or the definition of a merger.

Mr. COHEN: Yes.

Mr. HOWARD: Incidentally, I agree with you that perhaps it should not be altered from what it is, but inasmuch as we have this alteration before us—

Mr. COHEN: Yes.

Mr. HOWARD: In law is it not so that where there are—or in statute law—where there are two or three items listed, as there are here, as we have in one, two, three, that this is restrictive and means that it could be construed to mean that competition in areas other than those listed in one, two, and three would be perfectly all right?

Mr. COHEN: Yes. Presumably the draftsman intended, Mr. Howard, by listing little one, little two, little three, to be comprehensive in all phases of business activities. The key phrase, of course, is that phrase "in a trade or industry"; the words "trade or industry", for the purpose of its area of limitation. The rest of it, in a trade or industry, or among sources of supply, or among outlets, really merely spells out "trade or industry". The problem

then would be to define what is a trade or industry. The other problem of the definition that, of course, we found in our discussion the other day difficult, is that the "control" is a word of very grave difficulty, particularly in the light of the conservative approach taken by the court in *Rex. v. Staples*, where they said that buying 50 per cent of the shares was not taking control of a business, and yet you and I know you can have control, in some cases, with 15 per cent.

On both those grounds—on the ground that you may have restrictive problems with respect to trade and industry as undefined and on the grounds that the "control" may be insufficient in the present Canadian definition to account for a great variety of mergers—I think this is unsatisfactory and certainly after more study, I think it would appear to be an unsatisfactory definition.

We have had no chance to talk about the significance, for future merger definitions, of the Canadian Breweries case. Because in the Canadian Breweries case the Canadian Brewers brought up 20 or 30 odd plants from 1935 on. They shut down most of them, reduced the number of actual brands being turned out; and, in the end, by 1955 or 1956, the Canadian breweries had approximately 48 per cent of all the beer business of Canada, linked as they were with Western Canada Breweries, which they had bought into the west. They had two very strong competitors in Labatts and Molsons. Labatts, in Ontario, had a very substantial share of business. Molsons had a very substantial share of business in Quebec. Both were weak in the other province: Molsons was coming into Ontario, and Labatts into Quebec.

Both the commission and Chief Justice McRuer had to meet the problem you have had to face, this definition of merger and monopoly. Was there a merger and was there a monopoly under these conditions? It so happened that Chief Justice McRuer had before him particular facts which diverted his mind from certain fundamental aspects of the whole enterprise because the accused company had its prices set by the provincial liquor control board, under constitutionally *intra vires* liquor control law. So, in this situation, he said that price competition was made legal by the provincial law. The presence of the number of competitors in the industry was set by law because each brewery had to have a licence to get into the business. Therefore, in terms of entry into the industry on the one side and price control on the other these were eliminated, from his point of view, from impinging on this particular case.

In effect, the Canadian Brewery case, although important at one level, really contributed very little to the understanding of what is the future of the merger and monopoly law of this country.

You will forgive me for refining my legal ideas again. But Chief Justice McRuer said something else. Instead of trying to develop criteria of legality or illegality in the merger situation itself he looked to the judgments in the loose-knit, multi-firm situations. Most of those cases are cases where you have almost a preponderance, where 75, 85 or 90 per cent of the industry is involved. And where there are agreements not to compete. He said: there was a lot of competition going on in the Brewery business in the competition with Labatts and Molsons. He asked therefore how can one say there is a merger or a monopoly situation here?

Mr. HOWARD: I have another question on a different matter. This relates to section 32, and also to a provision giving extra duties or functions to the restrictive trade practices commissions—

Mr. COHEN: Yes.

Mr. HOWARD: —which you did not deal with. It starts at the bottom of page 3, but the relevant part is at the top of page 4, giving to the commission

additional specific findings—and I am reading now from the explanatory note which says:

> The amendment requires the commission to make certain additional specific findings.

If it relates to certain things, they have to find out where it does not relate to certain other specific things.

I wonder, when you couple that with the proposals in 32 which you say should not be in there, and I agree—that perhaps they might not be, when the bill is finally dealt with—does this not allow, or would it not allow a return to a movement towards a specific detriment type of argument?

If that be the case, there is no use in our engaging in this activity under 2-A, that is, the exchange of statistics; but we argue that we can take that as a defence, because it did not relate in No. 3 to (*a*) prices, for argument sake; and as a specific argument, we ask that you prove that it did relate to prices, or to quantity or quality of production, and so on.

It is this, in some way, which gets to the specific detriment argument which has been advanced over the years by corporations.

Mr. COHEN: I suppose that if the commission now has to spell out in terms of these various criteria, or various items what it finds, and if this is to be included as a mandate in the statute, you may have to search around for pigeon-holes a little more carefully in which to put each of these findings.

I would not think, however, that this is the goal. I am afraid I am thinking rather superficially here because I have not given this point much thought really. But I would not think, Mr. Howard, that this would affect the present, very careful draftsmanship that one finds in the reports. It might affect the structure of the report, and the way in which the actual conclusions are drawn, that is, the draftsmenship in respect to whether matters are in subsection 2, or whether the matters are in subsection 3; but I do not think that the actual maerial content of the report would be very different from what it is today, save in so far as the structural principle thereof is determined in part by these terms.

Mr. HOWARD: That is part of my question.

Mr. COHEN: And whether or not specific detriment would be incurred, or whether the courts and commission would have to go into this question more than they already do, is another matter. But let me put it to you this way: I think it is fair to say, Mr. Chairman, that one of the characteristics of recent reports of the commission—and those of you who get them probably know them just as well as I do—is that the measurement of detriment or "unduly"—or shall I say rather the explanation in the commission's mind of the character of the detriment that has taken place, is a little more detailed than it was perhaps in previous years.

And I think this has come about partly because the commission sits as a commission, and partly because I think it has been—if I may say so—influenced by criticism in part of some aspects of the *per se* doctrine, although there may be other considerations that are leading it to be a little more meticulous about spelling out what it means by competition being unduly restricted.

To that extent therefore there is a slight development of detail, in specifying detriment or "undueness". On the other hand they have not gone nearly as far as Professors Bladen and Styholt went, in their paper which some of you may have read.

Mr. HOWARD: I hope they did.

Mr. COHEN: Professors Bladen and Styholt said in their paper to be found in a book entitled Canadian Anti Trust Law—which was edited by Professor Wolfgang Friedman and which some of you may have read—that the commis-

sion should go into much greater detail in defining criteria for the measure of detriment.

They took a recent case and showed how that case should have been treated, using economic criteria for the purpose.

But whether the commission will go quite as far, is another matter; but at least I think it will have the effect of making for a different structure of the report itself.

Mr. HOWARD: What about if the case gets to court and arguments take place in court under proposal 32; is that court not then obliged to listen to the same argument by counsel and the accused that there was no specific detriment, when we are spelling out in subsection 3 (*a*) prices, (*b*) something else, and so on; are they not within the variety in the field and maybe arguing their case on specific detriment because they are specifically spelled out?

Mr. COHEN: This raises again what I tried to suggest this morning, and that is that items (*a*) to (*g*) under subsection (1), became proper defences. That is to say this kind of behaviour is not illicit. But it is not illicit today, that is the point. Therefore if the businessmen were to get together for the purpose of exchanging price information, or credit information, or talking about advertising, these items would presumably under the present law not be illicit except, I think, for the one clause, namely the clause dealing with advertising.

Mr. HOWARD: (*f*).

Mr. COHEN: Yes, the restriction on advertising.

Now, it is possible that restrictions on advertising budgets agreed upon may be regarded as an agreement which might contravene either 411 in some way, or the Combines Investigation Act. There again there maybe some doubts for a wide variety of technical reasons. For the rest of them, from (*a*) to (*e*) inclusive, these already would be known to the profession and to the bench, and to the businessmen as already perfectly lawful activities, so that the court would not be faced with something new here, when someone argued, "I just exchanged trade terms".

The court would be facing characteristic arguments: "what we did was not illicit, because all we did was to agree on these matters and nothing else". Indeed, prosecutions would only take place when there was evidence of the kind of things that you find in (*a*), (*b*), (*c*), and (*d*) of subsection 3. There would not be a prosecution if there were only matters under subsection 2.

Mr. HOWARD: But when you get into subsection 3,—and this is what I am getting at,—do you not then get into the argument on specific detriments because they are spelling out, or not spelling out, but confining it even more than—

Mr. COHEN: Mr. Howard, if you look at the judgments in the big cases; take the judgment in the paperboard case and the judgment in the fine papers case, there the court deals in great detail with the way in which they controlled distribution and the way in which they regulated prices. So far as there is a tradition for describing in detail the operation of a combine, that tradition already exists in the writing of the judgments.

Mr. MORE: Mr. Chairman, I just want to get back again to Mr. Cohen, and I preface my remarks with the fact that I am not for resale price maintenance as we knew it before, but I am of this opinion—and I state it because I have been a merchant—

Mr. COHEN: Yes.

Mr. MORE: I have been in what I presume would be what you call a smaller community. I think the consumers' interest, in my mind, is one of prices. I am not convinced that they have achieved any benefits since the complete removal

of resale price maintenance, but I am convinced that there has been harm to at least smaller communities, and I speak of a city of 100,000 people, in regard to the community business and specialty shops. When these people decide to move in, they move in. This report we have just had indicated there had been no great cash benefit to the consumer, which I think is their main interest. There has been harm done to the business community, and today there is no criteria on the value of articles. We had the instance this morning, when I talked about trying to get at this the other day, when we had the economists before us. Here is an article the manufacturers say has never been sold for $39.95 and cost $22-and-something from them, and it is being sold, I do not know where, for $24; but it has been advertised as a $39.95 value.

I have mentioned the specific case where a business man had been in the furniture business for over fifty years, and I knew him personally and very well. He quit the business because he could not stomach what has happened since retail price maintenance was eliminated. He pointed out a chair and said, "There is a chair being sold for $199.50 and it is only worth $99.50. I make my full profit on it, but I carry it, against competition, at $99.50." It is actually advertised at $159.50, $179.50, and they take a peanut, a pencil or an old coal scuttle, or anything. He said, "I cannot stand it," and he quit and got out.

Those are the things I want to see this bill correct. I think there is an urgency to have them corrected.

Mr. COHEN: I agree with you entirely, but you are describing a misleading advertising situation and not a loss leader situation.

Mr. MORE: On the loss leader end, I say there has been detriment to the general business community because the big consumers have moved in. Their basic merchandise is not these items that have helped the specialty shops to build up their reputation of service over the years; and they have given the community full value and have participated themselves in the community. These big concerns move in and say, "What in this community is quite a thing is what will drag people to our store." They get the merchandise; this does not happen too often; and they cannot stand it again. I am not for the old resale price maintenance, but I am for some measure of control. I am convinced of that, from my own personal experience. You are talking about the national picture. If you are content with the developments in the national picture that have taken place under the present act, then I cannot get any basis of agreement with you.

Mr. COHEN: I cannot compete with you in personnal knowledge, since you have lived in the community and have run a store.

Mr. MORE: I did not get put out of business.

Mr. COHEN: I cannot compete with any of you in terms of knowledge of constituents coming to you, because you get letters all the time, and you have a climate of awareness which I could not possibly have. I merely ask you to assess the weight of that correspondence and appraise it, not only in terms of this, but in terms of other competing interests of the community which are interested in the most flexible price system we can have, and the ability of the vendor to sell at whatever price he thinks he wants to sell at. It is for you to appraise these things as best you can. I think such an appraisal is a healthier and happier process, if it is based on the maximum objective fact.

I thank you, gentlemen, for giving me so much time.

The CHAIRMAN: Thank you for coming here, it has been a pleasure to have you with us. Your presentation has been too brief for my education, because you have covered an awful lot of ground, and certainly did it at a speed I wish some of our members of parliament could follow.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

Appendix to Proceedings on

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

(See note on page 3)

RECEIVED
JUL 14 1960
Library of Parliament

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23490-6—1

THE CORRESPONDENCE INCLUDING BRIEF APPEARING HEREAFTER (A. TO O.) WERE ORDERED PRINTED AS A SEPARATE DOCUMENT. (SEE MINUTES OF PROCEEDINGS OF THURSDAY, JULY 7).

23490-6—1½

A

Toronto, Ontario
10th June 1960

C. A. Cathers, Esq., M.P.,
Chairman, Banking and Commerce Committee,
House of Commons,
Ottawa, Ontario.

Dear Mr. Cathers:

Re: Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code

The Minister of Justice has forwarded you a copy of his letter to me of June 8th, 1960, in which he advises that the above Bill has been referred to the Banking and Commerce Committee of the House of Commons, of which you are the Chairman.

I do not know that it will be possible for me to make representations in person before the Committee and I am, therefore, enclosing a copy of a letter which I addressed to the Minister of Justice under date of the 27th May, 1960, commenting on Sections 32, 41A and 33B as proposed in the new Bill.

I would appreciate it very much if the representations relating particularly to new Sections 32 and 41A were placed before the Committee. I could add little, if anything, to what I have said in an oral presentation.

Yours sincerely,

M. Wallace McCutcheon

Encl.

Enclosure to preceding letter

27th May 1960

The Honourable E. D. Fulton,
Minister of Justice and Attorney General of Canada,
Ottawa, Canada.

Dear Mr. Fulton:

Thank you very much indeed for asking Mr. MacDonald to send me copies of Bill C-58.

Since then I have had an opportunity of discussing the proposed amendments generally with Mr. MacDonald. I understand that an opportunity will be given to interested persons to make representations to the Banking and Commerce Committee of the House of Commons and the Senate, but I would like to take this opportunity of commenting on one or two of the proposed amendments to you directly.

Dealing first with the new Section 32, I would suggest that the last words of that Section reading: "or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade or industry" be eliminated. It is quite conceivable to me that cooperation in research and development, for example, might well have the effect of restricting the entry into or the expansion in a trade or industry by some person who quite properly was denied access to the results of such work, and thereby the defence that the alleged agreement relates only to cooperation in research and development and not to any of the categories described in Subsection (3) (a), (b), (c) and (d) might be completely nullified. Without attempting to suggest other examples, it seems to me that the inclusion of these words imports into the Section a new concept. The words "restricted" and "restrict" are not modified by the term "unduly" which provides the Courts with the standard applicable in considering a prosecution under Section 32 Subsection (1). Is it intended that any restriction no matter how slight is to be considered criminal? Far from clarifying the provisions of the Section so that businessmen will know what they can do and what they cannot do, I think the inclusion of these words clouds the issue, and I would suggest that they be deleted.

Turning to the proposed Section 41A, I would suggest that Subsection (4) be amended to provide that no proceedings may be taken in the Exchequer Court without the consent of all parties. As I read the Section now, the Attorney General may institute proceedings under Section 31, Subsection (2) in the Exchequer Court at his sole option. Very serious results can flow from either the prohibitory order or the mandatory order which may result from such proceedings. The result can be quite as serious to a company as the result of a prosecution under Section 32, but a prosecution under that Section cannot be undertaken in the Exchequer Court without the consent of the accused. It appears to me that an accused (because I think that is the convenient if not strictly the proper way to describe a person against whom proceedings are commenced under Subsection (2) of Section 31) is being deprived of rights which he now has if he has not the option of insisting that such proceedings be undertaken in a superior court of criminal jurisdiction from the judgment of which he would, in most cases, have a right of appeal both to the Appellate Court in the province in which the proceedings were instituted and, subsequently, to the Supreme Court of Canada.

The Honourable E. D. Fulton

I do not intend to comment at length on the proposed Section 33B because no doubt others more competent than I will be making representations with respect to this Section. I suggest, however, that it would be difficult to enforce, and that the responsibility which is placed on a manufacturer or wholesaler to determine whether an allowance is offered on proportionate terms, is a very heavy one. Enactment of this Section, in my opinion, could only result in a charge which has frequently been made against other provisions of the Act, that the law was uncertain and that business was, therefore, left in a state of uncertainty. It is the type of Section which invites frivolous complaints to the Director, and which—as I see it—can only involve unwarranted time and effort on the part of the Director and his officials and on the part of many businesses. I would suggest that the proposed new Section 33B be not enacted.

Yours sincerely,

M. Wallace McCutcheon (Signed)

Enclosure to preceding letter

Ottawa 4, June 8, 1960.

M. Wallace McCutcheon, Esq., Q.C.,
Barrister and Solicitor,
10 Toronto Street,
Toronto 1, Ontario.

Re: Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code

Dear Mr. McCutcheon:

I wish to acknowledge and thank you for your letter of May 27, 1960 about this Bill.

On Monday last, the Bill was referred to the Banking and Commerce Committee of the House of Commons in order to give interested parties an opportunity to make further representations. The Chairman of the Committee is Mr. C. A. Cathers, M.P.

If you decide to make representations to the Committee, would you please get in touch with Mr. Cathers as soon as possible. I am sending him a copy of this reply.

Yours sincerely,

(Original signed by)
E. D. FULTON.

B

FOR THE ADVANCEMENT OF PHOTOGRAPHY

June 27, 1960

Mr. D. Lauder, Sales Manager,
Canadian Kodak Sales Ltd.,
TORONTO 15, Ontario.

Dear Mr. Lauder:

We, as a group of major Hamilton Photographic Dealers have been concerned for some time with the loss of business of colour film and camera equipment to businesses who are using it as loss leaders which have other lines to sell.

Further, the facts are, certain local jobbers are selling photographic merchandise over the counter at 5% above cost. As an example of the proportion this has grown, one of our dealers was approached by a large firm's employees group to supply $1000.00 worth of 8mm colour film (suggested list is $4.90) at a lower price than $3.59, which is what they have been paying.

Also we are concerned re photofinishers who have been using direct mail to advertise colour and black and white film free with every photofinishing order, plus the fact they have been merchandising photographic equipment at little above cost.

We feel all the above are loss leaders and this is creating a definite financial hardship to the photographic dealer which is a highly specialized business that requires skilled and specially trained help.

Your immediate attention is requested.

Yours very truly,

HAMILTON DISTRICT DEALERS ASSOCIATION

Boschler Camera Shop
Camera Corral
Cunningham & Reid
Duncan Camera Shop
Dundas Camera Centre
Hill's Photographic
Powell Camera Shop
Stuart's Camera Dept.

CC: Mr. D. Spring
Mr. F. Leonard, MP
Mrs. E. Fairclough
Banking & Commerce
Committee, Ottawa

C

GARLICK FILMS LTD

June 15th, 1960

Mr. C. A. Cathers, M.P.,
House of Commons,
Ottawa, Ontario.
Reference: Bill C-58

Dear Sir:

Your active support of legislation now before the House to amend the Combines Investigation Act is sought.

The continuance of loss leader selling and uncontrolled false advertising will further damage the Canada economy to the ultimate detriment of consumer and producer alike.

Jobs become less and less under these chaotic conditions which are entirely foreign to Canadian tradition and thinking.

This legislation is both timely and very much needed. We strongly urge your full support, with particular reference to proposed new section 33c and new subsections (5) a to e of Section 34: through the Committee stage and in the House at third reading.

Sincerely yours,

GARLICK FILMS LTD.

Roland de L. Garlick,
President.

D

CAMERA CRAFT LTD.
CAMERA SHOPS

Amateur, Professional, Commercial, Industrial, Educational, Audio Visual, Cameras and Accessories, Photo Finishing, Greeting Cards, High Fidelity Equipment, Custom High Fidelity Installations, Records.

Regina, Sask.

JUNE 13th, 1960.

Members,
of the
Banking and Commerce Committee,
House of Commons,
Ottawa, Ontario.

Loss Leader Selling

I understand that the amendments to the Combines Investigation Act has had it's second reading and has been turned over to your Committee for approval or further amendment. I and our Company are particularly interested in that portion of the amendments having to do with the subject of Loss Leaders and I wish to make the following comments for your consideration.

First, I will start out with the statement that Loss Leader Selling as an habitual practice in a form of dishonest and disceptive merchandising and that it is not in public interest and not in the interest of consumers, the rank and file small and medium size merchants or the manufacturers.

I am not going to dwell on the manufacturers interest, except to point out that the manufacturer has a proprietary interest in his trade mark and that when he sells his product, he does not sell his brand name, his trade mark or his good will. Despite this fact, Loss Leader Selling very frequently does great harm and depreciates the value of these things which he did not sell and he should have some recourse against those who have done him injury.

I will give just one example and that is the case of Sunbeam, who manufacture Electric Razors and other electric appliances and who had approximately 180 dealers displaying and selling their merchandise in Utah, prior to the discount houses and Loss Leader Merchants, moving in on them in the State of Utah. After their merchandise and brand name had been kicked around for a little less than a year, I am told that the number of accounts handling their merchandise in the State, was reduced to approximately 40. The injury was rather obvious.

The Small Business Man—The Independent Retailer

Now lets come to his place in the picture. I am sure we will all agree that the small business man, in large or small towns, throughout North America, is a vital part of our economy and free enterprise system. In most cases, in setting a suggested retail price, the manufacturer allows them only that which the manufacturer thinks is absolutely necessary for the rank and file of merchants to have, to pay his way, pay his bills and retain a modest profit so that he can look after himself in his elder years, without becoming a charge on the State. I believe we would have a very difficult time finding very many of these small business men that become wealthy.

Under the legislation as it stands today, there are no holds barred and there are no curbs on the wealthy and giant retailing organizations in the practices they use to pinch out the small business man and to lead in the direction of retail monopoly.

The use of Loss Leaders is invariably confined to well known brands which are sold at a loss to entice people into their store and leave them with the impression that everything in the store is sold at similar bargain prices. This is of course, quite untrue.

It should not be difficult for your Committee to find out that it costs Department Stores from 30% to 33% on their sales to do business. If they lose money on their Loss Leaders, that loss has, obviously, got to be picked up by a higher price on other merchandise including merchandise carrying their private brands or merchandise on which the consumer is unable to check its relative value or to make a price comparison.

The Loss Leader operators work on the old English saying of:—"What you lose on the swings, you make up on the round-a-bouts". Obviously, if these Loss Leader operators were to sell all of their merchandise on the same basis, they would soon go broke and this they of course have no intention of doing.

Therefore, if what they lose on the Loss Leaders must be added on to the price of other merchandise sold in the store, then the consuming public has had no benefit, but great harm has been done to the smaller merchants and therefore, is not in public interest.

There are no miracles and thinking that the consumer benefits by buying some of the merchandise from a merchant at a loss, but in the end pays whatever that loss is in higher prices on other merchandise, can be compared to the socialist type of thinking that the Government gives the various Welfare State services at no cost to the citizens.

There is no Santa Claus either in Loss Leader selling or Social Services. In the end, the public pays for both.

It would be a very interesting study to delve into the average profits made by these merchandising giants on their private brand of goods and their mark up from invoice cost, as compared to their mark up from invoice cost on Loss Leader merchandise.

What is a Loss Leader?

I believe the best definition that has yet been given, is that when an article is sold at less than the landed cost of the merchandise in the store, plus the average cost of doing business, it then becomes a Loss Leader.

Loss Leader Selling is just as dishonest as false or misleading advertising.

Those who uphold and approve of the principle of Loss Leader selling, are aligning himself with the financially wealthy giant merchandising organizations as against the rank and file small business man and merchant.

In general, the small business man asks the Government for no subsidies or hand-outs. He does ask the Government to make fair ground rules that will prevent the unscrupulous giants from bringing the jungle to the market place.

I do not condemn bigness, as such, but only condemn bigness when it abuses its size and indulges in practises which are unfair and tend toward creating retail monopolies.

All political parties give lip service to their concern for the small business man, but this situation presents them with an opportunity to really do something concrete for the small business man.

I therefore urge the Members for your Committee to do something concrete on this subject at this time, whether it be by way of giving manufacturers and distributors the privilege of withholding their merchandise from those who habitually use it for Loss Leader purposes, or whether you simply make Loss Leader selling an offence which if proven, will automatically carry an effective fine, plus an injunction.

Those who wish to uphold the principle of Loss Leader Selling, will advance many reasons why the situation can't be remedied one way or the other and will raise many problems of administration and enforcement. These problems can be settled if there is a genuine will to do something about it.

The administration would seem comparatively simple in that any one should be privileged to lay a complaint with the Combines Investigation Branch, accompanying their complaint with copies of Newspaper advertisement, Radio or T.V. Commercials or other advertising, showing the prices offered along with information as to the manufacturers or distributors selling price.

If the retailers so complained against denies that the price offered is less than his landed cost of the merchandise, plus his average cost of doing business, then he must substantiate his claim by submitting to the Combines Investigation Branch, a copy of his most recent Annual Statement audited by a recognized firm of Chartered Accountants.

As a small Retail Company, we urge you to give this matter your most serious and sympathetic consideration.

Yours Very Truly,

CAMERA CRAFT LTD.
S. C. ATKINSON,
President.

Photographic Centre for Saskatchewan

E

ALBERT S. KELLY JR., President,
514 Cumberland Street,
Bristol, Virgina.

MASTER PHOTO DEALERS' & FINISHERS' ASSOCIATION

Toronto, Ontario,
JUNE 7th 1960.

Mr. C. A. Cathers, M.P.,
North York,
c/o House of Commons,
OTTAWA, Canada.

Re: Bill C-58

Section 14—Subsection 5

(a) that the other person was making a practice of using articles supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for the purpose of advertising;

(b) that the other person was making a practice of using articles supplied by the person charged, not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles.

Dear Sir:

Members of this Association who operate camera and photographic stores in your constituency respectfully request that you will attend meetings of the Banking and Commerce Committee dealing with this legislation in committee, now that it has passed its second reading in the House. On their behalf, we earnestly ask your full support towards keeping the above clauses incorporated in Bill C-58 when it is returned to the House for third reading.

Yours sincerely,

W. J. Ivay.
Canadian Executive Manager
MPDFA

TERRITORIAL VICE PRESIDENTS

Maritime Provinces
J. A. Boutilier,
Maritime Colour Labs,
100 Sackville St., Halifax, N.S.

Eastern Canada
C. A. Nicholls,
Acme Photo Regd.,
4123 St. Catherine St. W.,
Montreal, Que.

Province of Quebec,
Guy Rouleau,
J. E. Livernois Cameras Regd.,
19 Buade St., Quebec, P.Q.

Central Canada,
J. E. McCutcheon,
McCutcheon Camera Shop Ltd.,
Maple Leaf Gardens Bldg.,
Toronto, Ont.

Prairie Provinces,
Hartley Gale,
Winnipeg Photo Ltd.,
133 Market Ave. E.,
Winnipeg, Man.

Western Canada,
John Gerald,
Munshaw Colour Service Ltd.,
1250 Richards St., Vancouver, B.C.

F

UNIVERSITY OF SASKATCHEWAN

Department of
Economics and Political Science

Saskatoon, Canada
JUNE 15, 1960

Mr. C. A. Cathers, M.P.,
Chairman,
Banking and Commerce Committee,
House of Commons,
Ottawa, Canada.

Dear Mr. Cathers:

Under a covering letter to the Minister of Justice dated November 30, 1959, the senior members of the Department of Economics and Political Science at the University of Saskatchewan, Professors G. E. Britnell, V. C. Fowke, N. M. Ward, K. A. H. Buckley and A. E. Safarian, submitted a criticism of Bill C-59. We regret that because of the late date on which Bill C-58 has been introduced, and the pressure of other commitments, we are now unable to submit a full appraisal of Bill C-58 for consideration by your Committee.

It is the view of those who signed our original submission, however, that the amended Bill carries over, in substantially unchanged form, several provisions of the original Bill which were subject to serious criticism. Thus, although the wording has been changed somewhat, the amendments to section 32, listing permissible forms of co-operation between companies, are still subject to the dangers which we indicated in our submission. Furthermore, the amended Bill is still likely to result in a significant weakening of the ban on resale price maintenance. Finally, our concluding suggestion that the application of the legislation to the service industries be examined has been completely ignored.

We would appreciate it, therefore, if you would draw the attention of the Committee to our original submission, containing criticisms of the proposed Bill which are still relevant.

A copy of our original submission is enclosed for your convenience.

Yours sincerely,

G. E. Britnell,
G. E. Britnell, Head
Department of Economics and Political Science.

Enclosure to preceding letter

Submission to the Honourable E. D. Fulton, Minister of Justice, by Members of the Department of Economics and Political Science of the University of Saskatchewan on the Amendments proposed under Bill C-59 to the Combines Investigation Act and the Criminal Code of Canada

The primary objective of combines legislation is to protect the consumer. It is generally agreed that in an enterprise system like our own the protection of the consumers' interest can be assured most effectively by the force of competition. This principle is explicit in the language of the existing legislation. Specific practices which reduce the force of competition can only be recognized in their own context, particularly when the industrial structure is changing rapidly as in Canada today. Therefore, the attempt to anticipate and spell out specific practices that either do or do not undermine competition is a fundamental weakness in the proposed amendments to the combines legislation. This was recognized and clearly enunciated by the authors of the Report of the Committee to Study Combines Legislation:

> "....Any gain in certainty by the device of specifying permitted and prohibited practices would be more than outweighed by loss of range and flexibility.
>
> If such a list were substituted for the broad definitions of our present legislation, undesirable consequences would follow. Such a suggestion ignores the very nature of monopolistic practices and their ever changing character. As we have attempted to show in defining the monopoly problem, the list of monopolistic practices is never complete and the arrangements themselves are always susceptible of further refinements. To include such a list in the legislation would thus encourage the discovery of new devices in order to avoid the law. Moreover, it has also been shown previously that almost all the monopolistic and restrictive practices have a common feature: they *may* lead to monopoly, but they do not *necessarily and always* bring about such result. In order to know if they are *in fact* monopolistic and restrictive, it is necessary to consider the concrete circumstances peculiar to each case. Thus it is undesirable and almost impossible to base anti-monopoly legislation exclusively on the principle of specific prohibition. . . .
>
> It must then be recognized that in most cases covered by the monopoly field, the relations are so complex, the facts so various and the situations so changing that it is fruitless to lay down fixed rules or to expect to reach finality in policy. Within general rules, only a case-by-case examination can afford a basis for judgment and the flexibility so much needed in this field. Uncertainty and vagueness must to a degree necessarily follow.
>
> As to those who complain about such a disadvantage, they must not forget the fundamental requirements of the free enterprise system in which they live. As it was shown in a previous section of this report, private initiative and freedom from government intervention is justified only when complemented by freedom from private monopoly power and by the action of competitive forces. Those who escape from the rigorous conditions of the competitive rule must expect to be subjected to legislation designed to check monopoly power and to such uncertainty as is inherent in this type of legislation.
>
> We therefore conclude that it is undesirable to include in the Act a list of permissible practices."*

*Report of the Committee to Study Combines Legislation, Ottawa 1952, pp. 45-46.

Our comments on specific sections of Bill C-59 follows:

1. *Mergers* (Pages 1 and 7)

The proposed legislation lays down a test of detriment in the case of mergers, namely, "whereby competition.....is or is likely to be substantially lessened." This change in itself is desirable, since it simply extends the general principle which is explicit in the present legislation.

The defences provided on page 7, however, place an undesirably restrictive interpretation on the merger provision, and appear to involve serious internal contradictions as well. A brief consideration of these defences will indicate the dangers involved in spelling out specific defences rather than relying on the general principle enunciated above.

According to page 7 of the proposed Bill

it is a defence if the accused establishes (a) that

(i) the merger was necessary to achieve economies of production or distribution that could not otherwise be achieved and that will be passed on to the public, and

(ii) a substantial degree of competition remains in the industry or trade despite the merger.

This defence appears to negate the general test of detriment laid down earlier. It would be entirely possible for a firm to argue that, while competition has been substantially lessened, a substantial degree of competition still remains. If a firm could establish that *some* economies had been achieved peculiar to the merger and *promised* to pass these on to the public, it could get off scot free. How would the court determine that the economies were peculiar to the merger rather than to some hypothetical alternative? How is the court to determine whether the economies will be passed on—there does not appear to be any provision for the court to follow up on this? The phrase "passed on to the public" is quite ambiguous. It is quite possible that the economy would benefit in a particular case, for example, if reduced unit costs did not lead to reduced selling prices but to higher retained earnings for purposes of capital expansion. Has this been "passed on to the public"?

It is also a defence if the accused establishes

(b) that, by reason of its financial situation or otherwise, one of the parties thereto would have had to cease operations if the merger did not take place. (Our underlining).

This phrasing appears to leave the door wide open for predatory tactics by one of the parties, which may have forced the other to a position where there is no alternative to merger, unless the predatory tactics happen to be specifically illegal under the Act.

2. *Conspiracy* (Page 7)

Sub-section 2 conflicts with the general principle underlying the existing combines legislation and with the complex realities of our changing industrial practices, as outlined at the beginning of this note. May we reiterate as strongly as possible that the attempt to anticipate and spell out specific practices constitutes a most serious weakening of the legislation. The combines legislation should establish a clear principle to serve as a guide to the courts, and the principle is readily at hand in the present legislation. Nor does the present legislation prohibit any of the agreements which it is now proposed to permit, so long as such agreements do not limit competition. Every one of the six permissible forms of agreement (not to mention "some other matter not enumerated") can be used to exploit the public. Their approval in the

Act (subject only to the highly equivocal criterion of specific detriment) is likely to lead to ever-changing forms of conspiracy, confusion for the courts, and lessened protection for the consumer. Even if a case could be made for listing specific practices, surely any legislation designed to protect the consumer should not go beyond listing prohibited practices, and should take care to make it clear that these are only some of many which are prohibited—the others being defined as those which also limit competition.

3. *The Commission's Report* (Page 4)

We have already stated our fear that any attempt to bring in the demonstration of specific detriment is likely to confuse the courts and to serve as a convenient escape hatch for those limiting competion. Our alarm is increased when we find that, in the case of a merger or a monoply, the Commission shall "include a finding whether or not the participants in its creation or operation have acted with calculated disregard for the interests of the public." This language suggests something more than public detriment must be established, namely, the intent of the participants. Is one to assume that breaking the law will be a crime if done deliberately, but not if the participants are merely thoughtless? If so, we would suggest that the idea that ignorance of the law *is* an excuse be applied first to persons whose familiarity with the law, and access to legal aid, is more restricted. We would also suggest that such contradictions are inherent in legislation which dilutes a general and simple principle with subjective and uncertain (if superficially specific) practices.

4. *Resale Price Maintenance* (Page 9)

The ban on resale price maintenance has been greatly weakened by the defences provided. The general effect will be to strengthen the manufacturer in his dealings with the distributor, and to weaken competition among distributors, to the ultimate loss of the consumer. The imprecise wording of the defences will enhance these effects.

The definition of loss-leaders, for example, is far from clear. Would the existence of any profit at all mean that the article was not used as a loss-leader, or would it depend also on whether the article was used partly for advertising purposes? It seems curious that persistent use of loss-leaders, resulting in permanent gain to the consumer, is illegal—but apparently not a sporadic price-cut which is only of temporary value to the consumer. Again, what is a "reasonable" level of servicing when different consumers have widely different ideas about the need for servicing? The same difficulty arises with the phrase "unfairly disparaging . . . . in relation to its price or otherwise." Given the complexity of many durable goods, many consumers are accustomed to asking the distributor's advice on the relative performance of different products. Can we be assured that accurate, if critical, information on such matters will not be treated as unfair disparagement, assuming it will still be forthcoming?

5. *Service Industries*

It seems regrettable that this major revision of combines legislation does not involve a substantial extension of the legislation into the services sector of the economy. This sector, which has been growing very rapidly over the past few decades, is also subject to monopoly restrictions, increased prices, and often a low degree of efficiency.

G. E. Britnell
V. C. Fowke
N. M. Ward
K. A. H. Buckley
A. E. Safarian

November, 1959.

G

GENERAL PHOTOGRAPHIC PRODUCTS CO.
Division of General Films Limited

Regina, Saskatchewan
June 20th, 1960.

Mr. Cecil A. Cathers,
House of Commons,
Ottawa, Ontario.
Dear Mr. Cathers:

Re: Bill C-58.

The continuance of Loss Leader Selling, which really constitutes false or misleading advertising, has and is continuing to do great injury to small business throughout Canada and particularly the small retailers operating specialty stores. I refer very particularly to the Camera Shops across Canada, who have been facing murderous competition from the large and financially powerful retail organizations who have been using photographic goods as Loss Leader bait.

I would urge that this practise which is not in the interest of either the Consumer or his Supplier, be curbed or eliminated and either in the manner outlined in Bill C-58 or in the alternative, by making the practise of Loss Leader Selling an illegal practice, subject to both fine and injunction on complaint to the appropriate Department in Ottawa and the Departments finding that the complaint is substantiated.

An article is sold as a Loss Leader when it is sold at a price that is less than the seller's landed cost of the article plus the seller's average cost of doing business.

If the Bill is put through as indicated, then I would urge that the Rights of the Manufacturer also be given to the Distributor where certain goods are distributed to the Retail Trade through distributor channels.

Small business men will be appreciative of your aggressive support in combating this very serious problem.

Thanking you in advance, I am,

Yours Very Truly,

O. M. Paulson,
General Manager.

23490-6—2½

H

CANADIAN PHOTOGRAPHIC TRADE ASSOCIATION,
25 RICHMOND ST. W., TORONTO 1, EM. 4-2154

June 17th, 1960.

Mr. Cecil A. Cathers,
House of Commons,
Ottawa, Ontario.

Reference: Bill C-58

Dear Sirs:

Our Association is seriously concerned by the chaotic and economically damaging conditions caused by misleading advertising and loss leader selling.

We earnestly solicit your strong and active support in Committee and your vote in the House on third reading to new section 33c and subsections 5 (a to e) of Section 34, to retain these clauses in Bill C-58.

Yours very truly,

CANADIAN PHOTOGRAPHIC TRADE ASSOCIATION

Roland deL. Garlick,
Vice-President.

I

10511-128 Street
Edmonton, Alberta
June 26, 1960

Mr. Cecil Cathers, M.P.
Chairman, Banking & Commerce Committee
House of Commons, Ottawa

Dear Sir:

Reading newspaper reports of your committee's study of the amendments proposed for the Combines Investigation Act, I am very much more impressed by the arguments of those opposing the amendments than by those of their proponents. This refers particularly to the amendment which would permit manufacturers or distributors to exercise greater restraint than now over the circumstances under which their products are ultimately sold.

Looking back over the past ten years, it is quite apparent that many common household products have, since the 1952 amendment, been available at prices that vary from store to store and from day to day, and a person is left with a firm conviction that the average result is an appreciably lower cost than prevailed previously, having in mind the trend of prices and wages in the interval. The very existence of this healthy competition is as refreshing as the converse standardized price is suffocating.

In the field of heavier goods, one gets the impression that there is still a certain amount of conspiracy among manufacturers, as evidenced by identical bids sometimes submitted in response to calls for tenders, although here too there does seem to be more competition than earlier.

May I urge you, and your committee, to hold in mind the interests of the individual consumer, who probably will not be represented before your body to a fraction of the extent the more organized manufacturers, distributors, wholesalers and retailers of the country will be, and to that end to reject the proposals in question and to work for stricter enforcement of the existing law, together with more punitive and effective penalties for its infraction?

Yours truly,

W. R. Peyton

J

CANADA PACKERS LIMITED
Toronto 9, Canada

29 June, 1960.

C. A. Cathers, Esq., M.P., Chairman,
and Members of the Standing Committee on
Banking and Commerce,
House of Commons,
Ottawa, Ontario.

Gentlemen:

BILL C-58

An Act to amend the Combines Investigation Act and the Criminal Code

While we are in favour of the stated purpose of proposed Section 33B, which is to prevent discrimination between trade customers and to discourage promotional allowances, we think that interpretation of the Section in its present form is so difficult that it would be impossible for a manufacturer to carry on his operations in the certainty that he was complying with the law.

Section 33B deals with discounts, rebates, price concessions or other advantages granted for advertising or display purposes which are collateral to sales of articles but are not applied directly to the selling price. Allowances must be offered to competing purchasers on proportionate terms and the Section defines what is meant by proportionate terms. Essentially, the definition seems to provide that in order to be on proportionate terms,

(1) Allowances offered to different purchasers must be approximately in proportion to the value of sales to such purchasers.

(2) Where advertising or other expenditures or services are exacted in return for allowances the costs required to be incurred by the purchasers must be approximately in proportion to the value of sales to them.

(3) Where services are exacted in return for allowances the requirements for the services must take into account the kinds of services that the different purchasers are ordinarily able to perform.

As a manufacturer, immediate practical difficulties of interpretation occur to me, for example:

To comply with Section 33B, a manufacturer, at the time an allowance is offered to a customer, must be satisfied that the allowance is in some ratio to the value of sales to the customer, but in the normal course it would not be possible for the value of the sales to be known at the time the allowance is offered or to be computed in advance.

What value of sales should a manufacturer attribute to an advertising allowance granted to a customer when the advertising allowance is restricted to advertising over a short period of time, such as a week? This situation arises when a product is sold as a special feature to chain stores. A dollar allowance may be granted to cover the cost of chain store newspaper advertising for the product concerned and perhaps to cover also the cost of other services, such as special displays in stores and featuring advertising material in stores. Although the duration of such chain stores "specials" would normally be one week, sales of the product may be stimulated for some length of time after the week in question. In this situation, what sales of the product are to be attributed to the advertising?

Section 33B(3)(b) is conditioned upon proportioning the value of the manufacturer's sales to the customer in relation to the cost of the advertising required to be incurred by the customer. However, the manufacturer would not be in a position to know the customer's advertising or other costs. Advertising rates vary greatly as among different customers.

Section 33B(3)(c) puts a manufacturer in the position of being forced to accept and pay for any services which may be offered by competing retailers, whether or not the manufacturer believes the services to be useful and good value for the money spent. Different retailers may offer different promotional schemes to a manufacturer to promote sales of his products. Costs to the manufacturer of the different schemes may be much the same. The manufacturer may conclude that the promotional scheme of a particular retailer is good value for the cost involved but that the promotional scheme of some other retailer is not good value. Would a manufacturer commit an offence under the Section if he were to exercise his judgment about the relative worth of different promotional schemes and assume the cost of one retailer's promotion but reject a promotion offered by another retailer?

The foregoing are only a few of the more obvious practical objections to proposed Section 33B. I am sure that further consideration would suggest many others.

If you require copies of this letter for consideration by the Committee or other officials I would be glad to supply them.

Yours very truly,

W. F. McLEAN,
President.

K

MEAT PACKERS COUNCIL OF CANADA

TORONTO 1, ONT.,
JULY 4, 1960.

Dear Sir:

By virtue of the fact that some of the member firms of our Council also have an affiliation with the Canadian Chamber of Commerce and/or the Canadian Manufacturers' Association, both of which bodies made submissions recently in connection with Bill C-58, it was not considered essential that we make a separate presentation before the Banking and Commerce Committee of the House of Commons.

We have, however, studied the two submissions referred to above and find the comments expressed therein, respecting the proposed amendments, are generally in close accord with the views we would have presented had we been making a submission on behalf of the Meat Packers Council of Canada.

We, therefore, wish at this time, on behalf of our members, who include a major segment of the meat processors operating under federal inspection, to commend the submissions of the Chamber of Commerce and the Canadian Manufacturers' Association for your earnest consideration.

Yours faithfully,

H. H. Dickie,
Secretary.

Mr. C. A. Cathers, M.P.,
Chairman,
Banking and Commerce Committee,
House of Commons,
Ottawa, Ont.

L

BENNET & ELLIOTT LIMITED
Automotive Parts Accessories
Wholesale Exclusively
TORONTO

49 Charles St. E. Kingsdale 1169

JUNE 30th 1960

The Banking Committee
Parliament Bldgs
Ottawa, Ont.

Att: Chairman

Gentlemen:—

You are being at this time, high pressured by various groups both pro and con for the repeal of Bill 34. The writer is only a small businessman who will neither gain or lose regardless of the outcome of your hearings.

However keeping in mind that your first duty is to the canadian public and not to any special group, you must remember that what is of paramount importance, is for you to see that the consumer does not pay any more for his goods than what he has to. And this of course within reason so that no small business is ruined in the process.

On the other hand manufacturers must realize that before this law is repealed, that they must place more realistic list prices on their goods than they have at present. Today they place a high list price on goods, give a big discount to both the jobber and the retailer in order to get them to stock their merchandise.

I dont want to bother you with a long list of goods as your time is too valuable but lets take bearings:—All canadians buy bearings since that nothing that rolls can be without it. The Timken Bearing Co. has a list price on a Ford bearing of $1.08, this cost me as a jobber .37, A ford truck bearing having a list of $3.30 cost me $1.12. As long as you have such a wide spread between list and jobber you will have price cutting, regardless of what law is passed because, there are too many loop holes.

On the other hand something should be in the law to stop sales at BELOW cost price which is the ruination of the small business. In such case the public loses in the long run because invariably, when he goes to get such advertised goods, he is high pressured to buy something else which gives the retailer a high profit.

The law should insist that at least a 10% profit should be made. Last year I was asked to attend a meeting regarding this and a copy of my answer is attached. It is self explanatory.

Yours very truly

Phil Gauvreau, President
BENNET AND ELLIOTT LTD

Enclosure to previous letter

WA 2-1161
April 20, 1959.

Mr. David A. Gilbert,
Retail Merchants Assn.,
77 York Street, Suite 112,
Toronto 1, Ontario.

Dear Sir:

Since writer will be out of town on April 22nd. I thought I might write you my opinion re the repeal of Bill 34.

I think that to try to ask for an outright repeal is running your head against a brick wall. I think it is futile and does not warrant the time or money that will be spent on it.

Of paramount importance to the Combines Act and its representatives is the fact that they are supposed to see that the Canadian Public does not pay any more than what he has to when he makes a purchase.

Until some of the manufacturers establish more realistic list prices than they have in the past, the government will do nothing. We in the wholesale automotive parts business have the same problem as everyone else, but we have been told that as long as we have list prices from which the jobber gets 60% off that there would be price cutting and that the government would do nothing to stop it.

There just is too much spread in a set of rings that list at $30.00 which cost us $12.00 to stop it. We have had experience in the past when inflated list prices were placed on a realistic basis, discounts to both jobbers and retailers were cut down and almost all price cutting stopped.

Don't misunderstand me, I am for the repeal of the bill but I also know that I have learned to live with some of it and still operate a profitable business.

I think that if we went to the government and asked that the following be made illegal with large fines attached we would accomplish more than ask for outright repeal and get nothing.

(1) All sales below cost.
(2) All secret rebates from manufacturer.
(3) That all sales should show a profit of a certain percentage.

Sales below cost used as come ons or loss leaders can easily be proved. In our particular business no one, no matter who it is can buy Prestone at less than $2.15 per gallon. Yet it was sold by retailers all last winter at $1.51 and I could give you a lot more examples.

If we could accomplish the above and show the government how much healthier business men are in two years from now then we could go after the rest.

Yours very truly,

BENNET & ELLIOTT LIMITED
P. Gauvreau
President.

P.G./i.a.

M

CANADIAN RETAIL FEDERATION
38 King Street West, Toronto 1, Ontario

Office of
The President

JUNE 27th, 1960.

C. A. Cathers, Esq., M.P.,
Chairman, Banking and Commerce Committee,
House of Commons,
Ottawa, Ontario.

Dear Sir:

Under date of June 22nd I wrote to you expressing certain views of our Executive Committee regarding Section 33B of Bill C-58. Since that time representations have been made to our offices by various member-companies and association members asking that we supplement our letter of June 22nd to emphasize certain points as follows:

1. It is felt that additional stress should be placed upon the fact that methods of distribution vary widely among different branches of the retail trade. The distribution of many commodities is carried out differently in forms of retailing other than the food trade. Rules that are intended to apply to one type of retailing—in this case food—cannot necessarily be made to apply to other kinds of retailers, whether they are large or small.

2. The penalties involved in Section 33B are serious and there is a strong fear that they would provide to manufacturers an excuse to eliminate, in effect, advertising allowances to retailers of all sizes. This could involve an effective prohibition of advertising allowances generally, which we thing to be unfair and unrealistic.

3. It has been pointed out to us that the three definitions of "proportionate terms" in sub-section 3 of Section 33B do not stand alone but are cumulative. Therefore, in order to qualify to receive an allowance, the three definitions of "proportionate terms" must be met in the light of their total effect. It has been urged upon us that this is a practical impossibility for retailers generally, large or small, and amounts to a virtual prohibition of the receipt of advertising allowances. Advertising allowances cannot possibly be used in the same way by a small retailer as by a department store or as by a mail order house; yet the legislation presumes that this is possible.

A number of our member-companies have told us that, after consulting with their solicitors, they have failed to obtain a satisfactory interpretation of the language of Section 33B which would direct them as to what course of action they must follow should this Section become law. It would appear that it is not possible for a retailer to know what course of action he should follow or under what circumstances he may properly receive an allowance from the manufacturing supplier.

We sincerely trust that this additional material will receive the careful consideration of your Committee.

Yours very truly,

J. H. Northway, President,
CANADIAN RETAIL FEDERATION

COPY

JUNE 27th, 1960.

Enclosure to previous letter

C. A. Cathers, Esq., M.P.
Chairman, Banking and Commerce Committee,
House of Commons,
Ottawa, Ontario.

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Yours very truly,

(Signed)
J. H. Northway, President,
CANADIAN RETAIL FEDERATION

COPY

Enclosure to previous letter,
JUNE 22nd, 1960.

C. A. Cathers, Esq., M.P.,
Chairman, Banking and Commerce Committee,
House of Commons,
Ottawa, Ontario.

Dear Sir:

The Executive Committee of the Canadian Retail Federation has requested me to place before you, by means of this letter, certain of its views regarding Bill C-58—an Act to amend the Combines Investigation Act and the Criminal Code.

Because we are principally concerned with one section—33B—it was felt that we should not impose upon the time of your Committee by seeking to make personal representations in Ottawa. It is hoped instead that by this method we may convey our views to your Committee effectively without adding to the undoubtedly lengthy list of deputations seeking to appear before you.

We would like to quote the explanation of the purpose of Section 33B given in the page opposite page seven in the "first reading" copy of Bill C-58. The explanatory note reads as follows:

> The Report, in 1959, of the Royal Commission on Price Spreads of Food Products pointed to the desirability of limiting promotional expenditures in favour of price reductions. The Report, in 1958, of the Restrictive Trade Practices Commission Concerning Discriminatory Pricing Practices in the Grocery Trade indicated that promotional allowances by manufacturers were a source of discrimination between different types of trade customers. The purpose of section 33B is to prevent such discrimination and, at the same time, discourage promotional allowances by providing that, where granted by a supplier, they must be made available on proportionate terms to all competing customers.

The Canadian Retail Federation does not oppose the objective outlined in the above-quoted explanation of Section 33B; but, while designed to remedy discrimination which these two Commissions considered to exist in the food business, the wording of Section 33B affects all segments of retailing.

The wording of the section is vague and we feel that additional study should be given to the phraseology to provide clarification. The three definitions of "proportionate terms" contained in sub-sections 3(a), (b) and (c) are most confusing to us. The word "services" is not defined. While it may have been the intention to limit the meaning of the word to advertising and display services, this is not so stated. The word "sales" is employed several times in sub-section 3 of Section 33B. This word is not defined and we do not know whether it refers to net or gross sales, to estimated or actual value of sales.

Sub-section 33B 3(c) is particularly difficult for us. As we have pointed out, the word "services" is undefined and this word, when used with tthe phrase "competing purchasers at the same or *different levels of distribution*", suggests unrealistic interpretations. This sub-section appears to assume that similar services are available from jobbers, wholesalers and different kinds of retailers, failing to take into account the different functions and practices involved.

Allowances have long been made to retailers by manufacturers for the performance of such services as storage, transportation, guarantees, warranties, etc., in addition to those relating to advertising. Some retail distributors would not be able to perform the same services as those performed by other retailers. This differing ability to perform services appears to have been completely overlooked when Section 33B was written.

Our two main criticisms of Section 33B are: 1. that its impact upon a wide variety of retailers has not been sufficiently considered; and 2. that the wording employed produces serious doubts as to what retailers must do to conform with the provisions of this section. The above would seem to suggest the importance of further consideration of the effect of the Bill on all retailing and the necessity for clarification, which is definitely required since the present wording is most confusing.

It would be regrettable and embarrassing if Section 33B were to be left in its present form. Retailers will be handicapped and confused unless the wording of the section is clarified. The administration of a section involving such ambiguous wording would be, we think, almost impossible. Section 33B appears to stand alone, so that the remaining amendments contained in Bill C-58 could be passed were Section 33B to be left out. Section 33B could then be redrafted for presentation to the next session of Parliament.

We therefore recommend that Section 33B be held over for further study and re-drafting, in view of the present confused wording.

Yours very truly,

(Signed)
J. H. Northway, President
CANADIAN RETAIL FEDERATION

BLAKE, CASELS & GRAYDON N
Barristers, Solicitors, etc.
THE CANADIAN BANK OF COMMERCE BUILDING
Toronto, 1

JUNE 30, 1960.

C. A. Cathers, Esq.,
Chairman,
Banking and Commerce Committee,
House of Commons,
Ottawa, Canada.

Dear Mr. Cathers:

I have been directed by the Executive of The Canadian Bar Association to submit to you and to the other members of the Committee on Banking and Commerce the enclosed letter setting forth the submissions of the Association with respect to Bill C-58.

Yours faithfully,

(Signed)
A. J. MacIntosh.

Enclosure to previous letter.

JUNE 30, 1960.

The Chairman and Members,
The Committee on Banking and Commerce,
House of Commons,
Ottawa, Canada.

Gentlemen:

re—Bill C-58

Last year when Bill C-59 was introduced a committee was appointed to examine this legislation on behalf of The Canadian Bar Association. Subsequently the Association made representations to the Minister of Justice. Further consideration has now been given to the provisions of Bill C-58 and as a result, the Executive of The Canadian Bar Association has decided that the following additional representations should be made to your Committee on behalf of The Canadian Bar Association.

1. Section 31(2), as amended, provides that a superior court of criminal jurisdiction may issue an order prohibiting the commission of an offence or the doing of any act constituting or directed towards the commission of an offence. The section further provides that where the offence relates to a "merger" or "monopoly" the court may make an order directing the dissolution of the "merger" or "monopoly". The proposed Section 41(a) provides that such proceedings, as well as prosecutions in certain circumstances, may be brought in the Exchequer Court of Canada. Subsection 3 of Section 41(a) specifically provides for an appeal from any judgment of the Exchequer Court in the case of any prosecution. However, there is no provision for any appeal from an order made under the provisions of Section 31(2).

In these circumstances and having regard to the provisions of Section 582 of the Criminal Code it seems certain that no appeal may be taken from an order made pursuant to the proposed provisions of subsection 2 of Section 31 as amended. We believe that there should be a right of appeal in this case as there is when a prohibitory order is made following a conviction of an offence under this legislation. Such an order may have very serious consequences not only to the persons before the court but to other persons as well. Where the offence relates to a "merger" or "monopoly" the legislation permits an order to be made directing the person, who "has done, is about to do or is likely to do any act or thing constituting or directed towards the commission of an offence" *or any other person*, to do such act or things as may be necessary to dissolve a merger.

We respectfully submit that such an order which can have such serious results and which may be directed to persons who may not even be before the court should not be left solely to the discretion of a single judge.

The dissolution of a merger, of course, will undoubtedly involve a substantial reorganization of the companies which have been the subject of a merger and may affect the employees of the merged companies as well as the companies themselves. In our view an order with such far-reaching consequences should always be the subject of an appeal to the Supreme Court of Canada. Another reason for the granting of an appeal is that such an order will also, in many cases, involve a declaration that an offence has been committed. Accordingly, we respectfully submit that the rules as to appeals in criminal cases should be applicable to this kind of case.

2. Section 32(1) provides that agreements restricting competition unduly shall constitute offences. Section 32(2) as amended by Bill C-58 provides for certain defences to this crime. Subsection 3 provides that these defences will not be applicable where the agreement in question has lessened or is likely to lessen competition unduly in respect of prices, quantity or quality of production, markets or customers, or channels or methods of distribution. The subsection further provides that if the agreement has restricted or is likely to restrict any person from entering into or expanding a business in a trade or industry, the defence shall not apply.

We respectfully submit that this clause should be altered by providing that the defence shall not apply where the agreement has unduly restricted or is likely to restrict unduly any person from entering into or expanding a business in a trade or industry. To illustrate our reason for this submission it is certain, for example, that almost any exclusive franchise, whether it be for a province, a district or a city, would to some extent restrict a person from entering into a trade or industry. Such an agreement would not seem to be an offence under the legislation. It should only be an offence if it restricted entry into the trade "unduly". Accordingly, we think that this exception should be governed by the word "unduly" as are all of the other exceptions set out in subsection 3 and enumerated as are the rest of the exceptions.

3. We are also concerned by the provisions of section 33 (B) of the proposed amendment. The explanatory notes state that the purpose of Section 33 (B) is to prevent discrimination in the granting of promotional allowances between different types of trade customers. Our concern is that the language used in Section 33 (B) is so general and vague that it will require much interpretation by the courts. As this is criminal legislation we respectfully submit that the language used should be precise so that persons will have little difficulty in knowing whether their conduct is likely to be criminal.

It would appear that this legislation is directed primarily to certain practices which are followed in the food and grocery trade. Some of our members have already attempted to apply this part of the legislation to factual situations relating to other trades. In each case they have found that it has been most difficult to determine the meaning of the legislation when it is applied to these conditions.

We respectfully suggest that this part of the legislation be redrafted after a thorough examination of the types of promotional allowances now being granted.

Last year the amending legislation was held over for further consideration and as a result considerable changes were made in the legislation following representations by interested organizations. We submit that it would be useful to follow the same course in respect to this new legislation.

Respectfully yours,

A. J. MacIntosh.

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GROCERY PRODUCTS MANUFACTURERS OF CANADA

July 4th, 1960.

C. A. Cathers, Esq., M.P.
Chairman,
Standing Committee on
Banking and Commerce,
House of Commons,
Ottawa, Canada.

Dear Mr. Cathers:

By special courier I am delivering to you with this letter eighty copies of this Association's submission on Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

It is my understanding, from our discussion last Tuesday, that this submission will receive full consideration from the Standing Committee following the final day for the examination of witnesses, which occurs today, and will thus be taken into effect in respect to the report to be issued by the Standing Committee.

Sincerely,

C. W. Duncan,
President.

Enclosure to previous letter

GROCERY PRODUCTS MANUFACTURERS OF CANADA

TORONTO, July 4th, 1960.

C. A. Cathers, Esq., M.P., Chairman,
and Members of the Standing Committee on
Banking and Commerce,
House of Commons,
Ottawa, Ontario.

Gentlemen:

Bill C-58
An Act to amend the
Combines Investigation Act
and the Criminal Code

Grocery Products Manufacturers of Canada, an Association, has considered House of Commons Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code.

It is desired at the outset to inform you of Grocery Products Manufacturers of Canada. A non-profit Organization, Grocery Products Manufacturers of Canada was Incorporated by Letters Patent of Canada dated December 2nd, 1959, and was activated on June 1st, 1960.

The Objects of the Association, as approved by the Secretary of State, are as follows:

OBJECTS OF GROCERY PRODUCTS MANUFACTURERS OF CANADA

(a) To promote in every legitimate way the welfare of the industries manufacturing products primarily distributed and generally available through grocery outlets in Canada;
(b) To elevate the production and distribution of products primarily distributed and generally available through grocery outlets to the highest plane of efficiency, effectiveness and public service;
(c) To study and organize action on problems common to manufacturers of branded packaged products primarily distributed and generally available through grocery outlets;
(d) To collect and disseminate information and to provide a forum for the exchange of operating experiences on industry matters among members;
(e) To co-operate in cases of common interest with the activities of product organizations formed to meet the problems peculiar to the manufacture, distribution and sale of particular products through grocery outlets;
(f) To work with government agencies in the development and endorsement of laws and regulations protecting the health and welfare of the public and consistent with sound industry practices;
(g) To develop and maintain co-operative working relationships within each segment of the industry responsible for moving "grocery products" from producers to consumers—farmers, other primary producers, brokers, wholesalers, retailers and others;
(h) To establish a public understanding of the efficient line of essential processes and services between raw materials and consumer products.

Because Grocery Products Manufacturers of Canada is a new Association, membership is in an immediate state of growth. At the moment of writing there are twenty nine member-companies, as listed below. Bearing in mind that Grocery Products Manufacturers of Canada has been a functioning Corporation for *only* twenty-nine days, it is reasonable to assume that ultimate membership will embrace the majority of manufacturers of grocery products in Canada, of all sizes and types.

Members as of June 29th, 1960.

Brooke Bond Canada (1959) Ltd., Montreal, Quebec.
The Canada Starch Company Limited, Montreal, Quebec.
Canadian Canners Limited, Hamilton, Ontario.
Catelli Food Products Ltd., Montreal, Quebec.
Christie Brown & Company Limited, Toronto, Ontario.
W. Clark Limited, Westmount, Quebec.
General Foods, Limited, Toronto, Ontario.
General Mills Inc., Rexdale, Ontario.
Green Giant of Canada Limited, Tecumseh, Ontario.
H. J. Heinz Company of Canada Limited, Leamington, Ontario.
S. C. Johnson and Son, Limited, Brantford, Ontario.
Interlake Tissue Mills Co. Limited, Toronto, Ontario.
Kellogg Company of Canada Limited, London, Ontario.
Lever Brothers Limited, Toronto, Ontario.
Libby, McNeill & Libby of Canada Limited, Chatham, Ontario.
Thomas J. Lipton, Limited, Toronto, Ontario.
McLarens Limited, Hamilton, Ontario.
Mother Parker's Tea & Coffee Ltd., Toronto, Ontario.
Nestle (Canada) Limited, Toronto, Ontario.
Pillsbury Canada Limited, Midland, Ontario.
The Procter & Gamble Company of Canada Limited, Toronto, Ontario.
The Quaker Oats Company of Canada Limited, Peterborough, Ontario.
Reckitt & Colman (Canada) Limited, Lachine, Quebec.
Reynolds Aluminum Company of Canada Limited, Montreal, Quebec.
St. Lawrence Starch Company Limited, Port Credit, Ontario.
Salada-Shirriff-Horsey Limited, Toronto, Ontario.
Simoniz Company Limited, Toronto, Ontario.
Standard Brands Limited, Montreal, Quebec.
Westminster Paper Company Ltd., New Westminster, B.C.

In submitting these considerations of Bill C-58, Grocery Products Manufacturers of Canada is aware that a number of representations already have been made to, and witnesses heard by, your Committee, as recorded in the published Minutes of Proceedings and Evidence, numbers 2 and 3, with subsequent representations yet to be published.

Grocery Products Manufacturers of Canada is also aware that the Standing Committee on Banking and Commerce will terminate the examination of witnesses concerning Bill C-58 on Tuesday, July 5th. It is understood, however, that the submission from Grocery Products Manufacturers of Canada, now placed before the Standing Committee, will be reviewed in common with all other submissions on Bill C-58 and that, further, Grocery Products Manufacturers of Canada may state, if it so elects, its concurrence with any part of other representations of which it has knowledge.

Inasmuch as this consideration of Bill C-58 primarily is concerned with Part V, "Offences in Relation to Trade", Sections 33A and 33B, Grocery Products Manufacturers of Canada now states concurrence with the views

on these Sections as advanced by The Board of Trade of Metropolitan Toronto in its brief dated June 27th and by its verbal testimony before the Standing Committee on June 28th. (As a member of The Board of Trade of Metropolitan Toronto, the President of Grocery Products Manufacturers of Canada, C. W. Ducan, was one of the delegation of four present on that day).

In particular, Grocery Products Manufacturers of Canada emphasizes its complete accord with specific statements contained in the brief submitted by The Board of Trade of Metropolitan Toronto, viz:

Allowances for Advertising and Display—S. 33B

The language employed does not express its intention with sufficient clarity to carry the intention into effect. The wording of the section is confusing to the degree that a leading counsel has stated he did not know how he could either prosecute or defend anyone under the section as it is presently written.

Under s. 33B(1) this could happen. A manufacturer might be giving a 3% quantity discount and, say, a 2% advertising allowance. He might then set annual purchases of $100,000 as a target and pay any customer who reaches it the 2% previously given as an advertising allowance. This would not contravene the provision.

From the retailer's point of view, it is difficult for a purchaser to have knowledge of allowances granted to purchasers in competition. And from a manufacturer's point of view it is impossible to get the cost of newspaper space from the trade; this is because each enjoys a local rate versus the national rate, and these rates are negotiated individually by accounts with various newspapers. This information simply cannot be gotten from the trade under any circumstances.

Owing to the absence of the "to his knowledge" qualification, the present joint responsibility in the case of illegal allowances may no longer continue in effect. In that event each operator would have to police his suppliers or customers, as the case may be, and this is an impossible task in to-day's circumstances.

Distribution is a wide and complex field. S. 33B(3) is not sufficiently comprehensive to embrace all types of proper and legitimate allowances, where no such mischief exists as may have occurred in the food trade. For instance, there are many cases where a small supplier may wish to introduce a new product through a large store. Once such a store has accepted the product and advertised it, the whole retail trade becomes opened to it. The product thereby gains an acceptance that such a supplier could not hope to achieve so quickly on his own. The question has been raised of why such a supplier should not be allowed to pay for this if it is important to him.

S. 33B(3) (a) and (b) create an offence at the time an allowance is offered and condition the allowance upon an approximate proportion of the value of the sales. The value of the sales cannot be computed in advance at the time the allowance is offered. Consequently, it is impossible to tell whether an offence is committed until the costs are known and the total number of sales, resulting from that ad, are known. In mail order that period may be as long as nine or ten months. No one can foresee accurately the sales any ad may bring.

S. 33B(3) (b) is conditioned upon a proportion of the value of sales to the vendor in relation to the cost of advertising to the purchaser. The vendor is not in a position to know the purchaser's adver-

tising costs. Also, it is not clear what is meant by the expression—value of sales. Does it mean the estimated value of sales, the actual value of sales, net sales or gross sales?

The problem involved in checking on "cost" of services under sub-sections 3(b) and (c) and getting it on a proportionate basis is beset by so many varying factors that it is not possible to foresee how it can be implemented in practice. For instance, how can one bring to a basis of comparison such things as stamps, mass display, radio or newspaper advertising, contests involving unusual display effort, etc.

In the realm of general trade considerations, Advertising and Display are integral parts of merchandising and are important in all levels and forms of distribution. Modern-day merchandising uses Advertising and Display aggressively and in many diverse ways throughout the distribution trades, depending on geographical location, levels, types and methods of distribution and the product to be distributed. It is not in the interests of either the consumer or the trade to confine all types of advertising or display within the limits of s. 33B in its present scope and wording.

In addition, Grocery Products Manufacturers of Canada concurs with the recommendation concerning Section 33B contained in the letter dated May 25, 1960, addressed to The Honourable E. Davie Fulton, P.C., Q.C., M.P., by The Canadian Manufacturers' Association, as follows:

> We are continuing our enquiry into the possible effects of this proposed section and we urge that it be "held over" to afford us, and other interested groups, sufficient time and opportunity to study fully its possible implications and to make representations thereon.

Similarly, Grocery Products Manufacturers of Canada concurs with the recommendation concerning Section 33B made by The Canadian Chamber of Commerce, as recorded in the Minutes of Proceedings and Evidence, Number 3, as follows:

> The proposed section 33B is entirely new. Its purpose is indicated as the prevention of discrimination between different types of trade customers based on promotional allowances. A brief study of this proposed new section indicates that it may raise problems of interpretation and its full impact is not clear. It is recommended that this proposed section 33B be withdrawn for the present to allow further opportunity of study as to the full implications and a further opportunity after such study to make representations thereon.

The Minister of Justice is recorded in the Minutes of Proceedings and Evidence, Number 2, as follows:

> I assured the House of Commons, when the bill was debated there, that while we think we have produced a good piece of legislation, the government does not intend to be rigid about it, and if, after discussion, there are ways in which members of the committee feel it could be improved and amendments are moved, I will, as minister, examine them with an open mind. I hope this committee's report, when it reports the bill back to parliament, will be valuable and helpful; and I can assure you that the government will so approach any report or suggestions the committee has to make.

It is a source of encouragement to Grocery Products Manufacturers of Canada to learn of this reasonable attitude. It is the opinion of Grocery Products Manufacturers of Canada that while the general intent of Bill C-58

is acceptable, the manner in which Section 33B in particular is written creates so many difficulties in interpretation, implication and application, that it is most undesirable in its present form.

Grocery Products Manufacturers of Canada therefore recommends that Section 33B be withdrawn for further consideration.

Respectfully submitted,

(Sgd.) C. W. DUNCAN
President.

(Sgd.) LEON A. MILLER
Chairman of the Board.

(Sgd.) W. E. WILLIAMS
Director.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

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STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 10

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

MONDAY, JULY 11, 1960

WITNESSES:

From the Canadian Federation of Agriculture: Dr. H. H. Hannam, President and Managing Director; and Mr. D. Kirk, Secretary-Treasurer.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23500-2—1

STANDING COMMITTEE

ON

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Vice-Chairman: E. Morissette, Esq., M.P.

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Rowe
Rynard
Skoreyko
Slogan
Smith (*Winnipeg North*)
Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams.

Antoine Chassé,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

MONDAY, JULY 11, 1960

The Standing Committee on Banking and Commerce met at 9.33 a.m. this day. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Aiken, Bell (*Saint John-Albert*), Benidickson, Broome, Campeau, Caron, Cathers, Howard, Macdonnell (*Greenwood*), Martin (*Essex East*), McIlraith, More, Morton, Nugent, Pascoe, Pickersgill, Southam, Stewart and Tardif.—19.

In attendance: From the Canadian Federation of Agriculture: Dr. H. H. Hannam, President and Managing Director; and Mr. David Kirk, Secretary-Treasurer.

The Chairman observed the presence of quorum and introduced three letters relating to the proceedings of the Committee, two of which were ordered to be appendices to the printed proceedings of this day's record. (*See Appendices "A" and "B"*)

Dr. Hannam was introduced and, reading from a brief and notes containing his personal comments, expressed anxiety at certain provisions of Bill C-58, particularly those relating to retail price maintenance.

Following the questioning of Dr. Hannam and Mr. Kirk, they were thanked, and at 10.58 a.m. the committee adjourned to the call of the Chair.

J. E. O'Connor,
Acting Clerk of the Committee.

23500-2—1½

EVIDENCE

MONDAY, JULY 11, 1960.

The CHAIRMAN: Well, gentlemen, I see we have a quorum. I think that is pretty good at 9.33, on a Monday morning.

I received some correspondence in the mail this morning. I have a letter—it is really a copy of a letter addressed to Dr. English from Camera Craft Limited. It is quite lengthy. It is a criticism of Dr. Rosenbluth and Dr. English's statements about businessmen being burglars, and so on. What would be your direction? Shall this be tabled, or placed in our evidence?

Mr. CARON: We might as well have it in the evidence.

The CHAIRMAN: Then, I have another letter.

Mr. MARTIN (*Essex East*): Did anybody say that businessmen were burglars?

The CHAIRMAN: The way he put it, he is quoting here.

Mr. MARTIN (*Essex East*): He meant it in the way of a simile.

The CHAIRMAN: Yes: like accepting the advice of trade associations as to how combines legislation should be amended, is like asking burglars.

Mr. MARTIN (*Essex East*): Yes, but that is quite different.

Mr. HOWARD: You should read all the words; it says a little like.

The CHAIRMAN: Then there is a communication from Professor English giving some information. I think he sent copies to Mr. Drysdale and to Mr. Fisher, in answer to some questions.

Mr. MARTIN (*Essex East*): Should they not become part of the record?

The CHAIRMAN: Yes, I think so.

(*See Appendices A & B*)

Mr. PICKERSGILL: I am a little troubled about the first letter, because here is a person seeking to get parliamentary immunity by writing a letter to us which, perhaps if he published it on his own, he would have to accept legal responsibility for.

I thing the chairman would be well advised to consult Dr. Ollivier about this question before we make any decision about it.

Mr. HOWARD: In addition, I do not think it is a letter to us, really.

The CHAIRMAN: No. It is a copy of a letter to Professor English. I wonder if we should do anything about it?

Mr. CARON: It is not addressed to the committee.

The CHAIRMAN: No, it is just a copy sent to me.

Mr. CARON: By Dr. English?

The CHAIRMAN: No.

Mr. CARON: By the writer?

The CHAIRMAN: Yes, by the writer, Mr. Atkinson, president of Camera Craft Limited; it is just a copy of a letter which he wrote to Dr. English. I guess we will not table it.

Mr. PICKERSGILL: I think we had better not do anything about it.

The CHAIRMAN: What about Dr. English's letter?

Mr. MARTIN (*Essex East*): I think that letter should go into the record. I think it is a comment on answers given to the committee.

The CHAIRMAN: Yes. And then I have a letter from Mr. Jones, the member of parliament, which includes quotations from Miss Atkinson of the consumers association.

Mr. MARTIN (*Essex East*): And an excellent witness, too.

The CHAIRMAN: I think that information should be read into the record. (*See appendix*)

Now, we have with us Dr. H. H. Hannam, president of the Canadian federation of agriculture. He has been most patient since, I think, last Wednesday or Thursday, and I would like to express our appreciation to him for the time he has given in preparing the brief, and for the time he has spent in waiting to present it. I now call on Dr. Hannam.

Dr. H. H. HANNAM (*President, Canadian Federation of Agriculture*): We have attended a lot of conferences, and have arranged for quite a few in our day, so we know how it can happen. We understand it.

I have with me Mr. David Kirk, secretary treasurer of the Canadian federation of agriculture, and Dr. Bert Hopper, economist in the Canadian federation of agriculture.

Our plan is that I shall present the brief and make a few comments, and then David Kirk, who has made more of a study of this than we have, will act as our witness in discussing the contents of the brief and the clauses of the bill.

Mr. Chairman and members of the committee:

This brief submission respecting proposed amendments to the Combines Investigation Act and the Criminal Code is being submitted to you in writing at the suggestion of the chairman of the committee. In this submission the Canadian federation of agriculture will attempt to make clear why it feels it must register its objections to certain proposed amendments. In particular, it views with great concern the amendments bearing on the question of resale price maintenance.

We would say at the outset: we appreciate the fact that in a number of respects, the present Bill C-58 represents a great improvement over the amendments submitted by the Minister of Justice to parliament last year. This is particularly true in relation to combinations in restraint of trade. It is not, we feel, true of the sections relating to resale price maintenance. This latter subject will be our main concern in this submission although we will have some comments to make on one or two other features of the bill.

Members of this standing committee will appreciate that farmers have always considered they have a very special stake in this combines legislation. We say this not to minimise its importance for the nation as a whole, which we think is very great, but to emphasize the special position of agriculture in relation to it.

In the first place, as a producer and business man, the farmer has always been, and always will be, engaged in intense competition with hundreds of thousands of other producers like himself, both at home and abroad. In a position of such extreme vulnerability, he feels strongly that private combinations in restraint of trade should be fought with all possible effectiveness.

Secondly, again as a producer and business man, the farmer must buy his production supplies, in effect, at retail. Unlike the corporation which controls large aggregations of purchasing power, he must sell at wholesale price or less and buy at retail, and he is therefore particularly sensitive to any conditions that increase artificially or unnecessarily, the prices which he pays for his business supplies.

Thirdly, of course, the farmer as a consumer shares with all the other consumers of the nation their interest in seeing that the public interest is not sacrificed to private advantage through price maintenance and combinations in restraint of trade.

Section 14 of Bill C58—respecting resale price maintenance

The Canadian Federation of Agriculture has consistently supported the principles of public policy embodied in section 34 of the present Combines Investigation Act. It is this section which makes it an offence for a dealer to set up his own machinery or follow private policies for enforcing maintenance of the resale prices of the commodities which he sells. We have always been opposed to such practices because we believe they stifle true price competition, establish excessively high margins, create rigidity in the price system, make for higher costs of distribution and in consequence unnecessarily high prices to the consuming public.

We are anxious about the trend toward the reduction or elimination of price competition which helps to keep costs down and is of definite value to consumers and the fact that price competition is being replaced by promotional schemes of various kinds to attract customers which add to the prices of products but do not raise their value to consumers. A return to resale price maintenance would contribute to this undesirable trend.

Farm machinery and equipment and other farm supplies constitute most important items in farm costs. The re-establishment of resale price maintenance for these requirements of farmers or the adoption of amendments to the existing law against this practice which would provide avenues through which suppliers who favour the practice could evade the penalty of the law, would be detrimental to agricultural producers. Moreover, it would be contrary to the interests of farmers and their families as consumers. Farm incomes are relatively much lower than are the incomes of non-farmers and to permit manufacturers or other suppliers to force retailers to sell their products at prices which they establish would be particularly onerous on farmers and their families.

As we understand it, the general validity of our position is not questioned by the Minister of Justice, but he thinks that there are five circumstances, enumerated in the amendments, which should be considered legal justification for refusal by a dealer to supply his goods to any person. Our position with respect to these amendments is twofold:

First, we think that it is wrong in principle to place in the hands of a dealer wide discretion to decide for himself when a person to whom he supplies goods is violating certain standards of fair trading, and in effect give to him authority to act on his own decision by refusing to supply. Surely no one could call this a democratic procedure. Action needing to be taken should be taken through public regulation and enforcement. The amendments provide for private enforcement and we would oppose them on these grounds alone. Our second contention is that these five circumstances, which are supposed to justify refusal of a dealer to supply are in several respects not soundly conceived because they are incapable of enforcement by a regulatory agency.

Mr. AIKEN: Mr. Chairman, I am a little confused in the use of the word "dealer" which, in the brief, has turned up three times in a place where I thought it could mean "supplier".

Dr. HANNAM: We are using the word "dealer". I suppose we are thinking of a farm implement dealer. We are thinking of the agency—the retail agency of that product.

Mr. AIKEN: When you refer to "dealer" you are referring to a retail agency.

Dr. HANNAM: Yes—and we use the terms "manufacturer" and "supplier" in the same sense.

Mr. AIKEN: In the same sense?

Dr. HANNAM: Yes. We are speaking of the manufacturer being the supplier or, if we used the word "supplier", we are thinking particularly of the manufacturer.

I did not realize that you might have a different interpretation of the term.

The CHAIRMAN: Is this right:

> Our second contention is that these five circumstances, which are supposed to justify refusal of a dealer to supply are in several respects not soundly conceived.

Mr. AIKEN: This is the third place where the word "dealer" has occurred, when I thought the word intended was "supplier" or "manufacturer". It also occurred in the seventh line from the bottom on page 2, and the fifth line from the bottom on page 3. In each case, I think the intention was to use the word "supplier".

Mr. MORTON: It would mean, in effect, the wholesaler—

Mr. AIKEN: Yes.

Mr. MORE: In this context "dealer" is not a "retailer".

Dr. HANNAM: I see, by your bill, "dealer" means a person engaged in the business of manufacturing or supplying or selling any article or commodity. That is section 34 in the present bill.

However, I am sorry that we used the terms "dealer", "agency" and "retailer" in the same sense.

Mr. DAVID KIRK (*Secretary-Treasurer, Canadian Federation of Agriculture*): The reason we used "dealer" is because of its use as a defined term in section 34.

Mr. AIKEN: Well, as long as we understand it. I expected it was intended to mean an individual retailer.

Dr. HANNAM: Our contention is that the effect of this amendment, if passed by parliament, would be to make possible general re-establishment of resale price maintenance by firms who wished to do so. In short it is giving to manufacturers and large suppliers a privilege at the expence of the farmers and consumers generally.

Let us look at these five practices which provide defenses for refusal to supply:

1) *The use of an article as a lossleader for purposes of advertising, not for the purpose of making a profit on the article.* In our opinion this provision clearly opens the way to the establishment of resale price maintenance. The definition of lossleadering contained in the section is extremely loose. Add to this the fact that the dealer is the one who in the first instance interprets it and takes action to enforce his judgment by refusal to supply. We find it difficult to see how any court could under these circumstances successfully convict persons who used this section as an avenue to the imposition of resale price maintenance.

2) *The sale of articles not for the purpose of selling such articles at a profit but for the purpose of attracting customers to the store in the hope of selling them other articles.* This provision in the amendments is in many ways similar in nature and intent to the previous one regarding lossleaders. Our objections to it are the same—that this should not be a matter for private

determination; that it is extremely imprecise for purposes of legal interpretation, and that it will open up a road to resale price maintenance.

3) *Engaging in misleading advertising in respect to an article.* We do not support misleading advertising, and believe that it should be a matter for continuous review and policing by public authority. If it can be proved by an official investigation that a retailer is engaging in misleading advertising, then prosecution should follow, But again, we believe that to place the policing of this matter in the hands of dealers can only open up another avenue to the achievement of what we are trying to avoid, that is, resale price maintenance.

4) *Inadequate levels of servicing for the purchasers of articles.* We firmly believe that to permit the re-establishment of resale price maintenance because in the opinion of a manufacturer or other supplier his products are being inadequately serviced by a retailer or other seller, could result in the complete elimination of the existing prohibition on resale price maintenance, which prohibition has contributed so much to the freeing of price competition for countless commodities now marketed in Canada.

What constitutes "a level of servicing that purchasers.... might reasonably expect" is, we believe, practically undefinable or reaches into the realm of a multitude of definitions depending on the kind of product, the retailers' normal selling methods, the characteristics of the purchasers and a host of other factors.

5) *Unfairly disparaging the value of articles supplied, in relation to their price or otherwise.* This question of disparagement is, in our opinion, perhaps the most unsatisfactory of all. It will be noted that what is defined in the amendment is disparagement of the value of articles in relation to their price or otherwise. We would be inclined to think that any dealer desirous of enforcing resale price maintenance for his product would consider that any selling of that product below his suggested price, would constitute disparaging the value of the article in relation to its price. The number of ways through which a person might be considered by a dealer to be disparaging the value of the article he sells in other respects is no doubt legion.

We have used the word "dealer" there as "supplier".

We cannot view this section in any other light than as constituting an open invitation to the establishment by dealers of systematic resale price maintenance of they wish to do so.

Before leaving this subject, we would also like to comment on the section in the proposed amendment that says "no inference unfavourable to the person charged shall be drawn from such evidence (of refusal to sell or supply) if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe...." We would draw to the committee's attention that under this wording the person charged must not necessarily prove that the article which he refused to supply was actually used as a loss leader, or was actually disparaged or was actually the subject of misleading advertising, or was actually inadequately serviced. He must only satisfy the court that he had received reports of these supposed misdeeds which he considered reliable and had reasonable cause to believe that he was justified in taking action. We understand that a dealer is not a court of law and therefore we understand the reason why this section is worded the way it is. But we also submit that this section clearly exposes the unsoundness of the whole principle of making private dealers, in effect, regulatory agencies.

Combinations in restraint of trade

On the question of offences in relation to trade under Part 5 of the Bill, we will not have a great deal to say. We have already pointed out that we

think considerable improvement has been made over the wording introduced by the Minister of Justice last year, in the Bill which he subsequently withdrew. Nor do we suggest any wholesale indictment of the changes that have been made. For example, the consolidation of the relevant sections of the Criminal Code into the Combines Legislation is sound and logical and the amendments to Section 412 of the Criminal Code (proposed Section 33a) are in line with the recommendations of the MacQuarrie committee. We would also like to commend the government for the new sections outlining discriminatory practices in connection with advertising and promotional allowances. Nevertheless, there is a section of the Bill that gives us, we think legitimately, cause for concern.

As far as we can see, the new Section 32 in the Bill is intended to make it clear that certain practices that are not detrimental to the public interest may be followed provided they are not accompanied by harmful effects. This section seems to us to create real dangers. It has never been illegal to exchange statistics, to define product standards, to exchange credit information, to define trade terms, to set up advertising codes and so on. It seems to us unnecessary to make special provisions to ensure that such activities may be carried on with impunity unless they are in effect used as a vehicle, or a subterfuge for offences in relation to trade and we are fearful about possible implications for successful enforcement of the Act. We are concerned also that this new section in effect redefines the nature of these offences. Section 1 defines the offences much as they have been defined in the past in the criminal court (but we would note with the addition of the word "unduly") to one of the sub-clauses. However, if combinations, agreements, or arrangements in relation to exchange of statistics, defining of product standards, and so on, are used as vehicles for carrying on illegal trade practices, then prosecution comes to depend not on the traditional definition in sub-section 1 but on the new definition in sub-section 3, which reads:

> "Sub-section 2 does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:
>
> (*a*) Prices
>
> (*b*) Quantity or quality of production
>
> (*c*) Markets or customers, or
>
> (*d*) Channels or methods of distribution,
>
> or if the conspiracy combination, agreement or arrangement has restricted or is likely to restrict a person for entering into or expanding a business in a trade or industry."

Now this Sub-section 3 is entirely conditioned by the key word "competition" and the question of freedom of entry of new business. It contains no general injunction against restraint or injury to trade or commerce, against the limiting of physical facilities, against the unreasonable enhancement of prices, or against the prevention, limiting or lessening of the manufacture or production of an article. That is, as far as we can see, these injunctions do not apply unless they can be directly related to the lessening of competition or the restriction of entry of new business into a trade or industry. We are not legal experts and consequently cannot speak with full confidence about the significance of these amendments, but they do strike us as having the effect of making more difficult effective prosecution for combination in restraint of trade. The foregoing is respectfully submitted by the Canadian Federation of Agriculture.

I have a couple of comments that I wish to make. This is purely from the farm angle and from my own experience.

This question of resale price maintenance has come forcibly to my attention, in a first-hand way, particularly in the purchase of farm machinery and equipment. After coming to Ottawa to take on full-time work for the Canadian federation of agriculture I purchased a farm which I have been operating as a dairy farm during the past 16 years. It was in 1944 that I purchased the farm.

During the first eight years I recall on dozens of occasions, when attempting to bargain on price, I was told by farm implement dealers—this is the retailer—representing different companies, that they could not consider any reduction in price because if they did they were sincerely fearful of losing their agency by being cut off by the supplying company. I have confidence in those retailers, and I am quite sure they were sincere about it when they said, "We do not dare take a chance in cutting this price".

Mr. PASCOE: In what year was that?

Dr. HANNAM: I bought the farm in 1944, and for the first eight years that I had the farm I ran into this every year, because I was buying new machines—we did not have machines to trade in. I was buying new machines, mostly, and this was the experience that I ran into.

Moreover, I found in a great many cases that the price for a particular machine was almost exactly the same, or varied very little in price, as between the different companies.

During the last half of this period, that is the past eight years, I have found quite a different situation prevailing. I have found that I can often get a price benefit by considering the purchase of different makes of machines. In other words, I have found that farm implement agencies will bargain on price and they will attempt to compete and to beat the price of another man when I go from one to the other—and in this case I say that price competition is working. Farm implement agencies do enter into price competition to some extent to the benefit of the farmer.

It may be argued that under resale price maintenance farm implement dealers and agencies can enter into effective price competition by granting higher valuation on implement trade-ins. That is the story when we make this charge: they say, "Oh, well, every agency will give a higher valuation for the old machine trade-in. In that way, they do compete in price". To some extent that is true but, in the farm machinery line, trade-ins have not been a large factor in the war and post-war period because the greater expansion has been in the tractor and power machinery field. As proof of this I have just a couple of comments here: Between 1941 and 1959, the number of horses on Canadian farms dropped from 2,800,000 to 624,000, a reduction of 78 per cent in 18 years. In other words, at the end of the 18-year period there was only 22 per cent as many horses as there had been in 1941. This horse power has of course been replaced by tractor power.

Then, again, in 1941 we had 159,752 tractors on Canadian farms. By 1959 we had 548,000—three and three-quarter times as many. Farmers have purchased these tractors together with all the power machinery they have acquired—and I would say the greater part of it without trade-ins. Statistics indicate also that we have two tractors on approximately 150,000 farms in Canada. Unless farm machinery is being priced now to the farmers higher than it needs to be priced—which is a possibility—a weakening of prohibition against resale price maintenance can mean a very great deal to the agricultural industry through the medium of price competition which is permitted to function.

It seems to me that a somewhat similar situation prevails for much of the equipment and supplies entering into farm costs of production. This is a matter of very great importance to Canadian farmers who, it is generally recognized, are today victims of a cost-price squeeze because the prices at which they sell their products are low, lower than they were for example 10 years ago, in 1949—by 6 per cent—and the index of the cost of goods and services purchased

by farmers last year, in 1959, was 31 per cent higher than 10 years ago. In other words, the price that the farmer has to pay for goods and services is 31 per cent higher than 10 years ago, and the average of the selling price of his products is 6 per cent lower. This is what I mean by the cost-price squeeze, and this is why we are putting a good deal of emphasis on the prices which the farmer can pay and the need for price competition between the goods, the supplies, and the implements that the farmer needs.

Because we have half a million individual farm units entering into price competition with each other for their farm products, and often with millions of producers in other countries, farmers as a class, in their selling procedures, are subject to a very large measure of price competition—I believe a larger measure of price competition than prevails for other industries, unless it should happen to be the fishermen.

On the other hand, amongst manufacturers and suppliers of farm equipment and supplies, there is a definite trend toward the concentration of business in the hands of fewer and larger corporations. I am saying that: I think that is universally agreed. This trend increases bargaining power greatly for these suppliers and consequently places the farming industry—essentially an industry of small units—at a seriously increasing disadvantage.

In conclusion: the farmers of Canada will be disappointed if parliament passes a bill whose effect proves to be the weakening of price competition between their suppliers—which is bound to aggravate further the unfair relationship now existing between the price levels at which the farmer sells and buys.

That concludes my part of the presentation.

As I mentioned before, David Kirk, secretary treasurer, will take over now as witness in respect of the clauses of this bill, if you wish to have some discussion in that regard. He is a graduate of the university of Saskatchewan in economics. He worked for eight or nine years on the secretariat of the Saskatchewan wheat pool before he came to the Canadian federation of agriculture, seven years ago.

Mr. MARTIN (*Essex East*): I would like to ask Mr. Hannam a question based upon this very excellent brief.

At page 7 you say, in the middle of the first paragraph:

> the consolidation of the relevant sections of the Criminal Code into the combines legislation is sound and logical—

Would you care to tell me, Mr. Hannam, why you think that is sound?

Dr. HANNAM: I do not know if we have approached this in the right way, not being lawyers, but it seemed to us that the section had been fairly satisfactorily defined in regard to this thing, and it seemed satisfactory to us to include it in the bill.

Mr. MARTIN (*Essex East*): Having in mind one of your objectives in supporting the philosophy behind the combines legislation, do you not think that the act is weakened by removing the authority from the Criminal Code to, what is basically, some civil minded legislation?

Dr. HANNAM: I would not know about that. Have you anything to say about that?

Mr. KIRK: Our thought was that if you have legislation that deals with combines, probably the sound way is to have all the provisions with respect to that in the act rather than having another section. We certainly are not in favour of reducing the effectiveness of prosecutions under this which, as we pointed out, we think, with the other amendment to the section, creates a tendency to this effect, but as far as consolidating the act, our thought was

that probably this is the satisfactory and logical way of doing it. That is, having the whole thing in the combines legislation.

Mr. MARTIN (*Essex East*): Have you studied this problem on the basis of comparison between our combines legislation and the anti-trust measures in the United States?

Mr. KIRK: No, sir, I have not.

Mr. BENIDICKSON: Mr. Hannam, you referred to your experience in your own contract with the market and the comparing of farm implements over ten years. You indicated that you had farmed from 1944 to 1960. You said in the first eight years that there was a reluctance on the part of the individual dealer to shave, in any way, the advertised price of the farm implements.

Dr. HANNAM: The individual dealer did not hesitate to say so. A great many of them have said so.

Mr. BENIDICKSON: Do you think the significance of that change was due to the fact that there was a new law in 1951?

Dr. HANNAM: Oh, yes. In the past eight years I felt that the farm implement agent was no longer afraid of reducing his price.

Mr. BENIDICKSON: And you give credit for that to the 1951 legislation, which resulted in the change, in your experience as a purchaser of farm implements?

Dr. HANNAM: Yes. The threat of resale price maintenance was removed.

The CHAIRMAN: Mr. Hannam, I started in this losing game of farming in 1936 and I must say that I did not find that. I think probably the explanation for your experience is that you did not start until 1944 when farm machinery was very scarce. For the following eight years that was the condition.

Dr. HANNAM: That is right, sir.

The CHAIRMAN: The dealer was a very independent person during that period.

Mr. BROOME: It was a sellers' market.

The CHAIRMAN: It was a sellers' market.

Mr. MARTIN (*Essex East*): Mr. Chairman, may I ask you a question, now that you have put yourself in the role of a witness. Are you able, in the face of your great preoccupations, to give to your farm concerns the attention which Mr. Hannam would obviously give to his?

The CHAIRMAN: I cannot answer as to how much attention Mr. Hannam has been able to give to his, but I know I have not been able to give enough attention to mine.

Mr. MORTON: Mr. Chairman, Mr. Hannam has stated that it appears that these various clauses in section 34 are going to weaken the law against resale price maintenance in respect to farm machinery and equipment. Can he tell me whether, in the farm implement trade he finds that the trade are using loss leaders as such, the same as they do in the electrical and grocery trade?

Dr. HANNAM: No, we do not run across that in the farm implement trade, or supply trade.

Mr. MORTON: So I take it, as far as farm implements are concerned, these sections would not apply?

Dr. HANNAM: The first two would not apply.

Mr. MORTON: The first two would not apply because there is no practice in respect of the price, in using farm implements as price leaders, so therefore your objections would really boil down as against paragraphs (*c*), (*d*) and (*e*), is that right?

Dr. HANNAM: Yes.

Mr. PICKERSGILL: I have a supplementary question to that. Mr. Morton is assuming, is he not, that the only interest farmers have is in the farm implement trade. In my experience as a former farmer, farmers also buy consumer goods.

Mr. MORTON: I was referring only to the farm implement trade, because farmers naturally also buy electrical equipment and groceries, the same as other Canadians. I was referring specifically to the farm implement trade.

Dr. HANNAM: Yes. If you are talking about farm implements, I would say that is true. On the other hand, in respect of all household goods and personal requirements—automobiles and everything else—they are in the same class as other consumers.

Mr. MORTON: But you were basing your comments today in respect of the farm implement trade?

Dr. HANNAM: Yes.

Mr. MORTON: You said that you were afraid the dealers would be able to set up a price maintenance scheme in respect of farm implements, and that is what you are particularly worried about?

Dr. HANNAM: Yes. I was referring particularly to my experience, and I was referring directly to the farm implement trade and the farm implement supply trade.

Mr. MORTON: We understand the amendment does not prevent a retailer giving a lower price now and then on a deal. This section covers continuously the practice of cutting down on prices?

Dr. HANNAM: I think you are misinterpreting our brief because, we say that because of these clauses it should not be very difficult for a supplier to find a defence against doing that, and that it would be extremely difficult to prosecute him when it is as wide as it is. It might be found almost useless to attempt to bring a supplier into court for doing this.

Mr. MORTON: You are stating that there appears to be fewer in this case manufacturers of farm implements?

Dr. HANNAM: Yes, sir.

Mr. MORTON: What do you find in respect of the competition between those manufacturers who are left? Can you say something in that regard?

Dr. HANNAM: I think that there is a definite trend toward getting away from price competition, as we have said here. There is a great tendency toward maintaining an almost uniform price, and having competition on the basis of service and promotion. The big companies compete for service, and they compete for business by using promotional schemes. They are getting away from actual price competition. We have not done any particular research in this regard, but it is my observation that the fewer and larger corporations we get, the less price competition there must be.

Mr. MORE: That is, it has been a growing development since the change in the law, that you are getting fewer suppliers, and they will eliminate the other people?

Dr. HANNAM: I am not suggesting a change in the law had that effect, but that is the trend of our times, and has been for many years.

Mr. MORE: You talk about uniformity of prices. What effect do you think the uniformity of labour agreements and wages has had?

Dr. HANNAM: I think they tend towards the same thing.

Mr. MORE: Have they not removed the opportunity for manufacturers to compete price-wise, to some degree at least, with the development of that uniformity of wage contracts?

Dr. HANNAM: I suppose it can be argued that the development of our commercial economy has resulted in that; but many factors contribute to more administered prices. Certainly, in our society, as far as farmers' purchasing is concerned, there seems to be much more uniformity and much more rigidity in costs all the time. There is a growing increase in the rigidity of prices. When our prices fall the other prices do not fall; they seem to be held. On the farmer's part, his prices fall and do not rise with other prices today, for a special reason; and that is because the technical revolution on the farm has enabled us to oversupply our markets. This over-supplying of our markets, at the same time, has resulted in the depressing of our prices. But in industry, they have more power to move up their prices, and more power to hold them rigid. This explains, I think, pretty well the disparity between the price at which the farmer sells and the price at which he buys.

Mr. SOUTHAM: You are in actual agreement on most of the proposed amendments, but your suggestion is that in several, which you refer to in particular, they have a tendancy to create, or could create more rigidity in price?

Dr. HANNAM: Yes. We think the wording of this bill now will enable manufacturers' suppliers to reinstate resale price mantenance; that they can do it and will feel safe to do it, because it is much harder to prosecute them under these amendments.

Mr. MACDONNELL: I understand you to contrast the position of the farmer and manufacturer by saying the farmer had to sell competitively?

Dr. HANNAM: Yes.

Mr. MACDONNELL: Would you not have to qualify that? You would not say that with respect to the western wheat farmer?

Dr. HANNAM: The western wheat farmer is selling competitively with farmers in all other countries.

Mr. MACDONNELL: I see what you mean.

Dr. HANNAM: He is taking the world price; the wheat board is taking off the cost of selling; and the farmer is getting what is left. It is true that competition within Canada has been removed—

Mr. MACDONNELL: How far has it been removed?

Dr. HANNAM: —on wheat.

Mr. MACDONNELL: On what other important products has it also been removed in Canada?

Dr. HANNAM: I would admit it has been removed somewhat—take on the price of butter, for example, where we have price supports that are relatively good. Price supports are not all relatively as good as they are on butter. In fact, most of them are not up in a place where they hold a price somewhat higher than competition would provide.

Mr. MACDONNELL: One other question. You spoke about the shrinkage of farm prices, and the rise in costs. I think you said in the last ten years it was 31 and 6 per cent. If you carry that ten years further back, and take a comparison for 20 years, would it show any substantial difference?

Dr. HANNAM: I think not.

Dr. HOPPER: I do not think it would.

Dr. HANNAM: No, it would be almost relatively the same.

Mr. PICKERSGILL: I would like to put a question to Mr. Kirk on the paragraph marked 4 on page 5 of the brief. I wonder if he could elaborate a little on this section and, perhaps, illustrate in the field of farm machinery the point that is made here.

Mr. KIRK: I am not intimately familiar with the farm machinery field, but I think our point here is that under this section the supplier of farm machinery

to the sellers, to persons who sell to the farmer, would be able to set up a certain set of criteria for sales rooms, for display, for servicing, for parts, and for carrying the full line of machinery, perhaps, that would, in effect, put him in the position of being able pretty much to regulate who dealt in his machinery and who did not; and, under other sections, the prices at which they dealt.

Mr. BROOME: A supplementary question to that. I have travelled a lot in the west, and I happen to be a part-time farmer too, like so many people here.

Mr. BELL (*Saint John-Albert*): Soya beans?

Mr. BROOME: From all I know of farming, farm machinery servicing is just about the basic factor. If a farmer buys a tractor and he buys it at a pretty low price, if the dealer is not going to stock the parts and have any servicing available, that farmer has cooked his goose. Servicing, perhaps, to the farming community is more important than, say, with regard to the automobile, where you have a choice of dealer. With regard to farm machinery, so many farming communities only have one dealer. I do not believe this section, whoever prepared it, reflects the viewpoint of farmers at all.

Mr. KIRK: The implication of this paragraph—and it does not refer only to farm machinery—is not that servicing is not an important item to the farmer, because it is clearly a very important service. The standards of servicing that are offered become a real, competitive factor. So far as that is concerned, there are laws in some places with respect to the maintenance of parts depots, and so on—

Mr. BROOME: What laws?

Mr. KIRK: —which farmers support. This is a servicing problem. Parts must be retained and available to farmers for a certain period.

Mr. BROOME: What laws?

Mr. KIRK: I think there is Saskatchewan legislation in respect to that.

But our point is that while these are certainly important features, in so far as is necessary, they should be dealt with either by regulation that lies outside the discretion of the person in business, the farm machinery manufacturer, or else, should be left to the competitive forces—that it should not be the business of the supplier of farm machinery to be able, in the name of servicing, to make rules and regulations that, in effect, allow him to maintain resale prices.

Mr. PICKERSGILL: Mr. Chairman—

Mr. BROOME: Following that up, take the case of an International Harvester or a Massey-Harris dealer selling tractors and farm equipment. Say he gives no servicing whatsoever. Customers start to write in, and they just cannot operate that type of equipment. Do you say that the manufacturer then, in that area, must leave his sales of his product in that area with that person who is going to kill his business completely—and not only kill his business, but will take away competition in that area because there will be one less competitor; and, finally, put people, who have purchased this equipment in good faith, in the intolerable position of not being able to use their equipment?

Mr. KIRK: Well—

Mr. BROOME: It is not practical. You are wrong.

Mr. PICKERSGILL: I was interrupted in the process of asking some questions about this. I had one or two more I wanted to put. Perhaps I could sum it up this way by asking Mr. Kirk, if, in his view, or in the view of Dr. Hannam, whichever gentleman cares to answer—the farmer himself should have the choice of whether he wants more or less service, instead of the manufacturer being empowered to dictate it. Would that be a fair way of stating it?

Mr. KIRK: That is part of it. But to answer more fully the point raised by Mr. Broome, I think our point throughout the brief is not that there is no such thing as a trade practice that is undesirable.

Our essential point is that in the case you mention, in fact dealers will and must supply service if they are going to remain in business.

There may be some kind of public regulation necessary to protect the farmer; but with legislation of this kind I think there might be undesirable instances where, taking them by themselves, action in connection with such an instance might be justifiable; but the game is not worth the candle; the effect of the legislation is that it is going to result in re-institution of resale price maintenance.

And even though you might pick out isolated, individual case where it might be worth while, I still say the game is not worth the candle.

Mr. PICKERSGILL: I would like to put my basic question in another way. You do not want the manufacturer or the supplier to become a policeman?

Mr. KIRK: That is right.

Mr. BROOME: Of his own product?

Mr. PICKERSGILL: Exactly.

Mr. MORTON: In the case of a dealer of farm implements, is it not true that there is only one dealer for each manufacturer in the district, and that there is very seldom competition between dealers of the same make within a district?

Mr. KIRK: No, there is not.

Mr. MORTON: So this is somewhat different, let us say, than in the optical trade, for instance, in the city of Toronto.

Therefore, whether or not that is true in that case, the manufacturer should have some control over the policy of the dealer, in order to see that there is some service. He has, in fact, to police the service going to the customer in that area.

Dr. HANNAM: Well, perhaps there might be something in that. As a matter of fact, my experience with the farm machinery business is that we do not very often have any complaints against the farm implement agent. I have more complaints against the policy of the supplier of parts.

I had one tractor. There was an agency here in Ottawa. I bought another farm, and I moved to another farm which was 25 miles east of Ottawa. We found that we could not get parts in Ottawa, because this was the head office, and they only sold wholesale. So we had to go to City View, to a retail agent there; and this made a distance of 35 to 40 miles from my farm. It was so completely inconvenient that I traded in that tractor in order to get an agent down there right close to my farm.

Mr. MORTON: That is part of the poor service of that company.

Mr. HANNAM: As a farmer I do not think we very often complain about the service we get from the retailer. We are far more critical of the policy of the supplier of parts, and where they are made available.

Mr. MORTON: I agree with you; that is part of the policy. But the point that I would bring up is that the manufacturer should in no case have any power to police the dealer.

I was suggesting that under those circumstances, where there is only the one dealer in the district, you could take control from them in policing the dealers. Otherwise, he may want to give good service. Would you consider it possible to do that?

Dr. HANNAM: I do not know what the nature of the contract is that the manufacturer has with his agent. But if a dealer is not disposed or equipped to give service, I presume the manufacturer will bring that contract to an end and appoint another agent. I see no reason why they should not do that.

But what we are discussing here is the manufacturer who wants to maintain his prices, and he finds a particular agent is cutting his price, and he hears about it. He can defend cutting him off on the basis, essentially, that this man is not giving good service. He can use that as an excuse to maintain his price.

Mr. SOUTHAM: I go along with Dr. Hannam. I have lived in the west all my life. I have found that the manufacturer will look pretty carefully into the background of the agent he proposes to set up; he will want to know about his financial backing, and his equipment, and his ability to give proper service on that equipment, because these are very important factors.

Now, in respect to Mr. Morton's point about competition between different companies, very seldom do you find very much discrepancy in that line; and I will go further with Dr. Hannam's remarks and say that this problem of repair parts, and the keeping of enough of them in stock and so on, in order to service properly machines which are becoming obsolete, is something which is giving people much concern. But as to whether or not it has been regulated, I would not know.

Mr. PASCOE: Following up Mr. Broome's suggestion that he is not sure of certain consequences, I wonder if Dr. Hannam, for the record, would outline how the Canadian federation of agriculture represents the business of the farmer, and how many farms or farm organizations were consulted in the preparation of this brief?

Dr. HANNAM: We have nine provinces in the federation, and in each one of the provinces there is a similar organization.

Our rule generally is that each province has three directors on our national board. The maritimes have three directors, rather than three for each province; and a few additional organizations make up our board.

Then at our annual meeting we have two extra voting delegates for each director. Thus we have at the annual meeting 79 delegates.

Now, we went over this—the outline of this brief—with our annual meeting; or rather, I should say, with our directors.

But, on the other hand—I was going to say it was in connection with the farm implement machinery. There was a separate resolution.

However, this question of resale price maintenance has been endorsed a number of times by our federation in past years, and that is the settled policy. Also, I think there is nothing new in this, than what was approved by our 28 directors, at the time of our annual meeting.

Mr. PASCOE: Is it fair to ask you this question, Dr. Hannam: when you give an expression of opinion, does it pretty well represent the views of the farmers?

Dr. HANNAM: We think it does—at least, as well as you can channel a complete expression in a country as large and as widespread as this country of ours, with so many geographical regions.

I do not think there is any national organization in Canada, whether you take the businessmen, manufacturers, and so on, that can present any better or any fairer point of view of their interest across Canada than we can as a federation.

Mr. PASCOE: I would like to follow up with one more question, in regard to what Mr. Macdonnell said.

On page 2, you say:

Thirdly, . . .

—and you talk about the farmers and their possible opposition or, perhaps suspicion in connection with price maintenance.

How does that fit in with the reasons for price support for farm products?

Dr. HANNAM: Well, we do not believe that the price support program which we have in Canada has been responsible for a rise in the retail prices of food products which are unfair to the consumer.

Mr. PASCOE: You call it—or, refer to it—largely as price maintenance.

Dr. HANNAM: No. You see, this is all done in the same way as marketing acts; they are all done under public authority. It is the responsibility of our dominion and provincial governments to seee that there is no exploitation of one group by another, and if you have legislation and programs that are administered by the public authority, either dominion or provincial, then, I am quite sure, they look after that.

Mr. BROOME: Mr. Chairman, on a question of privilege; I did not say this brief did not represent the views of the farmers. I said the question of service was imperative in connection with farm machinery, that it was of the utmost importance and, at page 5, section 4, it sort of talked down the value of service—and I said that that was wrong. Farmers put a tremendous value on proper servicing of their equipment, and I said if the dealer did not properly service it, then it was in the interests of the farmer that the manufacturer should make that dealer provide the service, or cancel it.

Dr. HANNAM: May I add this, Mr. Chairman; we do not know of any organization, or of any regional organization, of any group of producers that have put forward a point of view that is opposed to the one we are presenting to you.

Mr. BELL (*Saint John-Albert*): May I ask Dr. Hannam if, at any time, he has received any complaints from any sections of agriculture that their products are being used in the loss leader field?

Dr. HANNAM: Yes. Our fruit and vegetable men are very, very strong on this question of loss leadering.

Mr. BENIDICKSON: And, there is poultry.

The CHAIRMAN: And, poultry.

Dr. HANNAM: Yes, poultry as well; that is true.

However, our position is that farmers are somewhat different from others in respect to loss leadering because, if loss leadering is done, say in this city, by some of the chain stores, you see them advertised, and they permit loss leaders to bring people into the store. And to advertise these affects the sale on the market of that particular product—the local market and everybody who is buying. Once the stores that are buying in this area see an ad by a large chain store they say: our prices are too high; we will have to move them down. This has the effect that our farmers are more concerned particularly about the effect of the price in their area when loss leaders are used in the stores—and that is somewhat different from the general interest or harmfulness that is felt by loss leadering.

Mr. SOUTHAM: And, in connection with that question, the very fact the commodity is a perishable one, he cannot hold it until a time when they would not be practising this particular loss leader policy in the particular area. Therefore, the whole group in the area is immediately affected by that, and it is a very unfair situation.

Dr. HANNAM: Yes. As you say, they are perishable products. Then, if a certain large merchandising corporation advertises a product at what often is

a loss leader price, it is lower than the wholesale price. If they advertise a retail price which is clearly lower than it is sold at wholesale, then everybody in this whole region uses that as an excuse to push the price down. It has the effect of depressing the farm prices because there is an inadequate supply or, maybe, an oversupply, during that particular season.

Mr. AIKEN: Is not that exactly what this bill is intended to prevent?

Mr. BELL (*Saint John-Albert*): That is what I was going to follow up; in so far as this legislation might deal with loss leadering, then this section of your federation brief should be very strongly in favour of it.

Mr. KIRK: Well, there are two or three points on this.

First of all, the position of our federation is that if action on this agricultural loss leader problem is taken, it should be taken by public regulation. We do not think this kind of provision in the Bill would be of any assistance to the agricultural market. There is the question of dealing with agricultural loss leaders adequately. It is a very difficult problem to regulate loss leaders in connection with agricultural products because you have a fluctuating market price, to start with, and then a problem arises because the price can go down the next day. There is a great fluctuation in a volatile market like turkeys or peaches, and it presents a very difficult problem.

First of all, we think the legislation should be provincial. The problem is to try and develop usable legislation first of all, at the provincial level, which provides for public regulation and not for refusals by dealers to supply, and then supplemented, if necessary, by federal legislation, relating to the interprovincial and export trade with which, by implication, the province could not deal.

Mr. BELL (*Saint John-Albert*): Mr. Chairman, in connection with a slightly different field, I wonder if I could ask a general question.

The CHAIRMAN: Proceed.

Mr. BELL (*Saint John-Albert*): You have expressed some fears about big business, and concentration in the implement field, and how there might be a restriction on price competition as a result. Do you feel the same dangers might exist in a similar concentration in the chain food producing field, and thus eliminating competition in a general way?

Dr. HANNAM: I think there is no question that it does. But it is a different context. That is, the very large food chains are buying on mass-production orders and they want to buy on a very large volume; and they want, probably, a contract that lasts for a year to supply all their stores. This gives them tremendous bargaining power with which to bargain. Our farmers—hundreds of thousands of them—that are going to help to supply that order, are at a disadvantage on price in that context. That is a general statement; but I think there is a great deal of truth in it.

Mr. BELL (*Saint John-Albert*): I do not mean to be embarrassing about it; but there are the two different approaches in your position?

Dr. HANNAM: That is right.

Mr. BELL (*Saint John-Albert*): You have the approach on the farm implements side, which has been your main point of discussion this morning; but there is the other side, of the farmer as a producer and a consumer, which does bring in certain things into conflict, particularly in this instance where you have said you worry about big business in the implement field.

It seems to me you have almost suggested that it is an advantage to you in the chain store field.

Dr. HANNAM: No; I said that the large merchandising corporation has a tremendous advantage in bargaining power, when they bargain for a year's supply for all their stores. That is, there is not the competition between 100 other produce men for that particular order.

Mr. BELL (*Saint John-Albert*): Then this legislation, in so far as it might assist the small retailer and take away from the concentration in the national chains, would meet with your favour, if it were successful in that regard?

Dr. HANNAM: If you are speaking particularly of a clause there that says the supplier has to—if he is giving a special discount that is not connected with price, he has given that special discount to a big buyer, and he must also give the same discount to the small buyer—to that extent, yes. That is one instance in there.

Mr. BELL (*Saint John-Albert*): I have one other question, Dr. Hannam. Mr. Pickersgill asked a question that has been mentioned here quite often, and I think it is a question with which we are all concerned.

He said: is it not desirable that everybody be given the freedom of choice in so far as buying an article at a certain price is concerned, or an article at a higher price with services?

In other words, an article without, perhaps, some services, at a lower price than an article with services, at a higher price? Is not the problem really a little bit more than that; that we are concerned that this choice will not be available, because the small retailer in the farm implements field, if you like, will not be in business long enough to make available this commodity with the extra services he provides?

Dr. HANNAM: I think there is a trend in that direction. Certainly, in the farm implement field,—if we talk of that now—the depots where parts are available are larger and further away from the farmer. That is happening. But I think that is part of normal competition, whether or not you buy a certain product at a certain price, or buy another one where you can get more service with it. That is a choice in buying. But I do not quite see where this legislation enters into that.

Mr. BELL (*Saint John-Albert*): You do not agree, then, that there is much to worry about with respect to the difficulties of the small retailer?

Dr. HANNAM: I do not know whether I would say that as a blanket statement, or not. The small retailer is certainly at a disadvantage, the same as the small farmer. But we have never asked for a farm program in Canada that would help to maintain every small farmer that we have on the farm today.

There is a general trend toward more efficiency of units, and that often means a little larger unit, perhaps, but certainly more economic units. I think it is inevitable that some move out, and that that will apply to the retail grocer as well as to the farmer.

Mr. BELL (*Saint John-Albert*): I agree, perhaps, with the last part of your statement; but I am referring more to the farm implement field than the farmer as a producer in my comparison with the retail merchants' association presentation.

Dr. HANNAM: I do not know whether there are becoming less farm implement agents or not; I do not know about that.

Mr. SOUTHAM: Mr. Chairman, I think there is a trend there too. I have noticed in the western provinces, due to the fact of better roads, more pavements, farm cars are coming into the picture.

I can remember 30 years ago on the farm that every small farm had pretty well a representation of every agency to some extent. The standard of that agency might not have been as high; they did not have as large a stock of parts; but possibly in a town of 400 or 500 you would find possibly four or five agencies represented.

But today, in our area of southeastern Saskatchewan, you might find the John Deere agency in one town, and no other agency there. In the next town,

you might have a Massey-Harris agency. There are the bigger agencies, with a bigger stock of parts. This is because the farmer, due to better roads and cars, can still get the services.

The CHAIRMAN: On this question of the brief, Dr. Hannam: how do you justify the retail price of milk, relating that to your brief? There is a fixed price here; there is certainly price maintenance. You remember in Toronto, when some fellow started selling two quarts of milk, the row that went up.

Dr. HANNAM: I think milk has been considered in a class by itself over a long period of years, simply because it is so seriously perishable, and a high quality, fresh milk supply is considered so important for the cities that it was generally considered desirable that we have milk legislation and that we have the industry regulated, from the standpoint of supply, but more particularly, from the standpoint of health—and that you had a better supply, a higher quality milk, if you had milk industry regulated.

Mr. MORE: Dr. Hannam; would you venture an opinion as to whether loss leader selling is of any benefit to the consumer in the long run, in any regard, in any field of supply?

Dr. HANNAM: It is pretty hard to venture an opinion in that regard.

Mr. BENIDICKSON: What do you mean when you say "loss leader"?

Mr. MORE: That is a good question. This has been difficult to define. To me this means the persistent selling of an article at a level at which generally business could not survive.

Mr. CARTER: Selling an article at less than a profitable price.

Mr. MORE: I am not referring to an individual business, but selling at a price that generally business, considering overhead, could not survive. That is my idea of a loss leader.

Dr. HANNAM: I always think of loss leadering as selling at an unfair competitive price. Unfair competition cannot be justified in any case.

Mr. MORE: That is the point I am getting at. Would some effort toward eliminating that be good?

Dr. HANNAM: Yes.

Mr. MORE: This would be good if it could be done. We have outlined in this bill certain procedures. We say it does not legalize price maintenance. It may be that existing legislation does, but we are not accomplishing this change, it seems to me. I keep asking what the effect has been of removing price maintenance. By and large the consumer gets more service and better service, but reports do not indicate price competition, and it seems to me that this is the consumer's main interest. We have not had that over the past years. Any regulation that prevents this unfair competition practice and also prevents the areas of price maintenance developing seems to me to be good. This is very difficult to achieve, I feel. I have been amazed, keeping that idea in mind, that this legislation is so completely condemned.

Mr. KIRK: Firstly, this legislation is not the whole story of combines in the economic system. Secondly, it is more a matter of the small retailer, but it is also the question of the position of the manufacturer. There is a weapon given to the manufacturer here. If you have a situation where, by and large, there are a limited number of products which are widely advertised and recognized by perhaps the bulk of consumers as being *the* products, and the products they know about in a particular area,—and then if the manufacturer is in a position to regulate and maintain his price—this results in the lack of price competition at the retail level of this product. This assists the manufacturer also in his effort to maintain his selling price, and to have an administered price in order to avoid price competition in respect of his product. I certainly think that

in respect of regulation against resale price maintenance there has been, in this country, a real increase—certainly this has been true in my personal experience—in the tendency to compare prices and look to retailers to engage in price competition, and to expect price competition, which I do not think existed before. I think this is very healthy.

Mr. AIKEN: I have been waiting patiently to ask one or two questions, Mr. Chairman.

The CHAIRMAN: Yes, Mr. Aiken.

Mr. AIKEN: I notice, Mr. Hannam, in your concluding remarks you were careful to state that if the effect of this legislation is to reduce price maintenance, then you would be opposed to it. Is my understanding correct in that regard? If that is the effect of this legislation, you are opposed. To follow that up, it is doubtful whether you are absolutely certain that this legislation would have that effect. I gather you are in doubt as to what the effect actually would be.

Dr. HANNAM: In my final sentence I said:

> The farmers of Canada will be disappointed if parliament passes a bill whose effect proves to be the weakening of price competition between their suppliers—which is bound to aggravate further the unfair relationship now existing between the price levels at which the farmer sells and buys.

Mr. AIKEN: Yes.

Dr. HANNAM: I worded it that way because we have had some correspondence with the Minister of Justice. He was very fair in his consideration of our correspondence. We thought perhaps we would not be making some presentation and we had written him, you see, in respect of this. I feel that he does not fear the weakening of resale price maintenance as much as we do, but our presentation definitely says that we think these amendments are weakening the prohibition of resale price maintenance and that there seems to be in this legislation a great many "outs", all for the manufacturer who wants to force resale price maintenance, and that the legislation may become of very little effect.

Mr. AIKEN: I have one further question.

I understood you to say in your brief that some of these "outs" as you call them under section 34 (5) are too broad, and that you take particular exception to paragraph (*e*)?

Dr. HANNAM: Yes.

Mr. AIKEN: Do you feel that if paragraph (*e*), were eliminated, that some of the provisions would be tightened up in this legislation?

Dr. HANNAM: Certainly we would be happy if the fifth paragraph were eliminated.

Mr. AIKEN: Thank you. Those are all my questions.

The CHAIRMAN: Gentlemen, are there any other questions?

Mr. SOUTHAM: I think Mr. Hannam expressed his opinion and the opinion of the federation of agriculture right at the start of the brief when he said:

> We would say at the outset: we appreciate the fact that in a number of respects, the present bill C-58 represents a great improvement over the amendments submitted by the Minister of Justice to parliament last year. This is particularly true in relation to combinations in restraint of trade. It is not, we feel, true of the sections relating to resale price maintenance.

That is what we have been discussing.

Dr. HANNAM: Yes, that is our position.

The CHAIRMAN: Mr. Hannam, we appreciate your coming here and answering the questions which have been asked of you. I assure you that we will see that your requests receive every consideration in the passing of this bill.

Dr. HANNAM: Thank you very much.

APPENDIX "A"

House of Commons
Canada

OTTAWA, July 8, 1960.

Dear Mr. Cathers:

I have received from Miss Isabel Atkinson, National President of the Canadian Association of Consumers, a letter dated July 4th, in which she states the following:

> "Two points I failed to stress, and should have found an opportunity to state were (*a*) (in response to a question as to what *our* (CAC) solution was for the retailers' problem,) THAT CAC is a consumer, not a retailer, organization and we have a tremendous task to carry out our specific function, which is to solve consumer problems if we can, not tackle the other sections of the economy; and (*b*) that Mr. Gilbert's charge that a large proportion of retail bankruptcies since 1951 was due to the lack of Resale Price Maintenance is contrary to statements made in that week's Financial Post, based on DBS and Dunn & Bradstreet reports on bankruptcies which ascribed about 60% to lack of business experience and business ability."

I trust it will be possible for you to bring this to the attention of the Committee, or have her comments printed in the Committee's reports.

If either of these courses is not possible under the rules of procedure I will get in touch with you personally to see what can be done to ensure that Miss Atkinson's views are received.

Yours sincerely,

Henry Frank Jones, M.P.,
for Saskatoon.

Mr. C. A. Cathers, M.P.,
Chairman,
Standing Committee on
Banking and Commerce,
House of Commons, Ottawa.

APPENDIX "B"

CARLETON UNIVERSITY

July 8, 1960.

Mr. C. A. Cathers, M.P.,
Chairman, Banking and
Commerce Committee,
House of Commons,
Ottawa.

Dear Mr. Cathers:

I wish to thank you and members of your committee for the full hearing given to my brief on the afternoon of July 5th. I felt that the discussion period indicated a desire on the part of committee members to get at the heart of a rather complex subject.

I would like to supplement my reply on an important question raised by Mr. Drysdale and Mr. Fisher. It was claimed that in some cases, the fine papers case was cited as an example, tariff reduction could do an injustice to those firms who were not taking part in the conspiracy.

I have examined the record on fine papers and find the following:

	Percentage of Canadian Consumption supplied by accused Companies	Percentage of Canadian Consumption supplied by other Canadian fine paper Companies	Percentage supplied by other Canadian Manufacturers	Percentage supplied by Imports
1941	96.6	0	0	3.4
1942	92.2	4.4	0	3.4
1943	89.8	7.2	0	3.0
1944	88.8	2.6	5.1	3.5
1945	90.1	1.5	5.4	3.0
1946	88.0	1.5	5.2	5.3
1947	89.3	0	5.2	5.5
1948	90.4	1.3	4.6	3.7
1949	92.1	1.2	3.0	3.7
1950	90.8	1.2	4.6	3.4
1951	89.2	0.5	6.6	3.7

Mr. C. A. Cathers

Source of Data:

Column 1—Statement of Law and fact of the Respondent in the Supreme Court of Ontario, Volume 1, p.15.

Other columns—Computed from "Fine Papers", Report of Commissioner, Combines Investigation Act, 1954, p.14.

Only the first two columns refer to Canadian companies which were dependent on their production of fine papers. Concerning firms covered by column two, the Commissioner's report on "Fine Papers" states (p.12):

"Tonnage figures given in Tables II and IV also show that there is a certain amount of Canadian fine paper production by companies outside the group designated as "the mills". The great part of this production has been in the groundwood grates and has been consumed outside of Canada. Coated papers, besides being made by Alliance and Provincial, are made by Canada Glazed Papers Limited of Toronto. This company, which sells its products in Canada, buys the paper it coats from a number of sources and does not itself make paper. Canada Glazed Papers started operations in 1939 and although the evidence in the inquiry indicates that its officers had some knowledge of some of the arrangements described in this report, it played no important part in the planning of them or in their operation. Canada Glazed Papers was not a party to the "Loyalty Discount Agreement" described later on in this report and its distribution methods were apparently independently patterned. With this exception no Canadian producer outside of the group named above had any important position in the post-war years as a supplier of fine paper to the Canadian market. In fact, since 1935 only three other manufacturers have been engaged sufficiently in the production of fine papers to be classed with the fine paper mills. These were Montreal Coated Papers, Limited, Montreal, which ceased operations about 1939; Valleyfield Coated Paper Mills Limited, Valleyfield, P.Q., whose plant was destroyed by fire in 1938 and not rebuilt; and Champion Paper Mills Limited, Toronto, which produced book and fine papers form 1944 to 1948."

It might be noted in passing that Canada Glazed could probably have benefited from a reduction of tariffs, since it did not produce its own basic paper.

Thus, in the Fine Paper case, the producers other than those accused were not significant in number; some were mainly producers of other kinds of paper and the most important (perhaps the only) one which at the time of the investigation was a specialized finisher of fine paper would not have suffered from a tariff reduction. Of course if there are now new producers of fine paper and the tariff were reduced, these would have cause for complaint; but this would not be important if the tariff reduction were now mandatory since any new firm would then have known the conditions under which it entered the industry. Furthermore, had mandatory tariff reduction been in the law, there is a much better chance that some at least of the conspiring firms would have resisted the establishment of the combination.

In conclusion, I feel that the probability that any significant number of specialized firms would not be included in a combine agreement in very slight, for if it were so the agreement would not be likely to be effective. Selected product exemptions from tariff reduction or other forms of subsidy, would usually make it possible to benefit any firm which stayed out of combines.

In general, I remain convinced that the net benefit to the country of attacking combines through tariff reduction would greatly exceed the benefits to be derived from fining or other punitive sanctions.

I would appreciate it if you would insert this statement into the proceedings of the Committee. I am sending copies to other members who were particularly interested in the question.

Yours sincerely,
H. E. English,
Chairman,
Department of Economics.

HEE/db
Copies to: Mr. E. J. Broome
Mr. J. Drysdale
Mr. D. Fisher

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 11

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

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TUESDAY, JULY 12, 1960

RECEIVED
JUL 22 1960
Library of Parliament

WITNESSES:

Honourable E. Davie Fulton, Minister of Justice; and Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act).

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23506-9—1

STANDING COMMITTEE
ON
BANKING AND COMMERCE

Chairman: C. A. Cathers, Esq., M.P.

Vice-Chairman: E. Morissette, Esq., M.P.

and Messrs.

Aiken
Allmark
Asselin
Baldwin
Bell (*Saint John-Albert*)
Benidickson
Bigg
Brassard (*Chicoutimi*)
Broome
Campeau
Caron
Creaghan
Crestohl
Drysdale
Fisher
Hales
Hanbidge
Hellyer
Horner (*Acadia*)
Howard
Jones
Jung
Leduc
Macdonnell (*Greenwood*)
MacLean (*Winnipeg North Centre*)
MacLellan
Martin (*Essex East*)
McIlraith
McIntosh
Mitchell,
More
Morton
Nugent
Pascoe
Pickersgill
Robichaud
Rowe
Rynard
Skoreyko
Slogan
Smith (*Winnipeg North*)
Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams.

Antoine Chassé,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

TUESDAY, July 12, 1960.
(28)

The Standing Committee on Banking and Commerce met at 9.40 a.m. this day. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Aiken, Bell (*Saint John-Albert*), Broome, Campeau, Cathers, Drysdale, Hales, Howard, Jones, Macdonnell (*Greenwood*), Martin (*Essex East*), Mitchell, More, Morissette, Morton, Pickersgill and Robichaud.—17

In attendance: From the Department of Justice: Honourable E. Davie Fulton, Minister; Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act); and Mr. Marc Lalonde, Special Assistant to the Minister.

The Committee resumed consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

On motion of Mr. Pickersgill, seconded by Mr. Drysdale,

Ordered,—That a supplementary brief, received from the National Automotive Trades Association, *re:* Bill C-58, be reproduced in the Evidence as having been read.

Mr. Fulton was called and he addressed the Committee. He indicated certain amendments to the Bill that would be acceptable to the Government.

Mr. MacDonald was called.

Mr. Howard moved, seconded by Mr. Pickersgill,

That, we ask Mr. David A. Gilbert of the Retail Merchants Association of Canada, Inc., to appear before this Committee again, with the time to be arranged by the Steering Committee,

The motion was negatived on the following division: YEAS: 4; NAYS: 10.

Mr. MacDonald made a general statement outlining the work of the Combines Investigation Branch.

The Committeee proceeded to a detailed study of the various clauses of Bill C-76.

At 11.00 a.m. the Committee adjourned until 3.00 p.m. this day.

AFTERNOON SITTING

TUESDAY, July 12, 1960.
(29)

The Committee resumed at 3.20 p.m., the Chairman, Mr. C. A. Cathers, presiding.

Members present: Messrs. Aiken, Bell (*Saint John-Albert*), Brassard (*Chicoutimi*), Broome, Cathers, Creaghan, Drysdale, Fisher, Howard, Jones, Jung, Macdonnell (*Greenwood*), Mitchell, More, Morton, Nugent, Pascoe, Robichaud, Rynard, Southam, Stinson and Woolliams.—22.

23506-9—1½

In attendance: Same as at morning meeting.

The Committee discussed the advisability of the Committee sitting while certain legislation is before the House of Commons this afternoon.

Mr. Howard moved, seconded by Mr. Robichaud,

That the Committee do now adjourn.

The said motion was negatived on the following division: YEAS: 2; NAYS: 10.

The Committee resumed its detailed consideration of the Clauses of Bill C-76.

On clause 1:

Subclause (1) was adopted.

Mr. Nugent moved, seconded by Mr. Drysdale,

That Subclause (2) be amended by deleting the semi-colon at the end of line 32, page 1 of the Bill, and adding the following: ", but a situation shall not be deemed a monopoly within the meaning of this paragraph by reason only of the exercise of any right or enjoyment of any interest derived under the *Patent Act*, or any other Act of the Parliament of Canada;"

The abovementioned amendment was allowed to stand for review by the Justice Department.

Subclause 2 was allowed to stand.

Clauses 2 to 10 were adopted.

Mr. Howard moved, seconded by Mr. Fisher,

That the Steering Committee take into consideration the possibility of inviting the Restrictive Trade Practices Commission or a member thereof to appear before this Committee.

The said motion was adopted on the following division: YEAS: 9; NAYS: 4.

At 5.35 p.m. the Committee adjourned to the call of the Chair, in consultation with the Sub-committee on Agenda and Procedure.

E. W. Innes,
Acting Clerk of the Committee.

EVIDENCE

TUESDAY July 12, 1960.

The CHAIRMAN: Gentlemen, we have a quorum.

The first thing I would like to report to you is that I have received a supplementary submission from the national automotive trades association, which has been distributed to everybody. What is the wish of this committee in regard to this submission? Do you wish it included in the evidence?

Mr. PICKERSGILL: I would so move.

Mr. HOWARD: It could be put in the record as having been read and then printed.

Mr. PICKERSGILL: Yes.

Mr. DRYSDALE: I will second that motion.

The CHAIRMAN: When Mr. Pickersgill moves a motion it goes through unanimously.

Mr. PICKERSGILL: Do you not have a seconder in a committee anyway, do you?

The CHAIRMAN: I do not know, Mr. Pickersgill.

Mr. PICKERSGILL: You certainly do not in the committee of the whole and I think the rules are the same.

Mr. HOWARD: I have discovered that you do need a seconder in a standing committee.

Mr. PICKERSGILL: Who said so?

Note: The submission reads as follows:

In response to the request of members of the Committee when the submission of the national automotive trades association was heard on June 23, 1960, the following detailed proposals for amendments to bill C-58 are respectfully submitted to indicate how effect might be given to the main submissions of the association.

(1) *Prohibition of "tied sales"*

The purpose of this proposal is to prevent suppliers of one type of product forcing dealers to purchase other types of products from other named suppliers. The evidence shows that large oil companies frequently force service stations and garages to purchase tires, batteries and accessories from specified wholesalers and prohibit their purchase on the open market.

This practice could be regulated by the insertion of a section to the following effect, possibly after the proposed section 34.

34A (1) No dealer shall directly or indirectly by agreement, threat, promise or by any other means whatsoever require or induce or attempt to require or induce any other person to whom the dealer sells or supplies any articles or commodity to purchase or otherwise acquire other articles or commodities from any other specified by the dealer.

(2) No dealer shall refuse to sell or supply an article or commodity to any person for the reason that such person has refused to purchase or otherwise acquire any other article or commodity from any other dealer specified by the dealer.

Note: The definition of "dealer" in the present section 34 (1) would have to be extended to cover the proposed section.

(2) *Limitation of discounts to actual economies arising from large purchases; the "cost justification" proviso*

To ensure that discounts are related to actual economies achieved in large scale purchases and to protect small retailers from unfair and discriminatory discounts offered to large buyers, the following proviso might be added at the end of section 33A (1) (a):

> Provided that all such discounts, rebates, allowances, price concessions or other advantages make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods on quantities in which the articles are sold or delivered.

This proposal follows closely the wording of the Robinson-Patman Act enacted by the United States Congress in 1936.

(3) *The prevention of the abuse of the present privilege of establishing maximum re-sale prices*

While there may be justification for permitting dealers in general to fix maximum re-sale prices, this justification does not exist where the power to fix a maximum re-sale price in effect establishes a fixed re-sale price. This occurs where a retailer, such as a service station operator, is limited to one source of supply and must buy and sell gasoline and other products at prices and margins dictated by his supplier. This situation might be controlled, without limiting the general power to fix maximum re-sale prices by the addition of the following paragraphs in section 34 (2) and (3):

> 34 (2) (g): At a price not greater than the maximum price or at a markup not greater than the maximum markup or at a discount not less than a minimum discount specified by the dealer or established by agreement in all cases where the dealer by virtue of contract or other arrangement is the sole source of supply for such other person of such article or commodity.

The same language would be inserted as a new sub-paragraph (vi) in section 34 (3) (a) and as a new subparagraph (iv) in section 34 (b).

(4) *The abuse of consignment sales*

The present practice of companies resorting to consignment sales to escape the prohibition against re-sale price maintenance might be controlled by the addition of the following words at the end of section 34 (2):

> and, in the case of the maximum markup or minimum discount referred to in paragraph (f), whether such article is supplied by the dealer to such other person by sale, consignment or any other arrangement.

This addition would limit the application of the section against only those consignment sales dealt with in paragraph 3 of this memorandum; i.e., where the dealer can absolutely control both the buying and selling price or the discount or markup obtained by the retailer. It would not interfere with ordinary consignment sales.

All of which is respectfully submitted.

National Automotive Trades Association.

The CHAIRMAN: Gentlemen, we have the minister with us this morning. I would appreciate if he and Mr. MacDonald would come up here so that we can throw our questions at them.

Mr. PICKERSGILL: Have we heard all the other witnesses?

The CHAIRMAN: We have heard all the witnesses who have requested to appear before us.

Mr. HOWARD: Could we have a copy of the minister's brief?

The CHAIRMAN: You have a copy of the bill, have you not?

Mr. HOWARD: Is that the brief?

Hon. E. D. FULTON (*Minister of Justice*): My brief is really my speech as recorded in *Hansard* of the House of Commons.

The CHAIRMAN: Mr. Minister, will you carry on?

Mr. FULTON: Mr. Chairman and gentlemen, I understand that the committee is now going to commence its consideration of the bill cause by clause. I am glad to be here with Mr. T. D. MacDonald, director of investigation and research, to answer any questions and discuss with you the implications of the government's proposal as contained in the bill before the committee, and to consider all amendments that may be put forward.

If I might be permitted to take just a few moments of the committee's time to outline the way in which I feel I can be of most help to the committee, I would appreciate that opportunity. I think, and in fact, I am satisfied that the proceedings of the committee in the consideration of this bill have been most useful and valuable. I have not attended all the sessions at which you have heard witnesses and considered submissions, and I wish to apologize for my inability to be here at all those sessions. I have attended a fair number of them, and I have glanced at the record, and discussed with Mr. MacDonald the implications of what was said, and the suggestions that were made as well as the criticisms that were advanced by all these witnesses.

I believe that the course of the proceedings has served the purpose not only of airing some of the difficulties that attend combines legislation, but also in showing the need for these amendments. I would not for a moment suggest that everybody who has come here has been unanimous in supporting the bill, but I think it is fair to say that in general there has been more support for what we are doing than there has been criticism. I think that the hearings have therefore served a very useful purpose in that regard.

May I take the opportunity of reminding you again that what the government has proposed here is not a complete revision of the Combines Investigation Act, but rather the submission of specific amendments designed to make improvements where we felt that these improvements or changes were specifically needed. I make this comment because it is my impression, from hearing some of the evidence, and discussing others of the submissions, that some witnesses who have appeared before you have suggested that other changes should be made, the sort of changes which really would occur properly under a discussion of a general revision of the Combines Investigation Act, whereas, our thought has been not a general revision at this time, but a submission of specific amendments to bring about specific improvements.

Mr. Chairman, I would suggest to you that I might best help the committee if, at this time, I made no attempt to give a general answer to all the suggestions or criticisms that have been made, or, at least, if I refrained from doing that at this stage. I would appreciate, and perhaps even expect, the opportunity to deal in a specific manner with some of the points that have been made, when we come to the clauses of the bill to which those suggestions or criticisms specifically relate. It seems to me, if I may make the suggestion, that it would be a more expeditious way of proceeding, for me not to attempt a general

answer at this time, but to deal with criticisms made by witnesses, or questions of criticism made by members of the committee in relation to the clause to which those criticisms themselves relate.

However, as a result of reviewing the submissions that have been made, and some of the questioning by the members themselves, I think I should indicate to you that the government would be prepared now, and I would like to indicate on behalf of the government that we would be prepared, to accept some amendments to the bill, if those amendments meet with the approval of this committee, and a member of the committee feels inclined so to move.

There are three specific amendments that I should perhaps mention now in that respect. The first one relates to the provision regarding protection of rights acquired under patents. That has been an amendment frequently suggested, and the government would be prepared to accept an amendment to restore that provision to the legislation.

The second deals with an amendment to section 34. One of the criticisms particularly has impressed us, and that is the criticism related to sub-paragraph (*e*) where the suggestion has been made that the words of the sub-paragraph are unnecessarily vague. While I think some of the criticisms are expressed in perhaps an extreme form, they do seem to me on the whole to have merit, and also, we believe on reflection, that the intent of sub-paragraph (*e*) is probably achieved under some of the earlier sub-paragraphs. We would be prepared, therefore, to accept an amendment deleting that clause.

In respect of the third amendment, relating to the provision of an appeal from an order of injunction or dissolution, there has been some criticism that parties to litigation under the present proposal would be deprived of their right to appeal, and that as a very extensive area of interests may be affected by the order thus made, it is therefore wrong to deprive litigants of their right to appeal. We would be prepared to accept that point as a valid one, and to accept an amendment granting the right to appeal under the circumstances.

Mr. Chairman, those are the three specific amendments which, up to the moment, we have felt disposed to accept.

May I repeat what I said earlier in the House of Commons, and I think at the opening stages of this committee's proceedings, namely that the government does not wish to approach this problem with an inflexible attitude, and if members of the committee themselves feel there are other amendments which should be made, we will be glad indeed to consider all proposals put forward.

Mr. Chairman, I have with me, as I have said Mr. T. D. MacDonald, the director of investigation and research. Inasmuch as I think some of the comments that were made in the course of your earlier considerations indicate perhaps an incomplete awareness or knowledge of how an investigation is conducted, and all the implications surrounding it, the starting of an investigation, what is done in the course of it, and the attitude of the branch toward their problems, I wonder if it might be helpful if Mr. MacDonald were to give a short statement at this time, as it may give the committee a perspective as to how the branch operates. Mr. MacDonald is prepared to do that if it is desired that he do so.

Mr. PICKERSGILL: Mr. Chairman, before we proceed to do that, I would like to make a couple of observations in respect of what the minister has just said. In the first place, I would like to dissent, respectfully, if necessary, from his extraordinary observation about the witnesses. I unfortunately have not been able to be at all the meetings either, but I think I have been at at least as many meetings as the minister has. My impression is that we have yet to have a witness who is fully in favour of this bill. On balance, there has been far more criticism in respect of it than there has been favourable comment. It does seem to me that, in the light of the mass of evidence that we have had, and in the light of the conservative attitude taken by most of the witnesses,

namely, that they would rather have the law as it is now than have these changes, and in view of the fact that this session of parliament ought to terminate some time, the most successful course for the government to take would be to say that we had had a very useful study group, and that if the minister took the next few months to reflect on this matter, he could then produce a much shorter bill bringing in all those things, on which there is a real consensus, and leave all the rest, particularly the amendment to section 34, which we think should not be changed at all.

Mr. HOWARD: I agree with what Mr. Pickersgill has said in respect of leaving these proposed changes until the department has had an opportunity of reflecting upon the suggestions made by the witnesses, and perhaps directing their attention toward, what I think still should be done, and that is a complete revision and alteration of the act, taking into account changing economic factors. I suggest this is perhaps the best approach to the problem. In any event, if it appears that this will not be the course that will be taken, otherwise the minister would have indicated so in his opening remarks. I assume that we are going to carry on with our consideration of the bill in detail.

I would like to pose two thoughts to the minister when he speaks of the amendments. These are not amendments which will provoke any argument, I do not think, but merely in respect of items which I think should have been in the bill in the first place, but are not in it. The omission of these items will result in inconsistencies between the act and the bill itself. I draw his attention first to the reference—

The CHAIRMAN: Mr. Howard—

Mr. HOWARD: Well, just a minute.

The CHAIRMAN: We are going to start our consideration of this bill clause by clause as soon as Mr. MacDonald finishes his statement.

Mr. HOWARD: Yes, I realize that, Mr. Chairman, but when the minister said there were three amendments that the government would be prepared to accept, I thought, perhaps in general terms, there are two others. I would like merely to pose them, because perhaps the minister and his department would be perhaps in a better position to prepare the wording for the amendments than we are. Perhaps this is the course we are going to follow, but I would merely suggest these two additional amendments to the minister with the hope that he will have no hesitancy in accepting them.

The CHAIRMAN: Go ahead Mr. Howard.

Mr. HOWARD: The first one has reference to section 32, which makes reference to an offence and says: "—is guilty of an indictable offence and is liable to imprisonment for two years". What has been left out, or changed from the provision of the act which says: "—is guilty of an indictable offence and liable on conviction of a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both", are the words in respect of the fine at the discretion of the court. There will be an inconsistency between the proposed section and the act itself. In one part of the act we will have reference to a fine and/or imprisonment or both, and in the other section we will only have a reference to imprisonment. It is this inconsistency which I think perhaps should be cleared up one way or the other so that there is the same reference throughout.

Mr. FULTON: You are referring to section 34 of the present act?

Mr. HOWARD: I am referring to section 34 (4) which still says "fine and or imprisonment or both". For the sake of uniformity, if we are going to change one, then I think this change should be made throughout.

My second point relates to section 15 of the act and the amending portion of the bill, clause 6. But unless we make another change to 15(2) you are still

going to have reference in the act to sections 411 and 412 of the Criminal Code, which, in effect, will not be in existence if the bill carries. This is another consequential change that I think should be made.

Mr. FULTON: Thank you, Mr. Howard. I think I can deal with your first point about the inconsistency between sections 32 and 34; but I should perhaps wait until we get to the clause.

I do not have an answer to your second point at the moment, and I should like to look at it to see whether there is an answer or whether you are correct.

May I make a comment on what has been said, because I think it relates to the general approach to the bill. I am not going to enter into any statistical argument with Mr. Pickersgill or any other member as to whether the majority of the witnesses took this position or that position on specific matters; but it has certainly been my impression, and I think a reading of the record would establish it, that in so far as the bill before the committee is concerned, more witnesses supported it than opposed it. I have the distinct impression that although many witnesses made criticisms, those criticisms related more to things that they felt were not in the bill than to things that were. If there is a majority feeling along the lines that Mr. Pickersgill suggested, that arose out of the fact that so many would like to see us doing things which we are not doing, rather than the fact that so many opposed the doing of what we do propose.

That is why I made the remark that I thought it was desirable to remember that this bill proposes only specific amendments to the Combines Investigation Act, not a general revision, because so much of what was suggested and appeared to be critical of the bill is, I think, if seen in proper perspective, criticism only relating to the fact that the bill does not do special things that special groups would like to see us do.

Mr. PICKERSGILL: Mr. Chairman, in reply to the minister, I may say that I do not propose to enter into a debate at this point: I would just leave it to the *Winnipeg Free Press* to make a box score.

Mr. FULTON: The *Winnipeg Free Press* would, of course, be influenced by the umpire it would accept in that regard, which would be the *Winnipeg Free Press* itself.

Mr. DRYSDALE: Mr. Chairman, as one of the members of the committee who has attended practically all the committee meetings, I think it is important to underline what the minister has stated, because when he spoke to us in the house he pointed out that the amendments were a matter of clarification and he was bringing forth only specific amendments at this time.

He has indicated consistently throughout that a more thorough study would have to be made if there was consideration of a general revision at this time. Perhaps, as one of those who has side-tracked some of the witnesses before the committee in discussing general matters with a view, perhaps, to the future, when there may be a general revision of this particular act, I think, nevertheless, it should be emphasized that when the witnesses appeared before the committee, as the minister has stated, very often the comments were with regard to matters which were not contained in the bill, or the comments were more suitable if there was a general revision contemplated.

I think that Mr. Pickersgill's criticisms, under these circumstances, were unwarranted, and that we should keep sharply in mind what the views of the minister were in introducing the legislation, and what he has done consistently throughout.

Mr. HOWARD: Mr. Chairman, I wonder if, before Mr. MacDonald starts, I could ask the minister this question? This appears as good a place as any to do it. This has to do with the complete revision of the act, other than just straight, so-called clarification which these amendments are intended to be.

Could the minister indicate what steps are taking place in the department—perhaps this is a continuing thing—to study the act, to see how it fits into changing economic conditions, and revising the act completely to take account of these changing economic conditions, to keep it up to date?

Mr. FULTON: The present proposals arise in part out of the study that has been made of the legislation in the branch consistently, and to the particular consideration that we gave it, faced, as we were, with the responsibility of a new government to have a good look at everything for which we assumed responsibility.

That study resulted in the first draft bill two years ago and the present bill before the house. But I have not attempted to set up a royal commission or any special committee-type of study, as was suggested by Professor Cohen in his evidence here, because we wanted to clean up some of the things that confronted us as immediate problems. First, as a result of discussion, we changed those things which would be clearly required to be changed. We wanted to get those cleared out of the way, and then take up the sort of suggestion which Professor Cohen was making when he outlined the areas in which he felt further research should be made.

Mr. HOWARD: Hoping that if you come along and recommend a royal commission, it will not come along and recommend that you delete what you are proposing to change?

Mr. FULTON: It would not do that; these are sound amendments.

Mr. PICKERSGILL: Mr. Chairman, I would like to raise a point of order before we proceed with Mr. MacDonald, and it is this: my recollection was—and I have checked with someone who was here when I was away—that one of the very distinguished witnesses—I think, the first witness—Mr. Gilbert, was to come back to give us further evidence. Apparently he has not been back. What is proposed to be done about that?

The CHAIRMAN: My understanding of that is this: he was willing to come back if he were requested by the committee.

Mr. PICKERSGILL: I see.

Mr. HOWARD: This is not on a point of order, Mr. Chairman; but—

The CHAIRMAN: That is my understanding. If I am wrong on that understanding, I do not know.

Mr. HOWARD: I think we should ask him to come back again.

Mr. PICKERSGILL: He was such a refreshing witness.

Mr. HOWARD: Yes, he made quite a number of comments and statements, and was unable to complete his testimony, as other witnesses were, and I think we should have him back. In fact, I would like to move that we ask Mr. Gilbert, of the retail merchants' association, to come back again at a time to be arranged by the steering committee.

The CHAIRMAN: I would point out that the steering committee brought in a recommendation, I think it was last Thursday, that the last witnesses that were going to be called were Professor Cohen and the people from the Federation of Agriculture. That was the recommendation of the steering committee last week.

Mr. PICKERSGILL: I will be glad to second Mr. Howard's motion, so that we can divide the committee on the subject.

The CHAIRMAN: Wait a minute. We will have to have a motion to overrule the recommendation of the steering committee.

Mr. HOWARD: We can do it now.

The CHAIRMAN: We will have to have a motion to overrule the recommendation of the steering committee that we were not to have any more witnesses. That was approved last week.

Mr. BELL (*Saint John-Albert*): Mr. Chairman, I also want to point out that when it was decided to bring Professor Cohen in at the last minute, I, for one in the committee, mentioned that we should be very careful about a precedent being established here; and no mention was made by anyone at that time of any other possible future witnesses.

Mr. PICKERSGILL: We are not talking about future witnesses; we are talking about a witness who it was understood was coming back.

Mr. BELL (*Saint John-Albert*): Well, it was not mentioned.

Mr. DRYSDALE: Mr. Chairman, I have the committee proceedings before me, and at page 151 of the meeting of June 17 the last statement was this:

> The CHAIRMAN: We have to adjourn now, Mr. Howard, and I would like to advise the committee that you will receive notice that on Tuesday, June 21, at 9:30, a group consisting of the Canadian electrical manufacturers' association, the B.C. forest products, the fisheries council, and the Canadian metal mining will meet with us. In the afternoon, at 3:00 o'clock, we will have the Canadian chamber of commerce.
>
> —The committee adjourned.

Therefore, Mr. Chairman, there was no statement, or no request at that time that Mr. Gilbert be recalled, and I think they are trying to introduce something new at this present time that was not in contemplation.

Mr. PICKERSGILL: This is completely out of accord with the facts. It was not at the end of the meeting; it was during the course of a very stormy meeting when a number of motions were made.

The CHAIRMAN: It was the morning following that previous stormy meeting.

Mr. MORTON: Mr. Chairman, I think there was an understanding that if the committee wanted Mr. Gilbert back, he would be willing to come; but the steering committee went over the situation and did not see fit to recommend it. At that time the committee did not see fit to recommend any other witnesses.

However, we have a motion before the committee, and I think we could save time by voting.

Mr. PICKERSGILL: I have no desire to debate the motion; I would simply like to divide the committee.

The CHAIRMAN: Is there anything now, Mr. Howard or Mr. Pickersgill, that you want to bring Mr. Gilbert here for? Is there a definite purpose—because I hesitate to do it otherwise? He came; he gave two or three days of his time; and now, if there is something—

Mr. HOWARD: Mr. Chairman, he made a number of comments in his presentation. At the time of making those comments he also referred to some other briefs that he had presented to other groups. Some of us were able to get them at that time, and have them available.

Before Mr. Gilbert left, at the last minute he said that he arranged to mail to every member of the committee copies of those briefs. This was subsequently done. I cannot dig it out of the evidence; but Mr. Fisher asked him what about, for instance, appendix D, I think it was, to one of those briefs. Mr. Gilbert said that appendix D was not in the ones we had, but it would be in the ones mailed to us. The ones I got in the mail do not contain appendix D. That is one thing: what is this appendix D to which he made reference?

At one part of this submission, reference was made to the small business section of the Department of Trade and Commerce, I think it was: that was one thing. And there was the question of the statistical analysis. We did not

go completely into this particular thing. The understanding was that perhaps this committee would decide in future to call Mr. Gilbert back again to clear up these other points and that he would be quite willing to come. He did indicate that he would be quite willing to come back because he did not complete his testimony.

Mr. PICKERSGILL: I put a question to Mr. Gilbert at the end of the first day when he appeared. I was very anxious, and I still am, to have an answer from Mr. Gilbert as to whom he really represented, how many members each of these organizations had, who was financing their brief, and a great many other details about his bona fide and representative character. That never has been cleared up.

The CHAIRMAN: I think the first day he was here he stated whom he represented and the number of people he represented here.

Mr. PICKERSGILL: I was completely unsatisfied with that evidence. I asked a number of questions at the end of that meeting which the record will show, and no attempt at any time was made to answer those questions. We did not press it at the time, partly because there was no time and partly because it was understood he was coming back.

Mr. AIKEN: Mr. Gilbert was the first witness we had and at that time I think there were quite a number of things which were not clear to members of the committee. In my opinion the large number of witnesses we have had since then certainly has given us a broad picture of the whole problem. I do not know any reason why Mr. Gilbert should be recalled now any more than anyone else. I realize that at the time it was agreed if we wanted to have him back he would come back if we could get a suitable date; but in view of everything that has happened in the meantime and all the briefs—some of which have been long and some of which have been short—I think we have enough to work on.

The CHAIRMAN: I think it should be pointed out that since it was brought up last week by the steering committee that these would be the last witnesses, I think that was the time when Mr. Howard and Mr. Pickersgill should have raised this point, and not now.

Mr. ROBICHAUD: I think we all should take into consideration that at this late date in the session there have been a great many committees meeting at the same time and it has been impossible for the members of the committee to attend regularly the meetings of this committee; that also should be taken into consideration. Some of these points have been discussed at meetings when members who wished to be here could not be here.

The CHAIRMAN: I realize that, but I am pointing out that you had the opportunity to raise this point last Thursday when the steering committee brought in the recommendation that the Canadian Federation of Agriculture and Professor Cohen would be the last witnesses.

Mr. DRYSDALE: These proceedings have been printed for some time and this information was available to you.

The CHAIRMAN: We have a motion here that David A. Gilbert of the retail merchants association of Canada, incorporated, appear before this committee again at a time to be arranged by the steering committee.

All those in favour of the motion?

All those against?

The motion is defeated.

Mr. PICKERSGILL: Could we have the score put on the record.

The CHAIRMAN: Would you like it called again?

Mr. MACDONNELL: I regret that there should have to be this, but I think this is a suggestion that they could have raised previously and is unacceptable now.

The CHAIRMAN: All those in favour of the motion.

Those against?

I declare the motion defeated by a count of ten to four.

We will now hear Mr. MacDonald.

Mr. T. D. MACDONALD, (*Director of Investigation and Research, Combines Investigation Branch*): Mr. Chairman, the matters which I shall outline are provided for in the act, but I think that by putting them in narrative form it may make the actual working of the combines branch clearer to the members of the committee.

To begin with there are, of course, the four substantive provisions in the legislation. There are the provisions relating to combinations, provisions relating to mergers and monopolies, provisions relating to resale price maintenance, and provisions relating to discriminatory or predatory pricing. All those provisions are dealt with in the same way so far as investigation under the act is concerned. In other words if there is reason to believe that a contravention of any of these provisions is taking place, then the machinery of the combines branch is set afoot.

An inquiry may be commenced in three possible ways. It may be commenced upon direction of the minister; it may be commenced upon the formal application of six citizens; or it may be commenced when the director himself has reason to believe that a contravention of one of the provisions is taking place. In actual practice most, nearly all, of the investigations are started in the third manner; that is, because the director has reason to believe that a contravention is taking place. Directions from the minister and formal applications from six citizens are rare, the reason, I think, being that in the one case, as in the other, the tendency is to pass on information in an informal way to the director and permit him to consider, under the third method, to whether in his opinion it warrants an inquiry.

Information coming to the director which causes an inquiry may come from a considerable variety of sources. He may receive a complaint from a private source, from somebody engaged in a trade or industry, perhaps from a consumer, and frequently from a civic or municipal body. That information may come direct to the combines branch or it may come to the minister, and thence to the combines branch, or through various other channels.

When a complaint is received or when the combines branch itself, without a complaint, observes facts it believes raise a question of contravention, the course first is to examine all the sources of information that one might call street information, that is information that can be obtained, without any compulsory power in the act, from trade sources and other sources on the street, so to speak. If that information builds up to grounds for believing that a contravention has taken place, then the ordinary course of an investigation probably would be somewhat as follows: The director would go to the restrictive trade practices commission and indicate to the commission that he had reason to believe that a contravention was taking place. The commission, if so satisfied, would authorize him to visit the premises of the parties concerned, look at their files and copy the files on the premises, or bring them back to Ottawa for copying and return, at the option of the parties themselves.

Following that stage the Director ordinarily has quite a volume of documentary papers in front of him. The next step is to consider that material to see whether it supports or changes the original view, that there was a contravention of the legislation. If it supports the view that there is a contravention—and in practice it usually does—because that first step is not taken unless there

have been very good grounds for believing there is a contravention—then the next step probably is to return to the commission and ask the commission to summon witnesses from the parties before a member of the commission, acting as a hearing officer, in order that the documents may be further explained and various background facts relating to the industry may be filled in.

I am, of course, describing a typical, large investigation. Some investigations will not involve all these steps. In the typical, large investigation there, in addition to the documentary evidence, the director ends up with a considerable sized transcript of oral evidence taken from the witnesses called before the hearing officer. He then examines that, to see whether it supports or casts any different light on the original view about the case. If it supports the view that there has been a contravention, the next step probably will be to return to the commission again, and again ask the commission for authority to require the parties to make returns under oath or affirmation of information relating to their businesses. This will serve such purposes as describing the industry that is under review, establishing what is the market that is being inquired into and what shares the different companies hold of that market in order to determine whether they have a substantial control over that market.

When all that material is in, we have before us, ordinarily, three classes of information—the documents, the transcript and the written returns. Then a final appraisal must be made in order to determine whether or not the director is formally of the opinion that contravention of the legislation has been taking place. If he is, then his course, directed by the act, is to compile that material into something called a statement of evidence. It is a narrative statement of the evidence, sometimes extensively setting out the evidence and sometimes incorporating it by reference. It may run into one hundred pages or it may run into one thousand pages, and it will end up with specific allegations against certain parties to the effect that they have been parties to a contravention of one or the other of the four provisions I have mentioned. That statement is then submitted to the restrictive trade practices commission and to each party named in it against whom an allegation is made.

At this stage the director becomes, one among other parties before the commission. The commission sets a time and a place at which they will hear final arguments and give the parties referred to in the statement of evidence their opportunity to be heard. At that final argument, or hearing, the director comes in and argues in support of his statement, while the parties named in the statement may argue against it, and if they wish, call or recall witnesses or otherwise present evidence and make representations as to their side of the case.

Following that, the commission retires to write a report which, in due course, it presents to the minister. That report ordinarily is published within thirty days—unless the commission should recommend to the contrary, in which case the question of publication is in the discretion of the minister. The terms of reference of the commission, as set out in the Act, are to appraise the effect on the public interest of arrangements and practices disclosed in the evidence and to make recommendations as to the application of remedies provided in the act, or other remedies. The minister then considers the report from the standpoint of remedies, including prosecution and any other possible action.

Finally, and very briefly, I should point up the fact that the director under the Act and the commission, although complementary bodies, are independent bodies. The director, of course, has no control over the commission; the commission has certain control over the director in that it exercises surveillance over the exercise by him of the compulsory powers of gathering evidence given by the act; and in certain cases I may require him to gather additional evidence*.

*It must also concur before the director may discontinue an inquiry in which evidence has been brought before the commission.

In addition to the specific inquiries I have mentioned into suspected offences, there is a section in the act which provides for broader inquiries of an economic or research nature which are not directed to the investigation of suspected offences, but may be conducted into various situations of restraint of trade not amounting to offences, but which nevertheless, may raise some question of the public interest.

The CHAIRMAN: Thank you, Mr. MacDonald.

Mr. MACDONNELL: May I ask one question there.

The CHAIRMAN: Is it a question pertinent to the bill?

Mr. MACDONNELL: It is a question pertinent to the method of investigation.

The CHAIRMAN: Go ahead.

Mr. MACDONNELL: Mr. MacDonald indicated the various ways in which the question of contravention of the act may arise and come before the restrictive trade practices commission. One of the things he mentioned is that action is taken when the combines branch observes facts which require attention. My question is, to what extent does this indicate it is self-starter? Has the branch a means of inquiry to follow it up, or does it wait, on balance, until it is started by somebody else.

Mr. MACDONALD: It is a combination of the two. A large number of inquiries commence by reason of some complaint coming in. Others—and I never tried to figure out the exact proportion—commence as a result of what you might call the original work of the combines branch; that is particularly true in the mergers and monopolies field.

Mr. MACDONNELL: Thank you.

The CHAIRMAN: Does the title carry?

Mr. PICKERSGILL: Do we not end with the title?

The CHAIRMAN: I thought we would get started with it.

On clause 1.

The CHAIRMAN: Does clause 1 carry?

Mr. PICKERSGILL: I notice that the definition of "combine" in the old paragraph 2(a) in the explanatory note contained as (iii) under (a) says:

> fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation, or—

I can find nothing similar to this. This is being knocked out of the act, because it is alleged in the explanatory note that section 411 of the Criminal Code adequately takes its place. After a careful examination of section 32 I can find nothing which corresponds to that in any way. There seems to be something which corresponds to the other parts, but there is nothing which corresponds to that. I wonder why it is being dropped, if it is.

Mr. FULTON: It was the intent to see that everything substantive that was in the present definition was covered, and it was the view of the draftsman and advisers that those things in these paragraphs of the present definition, which Mr. Pickersgill has referred to, are variously covered in the operative section from the Criminal Code, section 411 in the form in which it is now reproduced here in what would be section 32 of the act. May I point, for instance, to section 32 (1) (*a*), Mr. Pickersgill, on page 6 where you have coverage of conspiracies relating to the limitation of facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article.

Mr. PICKERSGILL: That seems to correspond almost exactly.

Mr. FULTON: Yes, but it was our view that some of the words of the definition section were rather redundant, and that all those things which it was

intended to cover variously between the definition section of the Combines Investigation Act and section 411 of the Criminal Code were covered in 411 of the Criminal Code as reproduced in this present bill.

Mr. PICKERSGILL: Would the minister see any objection, since this has been in the law, and since it deals directly with the most obvious kind of combination of all,—that is to say the fixing of common prices,—to including it? It seems a very odd thing to leave out.

Mr. FULTON: I think again, if you look at the words of (iii) and then compare them with paragraph (c) of the proposed section 32, you will agree with me that all the factors entering into a conspiracy for fixing a common price or resale price, or common rental, etcetera, are the same factors as are covered by paragraph (c), which makes it an offence to conspire, combine or agree, and so on, to prevent, or lessen unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article. It was the view of my advisers, including the director and the draftsman that all factors that would enter into the commission of an offence under subsection (iii) of the present definition would be present in the conspiracy to commit an offence under paragraph (c) of the proposed section 32.

Mr. PICKERSGILL: Could the minister or the director say whether, in the experience of the combines branch over the years, any reference has been made in any prosecution to this particular part of the definition which is now being eliminated?

Mr. MACDONALD: It is my recollection, Mr. Chairman and Mr. Pickersgill that (iii) fixing a common price or resale price, and so on, may have been used in the Vancouver gasoline case where a conviction was registered in the trail court but quashed in the court of appeal. In retrospect we regretted that the prosecution had been brought under the Combines Investigation Act instead of under the Criminal Code, section 411, where the jurisprudence was more settled. The practices which are mentioned in (iii), fixing a common price or resale price, or common rental, or common cost of storage, or transportation, are the factors that ordinarily turn up in what is commonly called a price fixing combination; and the best charge, with the best prospect of successful prosecution, has been found to be a change under 411 (d) which now becomes 32 (1) (c).

Mr. HOWARD: Mr. Chairman, did I understand Mr. MacDonald to say, when he made reference to the Vancouver gasoline case, that a conviction was entered under the Combines Investigation Act and subsequently quashed by the appeal court, or some higher court?

Mr. MACDONALD: Yes.

Mr. HOWARD: What was the reason for quashing the conviction?

Mr. MACDONALD: The reason for quashing the conviction, Mr. Chairman, and Mr. Howard, was misdirection by the trail judge.

Mr. HOWARD: Was there not a possibility of a retrial?

Mr. MACDONALD: There was a possibility of a retrial; but by that time the case had become so complicated,—and the accused persons were small operators,—that the decision was eventually arrived at that, on balance, it would be oppressive to bring them back into court. It was very complicated, and without trying to spell it out, it came about something like this: due to the judgment given by the court of appeal of British Columbia it was clear that even on a retrial the case would not finish with that retrial, and would not finish even if appealed to the court of appeal of British Columbia, but would almost inevitably then have come to the Supreme Court of Canada, and then back to British Columbia for, really, a third trial.

Mr. BROOME: Would proceedings have been much clearer and easier if these proposed changes had been made at that time?

Mr. MACDONALD: I cannot see that there would have been any difference in that respect, Mr. Broome.

Mr. HOWARD: Would it have been clearer and easier if prosecution had been entered under section 411 of the Criminal Code?

Mr. BROOME: That is what I meant, because that is what these changes do here.

Mr. MACDONALD: Well, in this sense, Mr. Broome, that the department could not have made the decision which it later regretted having made, of prosecuting under the existing provisions of the Combines Investigation Act.

Mr. PICKERSGILL: There is just one point that was not answered. It may well be, as the minister has said, and as the director has confirmed, that all these things that are part of the definition of a combination in (iii) are in fact covered by section 411 of the Criminal Code as it is proposed to reneact it here. But for greater certainty, since a previous parliament saw fit to put this in the law, is there any possible disability that would come from retaining it here, because this omission as created in the act has resulted in the feeling in many minds, including mine, that it was being omitted for some purpose in order to weaken the act.

Mr. MACDONNELL: May I please ask a supplementary question there. I am able to follow (i) and (ii) quite clearly, which are covered by section 32 (1) (*a*) (*b*), but when I come to (iii) I am not so easily able to follow it into the succeeding (c), and (*d*). I would just like to know if it is considered that those points are clearly covered. The same words do not appear there.

Mr. FULTON: Yes, Mr. Chairman. In dealing with Mr. Pickergill's point first, I merely state categorically that the codification represented here was not intended to weaken the act. It was the considered opinion of the advisors, on reviewing their work in response to my direction that the effective definitions in the act should not narrowed, that the codification of section 411 embraces, completely embraces, and more clearly embraces everything that was intended to be covered by the old definition section of the Combines Investigation Act. That provision contained in (iii) of the present definition, as Mr. MacDonald pointed out, has only one use in the last 20 years, and that an apparently disastrous use.

I would point out that when it comes to framing indictments or charges under this type of legislation, sometimes a multiplicity of provisions, which overlap, or are too closely related to one another, present uncertainties to the person drawing the pleadings, and does open escape hatches which would otherwise not be there. It is desirable surely to have your charging sections as clear, as concise, and as precise as possible to avoid multiplicity or duplication. When I enquired, pursuant to my instructions to the draftsman to the intent that everything that is now covered should be covered, and that we make no change in the effect of the definition, but make it clearer, if possible—when I enquired as to the results I was assured, and am assured, that that has been done. I came to the conclusion in reviewing the work that the task of framing indictments would be less dangerous by having just the one definition section rather than two, as a result of which charges would be laid.

To return to Mr. Macdonnell's question, I do not know precisely what he has in mind, but it seems to me to relate to the question asked before. I can only suggest that if you make a study of the words contained in present subparagraph (i) to (vi), and compare them carefully with the provisions in the proposed section 32 (1) (*a*) to (*d*), and particularly to (c), you will conclude that everything that is intended to be covered under the present Combines

Investigation Act definition section, and all the factors that would enter into the commission of an offence thereunder, are in fact present and covered in the proposed section 32 (1).

With regard to (1) (c) the words "storage", and "rental", were specifically taken from (iii).

Mr. MACDONNELL: Thank you.

The CHAIRMAN: Does clause 1, subclause (1) carry?

Mr. PICKERSGILL: On division.

Mr. HOWARD: Before we get the division part of it, there are a few other thoughts that I would like to put forward.

The CHAIRMAN: Really, it is paragraph 1, I suppose, covering "article" and "business".

Mr. HOWARD: That is what I would like to talk about. Would I be correct, for argument's sake, on this Vancouver gasoline case to which you made reference—I assume the charge was fixing a common price, or resale price?

Mr. MACDONALD: There were three charges altogether, and it is my impression—but I am going to check before the next meeting—that (iii) covers one of them.

Mr. HOWARD: And this is the one that it foundered on, perhaps?

Mr. MACDONALD: I am not sure that it foundered on one any more than the others. The issue in the case arose not, as I remember it, from the paragraph under which the charge was laid: it is my recollection that convictions were registered on several, but not all, of the charges.

The difficulty arose in the interpretation of the words "to the detriment or against the interest of the public", as compared with the word "unduly" in the Criminal Code; and it was upon the ground of his direction as to the interpretation of those words by the judge that the conviction was quashed.

Mr. HOWARD: Then I misunderstood what you had reference to in the first instance.

With respect to "article", I wonder whether we might not have some discussion as to expanding the definition of "article", if this appears to be the thing to do; or to inserting another definition that would relate—and I use the general phrase—to the services, the service industries. Has this been given any thought?

Mr. FULTON: If you use the words "service industries" in the sense of the distributive trades, it would appear that the whole field is sufficiently covered in this:

> "article" means an article or commodity that may be the subject of trade or commerce;

which, as you see, is in part the present definition under clause 1 (1) (*a*) of the present bill. When you speak of an article or commodity that may be the subject of trade or commerce, it is our view that you have there covered the whole of the distributive trades.

Mr. HOWARD: I think perhaps my phrasing was a little bit difficult. I was not thinking in terms of the distributive trades distributing articles or material things, but the services which do not deal in articles or material things as such.

Mr. PICKERSGILL: Dry cleaning, for instance.

Mr. HOWARD: Things such as dry cleaning, such as barber shops—and, boy, if ever there was a price fixing arrangement, it is among barbers.

Mr. BELL (*Saint John-Albert*): Union, though.

Mr. HOWARD: Certainly it is union; but it is a price fixing arrangement.

Mr. BROOME: And lawyers.

Mr. HOWARD: Lawyers is another example. Remember, Mr. Broome started that. This is the type of thing I mean.

Mr. FULTON: I think the answer to that question, frankly, is that we were making an amendment, and not a revision. But supposing it were suggested that we take in these service tradès, barbers, and so on—people who render services, rather than supply commodities: you are pointing up a very vast field, including the question of the service which labour renders; and this seemed to us to be the sort of question that should be covered by a general review and revision of the philosophy of combines legislation, rather than in a proposal for specific amendments; so we deliberately did not extend the definition so as to include that type of service industry.

Mr. HOWARD: I would not presume to advise you on your duties; but if I were to do so, I would have started with the general revision as soon as you took office, and perhaps by now we would have got somewhere on it.

In any event, I wonder if there is not perhaps a conflict here in this type of service industry that deals, not in material commodities, but in services; a conflict between the definition, which leaves out reference to the service trades or service industries such as we have been talking about, and the reference in clause 13, amending section 32(1)(c), which says you cannot conspire in the price of insurance upon persons or property.

Is not insurance, or the price of insurance—it is not a material commodity that we are dealing in, unless you think of dollar bills in terms of a material commodity.

Mr. FULTON: I think the answer to that is that insurance is, I believe, the one service industry—if we use that loose definition—which is covered by the present legislation; so we are not extending it by retaining it in our present bill.

Mr. HOWARD: I am just wondering if there is not a conflict there.

Mr. FULTON: I have said, generally, and perhaps carelessly, that it is not covering service industries: I should have made it subject to the insurance business.

Mr. HOWARD: I should perhaps advance the thought that I am in favour of including service industries. I thought I did, in a general way.

Under (*aa*) of (1) it defines "business". It says:

> "Business" means—

and then it says what it does mean. I wonder, in some other parts of the bill, where you say that certain things are, whether in this instance it might not be better phraseology to say "business includes". To me, it seems to be sort of restrictive there. Can "business" mean other than what you say it is—other than manufacturing, producing, and so on? Would not "includes" be a sort of more general term?

Mr. FULTON: The answer may not be satisfactory; but I think it is because it is taken from the existing section 2(*e*), and was thought to be sufficiently comprehensive. There is a tendency, I admit, quite frankly, when you are presenting a bill as a bill amending only certain particulars, and not as an extension, to avoid changing words in particulars where it is not intended to amend because then you are accused of changing the whole implications of the act. So in this case we thought it was safer, where we were taking the position that we were not changing the definition of a combine, to stick, where we could, to existing expressions, words and phrases.

Mr. HOWARD: You say it is in section 2(*e*) at the moment?

Mr. FULTON: Yes, it is section 2(*e*) of the present act: it is taken from there:

> "Merger, trust or monopoly"—

Then there are the general words at the bottom of section 2(*e*): ..

> —and extends and applies only to the business of manufacturing, producing, transporting, purchasing, supplying, storing or dealing in commodities—

The present legislation says it extends and applies only to the business of manufacturing, producing, transporting, et cetera. We felt the meaning of those words was most accurately reproduced by the proposed ones, which says:

> "Business" means the business of manufacturing, producing, transporting—

Mr. HOWARD: Except that you change "commodities" to "articles".

Mr. BROOME: Then what about paragraph (*f*), where it says:

> "Minister" means the "Minister of Justice"?

Should that be, " 'minister' includes the minister of Justice"?

Mr. HOWARD: The Minister of Justice is Minister of Justice; he does not want to be split into two roles.

Mr. FULTON: Well, he is Minister of Justice and Attorney General of Canada. I do not mean to belittle the matter, but we are satisfied that in accordance with present drafting techniques, the definitions contain everything, and contain them rather more neatly than was formerly the case.

Mr. HOWARD: My concern, I suppose, is not so much whether this compares equally with what is in the act now, and whether it in fact is the same; but the only reference I have in mind is that it means this to me, and if it said "includes", it would be less restrictive.

Mr. PICKERSGILL: After all, a definition, surely—if I may help the Minister of Justice here a little bit—is a definition; and if you say "business includes", it ceases to be a definition: it is merely an illustration.

Mr. FULTON: I think that is a good point here.

The CHAIRMAN: Thank you, Mr. Pickersgill.

Mr. PICKERSGILL: But the thing that troubles me is that the minister said a moment ago, in response to Mr. Howard, that the only service that was included in the normal term of the word "service" was insurance. But surely transporting is not restricted to buying something to do the transporting? Surely, if transporting is included, transporting is a service, and not an article or commodity?

Mr. FULTON: But it is the business of transporting, et cetera, articles. That is what transportation is.

Mr. PICKERSGILL: But surely the business of dry cleaning, for instance, is dry cleaning articles and not dry cleaning in the abstract.

Mr. FULTON: I think the comment on that would be that we did not intend to extend or make any substantial alteration in the effect of the definition.

The CHAIRMAN: Does clause 1 carry?

Mr. HOWARD: Mr. Pickersgill raised another thought on this same subject, and in this regard I have to make reference to the next following paragraph wihch defines a merger. Then I will relate it, if I can, to the so-called service trades we have been speaking about. "Merger" means the acquisition, and so on, "whereby competition", and then it says "in a trade or industry; among the sources of supply of a trade or industry, or among the outlets for sales of a trade or industry, is or is likely to be lessened—". Then, looking at the definition of "trade or industry" in paragraph (*h*) we seem to be in conflict with what we were talking about before because now "trade or industry" includes something other than just meaning a definition of trade or industry. Why does a trade or industry include something but "business" means something?

Mr. JONES: Mr. Chairman, I do think it would be wrong to get off on the track that a definition which says that it includes something else is not a definition. Many definitions in the Criminal Code and in law, in general, do use this. I am stating that as a fact.

Mr. PICKERSGILL: The minister just accepted my argument.

Mr. FULTON: No. The minister just accepted your argument as to why business should be defined to mean the business of manufacturing, etcetera. This is related to the proposed paragraph 33A.(1) (b), a portion of which refers to persons engaged in a business who do certain things. Therefore, it was necessary to define business. We defined business by reference to specific activities.

Now you are pointing out that when you come to (h), trade or industry includes any class thereof. That is necessary because earlier in that paragraph it says that a merger means the acquisition, etcetera, whereby competition in a trade or industry is or is likely to be lessened. Then it is necessary to say what trade or industry embraces, and we wanted to make clear that trade or industry includes any class, division or branch of a trade or industry, so that it would not be open to anyone to say "I am not liable to be charged here because I do not carry on the business of manufacturing shoes; I only carry on the business of manufacturing soles of shoes". Or a better illustration would be, that he might say "I cannot be charged with a merger in the business of manufacturing doors, because I only manufacture aluminum doors". In this case it was necessary to make it inclusive so that it includes any branch of a trade or industry.

Mr. HOWARD: I would assume for argument's sake—I may be wrong here—that there is something called the banking industry and the banks deal in a sort of service, although maybe some people do not think it is a service at the end of the month. Nevertheless, this is a service industry, and because the definition of trade or industry is an inclusive thing, and sort of broad or general, I would assume it could include the banking industry and that merger means the acquisition by one or more, and so on.

Let us assume for argument's sake, that the two banks, for instance, the Toronto and the Dominion bank which merged two years ago—that if that merger were to take place now, and if this definition section were in effect, a charge could be laid under the merger section against those two banks for merging, and thereby lessening competition in a particular industry.

Mr. FULTON: The answer there is, I think, that the banking business or industry, whichever term you prefer to use, is covered in the Bank Act, and that all such mergers or dealings such as you have in mind in banks must go before the Department of Finance.

Mr. HOWARD: I took the bank as an illustration; but I might cite the dry cleaning industry, or the barbering industry. Are they not considered as trades or industries which might merge, and fall within one section of the act, but not the other, such as the conspiracy section?

Mr. FULTON: For the word "business" in connection with the merger definition, you have to go back to the general definition in clause 1.

Mr. HOWARD: You cannot drag in a service industry?

Mr. FULTON: It could be done by changing the Act, but it would open up a very large field.

Mr. HOWARD: I am not saying that you cannot do it. I am sorry. I think the possibilities are covered. That is what I am getting at.

Mr. FULTON: I think that is correct. You cannot drag in a service industry—with the one exception noted—under the present definition.

Mr. HOWARD: Personally I think they should be. I would not want to see any preparation of legislative changes such as this where changes are made,

and subsequently to discover that perhaps we find that a service industry can be dragged in, if it is the intention to leave them out—with the exception of insurance. That is what I was getting at.

Mr. FULTON: I see your point. I think I can safely state that it cannot be done.

Mr. PICKERSGILL: That raises another question, namely, intraprovincial transportation. I think it still recognized that it has no connection whatever with interprovincial or international transportation, which fall exclusively within the federal jurisdiction.

I presume that if a province attempted to set rates for the promotion of intraprovincial transportation, the people who adhered to such provincial rates would not be prosecuted under this legislation?

Mr. FULTON: Did not parliament a few years ago under the auspices of your government pass a provision transferring to the provinces authority which otherwise would have fallen to the federal government? I refer to the control of rates over trucking.

Mr. PICKERSGILL: That had to do with interprovincial and international transportation. But what I am talking about now is strictly intraprovincial transportation.

Mr. FULTON: If it is regulated under the authority of a provincial statute—

Mr. PICKERSGILL: They could not be prosecuted?

Mr. FULTON: That is right. It was partly on a ground related to that that Chief Justice McRuer dismissed the beer case.

The CHAIRMAN: Does clause 1, sub-clause (1) carry?

Mr. HOWARD: Before it carries, I wonder, in dealing with the bill in detail like this in committee, whether or not we might be better advised to follow the practice which was used in the privileges and elections committee, and that was that if an amendment is acceptable to the committee, or to the majority of the committee, and we want to recommend it, and if the government indicates that it is desirous of accepting it, would it not be better for the committee to think of the amendment in general terms and to let the jusice department and its draftsmen draft the amendment and bring it in again for consideration, rather than for the members of the committee to attempt to draft it themselves?

The CHAIRMAN: I think that is what we did in connection with the estate tax.

Mr. PICKERSGILL: It is practically 11:00 o'clock now, and Mr. Howard mentioned the Elections Act as a case in point. Mr. Martin is not here because he has to be in the committee on the bill of rights.

Mr. Howard and I, both—might I say modestly—were prominent members of the committee on the Elections Act which will be before the house probably all the afternoon.

Now, if this committee is going to meet at the same time, there is going to be a very serious disability placed upon some members of the committee. It does pose a real problem which I think the steering committee should consider between now and 3:00 o'clock.

Mr. BELL (*Saint John-Albert*): I think it is important; and we also have the Criminal Code amendment to talk about as well. But I think we should plan to meet at 3:00 o'clock. However, the steering committee could take into account these various conflicts.

The CHAIRMAN: Last Thursday we did that and nothing happened in the afternoon. We adjourned our meeting, but nothing happened. However, if that is agreeable to you—

Mr. PICKERSGILL: As long as the Russian treaty is going on, I do not think it matters very much.

The CHAIRMAN: Shall clause 1, sub-clause 1 carry?

Mr. PICKERSGILL: I think we had better let it stand.

The CHAIRMAN: I would like to report at least one clause carried.

The committee is adjourned until 3:00 o'clock this afternoon, unless it is changed by the steering committee.

AFTERNOON SESSION

TUESDAY, July 12, 1960.

The CHAIRMAN: Gentlemen we have a quorum.

This morning we decided to have a meeting of the steering committee to decide what time we would proceed this afternoon. Mr. McIlraith and Mr. Fisher were both unavailable, and we were unable to have a meeting of the steering committee. Shall we carry on now or shall we adjourn?

Mr. ROBICHAUD: Mr. Chairman, I was given to understand that it was agreed by this committee to adjourn this morning. I left the committee meeting at three minutes to eleven to take a phone call before the House of Commons opened and unfortunately I was not here. It is my understanding that it was decided that if the Elections Act was being debated this afternoon in the House of Commons this committee would adjourn.

The CHAIRMAN: No. We agreed to hold a meeting of the steering committee who would give their recommendation to this committee. The steering committee did not meet, and I think it is now up to the members of this committee here to decide whether we should meet or not. Personally I think that we will not be able to carry on if we adjourn every time a bill comes before the House of Commons. I think the bill presently before this committee is as important as the election act debate. I hope there is no election coming for a little while.

Mr. HOWARD: Why not, Mr. Chairman? We would like to test the effect of this bill which is before us.

Mr. MORTON: The House of Commons is in darkness so we can carry on here.

The CHAIRMAN: That is a good excuse.

Mr. HOWARD: That is not quite a good excuse, Mr. Chairman. It was my understanding this morning, when it was suggested by Mr. Pickersgill, that if the Elections Act was being debated in the House of Commons we would adjourn. Mr. Pickersgill was a member of the Elections Act committee and he felt that it was necessary that he should be in the House of Commons during this debate. I am in this same position, as is Mr. Fisher who is in the House of Commons at this moment. My understanding of the general thought that Mr. Pickersgill expressed was that we should leave the decision up to the steering committee. Of course, you could not get in touch with all the members of that steering committee, so we do not have their decision. It is definitely my understanding that it was decided that if the Elections Act was being debated in the House of Commons that this committee would not meet this afternoon.

Mr. ROBICHAUD: That is the understanding I was given.

The CHAIRMAN: The understanding was that the steering committee would meet and bring in its recommendation. There was no understanding that we would not meet.

Mr. ROBICHAUD: For that very reason, Mr. Chairman, I do not think it is logical to meet. We had a quorum here at seven minutes after three and we waited until at least 20 minutes after three because the minister was not here.

The CHAIRMAN: Correct.

Mr. ROBICHAUD: The minister was not here because he was detained in the House of Commons passing a bill. We must be logical and decide one way or the other.

Mr. NUGENT: It was my understanding that the meeting was called for three this afternoon to decide whether or not we should adjourn.

The CHAIRMAN: That is right.

Mr. BELL (*Saint John-Albert*): That is right.

Mr. MACDONNELL: Difficult as it is, Mr. Chairman, it seems to me it would be very unfortunate if we were to go forward at this moment in view of the rather confusing situation we had to leave this matter in this morning, especially when two members who we know are very interested, are not able to be here. The chairman himself has said that this is a very important matter, and this I would suggest from one point of view strengthens the argument. I personally would not like to go ahead, in view of those circumstances.

The CHAIRMAN: There are quite a number of members of the Liberal party who are on this committee, one who is in attendance here. Surely we do not require every member of each party to be in the House of Commons during the debate in respect of the Elections Act.

Mr. ROBICHAUD: Mr. Chairman, I just spoke to Mr. Martin, who happens to be a member of this committee, before coming in. He said he wanted to be in the House of Commons when the Elections Act was being introduced. He had a few remarks to make there, following which he would come to this committee meeting.

Mr. MORTON: I just came from the House of Commons on the way through. Apparently the minister must have made his introductory remarks because Mr. Pickersgill was speaking, and I see the minister is here now. If we are to adjourn this committee meeting when every bit of legislation is before the House of Commons we will never reach a conclusion of our considerations of this bill. I feel that the length of this session is going to be affected to some extent by the amount of time that we take in this committee considering this bill. I understand this morning clause 1 (1) was discussed. I was unable to be here for a while myself, but that was my own unfortunate problem. Surely there are enough members of the different parties so that they can alternate back and forth during the time the important items are being considered. It is not as though clause 1 is going to be discussed for ten or fifteen minutes only, resulting in the members missing this discussion. We have discussed this clause all morning. I would like to see this committee carry on with its consideration at this time.

Mr. FULTON: Perhaps we could stand over the controversial clauses as we reach them until Mr. Pickersgill is able to attend.

Mr. HOWARD: You are referring to the whole bill, I take it.

Mr. FULTON: No, there are perhaps three clauses only where there appears to be real controversy.

Mr. HOWARD: I move that we adjourn.

Mr. ROBICHAUD: I second that motion.

The CHAIRMAN: It has been moved by Mr. Howard, seconded by Mr. Robichaud that we adjourn. All those in favour? All those against?

The motion is defeated.

Mr. MACDONNELL: Could we accept Mr. Fulton's suggestion in respect of standing over the controversial items?

The CHAIRMAN: I do not see how we can accept that suggestion, Mr. Macdonnell. Mr. Howard has said, under those circumstances we should stand the whole bill over.

Mr. MACDONNELL: Yes, but we do not really believe that.

The CHAIRMAN: Let us move to a consideration of the bill. We were discussing clause 1 (1) this morning.

Shall clause 1 (1) carry?

Mr. HOWARD: Mr. Chairman, before we proceed, I was wondering whether at this particular stage we should in fact decide to pass or not to pass any particular item or article, or whether it would be better to discuss them and get the minister and Mr. MacDonald to give us their attitudes in respect of the different items, and then deal with the individual items later. We are going to be running at cross references. For instance, this morning we discussed the article in respect of mergers, and the other definitions in the bill, as so on, and conceivably we will be considering one item and then subsequently we will find that we are making cross references to something that has already been passed. I wonder if it would not be a better idea to refrain from passing any particular article at this stage, but just proceed in this matter until we have received the suggestions and opinions of the minister and Mr. MacDonald, and then having perhaps a better understanding of what this bill means in its full context, we might then proceed to deal with the bill clause by clause and pass them or amend them.

The CHAIRMAN: I do not know how we can carry that suggestion out in an orderly manner, Mr. Howard. If we go through this bill without passing the clauses, we will have the Chairman in a worse frame of mind than ever.

Mr. FULTON: I would suggest, Mr. Chairman, if there is a question in respect of a particular clause, and the committee feels that its approval or otherwise is dependent upon the committee's opinion with respect to a later clause, that we allow that clause to stand. I would be quite prepared to accept that suggestion. I do not think this would apply to every clause, but I would make this suggestion in respect of where the approval is dependent upon a decision made on a later clause.

In all my experience in committees, I do not recall any time at which we proceeded through a bill clause by clause and then came back over it again in order to carry the clauses. This committee has been sitting since June 16, which is just under a month. I would hope as minister—not as a member of this committee, that is true—that we might begin to look now for some definitive action in respect of the bill before this committee.

Mr. MACDONNELL: Surely the minister's suggestion is very generous, and we should accept it.

The CHAIRMAN: If there is any particular clause that we have difficulty with we can let it stand over.

Shall clause 1 (1) carry?

Some hon. MEMBERS: Agreed.

The CHAIRMAN: Are there any questions in respect of subclause 2?

Mr. HOWARD: In regard to sub-clause 2, is the definition of merger, we have received a number of suggestions from witnesses who have appeared before this committee in respect of whether this should be done or should not be done. I think probably the most emphatic of those suggestions was made by Professor Cohen. He said there was really no need to change the definition which exists at the moment. There have been other suggestions in respect of

the definition section, that we should stop it at the word "person" and really define what "merger" means without making reference to the effect of the merger, but place in some other clause of the bill—in section 33, which is the penalty section for operation of a merger—to place in there the reference to competition and if it is lessened or likely to be lessened.

I wonder whether the minister may not, having followed these representations about a merger and what it means, and what little we know about it—whether he could express an opinion as to whether he thinks perhaps Professor Cohen's remarks were the correct ones, or whether the other suggestions are—and I forget just by whom they were made at the moment—that it should be cut off at the word "person", and the actual effect part of it to be put in somewhere else?

Mr. FULTON: With the greatest respect to Professor Cohen's submission, which was an interesting but a very comprehensive one, in my humble submission that portion of it dealt largely with the question of the desirability of doing something which would be appropriate to a revision of the act.

With respect to his views, it does seem to me that when we are amending by way of a bill which is to have immediate effect, we should deal with each subject definitively, and where we are defining a word such as "merger" we should put the definition all in one place. That is what we have attempted to do here.

Mr. HOWARD: The argument is that you not only have the definition in here but the effect of merger at the same time.

I think Professor Rosenbluth or English said this is what the definition should mean—

> "merger" means the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor, supplier, customer or any other person—

—period, and that the definition should stop there. Once we get into:

> whereby competition...is or is likely to be lessened—

—we are then getting into the effects of a merger and not the definition of a merger itself.

Mr. FULTON: I believe, Mr. Howard, the inclusion of the three points in Roman numerals is not only reasonably exhaustive of the types of ways in which a merger may be accomplished, but also has the effect of directing the attention of the court, in the very clause which defines a merger, to those aspects of a merger which it is the object of the legislation to have the courts deal with. It seems to me it is desirable to have all those aspects of it in at this point.

Mr. HOWARD: You touched upon another question which I wanted to raise in conjunction with this, and one which I have raised with some of the witnesses; and that is whether or not Roman numerals (i), (ii) and (iii) are exhaustive of all the circumstances whereby competition is or is likely to be lessened as a result of a merger; whether or not this is in itself defining them in a sort of omnibus clause and saying that in some other items that is not restrictive in itself.

I compare this, or have a tendency to compare it with the proposed 32 (2), which points out there is a sort of escape hatch here for a conspiracy, and that the persons shall not be convicted of a conspiracy if it relates to—and then it says (*a*), (*b*), and defines a number of things and goes to (*f*). There is a catch-all clause (*g*) which says:

> some other matter not enumerated in subsection (3).

I wonder whether this is not so?

Mr. FULTON: A merger, though, by its very nature, is a much more readily ascertainable fact than a combination which may be brought about by conspiracy. You have a merger, which is a physical union of two companies in one of the ways outlined in (2) (*e*), and if that union thus accomplished affects competition—

(i) in a trade or industry,
(ii) among the sources of supply of a trade or industry, or
(iii) among the outlets for sales of a trade or industry,

is or is likely to be lessened to the detriment or against the interest of the public,—

—then your offence is committed.

So a merger is a much more readily ascertainable fact, not usually, or at any rate not necessarily brought about by conspiracy or subterranean agreements; and I think that is the reason for the differentiation in the treatment of a merger, on one hand, and a combination, on the other.

Mr. HOWARD: I do not think it is a matter of determining what a merger is as compared to what a conspiracy is. It is quite true a merger such as that of MacMillan and Bloedel, Powell River—which I understand your department is investigating or has investigated—that is an easily ascertainable thing and is public knowledge.

Mr. FULTON: What I mean to say is this, if you have a merger, it is an accomplished fact and everything that it is sought to accomplish is or may be accomplished in the one merging of the two companies. It would be, I think, impossible to have a merger as defined and have it relate only, shall we say, to the pooling of resources for research. If people want to make arrangements to pool their resources for research, that would not be a merging of their companies, because "merger" means the acquisition of control over or an interest in the operation of the other company.

Where you have a combination or a conspiracy or arrangement, however, under the general heading of "combination", you have a very different sort of arrangement by which they get together; and they may get together for the specific purpose of one acquiring control over the other. We are saying in 32, in distinction to this definition, if companies only make an actual arrangement for certain isolated purposes, then there is no offence. It is possible to make that arrangement, as outlined there, for only one purpose and not have a combination or arrangement for any other purpose. But if you have a merger, then, by definition, the whole thing is merged.

Mr. HOWARD: I misunderstood what you said earlier in this regard. If you have a merger and two companies then join in that merger, that is a merger whereby competition is or is likely to be lessened with regard to something that is not mentioned in (i), (ii), and (iii). Can it have an effect where competition is likely to be lessened, either in a trade or industry, for example, and then among the sources of supply and outlets there is a vertical and horizontal integration—one or the other?

Mr. FULTON: That is right. This definition was designed to point the attention of the court in a positive manner, to the effects of vertical integration or merging as well as horizontal merging. It did not seem to us that emerged very clearly from the present definition of a merger, and we thought it desirable to point the attention of the court to this practice of merger, as well as the horizontal type of merger.

Mr. WOOLLIAMS: Putting it another way, is there not a merger which is an illegal merger and which could be a conspiracy, but there is also a merger which is not a conspiracy? Is that not it?

Mr. FULTON: "Merger", I think, as distinct from "combination", is not dependent upon conspiracy.

Mr. WOOLLIAMS: There are two distinct things, but that is the point of "conspiracy". I am taking what Mr. Howard said. You can only have a conspiracy under the Code if it is for an illegal purpose.

The CHAIRMAN: Does paragraph "*e*" carry?

Mr. HOWARD: This does not seem, Mr. Minister, to deal with what they call conglomerate mergers. That is, for argument's sake, take a central holding corporation absorbing corporations or acquiring interests in corporations that are in different fields of endeavour. For example, it might obtain an interest in the shares or assets of one corporation that is in the mining field, and it might acquire the assets or control over another one in the transportation field, over another one that might be in the oil and natural gas field, or in the pulp and paper industry—that sort of thing. I think the Argus Corporation is probably a prime example of one that is involved in all of this sort of conglomeration of industries.

Mr. FULTON: I think that, in general, what you say is correct, because the main object of the combines legislation is to preserve competition as such. Therefore, the operation of the legislation is directed to striking at those who by merger, conspiracy or otherwise, lessen competition. So you find the merger provision as detailed here refers to the gaining of control over or interest in the whole or part of the business of a competitor, supplier, customer; but you do have the words "or any other person".

Then the operative words are, "whereby competition is or is likely to be lessened to the detriment or against the interest of the public". The intent of the language is to strike at a lessening of competition; so, generally speaking, I suppose, the acquisition by a holding company of interests in firms which are not mutually competitive would not appear to be covered by this provision, for the reason I have given—unless it be one of the effects that competition among the sources of supply of a trade or industry, for instance, is lessened.

Mr. HOWARD: What bothers me is that you mentioned—and I do not want to dig up your exact words; but this is the gist of them, as I got it—that you did not want to alter the definition of "merger", because there was not sufficient case law or determination by the courts as to what a merger meant in the present act—and that there is one case in the courts at the moment; I think it is probably the sugar case—

Mr. FULTON: That is right.

Mr. HOWARD: —and that there are one or two, or some, before the restrictive trade practices commission, in which they are studying the merger question, and that therefore until you had more understanding as to what the courts determined in so far as mergers are concerned, and what conclusions the restrictive trade practices commission came to, that you were not desirous of altering the definition of "merger"—and yet in fact you have altered it.

Mr. FULTON: I think—

Mr. HOWARD: To make it clear, I might say—as you said it—that a merger in a horizontal way should equally be looked at, as well as a merger in the vertical way; and there was probably some doubt in the law before as to whether that was so or not?

Mr. FULTON: Whether or not there was doubt is probably a matter of opinion. We think we have clarified it. We had to reword the merger section because by importing section 411 into the Code we were breaking up the old, original definition section in clause 2 of the act; and at the same time it was suggested to me that the word "trust" was really an archaic word of no precise meaning. Therefore, it seemed better to make clear definitions of a merger, a monopoly, a combination, and a conspiracy.

So there was a re-writing, if you like, of the definition sections; but the intention was not to change the effect of the definition, with this one exception in "merger" which you have put your finger on, that we wanted to point up the fact that vertical mergers should be as much a cause for concern as horizontal mergers.

Mr. HOWARD: But conglomerate mergers,—if I can use that term—we are not to worry about them?

Mr. FULTON: This act does not concern itself with them, unless they have the effect of eliminating or lessening competition.

Mr. HOWARD: The question of size itself, bigness for bigness sake, or the question of how big is too much—this is not dealt with, in so far as this bill is concerned?

Mr. FULTON: No, because the criterion that was in the former act, and which we have adopted, and the courts so far in the merger cases have indicated they are prepared to grapple with, is whether competition is or is likely to be lessened to the detriment or against the interest of the public.

We were certainly impressed by the majority of those who made representation to us, that the interest of the public should be the guiding factor here; so it does not matter whether competition is lessened by a giant firm, or by a small firm: if it is lessened to the detriment or against the interest of the public, then the offence is committed. That seemed to us to be a fair enough criterion to leave in the act.

Mr. DRYSDALE: Mr. Fulton, I wonder if you could perhaps give a little assistance in explaining the section, looking at it from the viewpoint of a lawyer who perhaps would have to interpret it for a client, and advise on a potential merger.

I will tell you the two things that particularly bother me.

Mr. HOWARD: Are you looking for free legal advice?

Mr. DRYSDALE: The first is, how you would interpret the words "any control". I think Professor Cohen indicated that some of the cases indicated this would have to be over 50 per cent of the interest in the company, I do not think that would apply in this specific situation.

Also, there are the two situations, first, where the competition actually has the effect of a detriment to the public; and there is what I would term a second one, where not only has it caused detriment, but also where there is the possibility—in other words, it is likely to be lessened as far as the public is concerned.

I am interested in that section, in conjunction with section 33, which provides that every person who is a party or privy to, or knowingly assists in, or in the formation of, a merger—etcetera. I am interested in how those two tie in, because I think it is very important that we should have some way of ascertaining what the clear test is of what a merger is. For example—a lawyer advising his client wants to be fairly sure that he is not going against the Combines Investigation Act, and I do not think it has been clarified as yet as to whether section 33 requires *mens rea*.

Mr. MACDONNELL: Has the word "control" never been interpreted in the courts?

Mr. FULTON: I think the section first has to be read with an understanding of its component parts, and the lawyer would have to ask his client: What business are you in now? Are you in a business which is in competition with the business of which you propose to acquire any interest or control? And if so, is it likely that as a result of that acquisition by you of an interest in or control over that business, that competition will be lessened?

Then, having answered those questions, I think that if the questions are answered in the affirmative, the client would then have to answer further questions: to what extent will competition be lessened; to what extent will competition in the industry as a whole be lessened by this acquisition? And here I think I would be prepared to say that there is a matter of judgment now that has to be exercised, as to whether the extent to which competition is lessened would be such that it would be to the detriment of or against the interest of the public, remembering that the courts have, in effect—I think I use the right words here—held by their cases that the public does have a vested interest in the maintaining of competition.

Mr. DRYSDALE: In effect, although the word is not used, would that be a substantial lessening of competition in the case where it was likely to affect the competition?

Mr. FULTON: In an earlier draft we had the words "substantially lessened", and business indicated to us that in their view these words were too vague and indefinite to be left in; so we went back to the words "lessened to the detriment or against the interest of the public".

Mr. DRYSDALE: There will, then, in your opinion, be more of a discretionary interpretation, because it is difficult to envisage any merger which would not automatically violate the Combines Investigation Act?

Mr. FULTON: Then your criterion and the one to be applied by the courts is the question of whether it is against the interest or to the detriment of the public.

Mr. DRYSDALE: Would a factor under consideration—take a hypothetical case, and I realize the danger of hypothetical cases; but assuming, for example, that on the coast there were five fish companies, and four of them were doing business fairly well and one of them, because of poor management, or some other factor, was forced to go out of business. If one of those other four companies was to acquire an interest, I think they would be faced with the difficulties of this section; so that there would almost be a premium to, perhaps, an outsider from another company, for example, an American company taking over the fifth company to avoid this very provision. Or, is the situation such that they could apply to the combines director and get an indication as to what attitude he would take?

Mr. FULTON: Well, one of the answers to your question—and, probably, this is as far as I could go—

Mr. DRYSDALE: I am not trying to put you on the spot.

The CHAIRMAN: I was going to draw your attention to the fact that, in the house, it is against the rules to ask the Minister of Justice to give a legal opinion.

Mr. DRYSDALE: A legal opinion would have to be based on a specific set of facts, which I have not given.

Mr. FULTON: You came pretty close to giving me a specific set of facts. If I answered your question, I would be coming close to giving a legal opinion, which I should avoid for two reasons, firstly, that I do not pose as an expert in connection with the detail in this field and, secondly, I think it is dangerous for the Minister of Justice to give out legal opinions based on a specific set of circumstances. However, what I would say, without violating my own set rule of conduct is that if one of these companies was, in fact, in a shaky position, it would become a question of fact and judgment as to whether, really, competition was lessened as a result of the acquisition, or whether competition was going to disappear anyway because of the shaky position of the company. It would become a matter of the application of his skill, his judgment, his

knowledge of the law and of the precedents, on the part of the lawyer, to the facts of the case which were put before him and, on that basis, he would have to advise his client.

Mr. DRYSDALE: Do you feel the act has sufficient flexibility so that it would not be necessary for an outsider from another country to come in and acquire the company in order to avoid going against the provisions of the Combines Investigation Act?

Mr. FULTON: What you are asking me, I think is this: is a set of circumstances, such as you have put, acquiring it by an outside company, the only way in which that company can be acquired and yet avoid all offences against the act; I do not know that necessarily would be the case.

Mr. DRYSDALE: The act would have sufficient flexibility in order that that factor could be taken into consideration.

Mr. FULTON: Yes, and any other factors that are pronounced in the definition of a merger.

Mr. NUGENT: There is one point raised by the brief of the executive council, Canadian chamber of commerce.

The CHAIRMAN: I wonder if you gentlemen would mind coming up to the front, please.

Mr. NUGENT: If I may, I will speak louder.

There is a point in the brief of the executive council of the Canadian chamber of commerce in connection with paragraph (*e*), where they asked was this left out by inadvertence:

> But, this paragraph shall not be construed or implied so as to limit or impair any right or interest derived under the Patent Act or under any other statute of Canada.

Mr. FULTON: I think it comes to the fore particularly with relation to paragraph (*f*).

I indicated this morning that the government would be prepared to entertain an amendment to re-insert that provision, in effect, because it was an inadvertent one that I am not able to explain, between the bill which was drafted a year ago and the present one.

Mr. NUGENT: I so move that we re-insert it and, thereby, keep these people happy.

The CHAIRMAN: This is under paragraph (*f*).

Mr. FULTON: Yes, under paragraph (*f*).

Mr. DRYSDALE: Mr. Chairman, I have a slightly more detailed amendment, which might have that effect, if Mr. Nugent would care to second it.

The CHAIRMAN: We are not on paragraph (*f*); we are still on paragraph (*e*).

Mr. MACDONNELL: I have a question, Mr. Chairman. We are using the word "control" in entirely the wrong way. "Control" means "control". I have asked whether it has ever been interpreted. It is used here in the sense of influence, and not control. The other day, when Professor Cohen was talking about it, he referred to the fact an attempt had been made to interpret "control" as "control", and he scoffed at it. He said you did not need to have 50 per cent of the stock to exercise control. Nevertheless, I find it very difficult to understand how you can take the word "control" and use it as it is obviously used here. We are not using it in the sense of control, because we are saying this clause is to apply regardless of its being 50 per cent.

The CHAIRMAN: It says "of any control".

Mr. FULTON: I think, Mr. Macdonnell, that the courts—and we have to repose some confidence in the common sense of the court officials—would

take a practical approach to this, and would have to be shown there is a pattern established after the acquisition of the interest or control which, in fact, amounted to a control. Then, they would also look at the question of whether the result of this pattern lessened competition in a sense that is outlined in the section itself. So, it is not the mere acquisition of a share interest, say 15 per cent, which is the offence; it is the acquisition of a share interest, and a pattern which establishes the competition is or is likely to be lessened as a result of that move.

Mr. MACDONNELL: I understand that, but some purely literal-minded people, like myself, might go into the court and say: "control" means "control". You cannot take it and use it in that sense. The dictionary does not give that meaning to it.

Mr. FULTON: I am not aware when the words first were put in. I realize that the fact they were put in there is not a valid reason for their continuance, but it is taken out of the present definition of merger.

> "Merger, trust or monopoly" means one or more persons who has or have purchased, leased or otherwise acquired any control over or interest in the whole or part of the business of another.

and so on.

Mr. STINSON: Could the minister tell us if the courts, in considering similar legislation to this, have interpreted the words "lessened competition to the detriment of the public" either in courts of this country, or other commonwealth jurisdictions.

Mr. FULTON: Well, I think I have to preface my answer by saying that, in Canada, we have had, recently to my knowledge, only one large merger case before the courts on which the courts have so far ruled—and that is the beer case. The decision in the sugar case has not been handed down to date. So, we do not know how the courts will interpret these words in the overall picture.

I would think, on the basis of the jurisprudence—and I am hazarding a guess, and not expressing an opinion—I would be inclined to think, on the basis of the jurisprudence so far, the courts would look for more than a minor interference with competition, because it says it has to be lessened to the detriment, or against the interest of the public. Certainly, the legal maxim, de minimis non curat lex, applies.

Mr. HOWARD: Would the minister mind giving us a translation of that?

Mr FULTON: The law does not concern itself with trifles.

The CHAIRMAN: Gentlemen, does paragraph (*e*) carry?

Agreed.

The CHAIRMAN: Paragraph (*f*) is next.

Mr. NUGENT: Mr. Chairman, I would like to move an amendment at the end of paragraph (*f*)—that the semicolon at the end of line 32 on page 1 be deleted, and the following be added: ", but a situation shall not be deemed a monopoly within the meaning of this paragraph by reason only of the exercise of any right or enjoyment of any interest derived under the Patent Act, or any other act of the parliament of Canada.

That is the suggestion of the Canadian chamber of commerce.

Mr. HOWARD: I do not know if Mr. Nugent was here when we discussed this earlier. However, it was my suggestion that if, perhaps, we came to detailed amendments, it would be better if we agreed upon the principle of the amendment, and then have the drafting officers of the department draft the amendment on our expressed thoughts. In this way, we would get uniformity in legislation.

The CHAIRMAN: Then, we will pass on, and will revert to it later.

Mr. NUGENT: I think those were the words that were in the old act, and which were left out by inadvertence. I do not think we should have any difficulty in this.

Mr. FULTON: I think, in conformity to what I believe was the agreement this morning, we should have a look, perhaps, at this. It certainly seems to accomplish the object, but we would like to make certain it fits in with the present drafting of the act.

The CHAIRMAN: Then, we will pass paragraph (*f*), and come back to it.

Mr. HOWARD: Before we do, perhaps there may be another alteration which might be made in paragraph (*f*), and also an application of this proposed amendment, as I understood Mr. Nugent to read it, which applied to the monopoly section. I do not find this reference to the Patent Act in the bill elsewhere under the definition of monopoly.

Mr. FULTON: My impression is confirmed. It was in last year. We will get you the exact reference in last year's bill. It is in the present act.

Mr. HOWARD: I do not think that last year's bill really is the point there, although I could not find it.

Mr. FULTON: Do you want to know where it is in the present act?

Mr. HOWARD: No. I see it here. It is in (*e*) here. However, as I read it now, it reads to the effect that this shall not apply so as to limit or impair any right or interest derived under the Patent Act, and so on; but this applies also to mergers.

An HON. MEMBER: No, no.

Mr. FULTON: Well, as a matter of fact, it is our view at the present time that although this does appear at the end of paragraph (*e*)—that is the definition of merger, trust or monopoly—we do not see how it would really have any effect or bearing on a merger situation. It seems to have been put in there in reference to a monopoly situation.

Mr. HOWARD: That is fine. I have one other point.

Mr. FULTON: And I can tell you it is in proposed section 33(3) of last year's bill.

Mr. HOWARD: In the act, under (*e*) "merger, trust or monopoly", under (ii) it says:

> Who either substantially or completely control, throughout any particular area or district in Canada or throughout Canada the class or species of business in which—

and then the words "he is or they are engaged". How do you draw a distinction between the singular—one organization or corporation for instance—and (ii)—"which might control". I wonder whether you might consider reinserting the words in there so that in line 29 it would read "species of business in which he is or they are engaged".

Mr. FULTON: I have to report that in the opinion of the draftsman the current thinking and philosophy of drafting, if you like, is based on the desirability of brevity where brevity can be accompanied by clarity. Where it is found that the Interpretation Act makes it unnecessary to use the singular and plural, they use just the one. My understanding is that the Interpretation Act in this case should apply so that the plural would include the singular.

Mr. HOWARD: There is no question in that?

Mr. FULTON: Not according to the view of the draftsman who drafted this section.

The CHAIRMAN: Is it agreed that paragraph (*f*) stand and we will go on to clause 2.

Mr. HOWARD: How about paragraphs (*g*) and (*h*). There might be some amendment to (*g*). Do you think, Mr. Minister, that you should include "means the Minister of Justice or the Attorney General of Canada".

Mr. FULTON: The minister who has responsibility under this act is the Minister of Justice. The Minister of Justice happens also to be Attorney General of Canada. I do not think it is necessary to give him his full title.

The CHAIRMAN: Shall paragraph (*g*) carry?

Agreed.

The CHAIRMAN: Paragraph (*h*).

Mr. HOWARD: On (h) "trade or industry", we dealt with this slightly before, but to me there still is no definition of what is a trade or what is an industry, is there?

Mr. FULTON: Well, I do not know that you really can get a definition of trade or industry, apart from the use of the words themselves here, which would not affect or narrow down the scope of the provision. "Trade or industry" surely are words capable of understanding by everybody including the courts. I do not think you need a definition of the words "trade or industry". All we were concerned with was to make it clear that no one can defend himself against a charge by saying, for instance, "I am not engaged in the industry of manufacturing doors because I only manufacture aluminum doors." So this includes any class, division or branch of a trade or industry. It has not seemed necessary to define those words "trade or industry".

Mr. HOWARD: Is there any reference in the act at the moment to a trade or industry?

Mr. FULTON: No. I believe there is no reference in the present act to trade or industry. I am told that the Sherman Act, for instance, uses even broader words "a line of commerce"—without refinement.

The CHAIRMAN: Does (*h*) carry?

Agreed.

On clause 2.

Mr. HOWARD: On clause 2, I remember a little while ago reading in *Hansard* some of the pearls of wisdom from the Minister of Justice when he was then in the position of being only the member for Kamloops. He dealt with this particular section here and wondered why any six persons had to be Canadian citizens and why they could not be British subjects. For argument's sake I would like to wonder along with the minister: why not?

Mr. FULTON: Perhaps, Mr. Howard, I should say that the arguments then used against me must have convinced me and I see no compelling reason to change the words now.

I must make a correction in respect of my reply to you on paragraph (*h*) earlier. I find that the words "trade or industry" are used in section 412 of the Criminal Code although not in the same context, "everyone engaged in trade, commerce or industry is a party or privy to", and so on. There again the words "trade, commerce or industry" are not defined.

Mr. HOWARD: This is in section 412?

Mr. FULTON: Yes, of the Criminal Code.

Mr. HOWARD: I was going to ask what has been the practice of the courts in determining what is trade or industry.

Mr. FULTON: This is the provision relating to discriminatory practices.

Mr. HOWARD: There have been no court cases under that?

Mr. FULTON: No. We had at least one reference to the commission and the words did not seem to give the commission any difficulty in interpretation or application.

Mr. HOWARD: It is true that the minister found the former government did have some effect upon his knowledge of these things. My thoughts now are related particularly to the point that these six persons give a concise statement of the evidence supporting their opinion that the offence has been or is about to be committed. I understand that this has only been used on three or four occasions.

Mr. FULTON: The director tells me he distinctly remembers only one, but there might well have been three occasions within his experience.

Mr. HOWARD: There were very few, in any event. But could I, perhaps, obtain what you would like to see in this concise statement, to what extent it would be necessary for the six people to go into detail? Would they have to give evidence supporting their plea?

Mr. FULTON: I shall have to ask the director to reply, because he is familiar with the assessment of complaints, and on what basis they start.

Mr. MACDONALD: We have not had very much experience there, which I can recall. I can remember in detail only one application; but we would expect to see a concise statement of the facts.

Mr. HOWARD: Does concise mean brief?

Mr. MACDONALD: A brief statement showing on its face a contravention of the legislation.

Mr. HOWARD: You would not expect six citizens to have any sort of intimate knowledge of the inner functions of a group of corporations, if it related to a price conspiracy?

Mr. MACDONALD: I think that is correct. The effect of a formal application would be to start the combines branch off on its own inquiry. We would not look for all the facts in the application. We would look for a reasonable indication, an indication that the people concerned had reasonable cause to believe there was an offence and finding that, we would take it from there.

Mr. HOWARD: If for argument's sake—and this is only hypothetical; perhaps it is more than hypothetical—suppose the city of Toronto was concerned about identical bids for cement, that is, tenders, and suppose the city of Vancouver was concerned as well with identical bids by various firms. Supposing this had occurred three or four times, and one of the city councils comprising six members, decided to draw it to your attention. You would have authority to act under section 7. This, I imagine, would be reasonable evidence that perhaps an inquiry was necessary.

Mr. MACDONALD: If they came to us in a formal application, it would certainly start us on an inquiry. But how far we would go with that inquiry is another matter. We might come to the conclusion that the application by the council was groundless. It would depend on what we found.

Mr. HOWARD: For argument's sake, let us suppose six citizens should write to you and make the statement that they believed that certain companies were fixing prices, without knowing what those prices were. This would not be considered as evidence. That is what I am trying to get at.

The CHAIRMAN: Clause 2 agreed to.

On clause 3.

Mr. DRYSDALE: I wonder why the words "is being" are being eliminated from clause 3. It was "has been or is about to be violated" under the old section. This is right opposite on the same page, Mr. Fulton.

Mr. FULTON: The reason is that we think the words "is being" are redundant and unnecessary. We think that the words "has been" will, in fact, cover the situation envisaged, in this way: the section provides "that the director shall, on application made under section 7, whenever he has reason to believe

that"—this is in (b)—"section 32 or 34 of this act or section 411 or 412 of the Criminal Code has been, is being or is about to be violated, or . . .". That is, if the director came to the conclusion at this point of time, that sections 32 or 34 are being violated, by the time he reached a decision and put it down in writing, it has been violated. Therefore it does not seem necessary to use the words "is being"; and this is being standardized elsewhere throughout the act.

The CHAIRMAN: Clauses 3, and 4, agreed to.

On clause 5.

Mr. ROBICHAUD: On clause 5, was there any special reason to make this change "whenever in the opinion of the minister the public interest so requires, he may appoint and instruct counsel to assist in an inquiry under this act"?

Before, was any application made to the director?

Mr. FULTON: Yes, but there seemed to be discrimination between the right of the director to apply, and the right of the commission to apply. But I shall ask the director to explain it.

Mr. MACDONALD: In certain cases where the commission wished to engage counsel, there was no provision under the present section 13, as it is in the act now, for them to go to the minister with a request for counsel, except to ask the director to do it.

It did not seem compatible with the independence of the commission. So the commission requested that the provisions be widened so as not to put upon them the necessity of going to the minister through the director. And when the section was redrafted, as a result of that request from the commission, it took this form.

The CHAIRMAN: Clause 5 agreed to.

On clause 6.

Mr. HOWARD: This is one which I raised earlier. I think it has been embodied consequentially later on in what is now section 15 (2), because if we do not, we will still have reference to subsection 7 and sections 411 and 412 of the Criminal Code which will not exist when this bill is passed.

Mr. FULTON: The situation there I think is that there are inquiries presently underway, and the law presently applicable is sections 411 or 412 of the Criminal Code; therefore if we eliminated reference to sections 411 and 412 of the Criminal Code, we would be cutting off the possibility of the continuing effect.

Mr. HOWARD: Do you not have a carrying forward section somewhere which says that anything instituted under the old act shall continue? It would seem to me to be a sensible thing to do.

Mr. FULTON: I am advised that in prosecution experience, where a section has a new number which is an entirely new section, that relates to a provision of law as it formally existed, the drafting practice is to draft your charge under the section describing it as it was at the time of the offence.

Mr. HOWARD: Some time we will have to come back and amend subsection 2, will we not?

Mr. FULTON: It will just become inoperative.

Mr. DRYSDALE: Clause 21 of this bill repeals sections 411, 412 and 416 of the Criminal Code?

Mr. FULTON: Yes; but there again if an offence is now being committed, it would be open to us to charge that it was an offence committed under section 411 or 412, so it is necessary to provide a new section to establish that the law is the same when this offence was committed as it was when the old section was in force.

Mr. DRYSDALE: The repeal would not be retroactive, as far as the offence being committed is concerned?

Mr. FULTON: No, and it is not intended to be. We are merely transferring the law of the Criminal Code into the Combines Act.

The CHAIRMAN: Clause 6 agreed to.

On clause 7.

Mr. HOWARD: On clause 7, is it possible to seize anything without a search warrant, or is this perhaps under the general functions of the director? Does he have the right, shall we say, to enter premises to seize documents, or to make copies thereof, without, any warrant?

Mr. MACDONALD: The director, before he issues his order authorizing his representative to enter upon premises to examine files, and take copies of documents, or take documents, must have the authorization of the restrictive trade practices commission.

Mr. DRYSDALE: But if a document is wrongly seized, it does not make any difference so far as the evidence is concerned under the Combines Act.

Mr. MACDONALD: I do not understand your question.

Mr. JONES: The evidence is still receivable?

Mr. MACDONALD: If you seized a privileged document, it certainly would not be admissible.

Mr. JONES: That would apply in all cases of privilege, would it not?

Mr. MACDONALD: Yes.

Mr. JONES: Although the question merely was in respect of the use of documents, no matter how they came into possession, whether seized illegally or not?

Mr. MACDONALD: I find it difficult to answer that question offhand because I find it difficult to fix my mind on circumstances under which a document would be illegally seized in the first instance, and still turn out to be relevant to the later proceedings.

Mr. DRYSDALE: You might have the permit to seize certain documents in a certain area, and if the people who were being searched did not fully understand the limits of the search warrant—for example you might send the Royal Canadian Mounted Police, and they would take their trucks and bring everything—then it would not matter, as far as the court was concerned, as to how the evidence was obtained, and whether it was actually technically under the provisions of the search warrant or not.

Mr. MACDONALD: Technically I think that position is correct.

Mr. FULTON: To return to Mr. Howard's question, section 10 of the present act, which authorizes the director to enter, search and copy, or take away, provides that before exercising that power he must produce a certificate from a member of the Commission authorizing the exercise of that power.

Mr. HOWARD: The commission in this regard, then, acts somewhat similar to a court in authorizing a search warrant?

Mr. FULTON: A search warrant for the purposes of this act, yes.

Mr. HOWARD: Yes, for the purposes of this act.

The CHAIRMAN: Shall clause 7 carry?

Clause 7 agreed to.

Claude 8 agreed to.

On clause 9, findings to be included in report.

Mr. HOWARD: In respect of clause 9, Mr. Chairman, there are a number of things which have been mentioned by witnesses, and one in particular

was a reference made to the words at the top of page 4, namely: "a finding". I am not just sure what organization it was that appeared before us, but one of them suggested that "a finding" is in fact a sort of determination in respect of a certain thing having been done, rather than an expression of opinion as to whether a certain thing had taken place.

Mr. WOOLLIAMS: Following that up, that suggestion was made by the Canadian chamber of commerce.

Mr. HOWARD: This was the organization that presented a divided opinion in respect of section 34.

Mr. FULTON: Without disrespect to the views of that body, it seeems to me it was largely a matter of semantics. If you have a report that concludes certain things, or states certain things, it seems to me that it is permissible to call that a "finding".

Mr. HOWARD: On one other point, Mr. Chairman, Dr. Skeoch suggested that the inclusion,—and he made reference here to your explanatory notes—was a slipout in the drafting of the explanatory notes. Perhaps I am doing Dr. Skeoch an injustice here, but if I read between the lines correctly, he intimated that what you had in mind slipped out in your drafting of the explanatory findings. This suggestion was made regarding the suggestion that the amendment requires the commission to make certain additional specific findings. As a result of that they argued that this led up to a specific detriment argument that has been advanced in particularly every case by counsel for those who had been prosecuted. I wonder if you would care to comment in that regard, and tell us what you think of that suggestion?

Mr. FULTON: The purpose for which we included this direction that the commission make certain additional findings was to assist the minister in two ways; firstly, to assist him in making up his mind as to whether he should prosecute, and to assist counsel to whom it might be referred, and also to assist the minister in assessing the nature of the offence so that he might then determine whether to prosecute in a trial court or whether to take one of the other alternative remedies which is opened. I am satisfied that this will greatly assist the minister, whoever he may be, in making his decision as to disposing of the case, in so far as his responsibility lies, if he receives the assistance of such findings from the commission.

I say, without disrespect to the commission, who have a very difficult task, that if you are in the position of a minister reading some of these reports, you would, I assure you, be on some occasions in very great doubt as to whether you should really prosecute, or whether you should not.

In addition to that simple alternative we provide other alternatives. This is included in order that the minister can decide what course of action he should take, and so that he may have the assistance of specific findings by the commission.

It has, incidentally, as I recall it, been a complaint of accused persons in the past also that the commission's findings are too vague and general to form a proper basis for prosecution.

Mr. HOWARD: I take it that perhaps what this leads up to is that the commission will not only find in detail the fact of a conspiracy, for argument sake, but will also make specific recommendations as to what course of action should be followed to deal with it?

Mr. FULTON: No, the commission is not asked to do that, and indeed, I do not think it is authorized to do that. The commission is authorized only to include a finding as to whether or not a conspiracy, combination, agreement or arrangement is lessening, or is likely to lessen competition unduly in respect of one of the matters specified in paragraphs (*a*) to (*d*) of subsection (1) of

section 32, or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade or industry.

We are asking the commission to make a finding in regard to those points, not to make recommendations to the minister. The act I think then will indicate clearly to the minister what his obligation and duty is when these findings are made.

Mr. HOWARD: I take it you do not want the commission to make such recommendations?

Mr. FULTON: No. I think it would be putting the commission in an improper position to do so.

Although I know that business tends to regard the commission as its enemy, in fact that is not the case. The commission is established as a fact finding body to make findings of fact in respect to the act. The commission is not charged with the responsibility of saying whether persons should be prosecuted or should be convicted. It is true that the commission may make recommendations as to how the harmful effects of a situation, on which it reports, may be altered or alleviated; but with regard to the question of prosecution I do not think it would be proper to put the onus on the commission of making specific recommendations. We want to preserve the role of the commission as a fact-finding body.

Mr. HOWARD: I wonder if I could ask the minister a question in regard to subsection (1) which says:

> The commission shall as soon as possible after the conclusion of proceedings taken under section 18, make a report in writing and without delay transmit it to the minister; such reports shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this act or other remedies.

I think this gives the authority to the commission to make those sorts of recommendation to you.

Mr. FULTON: My understanding of the interpretation of the word "remedies" there, is that it means remedies for dealing with a situation which the combination or merger has brought about, and not remedies in the sense of penalties imposed upon individuals who brought them about.

For instance, take one case, in the beer report, there were, I believe, four recommendations of things that should be done or should be required to be done by the companies party to the activities with which the commission was concerned, but that did not concern itself with whether or not there should be prosecution. These were remedies which might be used to bring about, in effect, a dissolution of the merger.

Mr. HOWARD: I take it your predecessors in office held this same view of the function of the commission?

Mr. FULTON: I think that this is what the act says, and the relationship of the commission to the government is outlined in the provisions of the act. I understand the commission itself has always taken this view of its own functions, and this I have been endeavouring to put before you.

Mr. HOWARD: I was wondering whether the reverse was not true, that a convenient interpretation had been given under recommendations as to remedies in this act, to get across to the commission that the Ministers of Justice in the past, yourself included, did not want specific recommendations about remedies that might be taken, not only to correct the situation that might develop, but also with respect to court remedies such as dissolution orders, prosecutions, and so on?

Mr. FULTON: Well, might I refer you to the MacQuarrie committee's report, the 1952 report, which is the main report, on page 34:

> We do not think the report—

—referring here to the report of the commission—

> —should recommend prosecution or non-prosecution. This should be left to the Minister's decision on the basis of the report and such advice as he may seek. We consider that the report has important functions other than that of furnishing a preliminary verdict as to whether or not the accused shall be prosecuted.

What I have said is, with the assistance of these additional findings—which are findings and are not recommendations for prosecution—I think the task of the Minister in deciding what legal remedies or course he should follow would be made very much easier, to his benefit and to the benefit of all parties, in disposing of these cases in the quickest manner, at the same time before the most appropriate forum, and on the basis of application for the most appropriate type of order.

Mr. FISHER: What do you mean by "appropriate forum"?

Mr. FULTON: Whether it be the Exchequer Court or the trial court.

The CHAIRMAN: Does clause 10 carry?

Mr. WOOLLIAMS: Just before we pass clause 9—

The CHAIRMAN: We have passed clause 9.

Mr. WOOLLIAMS: There is just one thing in there that I tried to bring to the attention of the chairman before. I do not want to go back on it, but the Chamber of Commerce did suggest the word "unduly" be put in ahead of the word "restricted," at the top of page 4, clause 9. Has the Minister or Mr. MacDonald any comment in that regard, because the word "unduly" has been interpreted in various ways by various decisions.

Mr. FULTON: We are dealing with clause 9 of the bill?

The CHAIRMAN: Yes, at the top of page 4.

Mr. DRYSDALE: Line 8. "unduly" before "has restricted."

Mr. WOOLLIAMS: "Has 'unduly' restricted."

Mr. FULTON: You will appreciate this part of this clause relates to section 32, and particularly to subsection (3) of section 32. There the word "unduly" is not included in that subsection of section 32. It would only go in there if, in fact, it was decided to put it in the other places as well.

Mr. WOOLLIAMS: This is what the Chamber of Commerce said in the brief, and it is suggested also that the word "unduly" should be inserted before "restricted" and before the words "to restrict" in the eighth and ninth lines on page 4 of the bill. "Undue restriction" is the offence under the act.

Mr. FULTON: I think we can probably deal with that at the time we are considering the relevant clause of section 32, rather than here. I would be prepared to do it here, but I think it would be more relevant if we discussed arguments for or against the insertion of the word "unduly" at that time.

Mr. HOWARD: In that regard, perhaps it would be better, because we are going to be referring to it when we get to section 32, and then we will get back to clause 9. Then we would be agreeing to something the committee had already done.

Mr. FULTON: You are suggesting this stand?

Mr. HOWARD: Perhaps it might stand, and for another reason also. This is the first part in the bill where we have reference to the restrictive trade practices commission, which, as I understand it, is a sort of check and balance against the activities of the director, though, perhaps, he does not need them. But it is an intermediate step in assessing the weight of all the evidence, and

so on, and has developed quite an extensive bit of reading material under the various things that have come to its attention, in cases and also on research projects. It has made a case study of loss leader and discriminatory pricing practices in the grocery trade. On this basis, I think that with this and other work which it has done, the restrictive trade practices commission might properly be asked to appear before this committee, to give the views which it has gained over the years in working with this particular act. Before we proceed any further, I would like to ask the minister whether he could undertake to say whether this would be possible or not?

Mr. FULTON: I do not think it would be very desirable—

Mr. HOWARD: Why not?

Mr. FULTON: I am just going to develop the reasons. The person who discharges the act, in so far as the administrative responsibility is concerned, is the director. The duties and functions of the commission are of a special nature, and they arise only on the reference to them of matters by the director. The director has just pointed out to me that they can direct inquiries under section 42, that is inquiries of a general nature; and they can, in cases where they have a statement from the director, in turn, direct him to bring more information before them. But, generally speaking, their duties only arise on a report from the director, and it would seem to me the best person to speak in the field into which this committee is inquiring is the director himself.

I must say, however, if the committee feels they would like to have them appear, I am certainly not prohibiting the appearance of the commission, or any member of that commission.

Mr. FISHER: You mean, from the point of view of yourself, as the minister?

Mr. FULTON: I would have to look at the act to see if I could prohibit their appearance, if I wanted to. I am not sure that I could. In that case, it would be a matter for this committee to decide whether it wants to call that type of evidence.

Mr. HOWARD: I am of the opinion that perhaps the restrictive trade practices commission, because it functions in a different capacity, than does the director, and because it has, at its own instance, the right to initiate matters, particularly so-called research ones under section 42—that the thinking and guidance that the commission could give us would be invaluable in our assessing the impact of some of the proposed sections. I have special reference to the proposed amendments to section 34, because in this field the restrictive trade practices commission has carried out some studies, and one, I gather, is the blue book, so-called, on loss leaders and the other discriminatory pricing practices in the grocery trade, which have a direct connection with the resale price maintenance section.

Mr. FULTON: With respect, that one does not: the first one does.

Mr. HOWARD: I am sorry—price discrimination. It is the same relationship, between manufacturer and the dealer or retailer. I think their guidance would be invaluable to us, with the wealth of experience the commission has had in these things.

In fact, I would move that we ask the restrictive trade practices commission to appear before the committee.

Mr. AIKEN: Mr. Chairman, before we consider the matter, I would like some clarification. Does Mr. Howard propose that the chairman of the commission should appear in the same capacity, perhaps, as Mr. MacDonald, to assist the minister—or does he propose that they appear as witnesses? I think there is quite a difference.

Mr. HOWARD: In whichever way they would want. I would think, as witnesses would be preferable.

Mr. JONES: That matter has already been decided by the committee.

Mr. HOWARD: That matter has not been decided.

Mr. JONES: I understand that the committee decided there would be no more witnesses. Is that not right, Mr. Chairman?

The CHAIRMAN: That is my understanding.

Mr. HOWARD: Mr. Chairman, that is not correct. I reviewed the typescript of the evidence of Thursday, and that was not a decision of this committee.

Mr. BELL (*Saint John-Albert*): I think this is a matter that the steering committee could look into and give us the benefit of their detailed advice.

The CHAIRMAN: If you can find them!

Mr. FISHER: Mr. Chairman, can I second Mr. Howard's motion, and then the committee would have a motion to consider?

An Hon. MEMBER: What is the motion: I did not hear it?

Mr. HOWARD: That we invite the restrictive trade practices commission to appear before this committee.

Mr. FISHER: That would give the steering committee time to consider.

Mr. HOWARD: Yes.

Mr. BELL (*Saint John-Albert*): As far as I am personally concerned, I think this motion should not be quite as binding. They might decide that there will not be anything gained by having them here, and if we just made it a little less strict and said that the steering committee should consider the advisability of this, I think that would be better.

Mr. ROBICHAUD: Mr. Chairman, in view of the practice in the past, I think that would be the proper procedure to follow.

Mr. JONES: I agree with Mr. Robichaud.

Mr. FISHER: We will just refer that motion to the steering committee for their recommendation.

The CHAIRMAN: That is not what this motion says.

Mr. HOWARD: No, that is not what that motion said.

The CHAIRMAN: Then will you reword your motion?

Mr. HOWARD: I thought Mr. Bell was going to move an amendment.

Mr. MORTON: That it be referred to the steering committee for consideration and recommendation to the committee.

Mr. DRYSDALE: Mr. Chairman, I am not quite clear what the objective is behind Mr. Howard's motion.

Mr. HOWARD: I think I explained what the objective was—to get valuable guidance from the restrictive trade practices commission as to what they thought about certain aspects here.

Mr. BELL (*Saint John-Albert*): What particular aspects are you interested in? I think that probably they should be incorporated in the motion, for the consideration of the steering committee.

Mr. DRYSDALE: Yes, as to what you expect to get from them; as to how it would assist in any amendments to this act, having in view the specific amendments under consideration.

Mr. FULTON: Mr. Chairman, this had not occurred to me before, and I want to speak, therefore, subject to the right to reconsider what I express. But the point of concern that I was trying to comment on before is that the commission is a semi-judicial tribunal whose terms of reference and authority are defined in the act. It has always been my feeling about such a commission that, in something the same way as a court, they do not express, or should not express their views on matters in general with regard to the

statute; but could express their opinion with regard to the working of a statute such as this, under which they have their authority, in connection with specific cases that come before them.

Therefore, I am rather doubtful as to whether it is an appropriate course to ask a commission of this sort to come before a committee of this type and give evidence as to specific amendments which the government is recommending.

Would it be proper to pass a motion in this regard? Suppose we were amending the Supreme Court Act, even with respect to the jurisdiction of the Supreme Court of Canada, would it be proper to call a judge of the Supreme Court before a parliamentary committee and ask for his views with regard to the court generally—or, indeed, with regard to specific amendments which the government was recommending? I think it would be held to be an improper and unwise course to follow.

I am not suggesting that the restrictive trade practices commission is in exactly the same position as a court; but it is certainly in very much the same position, in that it does exercise a semi-judicial function. I do suggest that it is strongly arguable that it would not be a wise or proper thing to ask that commission, or members of it, to come before the committee and give their opinions as to amendments which are suggested by the government and are being considered by the committee.

I should say, of course, that with respect to the discussions I have had in the department, I had expected— and I think my expectation has been borne out—that the director would feel himself free to consult with the commission at any time with respect to the matters that were under consideration. But just as I think a judge is not called before parliamentary committees to express his opinion on legislation that is recommended by the government, I do indeed question the propriety of asking this commission to come.

Mr. MACDONNELL: Would it be possible to ask them to come, not to make suggestions but to review the course of their own procedure, which in itself might be enlightening to us?

Mr. FULTON: I suppose that could be done, Mr. Macdonnell; but I think you would be imposing on the members of the commission a task of making constant, very fine distinctions as to how far they could go, and where they would be expressing an opinion on the legislation and where they would be conducting just a general review.

The director is here, and can speak on the basis of knowledge and intimate connection with the commission, as to its practices and procedures. It does seem to me that is the proper way to get it.

The CHAIRMAN: Mr. Howard, in view of that explanation, do you still want to put your motion?

Mr. HOWARD: Mr. Chairman, I have reworded it now, along the lines suggested—to the effect that the steering committee take into consideration the possibility of inviting the restrictive trade practices commission, or a member thereof, to appear before this committee.

The CHAIRMAN: You have heard the motion, gentlemen.

Mr. DRYSDALE: Mr. Chairman, I would like to speak against the motion.

Mr. FISHER: Before—

Mr. DRYSDALE: It has been seconded. Before what?

Mr. FISHER: Before Mr. Fulton puts forward any further argument in so far as the Supreme Court is concerned, I would like to give him several other examples, such as the Canadian wheat board, and the C.B.C., which at one time had quasi-judicial functions. They certainly came before parliamentary committees.

Mr. BELL (*Saint John-Albert*): This is just a motion giving the steering committee some advice, and I think we should decide whether we are going to vote on this without discussion, or else bring the whole matter into this committee, discuss it and decide once and for all.

My thought would be that the steering committee could meet tonight, or, at least, before tomorrow's sittings, and look into this whole matter, check their thoughts and refer the matter back to us. It would save time this afternoon, because I am sure we could spend a whole hour discussing various judicial boards, administrative functions, and the results of calling them.

I think we should just put the motion, throw it to the steering committee, and let them do this work. It will save time for everybody.

Mr. DRYSDALE: The only difficulty is that the members of the steering committee are not here, and I do not know how they are going to get the benefit of the observations.

The only point I wish to make, quite simply, is—backing up what the minister has said—that this would put the members of the commission in an extremely awkward position, since their duty is to enforce the legislation as set up by us, the legislators.

Mr. FISHER: So is Mr. MacDonald.

Mr. DRYSDALE: He is acting on advice, not on matters of policy. I think this would put the commission in an awkward position, if we asked them to come before the committee to make recommendations, which might not be accepted by the committee, and then they would be in the position of enforcing a piece of legislation which they do not believe in themselves.

I think, under those circumstances, it would be placing them in an extremely invidious position, because as a commission their only job is to interpret and enforce the legislation as put before them.

Mr. HOWARD: Does the commission interpret and enforce this legislation?

Mr. DRYSDALE: There are certain section which deal specifically with the commission.

Mr. AIKEN: Mr. Chairman, I think Mr. Howard has placed a motion, and I would like to hear what he has to say in support of it, what particular aspects he has in mind, and what assistance the commission might give to us.

I had the feeling that we pretty well had covered the ground. However, there may be something with which they could help us. I have not yet heard him give any reason why he would like to have them called.

The CHAIRMAN: I would like to speak on this myself.

Mr. HOWARD: You had better vacate the chair then.

Mr. ROBICHARD: He does not have to.

The CHAIRMAN: It was decided by the steering committee that we were going to hear the two witnesses that we heard on Friday and Monday, and that would be the end of the witnesses. Now, you are coming back and putting the same thing up again.

Mr. HOWARD: That is not quite correct, and you know it.

The CHAIRMAN: Pardon?

Mr. HOWARD: That is not quite correct.

The CHAIRMAN: I would ask you to withdraw that last remark.

Mr. HOWARD: And you do not know it, then.

Mr. JONES: Mr. Chairman, we had a discussion this morning. It was agreed that was the point that was taken by the committee, and decided by it before. We, the committee, in fact, did decide it before.

Mr. HOWARD: Let me read your words from the transcript of evidence on Thursday, July 7—and this is in connection with Mr. Martin wanting a postponement:

> I think the same problem will come up on any day that we sit, Mr. Martin.
>
> There is a further recommendation of the steering committee to be placed before you today and that is that, in view of the fact that this is the last request to appear before this committee, we proceed tomorrow morning at 9.30 to analyze the bill.

That is different to what you said.

Then:

> Mr. TARDIF: The agricultural committee is sitting tomorrow morning.
>
> Mr. MCILRAITH: The steering committee did not recommend that we start our analysis of the bill tomorrow morning. The recommendation was that we hear from Mr. Fulton and Mr. MacDonald.
>
> The CHAIRMAN: Yes, we were going to hear the minister and Mr. MacDonald.

The CHAIRMAN: You are splitting hairs on that.

Mr. HOWARD: No, I am not.

Mr. JONES: Could we have the motion, Mr. Chairman.

Mr. WOOLLIAMS: Is there any objection to referring this to the steering committee? Surely, the members of this committee have confidence in the steering committee. Are there any objections to that?

Mr. FISHER: I have not any.

Mr. ROBICHAUD: There is a motion before the committee.

Mr. JONES: Put the motion.

The CHAIRMAN: All right.

All those in favour of the motion?

Mr. WOOLLIAMS: Would you please read the motion first.

The CHAIRMAN: I hope I can read it—that the steering committee take into consideration the possibility of inviting the restrictive trade practices commission or a member thereof to appear before this committee.

Mr. ROBICHAUD: And, the question.

Mr. MORE: Am I correct in saying that the steering committee will bring in a report which this body can accept or reject?

The CHAIRMAN: Yes.

Mr. JONES: Mr. Chairman, I do not think that motion is worded quite correctly, in accordance with the views that have been expressed. It is not the desire of the members to inquire into the possibility of the commission coming here; it is a question of the desirability.

The CHAIRMAN: Well, there are the two questions: The minister has raised the point as to whether it is in order, and then, also, the desirability of it.

Mr. JONES: Well, for myself, I would not like to be limited to the question of possibility.

The CHAIRMAN: All those in favour of the motion?

The CLERK OF THE COMMITTEE: There are nine in favour.

The CHAIRMAN: Against?

The CLERK OF THE COMMITTEE: Four.

The CHAIRMAN: The motion is passed.

Mr. FULTON: I was wondering if we could carry section 9 subject to the decision that if the steering committee decides to call the restrictive trade practices commission—at least, carry section 9 without prejudice to any observations that the restrictive trade practices commission might make on it, if it is decided to ask them to come and give evidence.

Mr. ROBICHAUD: I understood it was on account of its relation with 32. Could we stand it until then?

Mr. FULTON: I said that in order to enable us to go on, clause by clause. I would have no objection to discussing the question now as to whether the word "unduly" should be inserted.

The chamber of commerce made the main suggestion that the word "unduly" be inserted ahead of the words "restricted" and "to restrict", and it seemed to me to be relating it to the question of whether or not this imported anything new.

Mr. WOOLLIAMS: The one phrase they used might be the key to the whole thing.

> This suggestion is offered since it is undue restriction which is the offence under the act.

I take it, they were then referring to section 32.

Mr. FULTON: Yes, I think they were.

Mr. MORE: I believe it was brought up also by the board of trade of metropolitan Toronto, in their presentation.

Mr. FULTON: It is my feeling that this provision, that relates to the question of whether a conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business, stands on its own, and is not the same as a provision related to the possibility of a combination, and so on, lessening competition unduly in respect of prices, quantity or quality of production, markets or customers, or channels or methods of distribution. I think those are all matters which lend themselves readily to a sort of quantitative measurement, and it is a real question whether an action there is, *ipso facto,* bad, or has created an undue restriction. But, where it comes as a result of an arrangement which has the effect of restricting the entry of a person into a trade or industry, you have a much more absolute type of criterion with which you are dealing, and you do not have to qualify the word "restriction" by the word "undue", as any restriction on that type of activity is, in itself, undue.

We deliberately left out the word "unduly" for that reason, in that context, whereas we retained it in the other context where it had been before. It seems to us to be a different field of activity, and to have a different connotation. Therefore, if it should be decided, as I hope it will be, that it should not be in that subparagraph then it, *ipso facto,* should not be in this part of clause 9.

Mr. DRYSDALE: "Restriction", in your mind, has a connotation of "unduly" retained within it.

Mr. FULTON: Yes. If you have a combination, arrangement or conspiracy to restrict somebody else from getting into a business, is that not something, in itself, which is undue, and one need not have any hesitation to say it is bad to stop somebody else from getting in, and you do not need a quantitative word to apply to that.

Mr. JONES: Any restriction of that is undue.

Mr. FULTON: When it comes about as a result of a conspiracy.

Mr. WOOLLIAMS: If that is correct, then what harm is there—and I put it the other way; it would clarify it, would it not?

Mr. FULTON: No, I would think not. I think it would indicate to the courts that parliament did not intend to establish that a conspiracy to restrict any

person from entering into or expanding a business was, *ipso facto,* bad, because parliament has qualified the words it used. If you leave the word out, it becomes obvious that parliament intended to say that a conspiracy to restrict entry was, in itself, bad.

Clauses 9 and 10 agreed to.

On clause 11.

Mr. ROBICHAUD: On clause 11, Mr. Chairman, could the minister explain why, on line 38, have been added the words "presently being", while the old act read:

> If it appears to the governor in council that such disadvantage to the public is facilitated by the duties of customs imposed on the article...

and so on.

The amendment reads:

> and if it appears to the governor in council that such disadvantage to the public is presently being facilitated by the duties of customs imposed on the article...

Why this addition of the words "presently being"?

Mr. FULTON: When we came to review this section, we were faced with the problem, as a result of the words to which you have referred, as they now appear, that such disadvantage to the public is facilitated.

Mr. MACDONNELL: Does that not mean increased?

Mr. ROBICHAUD: If it is facilitated, it is presently being facilitated, why the addition?

Mr. FULTON: I am sorry; my explanation which I started to give related to the earlier change, where we changed the words to "has existed".

Your question is why we changed "is facilitated" to "is presently being facilitated". That was to meet, what might be called, an exercise in semantics. It seemed to us it might be raised and that it might present a difficulty. If you left the words "is facilitated", then it is possible it might be suggested to you that you have to deal with a hypothetical situation. Somebody could say: you have had a conviction in the past, and the arrangement under which that combine operated was more readily capable of achievement because of the protection of customs tariffs. Therefore, if that was the situation before, and you only say that that situation is facilitated by the tariffs, it would be possible to argue that this merely means, because there are now tariffs which could possibly facilitate such arrangement, you should go and change the tariffs. Whereas it seems to us the intention of the section is to get at a situation where somebody is actually using the tariff to carry on an arrangement which was perfected under a combine. It was more to express the idea—if you use the words "is presently being facilitated"—as having the connotation that somebody is taking advantage of the tariffs to carry on a pattern which was established under a combine. It was for that reason we used the words "is presently being" as distinct from the words "is facilitated". The possibility of abuse is there, in the connotation of the words "is facilitated"; but if you want to confine it to a situation where there is abuse actually being carried on, it seemed to us that the better words would be "is presently being facilitated".

Mr. MORE: You think the wording strengthens it?

Mr. FULTON: Yes. It makes it clear that the sections cannot be used to strike at hypothetical situations, but only at cases where something is actually being done and which is actually being facilitated by the tariff.

Mr. FISHER: Is this the section under which you took the action of writing the letters to the fine papers companies?

Mr. FULTON: What letters are those?

Mr. FISHER: I understood they had received a communication from you to show cause why.

Mr. FULTON: If you understand that, you must have gained your impression from someone else.

As I explained in the house, the policy which I subscribe to is that one neither confirms nor denies whether there has been any inquiry under this section or any other section of the act, and I have to rest on that. I neither confirm nor deny that such letters were written.

Mr. FISHER: I have received a communication from one pulp and paper company to this effect. Could I put it another way: this is the section that enables you to send a letter to companies that have been convicted of a conspiracy, and asking them to show cause why their customs protection should not be withdrawn. Is that true?

Mr. FULTON: Yes, this is correct.

Mr. FISHER: In referring to the fine papers situation, what would the difference between "is facilitated" and "is presently being facilitated"? The reason I ask this is because of the arguments that have been given to me by various people in some parts of the pulp and paper industry—particularly, in my constituency—and they argue that such a combine is no longer being facilitated.

Mr. FULTON: Well, Mr. Fisher, the section does not refer to a combine being facilitated, but to a disadvantage being facilitated and, from the point of view of any inquiry that might be under way, into an actual situation, there is no difference between whether you use the words "is facilitated" or "is presently being facilitated".

Mr. FISHER: But, is it not correct that there was an investigation in this particular field, and there was a conviction?

Mr. FULTON: Yes, of the operation of a combine.

Mr. FISHER: The point I am wondering about is this. I want to know whether this section, with this wording, or the old wording, opens up a whole new inquiry, and a new ruling—and does it require any conviction?

Mr. FULTON: No. Let me see, now. From that point of view, the present section is exactly the same as the existing one because the existing, as well as the present one, say:

> Whenever, from or as a result of an inquiry under the provisions of this act, or from or as a result of a judgment of the Supreme Court or Exchequer Court of Canada, it appears to the satisfaction of the governor in council...

So, in the new section, as well as the old one, you might have the situation revealed as a result of an inquiry, without going through court to conviction, or as a result of inquiry followed by prosecution and conviction.

Mr. FISHER: I would like to use today's record to send to some of the people in my constituency who are bothering me, and I do not quite follow the powers that you have here.

Take the clause,

> The governor in council may direct either that such article be admitted into Canada free of duty or that the duty thereon be reduced...

and so on. Does that mean the governor in council can do that without bringing anything into parliament? Some people believe it is impossible for the government to direct the duty without bringing anything before parliament.

Mr. FULTON: This section does not affect the power or enlarge the power of the governor in council to make changes in customs tariffs collected.

Mr. JONES: Is it not in this regard, the same as before?

Mr. FULTON: In that regard, yes.

However, if I may, I would like to change the record. I would like to change my answer, to indicate that while this section appears to give the governor in council the power to change the rate of customs tariff, or abolish it by order in council, that is the present effect of the present section. We are not changing the section in that regard at all.

Mr. FISHER: But, you have that power, and there would be no need to bring it before parliament, either under the former or present one.

Mr. DRYSDALE: I wonder if I could follow up the wording which you have underlined. At the moment you contemplate considering the termination of the conspiracy, combination, or agreement, and the continuing of these effects.

Mr. FULTON: Yes.

Mr. DRYSDALE: And with these effects still current, that is the reason for the wording presently being facilitated?

Mr. FULTON: That is right. And if I appreciate your question correctly, the section is intended to cover this situation. You may have a group of companies who form an arrangement as the result of a combine to parcel out certain markets and eliminate competition to that extent.

The pattern which they established may be facilitated by the existence of custom tariffs, and the protective wall under which they operate, which makes it easier for them to do so.

They may be convicted of a combine. They may discontinue all overt and, indeed, implicit arrangements. They may stop meeting together and conspiring; but it may be possible that the pattern of action which was established as a result of the agreement continues, because it just simply is not discontinued.

They may have no further agreement, and no more meetings, but they simply continue, without an explicit agreement, a pattern which was established at the time they operated a combine.

It would then be the case that this pattern which would result in a disadvantage to the public, would still be facilitated by the presence of customs tariff.

It is therefore the intent of the existing section to empower the governor in council to relieve against the disadvantage to the public that was built up in this way under tariff protection, by taking action to alter the tariff.

Mr. DRYSDALE: That would provide an immediate remedy instead of proceeding under another section of the act and laying a conspiracy, or combination, or agreement charge?

Mr. FULTON: Yes. The section says that where it appears to the governor-in-council upon a conviction in a court that certain disadvantages to the public have been facilitated, and that there existed, and so on, it would be up to the Governor-in-Council to alter the tariff.

Mr. MORE: Under the old section you had to prove that the conspiracy existed; but under the new section you do not have to prove it. If a pattern exists to the detriment of the public, you can take action. Is that a correct interpretation?

Mr. FULTON: No, I do not think so.

Mr. MORE: Under the old act it says where there exists a combine.

Mr. FULTON: Our interpretation of the present wording, in the present act, is that the word "exists" must be read to mean "has existed any conspiracy, combine and so on"; otherwise the section would be incapable of application, and you can never interpret a section in such a way as to make it incapable of application.

Consider the case of a group of companies which are affected. They immediately obtain a dissolution order—I am sorry; I mean a group of companies which have been convicted. But there is implicit in that conviction an order that they desist from carrying on a combine. We assume on good grounds that such companies do so desist. Therefore from that point of time onward a combine does not exist any longer.

But as I say, if you interpret the wording here as "there exists any combine", and yet there is a court order, which is a dissolution, then by the combination of those two sets of circumstances, you would make the section as presently worded incapable of application. But we do not believe that parliament intended it to be that way; so that the word "exists", where it appears there, must have the meaning of "has existed at the time of conviction."

Mr. DRYSDALE: What is the nature of the evidence you would expect in order to use this particular section? The case I have in mind is where you might have difficulty in forcing upon a company, a dealer, or somebody that they did not want perhaps for reasons such as that his credit might not be too good, or something to that effect.

Mr. FULTON: I do not think it is possible to deal in absolute specifications in a general discussion like this.

Mr. DRYSDALE: It is difficult to deal with it in generalities, too.

Mr. FULTON: What you would require is a continuation of the pattern which was connected with the offence at the time prosecution before the court was taken, and which resulted in a conviction.

There must be a pattern of action which satisfies the provisions of the act that there was a combination, or a combine; and if that pattern continues, it results in a disadvantage to the public; and if that pattern is facilitated by the existence of customs tariffs, then there is power given to the Governor-in-council to relieve the public by altering the tariffs.

Mr. DRYSDALE: Your normal procedure would be to show cause why the section should not be enforced?

Mr. FULTON: The section is silent as to the procedure which would follow; but I think it should be done in accordance with the spirit of the bill of rights, and that those whose actions you are concerned about should certainly have an opportunity to appear and show cause why an order should not be made.

Mr. WOOLLIAMS: When you read it as whenever, from or as a result of an inquiry under the provisions of this act, or from or as a result of a judgment of the Supreme Court or Exchequer Court of Canada . . .", do we take it that an inquiry would be sufficient to implement what you have said under the act, or with a conviction would you have the same impact, that is, whether you had a conviction, or the result of an inquiry which would not be a conviction?

Mr. FULTON: With the section as it presently stands, and as it will be after these amendments, there is no alteration in that respect.

Mr. MORE: This seminar for junior counsel has been beneficial to me, too.

Mr. FISHER: How many times in the past has the minister taken advantage of the section as it presently stands?

Mr. FULTON: This minister has not at any time done so. The tariff has not been changed under this section since I have been a minister of the crown; and so far as the director can recall, it has never been done by previous ministers.

Mr. FISHER: In other words, effectively it has been inoperative.

Mr. FULTON: That is right.

Mr. FISHER: Do you feel that this particular change will make it more operative?

Mr. FULTON: Perhaps I should say that it will be less inoperative.

Mr. JONES: Do you know the deterrent effect of it, as it stands?

Mr. FULTON: We felt that it was a proper provision to have at the disposal of the Governor-in-Council, whether or not it was ever used; we thought it was a proper one to be used in appropriate cases. But when we came to the exercise which we considered throughout this bill, that is, the question of seeking clarification to make it perfectly clear what the section means, we felt that this section which was being retained should also be clarified.

Mr. FISHER: Might I ask either you or Mr. MacDonald as to whether you know if any difficulty you have experienced in proceeding under this section has been due to the present wording?

Mr. FULTON: I do not think I could say that, Mr. Fisher. This is a difficult act in itself. All its provisions are difficult in the sense that it means getting after people. This section perhaps is no more but no less difficult in that sense and in others. It may have been because of the rather unusual nature of the recourse with which the governor in council was provided that it has not been used or that no tariff changes have been made under it. We do feel, however, that it is a proper one to have in there and that if it is going to be retained it should be made absolutely clear. It may be by thus changing it, and by this discussion, that attention will be focussed on it, and it may become, even a more potent recourse in this field.

Mr. FISHER: You have refused—and properly I imagine—to indicate whether any particular action has been taken; but so far as I am concerned there is a hornet's nest now going on which relates directly to this section. I would like to know something about the time element involved, because one of the arguments put to me by people protesting against this action they alleged you have taken is that there is no time or public place for them to state their particular case. This is one thing they want to know: what action can they take to put forward their particular side? The case which has been most used with me is the case of some of the workers within one of the mills involved. There is absolutely no sequence set up. You said there would be due consideration and there would be some kind of a hearing. What kind of a hearing, where would it take place, and who would sit in judgment.

Mr. FULTON: I think that would depend on the policy determined by the particular government in power at the time. It would be my view that because this is a potent resort in the hands of the governor in council, no minister should initiate action under it of his own volition. In my view there should be a preliminary report to cabinet outlining the circumstances and seeking, shall we say, cabinet authority because the power is a power vested in the governor in council. I think there should be full cabinet authority to initiate proceedings under this section. That is my own view. Other ministers may feel differently In any event, the final decision as to whether or not the tariff action shall be taken must be made by the governor in council which means the cabinet. My own personal view is that before the companies are asked to come and even show cause there should be a reference to the cabinet so that they can be appraised of the circumstances. Cabinet may say "you should not even talk about this method" if that should be their view. However, if the cabinet says "you have established a prima facie case" then the Minister of Justice, who is the responsible minister under the act, would, as I see it, serve notice on those involved that in his view thus and thus are the facts and they indicate there is a disadvantage to the public. He would therefore suggest that those companies may, if they wish, have an opportunity to come and show cause as to why a recommendation should not be made to the governor in council to take the action authorized under this section.

My view would be there should be a hearing, and on the basis of whatever was alleged at that hearing, the minister conducting the hearing would make a further report to cabinet one way or another and then it would be up to cabinet, as I say, to make a decision.

Mr. MACDONNELL: That seems reasonable, but there is nothing to bring it to the attention of those who would be concerned. Could some indication not be given in the act?

The CHAIRMAN: It is.

Mr. FISHER: That is exactly my view. To me this is unsatisfactory. I do not think any member of parliament likes to be under the pressure of some organizations suggesting that the minister is taking advantage of an arbitrary power or anything like this. I wonder if it might come to this, since most customs tariff changes up or down or in terms of abolition come from the House of Commons—I think you would agree.

Mr. FULTON: Yes.

Mr. FISHER: —might it not be sensible to put in a provision that the government will bring before the house a recommendation that such and such a customs tariff be dropped or abolished. Does that make it too inflexible for your purposes?

Mr. FULTON: It would have that effect. I point out that in my view a responsible government body—that is the full cabinet—should be satisfied that there exists good grounds for taking the action which the section authorizes.

Mr. DRYSDALE: Would the innocent as well as the guilty be allowed to appear before that committee, because if it was a tariff reduction it would be right across Canada and I suppose it would affect the innocent as well as the guilty.

Mr. FULTON: That possible effect of a tariff reduction would be in the mind of the governor in council when he came to make his decision.

Mr. DRYSDALE: I wonder how they effectively could be invited if they wanted to appear. You would have a situation where naturally the guilty people would be invited to show cause but there might be innocent people in other sections of the country who might be affected to the detriment of their business and employment, and yet they had not participated in the combination or conspiracy.

Mr. FULTON: That would be one of the factors which the government would have to take into consideration in deciding whether or not to take action under this section, that is that its action might affect people who had not been parties to or had not benefitted from the acts. All those factors would have to be taken into account. I can simply say this is a far reaching remedy which would only be used very sparingly and I would think in quite exceptional circumstances. It has been in the act for some time. Mr. MacDonald's opinion is that it goes back to the proprietary trade articles association case.

Mr. FISHER: It has been in effect for some time and has not been used, and therefore it is modus vivendi. May I ask you if, in answering the kind of pleas I have had, I should suggest that this purely and simply is a matter of cabinet decision and that the cabinet is the place to go either for a remedy, to protest, or to present a case or opinion on the matter.

Mr. FULTON: I think that is absolutely correct. The section as it has been in the act since the beginning vests in the governor in council the authority to make a decision.

Mr. FISHER: There would be no possibility of action being taken under this particular section without consultation with the Minister of Finance from the point of view of the revenue involved, and the customs department with a view to the operation of the act.

Mr. FULTON: Yes. My view, as I have said, is that this section would impose upon any minister who contemplated its use the necessity of consulting with and informing the whole cabinet from the very outset.

Mr. FISHER: At least now I have something to say to the people who are worried about the fine papers case.

Mr. FULTON: When you say "worried about the fine papers case", that is your own conclusion and not mine.

Mr. ROBICHAUD: I would suggest that since we have covered eleven of the twenty-three sections and have been sitting now for two and one-half hours that we might adjourn.

Mr. FISHER: I was speaking in the house to Mr. Pickersgill and Mr. Martin. They were not able to leave the house. They both were disappointed they were unable to be here. Some of you may have different views on that.

Mr. FULTON: Is there a particular point in relation to this section? Could we carry this and leave it there?

Mr. ROBICHAUD: There is something on which I would like to get more information.

Mr. DRYSDALE: Are we adjourning until 8 o'clock?

Mr. FISHER: The steering committee has made no agreement to meet at night.

Mr. DRYSDALE: It is a very ephemeral body.

Mr. FISHER: I agree it is.

Mr. DRYSDALE: The committee is here and we could decide.

The CHAIRMAN: I would like to have a meeting at 8 o'clock tonight.

Mr. FISHER: I cannot give you any assurance that our party will be here.

Mr. ROBICHAUD: I cannot either. We might be on a very important discussion in the house until 11 o'clock tonight.

Mr. DRYSDALE: I never knew that business in the House of Commons got this important at this stage of the session.

Mr. AIKEN: When is our next scheduled meeting?

Mr. FISHER: The next scheduled meeting is for Thursday morning.

Mr. FULTON: Are we not going to meet tomorrow?

Mr. ROBICHAUD: I would not object to a meeting of the steering committee. I thought you were referring to a regular meeting.

The CHAIRMAN: I will hold a meeting of the steering committee as soon as I am able and give you notice as to the time of the next meeting.

Mr. JONES: We will meet tonight if the steering committee recommends it.

Mr. FULTON: May I raise a question as to whether the committee wishes to meet tomorrow. I hate to impose on anyone, but I have a lot of places to be myself. I am not asking for special consideration if the committee does not wish to give it to me, but as chairman of the Canadian team on the Columbia River, I do have to attend at negotiating sessions with the United States representatives on Thursday and Friday. I will be free on Thursday and Friday nights, but I do not think I can be free in the morning or afternoon of those two days. It would, therefore, be appreciated if the committee felt it could meet tomorrow in order to take advantage of Wednesday, and then, if the committee wishes, as I say, on Thursday and Friday nights.

Mr. ROBICHAUD: I would have no objection to meeting tomorrow afternoon, but not in the morning as we have a caucus.

Mr. BELL (*Saint John-Albert*): Mr. Chairman, could you call the steering committee together to go over the time that is available for the rest of the

week, considering the fact that the minister has meetings, and the fact that there is a caucus tomorrow, in an attempt to ration the time out? I think everyone feels that we would like to push forward with our considerations of this bill. We have not as yet touched on the big sections. Let us not kid ourselves that we have made much progress today. Keeping what I have mentioned in mind the steering committee could probably agree as to the times we could sit, and would perhaps consider making an exception in respect to sitting on Thursday night.

The CHAIRMAN: If the steering committee wishes to bring forward a recommendation we will have to meet in order that that recommendation be presented to the committee.

Mr. FISHER: Perhaps the steering committee could decide on a meeting at the call of the chair. Perhaps we should set a meeting for 2 o'clock tomorrow afternon.

Mr. DRYSDALE: Surely we can meet at 8 o'clock tonight and stand the clauses aside if they are contentious, or adjourn at that time if there is insufficient representation. The committee's meetings are continually being disrupted because there is something of interest happening in the House of Commons. We have been adjourning in this fashion quite often of late, and when we come back to meet we find that we have lost a lot of time.

Mr. ROBICHAUD: We have done a good deal today.

Mr. FULTON: There will be consideration of estimates in the House of Commons tomorrow. My suggestion is that no one will be taken by surprise if the chairman calls a meeting for tomorrow afternoon as well as Thursday and Friday nights if the steering committee so recommends it.

Mr. FISHER: Not Friday night, my goodness!

The CHAIRMAN: If we hold a meeting of the steering committee, we will have to hold a general meeting in order to bring before it any recommendation.

Mr. FISHER: Surely we can give you the authority to call a meeting on the recommendation of the steering committee.

The CHAIRMAN: That would be fine.

Mr. BELL (*Saint John-Albert*): We have a lot more confidence, in the steering committee than you appear to have in it yourself, Mr. Chairman.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 12

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

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WEDNESDAY, JULY 13, 1960

THURSDAY, JULY 14, 1960

WITNESSES:

From the Department of Justice: Honourable E. Davie Fulton, Minister; and Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act).

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23508-5—1

STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. Cathers, Esq., M.P.

Vice-Chairman: E. Morissette, Esq., M.P.

and Messrs.

Aiken
Allmark
Asselin
Baldwin
Bell *(Saint John-Albert)*
Benidickson
Bigg
Brassard *(Chicoutimi)*
Broome
Campeau
Caron
Creaghan
Crestohl
Drysdale
Fisher
Hales
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Jones
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MacLellan
Martin *(Essex East)*
McIlraith
McIntosh
Mitchell
More
Morton
Nugent
Pascoe
Pickersgill
Robichaud
Rowe
Rynard
Skoreyko
Slogan
Smith *(Winnipeg North)*
Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams.

Antoine Chassé,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

WEDNESDAY, July 13, 1960.
(30)

The Standing Committee on Banking and Commerce met at 3.10 p.m. this day. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Aiken, Asselin, Bell (*Saint John-Albert*), Benidickson, Brassard (*Chicoutimi*), Broome, Campeau, Caron, Cathers, Cresthol, Drysdale, Howard, Jones, Macdonnell (*Greenwood*), McIlraith, Mitchell, More, Morton, Nugent, Rynard, Skoreyko, Southam, Stinson, Tardif, Thomas and Woolliams—26.

In attendance: *From the Department of Justice*: Honourable E. Davie Fulton, Minister; Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act); and Mr. Marc Lalonde, Special Assistant to the Minister.

On behalf of the Subcommittee on Agenda and Procedure, the Chairman submitted the following report:

"(1) The hours of sitting of the Banking and Commerce Committee recommended by the Steering Committee are as follows:

WEDNESDAY, July 13—3.00-6.00 p.m.

THURSDAY, July 14—8.00-10.00 p.m.

(2) In regards to the motion moved by Mr. Howard, and seconded by Mr. Fisher, that a member of the Restrictive Trade Practices Commission be called as a witness, the Steering Committee felt that, due to the function of the Commission, it would not be proper for its members to be called as witnesses; however, the Steering Committee felt, if it could be established to be proper to have a member of the Commission in attendance with the Minister and Director, to give advice on technical and operational matters, they would so recommend."

Moved by Mr. Morton, seconded by Mr. Asselin,

That the first recommendation, contained in the above-mentioned report, be adopted.

The said motion was adopted on the following division: YEAS: 12; NAYS: 4.

On motion of Mr. Morton, seconded by Mr. Drysdale,

Resolved,—That the Committee record its opinion that it is not proper to call members of the Restrictive Trade Practices Commission before it.

The Committee resumed detailed consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code.

On Clause 12:

Following discussion, the Minister indicated that a certatin amendment would be acceptable. The Clause was allowed to stand for further study until later this day.

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On Clause 13:

The proposed section 31A, as contained in Clause 13, was adopted.

Under Part V, the proposed section 32, as contained in Clause 13, was adopted, *on division*.

The proposed section 33, as contained in Clause 13, was adopted.

The Committee reverted to Clause 12.

On Clause 12:

On motion of Mr. Drysdale, seconded by Mr. Morton,

Resolved,—That Clause 12 be amended by adding the following subsections to the proposed section 31, immediately following line 33, page 5 of the Bill:

"(2*a*) The Attorney General or any person against whom an order of prohibition or dissolution is made may appeal against the order or a refusal to make an order or the quashing of an order

(*a*) from a superior court of criminal jurisdiction in the province to the court of appeal of the province, or

(*b*) from the court of appeal of the province or the Exchequer Court of Canada to the Supreme Court of Canada

as the case may be, upon any ground that involves a question of law or, if leave to appeal is granted by the court appealed to within twenty-one days after the judgment appealed from is pronounced or within such extended time as the court appealed to or a judge thereof for special reasons allows, on any ground that appears to that court to be a sufficient ground of appeal.

(2*b*) Where the court of appeal or the Supreme Court of Canada allows an appeal, it may quash any order made by the court appealed from, and may make any order that in its opinion the court appealed from could and should have made.

(2c) Subject to subsections (2*a*) and (2*b*), the provisions of Part XVIII of the *Criminal Code* apply *mutatis mutandis* to appeals under this section."

The Clause, as amended, was adopted.

The Committee reverted further to Clause 1.

On Clause 1:

On motion of Mr. More, seconded by Mr. Drysdale,

Resolved,—That Subclause (2) of Clause 1 be amended by deleting the semicolon at the end of line 32, page 1 of the Bill, and adding the following:

", but a situation shall not be deemed a monopoly within the meaning of this paragraph by reason only of the exercise of any right or enjoyment of any interest derived under the *Patent Act*, or any other Act of the Parliament of Canada;"

Clause 1, as amended, was adopted.

At 5.30 p.m. the Committee adjourned until 8.00 p.m., Thursday, July 14, 1960.

THURSDAY, July 14, 1960.
(31)

The Standing Committee on Banking and Commerce met at 8.15 p.m. this day. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Bell (*Saint John-Albert*), Cathers, Crestohl, Drysdale, Fisher, Howard, Macdonnell (*Greenwood*), McIlraith, Mitchell, More, Morissette, Morton, Pickersgill, Southam, Thomas and Woolliams—16.

In attendance: From the Department of Justice: Honourable E. Davie Fulton, Minister; Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act); and Mr. Marc Lalonde, Special Assistant to the Minister.

The Committee resumed its detailed consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code, the Minister and Director answering questions thereon.

On Clause 13:

Mr. Howard, seconded by Mr. Fisher, moved,

That subsection 1 (*a*) of Proposed Section 33A be amended by striking out the words "and quantity" in line 21, page 7 of the Bill, and substituting therefor the following:

> "except that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such articles are sold or delivered to such purchaser"

The amendment and the proposed subsection 33 A (1) were allowed to stand.

The proposed subsections 33 A (2) and 33 A (3) were adopted.

Proposed Section 33 B was discussed and allowed to stand.

Moved by Mr. Drysdale, seconded by Mr. Bell (*Saint John-Albert*),

That the Committee meet again at 9.30 a.m., Monday, July 18, 1960.

The question was put; and the vote being 5 yeas and 5 nays, the motion was resolved in the affirmative by the vote of the Chairman.

At 10.12 p.m. the Committee adjourned to the time mentioned above.

E. W. Innes,
Acting Clerk of the Committee.

EVIDENCE

WEDNESDAY, July 13, 1960.

The CHAIRMAN: Order, please, gentlemen. I would like to first report the recommendations of the steering committee regarding hours: Wednesday, July 13, 3.00 o'clock to 6.00 o'clock; Thursday, July 14, 8.00 to 10.00 p.m. Does the committee approve?

Some Hon. MEMBERS: Agreed.

Mr. HOWARD: Mr. Chairman, I have an objection to raise to it and a disagreement to express with respect to the decision and recommendation of the steering committee—incidentally, I do not know whether Mr. Fisher agreed or disagreed with this particular proposal; but I have an objection to raise with respect to this afternoon's sitting and, again, with respect to the sitting tomorrow evening.

I assume this was done purely and simply for the convenience of the minister, who has many other things to do, and did not take into account the convenience or desires of other members of the committee. Unfortunately, it puts myself and Mr. Fisher in the position this afternoon of not being able to be here; we have to be in the house because of the C.B.C. and board of broadcast governors estimates that are taking place there.

I think the steering committee would have been better advised to consider holding these meetings—at the convenience of the minister and at ours—in the mornings rather than during the time the house is sitting. This is the inconvenient part of it, and it is to this that I raise objection. I only came to the committee this afternoon in order to register those objections with the committee. I think it was most unfair of the steering committee to proceed in this manner purely for the convenience of the minister, and not taking into account the inconvenience it will cause to other members.

Mr. MORTON: Mr. Chairman, I think Mr. Fisher agreed to sitting this afternoon. He did have some question about working in the evening. But the committee as a whole felt that if we were going to get ahead with the committee work we had to make a definite decision as to when we would meet.

Every time anything comes up in the house there are objections that the committee should not meet parallel to it, or other committee meetings. I think we cannot escape that proposition, and I think each individual member has to assess within himself where he is most needed. If we were to wait until every member could be in attendance, I am afraid we would not have any meetings.

The CHAIRMAN: Well, I would like to entertain a motion in regard to the sitting hours as recommended by the steering committee.

Mr. MORTON: I would so move.

The CHAIRMAN: It has been moved by Mr. Morton. Have we someone to second the motion?

Mr. DRYSDALE: I will second the motion.

Mr. CRESTOHL: Mr. Chairman, before you call a vote, would you inform us whether the Liberal representative on the steering committee has acquiesced?

Mr. MORTON: Yes; Mr. Robichaud has.

Mr. CRESTOHL: The reason I asked is because I do not see him here now, and I wondered.

Mr. BENIDICKSON: Well, that is the difficulty. There is no continuity in this and for some of us at least, it is not entirely our own fault. It is unavoidable. We have something that keeps us away, as it did me yesterday, for almost two hours. We find that the same people just cannot attend the meetings each time. I think the result of all this is going to be that the work which would normally be done in this committee, at this stage, in so far as examining and looking at possible amendments in connection with the bill, simply will have to be done back in the House.

Mr. E. D. FULTON (*Minister of Justice*): Mr. McIlraith is here now.

Mr. BENIDICKSON: It is impossible to be conscientious in attendance at so many important meetings at this particular time, with the long hours we have in the House. So, if some work is not done here, at this stage, perhaps there is a good reason for doing it in the House.

The CHAIRMAN: I can sympathize with your point of view, but I fail to hear any suggestions how we can overcome the difficulty.

Mr. BENIDICKSON: Of course, we have had all the witnesses from outside. We have heard all their evidence, and it is only a matter of, perhaps, examining the minister at greater length and, perhaps, this will develop in the house, because of the circumstances.

The CHAIRMAN: All those in favour of the motion, would you please signify?

Mr. HOWARD: Mr. Chairman, if you want suggestions, you will recall that I suggested to you privately—and I will do so publicly now—that you would have less conflict if the steering committee had attempted to have arranged meetings of this committee during the morning when the House is not sitting. If you did this, you would have an area of much less conflict. It is true, perhaps, you would conflict with other committees, but the objectionable part of it is meeting when the House is sitting. The business of the House is being juggled around, by agreement and circumstances, and it leaves one in the awkward position of not knowing from one day to the next what position they are going to be in.

Mr. BELL (*Saint John-Albert*: Mr. Chairman, I think we should reiterate what we already know—that Wednesday morning was a caucus morning; we could not sit today, and Thursday and Friday the minister has said—and it is on the record—that he has to attend a Columbia river hearing. Therefore, it would be impossible, in all fairness to the committee, to sit in the morning for the balance of this week.

Mr. HOWARD: I am not talking about the balance of this week.

The CHAIRMAN: Well, that is all we are talking about at the present time. We have not recommended anything about next week.

Mr. HOWARD: Well, I am going to have to leave.

Mr. FULTON: Mr. Howard, may I ask you a question?

Do I take it you are primarily anxious to be here in order to question with respect to the proposed sections 31, 32 and 34, and that these would be the main ones in which you are anxious to have an opportunity to question?

Mr. HOWARD: I think perhaps not only my main interest, but everyone else's falls on those sections; that is the meat of the bill. If the suggestion is that perhaps you will discuss these and hold them over it is a convenient move that is appreciated; but again there is the possibility that if they are going to be held over until tomorrow evening at 8 o'clock there will be a similar situation tomorrow night, and I and others would be absent. In that event the matter still would not be resolved.

Mr. WOOLLIAMS: Will you kindly put the motion again, I was late coming in.

The CHAIRMAN: The recommendation as to the hours of sitting is Wednesday, July 13, from 3 to 6 and Thursday, July 14, from 8 to 10 p.m.

All those in favour of the motion?

Mr. MCILRAITH: Before you call the motion, Mr. Chairman, I was away yesterday, as I indicated in advance. It seems to me this committee was in difficulty twice before on this question of procedure, and on each occasion it was reasonably well resolved, I think, in the view of all members, by the procedure of calling a meeting of the steering committee to work out the program. Now I am somewhat at a loss to know why that procedure was not continued.

The CHAIRMAN: May I interrupt?

Mr. MCILRAITH: No.

Mr. MORTON: The steering committee did in fact meet.

Mr. DRYSDALE: It met last night.

Mr. MCILRAITH: That is my point. I advised the Chairman last week that I would be away on Tuesday. On Friday I was very particular about that. I am one of the official opposition representatives on the steering committee. One of the members now interrupts and says the steering committee did meet last night. It seems, in the light of my having advised the chairman on last Friday that I would be away on Tuesday, that he took no steps to replace me by someone else on the committee, as could have been done.

Mr. DRYSDALE: Mr. Robichaud was there.

Mr. MCILRAITH: He may have been there, but I am pointing out the appropriate steps according to the usual practice were not taken, and now we are back in the same difficulty we usually have in this regard.

Mr. MORTON: Perhaps Mr. McIlraith should understand it was not at the call of the chair but rather at the request of the committee last night. This committee requested that certain matters be decided by the steering committee last night.

Mr. MCILRAITH: We will see whether the record shows whether or not the chairman was advised on Friday that I would be absent on Tuesday.

The CHAIRMAN: All those in favour of the motion?

All those against?

The CLERK OF THE COMMITTEE: Twelve in favour and four against.

The CHAIRMAN: Then, in regard to the motion moved by Mr. Howard and seconded by Mr. Fisher that a member of the restrictive trade practices commission be called as a witness, the steering committee felt that due to the function of the commission, it would not be proper for its members to be called as witnesses. However, the steering committee felt that if it could be established to be proper to have a member of the commission in attendance to give advice on technical and operational matters, they would so recommend.

Mr. MORTON: I did check with a number of sources, and most of the sources I checked felt that this commission was a quasi judicial commission, and therefore it would not be proper to have them here to give evidence, nor was it proper to have them here to give advice in this case, and that anything they could give could be given by the director or the minister.

We tried to find any precedents for such action in the past, but we could find none.

Hon. E. D. FULTON (*Minister of Justice*): Might I express an opinion which might be helpful. In addition to what I said yesterday about the quasi judicial nature of the commission's functions, might I offer one example: the commission is holding hearings now as a result of a number of inquiries, and one of them, to which reference has been made, is a case which I think is

bound to be discussed when we come to one of the sessions which has to do with the situation of industries in the export trade.

Therefore it would be quite improper for the commission to be asked questions about that matter; and yet I do not see how at that time you could avoid venturing into a field in which the commission is actually in the process of holding hearings.

I have given you one case, and I am sure there are other cases. Furthermore, any questions that could be answered by the commission with regard to procedure under the act could be fully answered by the director, who is here.

I think that on balance it would be an undesirable practice to have the commission here. And one other reason I can give you is that we are not proposing an enlargement or a diminution of the powers of the commission itself. If we were doing that, and if we were having a general inquiry into the Combines Investigation Act, then I would suggest it might be more appropriate to have the commission here, although I would not care to express a final opinion.

But inasmuch as we are not having that sort of inquiry, we are directing our attention to a specific proposal by way of amendment, and I respectfully suggest that it would not be appropriate to ask the commission to come here.

Mr. CRESTOHL: Could you inform the committee who it was who suggested that the commission be invited to come before the committee?

The CHAIRMAN: Mr. Howard.

Mr. CRESTOHL: Perhaps if Mr. Howard would indicate what it is he is seeking from the commission, then at some time we might decide as to whether or not someone else could answer it; because sometimes when a witness is not available, you ask what it is you want to prove with that witness.

The CHAIRMAN: We had that yesterday.

Mr. JONES: He was asked that question several times yesterday, but he gave no indication.

Mr. CRESTOHL: It would be surprising to the committee to hear a witness of such a nature.

Mr. BROOME: What is it we are supposed to prove or to disprove?

The CHAIRMAN: Mr. Morton has, I think, looked into it, and he finds that it is improper. So I think you should make a motion to that effect.

Mr. MORTON: I move that the commission or its members not be called.

Mr. CRESTOHL: What is the motion?

Mr. MORTON: That the commission not be called.

Mr. CRESTOHL: You do not make a negative motion. If there is a positive motion we may vote it down.

Mr. AIKEN: Perhaps we should merely approve the report of the steering committee, that the restrictive trade practices commission or a member should not be called.

Mr. WOOLLIAMS: I think that is an excellent suggestion.

Mr. ASSELIN: Would you put the question on the main motion so that we can vote for it or against it?

The CHAIRMAN: It is a recommendation; it is not in the form of a motion.

Mr. MORTON: I move that we accept the recommendation of the steering committee in respect to this matter.

Mr. BROOME: What is it? Read it.

Mr. MCILRAITH: Put the motion in the positive.

The CHAIRMAN: It is not really a motion. In regard to the motion moved by Mr. Howard and seconded by Mr. Fisher that a member of the restrictive

trade practices commission be called as a witness, the steering committee felt that due to the functions of the commission, it would not be proper for its members to be called as witnesses. However, the steering committee felt that if it could be established to be proper to have a member of the commission in attendance with the minister and the director to give advice on technical and operational matters, they would so recommend.

Mr. MORTON: Mr. Chairman, perhaps to resolve this problem we could put the steering committee's motion to a vote and vote it down.

Mr. DRYSDALE: We have the steering committee's recommendation.

Mr. AIKEN: We have a motion before us which was moved and seconded yesterday but left over for consideration. As Mr. Morton says, we can now vote on that motion which Mr. Howard made.

The CHAIRMAN: It was just referred to the steering committee.

Mr. MORTON: Mr. Chairman, I understood the motion was that we call them. There was another motion referring that motion to the steering committee.

Mr. WOOLLIAMS: Mr. Chairman, it seems to me that this can be resolved in a very simple way. The steering committee have mentioned that it is probably improper, and is improper to call these members as witnesses. Let us approve of what the steering committee has said in reference to this and then we will be finished with it.

Mr. DRYSDALE: I will second that motion which Mr. Woolliams has made.

Mr. THOMAS: Mr. Chairman, was there a definite motion moved by Mr. Howard and seconded by Mr. Fisher?

Mr. DRYSDALE: That was referred to the steering committee.

Mr. THOMAS: That motion was referred to the steering committee?

The CHAIRMAN: Will you let me read the motion that was moved yesterday?

Mr. THOMAS: Just a minute. I have heard the recommendations of the steering committee, but it is not a definite recommendation. I do not think we can vote on the recommendation of the steering committee.

Mr. BROOME: Why do you not ask some M.P.'s to help, they would get this straightened out.

Mr. FULTON: Mr. Chairman, having heard the comments of the steering committee, and other comments made here today, perhaps we could ask the steering committee to bring in a final report which might then be put before the committee for approval. Otherwise I think you will have to dispose of the motion in respect of having a member of the commission attend, which the steering committee has suggested is improper.

Mr. BROOME: Is that not Mr. Morton's motion?

Mr. MORTON: That was my motion.

Mr. BROOME: Why in hell do you not let it stand, then?

Mr. MORTON: Somebody said it was negatived.

Mr. DRYSDALE: Are you positive it is negatived?

Mr. MORTON: Let us dispose of this matter, Mr. Chairman.

Mr. DRYSDALE: I have seconded Mr. Woolliams' very excellent motion.

Mr. WOOLLIAMS: If we leave the first motion as it stands I will support it, but Mr. Crestohl has suggested that it was negatived and there was a compromise made, at least by discussion, but perhaps not by the wording. However, Mr. Chairman, let us have one motion put so that we can be rid of this problem and proceed with our business.

Mr. AIKEN: Put your motion again.

The CHAIRMAN: The Attorney General is drafting one here for me.

Mr. FULTON: I would say that in order to resolve this problem, Mr. Chairman, you could cover all points with a motion in this form: that the committee record its opinion that it is not proper to call a member of the restrictive trade practices commission before it.

Mr. WOOLLIAMS: I will so move.

Mr. DRYSDALE: I will so second it.

The CHAIRMAN: All those in favour of the motion? All those opposed.

Agreed to unanimously.

The CHAIRMAN: Getting back to our considerations, gentlemen, we had completed clause 11 and we were discussing clause 12.

Mr. FULTON: That is my recollection. This is the clause, Mr. Chairman, in respect of which I already indicated that the government would be prepared to accept an amendment to provide the right of appeal from an order of prohibition or dissolution. In the light of the suggestion made by Mr. Howard that it was difficult for members of the committee to draft amendments, I have taken the liberty of having an amendment drafted in the department which would accomplish this result. If you will allow me I will read that amendment. I have one extra copy, and if I read it the amendment will then be recorded in your minutes and can either be considered now or later as you wish. Mr. MacDonald tells me he has more copies, which could be circulated.

The amendment would take the form of adding subsections (2*a*), (2*b*) and (2*c*) to the proposed section 31. This would appear then on page 5 of the printed bill. The amendment would be as follows:

That the following subsections be added to section 31:

(2*a*) The Attorney General or any person against whom an order of prohibition or dissolution is made may appeal against the order or a refusal to make an order or the quashing of an order.

(*a*) from a superior court of criminal jurisdiction in the province to the court of appeal of the province, or

(*b*) from the court of appeal of the province or the Exchequer Court of Canada to the Supreme Court of Canada

as the case may be, upon any ground that involves a question of law or, if leave to appeal is granted by the court appealed to within twenty-one days after the judgment appealed from is pronounced or within such extended time as the court appealed to or a judge thereof for special reasons allows, on any ground that appears to that court to be a sufficient ground of appeal.

(2*b*) Where the court of appeal or the Supreme Court of Canada allows an appeal, it may quash any order made by the court appealed from, and may make any order that in its opinion the court appealed from could and should have made.

(2*c*) Subject to subsections (2*a*) and (2*b*), the provisions of Part XVIII of the *Criminal Code* apply *mutatis mutandis* to appeals under this section.

That, I regret, is a fairly long amendment, and it may well be you might want to have it typed and circulated, at least, before you discuss it in detail.

Mr. WOOLLIAMS: Would you mind giving us the meat of it, just where the appeals are to and from whom, and just what clause of the code it covers?

Mr. FULTON: The meat of the amendment is that if we apply to a superior court of a province or to the Exchequer Court of Canada, under the new procedure, for an order of dissolution or prohibition, then either the crown or the person against whom we seek the order may appeal—in the case of a

trial court of a province, to the court of appeal of the province and thence to the Supreme Court of Canada, and in the case of the Exchequer Court of Canada, direct to the Supreme Court of Canada. The appeal may be taken on any ground that involves a question of law, or if leave to appeal is granted by the court of appeal within 21 days of judgment, then the appeal may be on any ground that appears to that court to be a sufficient ground of appeal. You are giving a very wide right of appeal to both the crown and the parties against whom the order is made.

Mr. WOOLLIAMS: There is just one thing. I think you were here on the occasion of the general discussion, when there was some question raised of the appeal from the Exchequer Court to the Supreme Court of Canada, and if you went by that procedure it would be rather costly, and would differ if you went from the trial or the Queen's Bench division of a province to the court of appeal of a province.

Mr. FULTON: We considered that, but you will appreciate, especially as the bill now stands, that we cannot bring a prosecution in the Exchequer Court unless the parties want to go there, that it is with the consent of both parties.

Mr. WOOLLIAMS: That is fair enough.

Mr. FULTON: That being the case, if they consent to a prosecution being brought in the Exchequer Court of Canada, we think it quite proper to stipulate that the appeal can only be to the Supreme Court of Canada, in the usual way. I am referring of course to section 41A(3).

Mr. WOOLLIAMS: I think that answers it very well.

Mr. CRESTOHL: Assuming there is a decision either to dissolve a merger or to stop the continuation of doing something, using the words of this section—supposing such a judgment is rendered, is there to be an arrest of that judgment until the appeal is finally decided, or will there be an order immediately to arrest the doing of that which is desired?

Mr. FULTON: The situation, in effect, would be no different from the present, Mr. Crestohl, in that at the present time you can obtain orders in the trial court. If a judgment, including an order, against a party is handed down, and that judgment is appealed, then the judgment and the order are no doubt held in abeyance until the appeal is heard and decided.

I am told by the director that for all practical purposes you do not concern yourself too much with whether in the interim, before the appeal is heard, there is a continuation of the practices complained of; but, to all intents and purposes, the judgment and order are held in abeyance until the appeal is disposed of. There will be the same situation now with respect to judgments and orders of the Exchequer Court, if they are appealed from.

Mr. CRESTOHL: This is in the nature of a sort of injunction. The damage may be fully accomplished by the time the appeal is ultimately heard, unless there is an arrest by that judgment that there should be no continuation of what is being done.

Mr. FULTON: I do not know how you could accomplish that. As I understand it, the view has been taken that an order which might now be made by a trial court—and, indeed, frequently is made—is an integral part of the judgment. If the judgment and the order are appealed from, then the view of the branch has been, as I understand it, that the whole of the court's finding and the order are in abeyance until the appeal is disposed of.

Mr. CRESTOHL: That is the customary thing.

Mr. FULTON: I would think, Mr. Crestohl, that for all practical purposes common sense would prevail.

Let us take the case of a projected merger, for which an application is made to the Exchequer Court for an order of prohibition. Say the crown wins in the Exchequer Court and the parties then decide to appeal to the Supreme Court of Canada. It would seem to me that common sense would dictate against their taking any further steps to complete the merger, because the Supreme Court of Canada may well confirm the finding, and they might be ordered to undo something which they might have done.

Mr. CRESTOHL: How about orders for the dissolution of a merger? A dissolution may take place, but what about if there is no dissolution and they continue with that merger?

Mr. FULTON: Again, I would think common sense would dictate that the matter be held in abeyance, and that no further steps be taken under the merger, until the final judgment of the Supreme Court of Canada is given, if they decided to appeal.

Mr. MCILRAITH: Far be it from me to question the minister—

Mr. FULTON: Why not?

Mr. MCILRAITH: If the point he is getting at there is what I think it is, is there not jurisdiction in the court, under its own processes, to order a stay of proceedings until an appeal is heard? That jurisdiction is quite outside what is set specifically in this proposed amending clause.

Mr. FULTON: I think that is right. I asked Mr. MacDonald whether we have ever applied or asked a court, of its own jurisdiction, to order the parties to refrain from taking any further action until the appeal was disposed of; and he has told me that he is not aware of any case in which that has been done. In my view, that is probably because common sense would dictate that the parties do not do anything further, until the matter has been finally disposed of by the highest court, if there is going to be an appeal. I think I must agree that a court with any inherent jurisdiction could order the parties to refrain from taking any action under the proposed arrangement, until the appeal has been heard, in a case like this.

Mr. CRESTOHL: Could we not solve that by giving the courts the authority to issue an interim order, saying that the court may issue an interim order to the parties, that they must refrain from doing any such thing that may defeat the ultimate objectives of the appeal?

Mr. FULTON: I think, Mr. Crestohl, that is a thing that might be better left, as I say, to common sense, in that we would not attempt to enforce any order while the matter was under appeal by the parties; and I doubt very much, if any sensible businessmen would attempt to proceed further with an arrangement while their right to do so was under appeal.

If, in the light of experience, we find we do have to authorize specifically the granting of interim restraining orders, then we could introduce an amendment at that time.

Mr. DRYSDALE: Would those be appealable?

Mr. FULTON: Well, I would think the way to do it would be, if we found we had to do it, to provide the court of appeal may make an order restraining the parties from any further action until the appeal is heard, and make that, in effect, a condition of the appeal. We would have to consider that if we found it necessary to take any such action at all. But, frankly, I do not think it is necessary because, as I say, common sense and the practicability of the situation will govern the actions of the parties.

Mr. WOOLLIAMS: It is like a murder case. While an appeal is pending you do not hang the accused. There is almost an automatic stay, and I think that is what you have in mind.

Mr. FULTON: In so far as the crown is concerned, yes; and in so far as any action by the crown is concerned, that is the case. In so far as the parties are concerned, I cannot see their taking any action to perfect an arrangement which they know may in the near future be found to be illegal.

Mr. MCILRAITH: Is this point not covered already by the rules of the various courts, as they now exist, that a situation existing between parties cannot be changed in the interim? Is there not protection in the rules of the appropriate court covering this point? Is that not the practice in the courts?

Mr. FULTON: I would rather look that up and be quite satisfied before answering you.

Mr. MCILRAITH: Perhaps I could leave it this way. It is a little difficult to know precisely all the implications of the amending clauses and to take them up in this kind of discussion. On the point Mr. Benidickson raised earlier, I would hope that we are not confronted in the house with members saying, "You did not suggest an amendment in committee." That difficulty is running all through these clauses that are in, and the amending clauses now.

I am content to let the amending clause go, but I do not want to be confronted, later on with that situation, if, in the interval, we find there is need for further amendment—with the argument that, "You should have offered that amendment in committee."

Mr. FULTON: I can only repeat that the right to apply for an order, and for an order included as part of a judgment, is in the present act, and it has not presented any practical difficulties to the crown or the party against whom it is taken. I see no reason why, in providing the alternative form, in the Exchequer Court, it should suddenly create any practical difficulties.

Mr. MCILRAITH: I do not say it does, and that is my impression of the amending clause. All I wanted to do is to put in a word of caution, in case we do find something in it, between now and the time it comes up in the house. However, it is not necessary, as I see it, to hold up the clause until we all see and analyse the amending clause.

Mr. CRESTOHL: You are putting in a caveat!

Mr. MCILRAITH: Yes, I think quite properly.

Mr. FULTON: I would respect that.

Mr. MCILRAITH: That applies to clauses generally, because it has been very awkward, going on as we have had to in committee, in dealing with the clauses, as a result of which it may be necessary to offer amendments in the house—

Mr. FULTON: Yes.

Mr. MCILRAITH: —that it is not possible to offer in committee.

Mr. FULTON: Quite so. As a matter of fact, my suggestion, this afternoon, is that we leave this amendment. There are some copies which can be circulated. We could come back to it at, say a quarter to six, and then ask if the amendment is now accepted, and then the clause as amended, because I realize it is a long one which has just now been presented to the committee.

Mr. CRESTOHL: I suppose that between now and the time it comes up in the house your department will look into that?

Mr. FULTON: Certainly and, of course, nothing done here precludes the right of any member to move an amendment in the house.

Mr. AIKEN: I was going to add, Mr. Chairman, is it not a basic rule of law that the trial courts make what is intended to be a final judgment, that it cannot be conditional and, therefore, that judgment does stand as the court judgment until appealed. Therefore, perhaps, a great deal of the discussion we have had is unnecessary. A trial court judgment stands until it is reversed.

Mr. FULTON: Well, as I said, and say again, I think this is the situation. The parties have not experienced uncertainty as to what their appropriate course should be in the past, and I see no reason why there should be any uncertainty in the future.

The CHAIRMAN: Gentlemen, does clause 12 carry?

Mr. DRYSDALE: If I may, Mr. Chairman, just ask a question for a matter of clarification. Does the appeal intended under the final order of prohibition or dissolution include interlocutory applications? Would there be any appeal on interlocutory applications?

Mr. FULTON: This would be governed by the ordinary rules of court. We are not proposing to make any more change in the ordinary rights and rules of appeals. We realize, in the bill as drafted, there was no right of appeal from a particular course which we were now authorizing and we felt the representations made in that regard were well based. Therefore, we have sought to give the same rights of appeal, subject to the rules of the court in that case, as in all others.

Mr. AIKEN: Do we not have to consider the amendment before we pass the clause?

Mr. FULTON: My suggestion was, because it is a long amendment, that it might wait until a quarter of an hour before adjournment time; then we could go back to it, and ask if the amendment is carried, and then, the clause as amended.

The CHAIRMAN: Then, shall we go on to clause 13?

Mr. DRYSDALE: I am sorry, Mr. Chairman; I do not want to hold things up. Before we leave clause 12, part II, I would like to ask if there was any intention or consideration given for a limitation period somewhat similar to the three-year period in clause 1, and is it the intention of the legislation that it be restrictive?

Mr. FULTON: You are referring to clause 2 of proposed section 31?

Mr. DRYSDALE: Yes.

Mr. FULTON: I will ask the director to answer that, because I think he can do so more fully, from the technical point of view, than I can.

Mr. MACDONALD: In subsection 1 of section 31 there is a three-year period in paragraph (*b*) within which a Superior court of criminal jurisdiction could, as a result of the original prosecution proceedings, still grant an order under section 31. That three-year period is only a limitation period in the restricted sense that it keeps proceedings that depend on the original prosecution from dragging on for too long a time. Now, as for the time in which a prosecution may be started, there is no period of limitation at the present time. By the same token, there is no period of limitation within which an order of prohibition or dissolution, as an alternative to prosecution, may be sought under subsection 2—neither in the one case nor the other is there applicable a period of limitation.

The question as to when you may bring an original action is not to be confused with the fact there is a three-year period in paragraph (*b*).

Mr. DRYSDALE: Well, to give a simple example, if there is a merger, a conviction, and then there is three years in which to apply for the dissolution of the merger, and after that time it can be dissolved.

Mr. MACDONALD: It cannot be dissolved in the course of those proceedings.

Mr. DRYSDALE: Take the contrast, where there has not been any conviction, and two companies have merged; if there is no conviction, or attack on them, then, under this section, there is an infinite amount of time, in theory, in which

there could be an application made to the court, without a conviction for the dissolution of the company.

Mr. MACDONALD: That is my understanding. And, may I point out that, at the present time, neither is there any such period of limitation upon a prosecution—commencing a prosecution—in respect of the same merger.

Mr. MCILRAITH: Let me understand this. I could not hear the first part of the answer you gave, Mr. MacDonald. I could not hear whether or not you had a negative in it. Let me understand this point about only the case where there is a prosecution. In a merger case, saying this bill is passed in its present form, could you then prosecute a merger that took place seven years ago?

Mr. MACDONALD: Mr. McIlraith, if a merger, which took place seven years ago, was a contravention of the anti-combines legislation you could, today, under the present law, prosecute it, as for a criminal offence. In other words, there is no period of limitation. Likewise, if this section 31 becomes law, in its amended form, as an alternative to the prosecution you could also seek your order of dissolution without any such limitation of time.

Mr. FULTON: May I add to that something which I think was overlooked by some of those who made their criticisms in the committee. They said you could obtain an order of dissolution without a conviction, and that this might go away back in years. They said that this seemed unfair, and that you were getting an order of dissolution without a proper hearing as to whether an offence had been committed.

In my view, that is an entirely misconceived objection because, surely, no court would grant an order for dissolution on the application of the crown, unless they had a full hearing to find out whether a contravention of the law had been committed. They would only grant a dissolution if they found there had been a merger or combination which was contrary to the act. So, what you are providing is an alternative remedy—in one case a prosecution and conviction, and in the other case, an order for dissolution—the undoing of what was done. But, to obtain the result in either case you have to establish what was done was a contravention of the act.

Mr. CRESTOHL: The act at that time.

Mr. FULTON: At the time it was done.

Mr. MCILRAITH: Following that particular submission, or the point raised by this particular witness, Mr. Minister, they went a step further and raised a subsidiary point about the objection of going back a very long way, in cases where there was a merger that was in contravention of the act, but that was done publicly with full public knowledge, and acted on by all the public over a great number of years.

Have you addressed yourself to consideration of some sort of limitation on that point?

Mr. FULTON: We have, Mr. McIlraith, and concluded that we could not put a limitation on it, and that the concern expressed by those people is met, in large part, by the provision of this alternative procedure. Whether you have a prosecution, and seek a conviction, or you apply for an order of dissolution, the administration is bound to be much concerned as to whether it is fair to do either one of those things after the passage of a number of years—as much as seven years, which was the figure mentioned. The considerations in the mind of the administration, in deciding to follow that course, would be the same in either case: is it fair to do that after all these years? The right to take action is not new in this bill, it exists in the present Act. It seems to us, therefore, that there may be circumstances where an administration might come to the conclusion it is a proper thing to do. You are providing a less opprobrious method of doing it by seeking an order of dissolution than if

your only recourse was to seek a conviction. There may be situations in which the administration may come to the conclusion that although what was done was done publicly, and many years ago, it is only now that the harmful results are obvious and it is incumbent upon an administration, in the national interest, to undo that. If you should come to that conclusion, is it not more fair, instead of convicting people so long after an event, to apply for an order of dissolution?

Mr. McILRAITH: Thank you, Mr. Minister.

There are two points which arise out of your answer. I take it you have satisfied yourself that there is sufficient protection against the situation that the ones making the representations fear in that regard, and that lies in the responsibility of those administering the act.

Mr. FULTON: And, Mr. McIlraith, to complete that should add: and in the government which, through the minister, in the final analysis, directs the prosecution, or the application.

Mr. McILRAITH: Following a bit further the legislation, as it formerly stood, it referred to the Criminal Code.

Mr. FULTON: Yes.

Mr. McILRAITH: And the Criminal Code, as I recall it, has no limitation.

Mr. FULTON: No limitation.

Mr. McILRAITH: I come back to the point here—and this is what bothers me—that there is no limitation on the prosecution in the Criminal Code.

Mr. FULTON: No, there is none.

Mr. McILRAITH: But there we are getting into an area which is very close to an ordinary civil proceeding, and it is usual in those cases to have some kind of limitation. Most civil actions have. But, we are providing now here by statute, but are relying on the administrative authority and the government to use their discretion.

Mr. FULTON: That is true, Mr. McIlraith, but whatever direct improvements there are now result from the fact that we are now consolidating all the legislation into the Combines Investigation Act and taking certain provisions out of the Criminal Code. Nevertheless, as has has been pointed out, the jurisdiction is of a criminal nature, and the same arguments which applied against a limitation period in the Criminal Code would apply against a limitation period in this legislation, because the results of what was done may be extremely harmful. Therefore I think it is not wise to have a limitation period.

Furthermore, it may be a long time before these results become fully apparent. Therefore, we do not think it is wise to have a limitation period. But whatever remedy you seek, whether you go for a prosecution or an order of dissolution, you are going to have to consider the practicalities of the situation, and the administration is going to have to look at the question as to whether it is practical to undo what was done.

If the administration comes to the conclusion that it is desirable to seek to undo what was done, nowithstanding the practical difficulties, it is then going to have to prove beyond a reasonable doubt that what was done all those years ago was a contravention of the act. So, the proof necessary is not made any easier. Indeed, it is probably made more difficult by the passage of time. All these factors will be present in the minds of the administrators when they make the decision whether to apply the remedy. There is, as I endeavoured to point out before, no less burden or onus of proof on the crown in obtaining a dissolution order than there would be in obtaining a conviction.

Mr. McILRAITH: I suppose I could suggest that I might well argue that if we did have a statutory limitation period we would be making it abun-

dantly clear that it is a civil proceeding. That is what we argued in respect of putting on a limitation period, and that would raise the question as to the jurisdiction of the federal parliament at some point which would have to be resolved.

Mr. FULTON: Yes. I think, Mr. McIlraith, the only effect then would be that the court would say, the new procedures are ultra vires, you have proceeded in the wrong way, you can only proceed by way of criminal prosecution.

May I direct your attention to another thing, which I think is significant, in line 26 of the proposed section 31, in respect of the word "may". That appears on page 5 of the bill.

Mr. MCILRAITH: Yes.

Mr. FULTON: It says:

> the court may prohibit the commission of the offence or the doing or continuation of any act or thing by that person

and so on. Now, I know there are a lot of arguments about the use of the words "shall" and "may", but here the word "may" is used. I think the court, too, in addition to the administration, would take into account what are the practicalities of the situation. They would ask if it is really practical and sensible to order the dissolution of something that was done years ago, and if the administration has made a decision against common sense it is still open to the court—because it is not mandatory—it is open to the court to say that this is not practical, and therefore the court would not make the order.

Mr. CRESTOHL: I think your suggestion is supported, Mr. Minister by the last words of the section.

> in such manner as the court directs.

The court will then direct that there should be no undue prejudice suffered by anyone which might be the effect of a merger that took place several years ago.

Mr. FULTON: Yes.

Mr. DRYSDALE: On the other hand, the section says:

> Where the offence is with respect to a merger or monopoly—

not merely a situation under part 5 then the person will be directed to do such things; to dissolve the merger or monopoly. It seems to me that if you give it the classification of a merger or a monopoly under this particular section the court directs how it is done, and there is just a choice as to the way it is done.

Mr. FULTON: Yes.

Mr. DRYSDALE: The thing that I was wondering about is, in the case of a lawyer advising a company, as to whether, early in its career, it should perhaps merge with another company, or whether it should expand by growth. It would seem to me that under the act at the present time it would be better to urge expansion, because from what you have indicated, if it merges, then it does not matter when it has merged, or the size of the merger; there is the taint of it being merged and it is subject to review under this particular section. Whereas, a company that expanded without merging with another company, but which became just as big as this one that did merge, would not be subject to review under the Combines Investigation Act. Would that suggestion be correct?

Mr. FULTON: There is nothing against bigness, of course, in itself.

Mr. DRYSDALE: There is nothing against bigness, but the advantage is in not merging, but expanding. There is no monopoly; but I am saying, once you have established that the company has merged with another, then the two small companies—

Mr. FULTON: May I put it this way: is it not better for the economy to have companies which are expanding and competing with each other rather than companies which seek to lessen competition by merging with each other?

The offence is the interference with competition in a manner which is to the detriment of the public.

Mr. CRESTOHL: If I may say so, Mr. Minister, Mr. Drysdale, if he gives such advice, is likely to become an accessory to the fact.

Mr. DRYSDALE: That point brings up another item I will want to discuss.

Mr. FULTON: I know in our province, Mr. Drysdale, lawyers can take out insurance against professional negligence.

Mr. AIKEN: Mr. Chairman, we are going to let this clause stand, so perhaps we can go on to the next one.

The CHAIRMAN: Clause 12 is to stand until later. Perhaps we could consider clause 13.

On clause 13:

Mr. AIKEN: Carried.

Mr. CRESTOHL: Wait a minute, I would like to hear from the minister in this regard. Are there any proposed changes?

Mr. FULTON: No. The amendments here are simply in the underlined words. The explanatory note makes it clear. Section 33 becomes section 31 A, and the only change, therefore, is in the cross references. Section 32 is reenacted under part V below. If you compare what is 31 A in the Bill with what is presently section 33, which is reproduced in the explanatory notes, you will see that all we are doing is changing the cross references, because we are repealing sections 411 and 412 of the Criminal Code.

Mr. CRESTOHL: I was wondering if we could clear up one or two things, Mr. Minister. I have always been puzzled as to whether or not there could be a transgression of the law with respect to articles of trade and commerce, as defined in the beginning of the bill, when we are dealing with something like transportation, for example, where we would not be dealing with an article of commerce. This is a service.

Mr. FULTON: Yesterday we had a lengthy discussion in this regard under the definition section. I explained that it was not our intention to extend the purview of the act, but merely to make specific amendments, and therefore we had been careful not to extend the purview to the service industry.

Mr. CRESTOHL: I was not here yesterday.

Mr. FULTON: Perhaps I could explain what otherwise might be a confusion, and make a suggestion as to how we should proceed.

Clause 13, which we are now considering starts out by saying:

> Sections 32 and 33 of the said act are repealed and the following substituted therefor:

Under this clause you have the proposed new section 31A, and under the heading "part V" the proposed new sections 32, 33, 33A and so on. In other words, clause 13 proceeds from the bottom of page five to nearly the bottom of page eight. I would suggest, Mr. Chairman, that you might call the proposed new sections by number, and then part V on page six, and then the proposed new section 32, and so on.

Mr. MCILRAITH: That would be a much more orderly way of proceeding.

Mr. AIKEN: Mr. Chairman, when I said "carried" a few moments ago I was referring really to section 31A. I felt there was no change in that. I was not trying to rush the considerations, but I did not think there was any change there.

Mr. FULTON: No. 31A is the old 33 with the changes in the cross references.

Mr. DRYSDALE: The only question I would raise, Mr. Minister, is based on the uniformity in the penalty section in respect of the matter of the discretion of imprisonment or fine.

Mr. FULTON: Would you mind my asking you to elaborate your question?

Mr. DRYSDALE: In section 32 it says:

—is guilty of an indictable offence and is liable to imprisonment for two years.

I understand that is covered by sections 28 and 29 of the Interpretation Act, and I think section 622 of the Criminal Code.

Mr. FULTON: Yes.

Mr. DRYSDALE: I was just wondering in respect of uniformity if you intended to have it read "imprisonment for two years". That would put a bit of a scare into some people reading the section.

Mr. FULTON: There is this inconsistencey, I think perhaps, Mr. Drysdale, that in some places we were merely reproducing the section and not really changing it at all, we had to reproduce it because of the new numerical order. We were actually making a change in the numerical order of the sections to fit in with our pattern. Where that was all we were doing we did not open up the section by amending the fine print. You may say we were careless.

Mr. DRYSDALE: No, I do not suggest that.

Mr. FULTON: That would be an argument, but in fact there is no difference. The Interpretation Act, and the section of the code to which you referred, result in the penalty provisions of section 32 and section 31A being the same.

The CHAIRMAN: Does section 31A carry?

Section 31A agreed to.

On part V, Section 32 (1).

Mr. BENIDICKSON: I think here, Mr. Chairman, it will lead to a little more orderly inquiry if we deal with subsections (1) and (2) separately. We are now reaching the items in the bill which I think arouse a fair amount of controversy.

The CHAIRMAN: All right, we will deal with section 32 (1).

Mr. FULTON: Perhaps we should say differences of opinion.

Mr. BENIDICKSON: Differences of opinion.

Mr. FULTON: As I have explained, 32(1) in fact incorporates section 411 of the Criminal Code which has been in effect without substantial modification since 1900, and is the section under which most combination cases, especially in recent years, have been charged. We have, in doing that, made it unnecessary to retain the definition section of the old combines act which, as explained earlier, has therefore been dropped. Here is where you have your operative words defining a combination as distinct from a merger or monopoly.

Mr. MCILRAITH: I do not think there is any need to repeat, but I suspect the question was raised yesterday in respect of the definition of merger and monopoly.

Mr. FULTON: That is right.

Mr. MCILRAITH: There is a difference now. I was not here, but I presume the matter was raised yesterday.

Mr. DRYDALE: It was discussed extensively.

Mr. FULTON: I think I satisfied the committee with the explanation that there is no difference except it is made claim that vertical integration is as much a concern as horizontal integration. There is no change in the merger definition; there is no change in the definition of monopoly—no substantive change.

Now we come to the definition of combination.

The CHAIRMAN: Does section 32 (1) carry?

Section 32 (1) agreed to.

On section 32 (2).

Mr. BENIDICKSON: Is this one of things that the MacQuarrie committee recommended should be put in the combines legislation rather than the Criminal Code?

Mr. FULTON: Yes. The MacQuarrie committee in its report at page 37 said:

> In our opinion no injustice has resulted but there is some merit, on the grounds of convenience, in the suggestion that the legislation should be consolidated.

At the end of the paragraph it is stated:

> Our recommendation rather is that consideration be given to the transfer to the Combines Investigation Act of those parts of sections 498 and 498A of the Criminal Code which create offences not now contained in the Combines Investigation Act.

We are doing what the MacQuarrie committee in fact recommended.

Mr. BENIDICKSON: Although there are many people in the land who regard these offences as serious crimes against society, I think perhaps it should be pointed out a little more clearly if they are in the Criminal Code rather than in the statute.

Mr. FULTON: Well, I realize that there is that point of view. However, the remedies open to us are still the same. At least, we have the same remedies open to us as when they were part of the criminal code.

Mr. MacDonald mentioned yesterday the case of the Vancouver gasoline retailers, where an attempt was made to prosecute under one of the headings of definition in the Combines Act that created certain difficulties; and he believes that is one of the reasons why the court of appeal quashed the conviction.

It seems to us it is better to consolidate your legislation and, particularly, your definitions—in part, for clarity in the charging section of the pleadings, in any prosecution that may be authorized, and also because I think clarity is desirable for those who have to try to understand what it is hey may or may not do, what it is the law prohibits, and for those who have to advise their clients in that regard.

Mr. BENIDICKSON: You amend the Criminal Code in a subsequent section?

Mr. FULTON: It is in this bill later on. Sections 411 and 412 are repealed, and there is also a transitional provision.

The CHAIRMAN: Does subsection (2) carry?

Mr. CRESTOHL: The minister was good enough to say that he would explain, at some time, paragraph (*g*)—

> Some other matter not enumerated in subsection (3).

I am thinking of paragraph (*g*) in subsection (2).

Mr. MORE: I do not think we formally carried subsection (1). A question was raised when you put the motion, it was not carried and has not been put since.

The CHAIRMAN: Does subsection (1) carry?

Agreed to.

The CHAIRMAN: Subsection (2).

Mr. DRYSDALE: You are in order now, Mr. Crestohl.

Mr. FULTON: On subsection (2), I have explained in the house that it has been represented to us by responsible businessmen—in my view and in the view of those who advise me, with some justification—that the law, in its

interpretation and application by the courts in the jurisprudence which has been built up, has raised, in their minds a concern that the combination part of the combines legislation is so far-reaching and throws the net so wide that they may not get together and have consultations, even for purposes which everyone here, I am satisfied, would recognize to be innocent and desirable purposes, for fear that by coincidence or otherwise they might later be charged with having effected a combination as a result of those meetings and consultations.

We said to them, "We think you are exaggerating. Your fears are not really well founded because if you did confine your activities, and could establish you were confining them to one of these desirable purposes, you would not be prosecuted". They said, "Well, you may say that, but we are not certain; and, furthermore," they said, "you may be a reasonable person now but your own views might change". I am merely summarizing what they said. They said, "Somebody else may succeed you who is not reasonable or takes an entirely different view; and we do not feel we are on solid ground unless the law itself outlines what may or may not be done". They said, "As a result we simply do not meet for such matters as to consult with each other or arrange cooperation in research and other matters, where the public interest would not be prejudiced but would be promoted by such consultation. Whether you think we are unreasonable in that fear or not, we assure you that fear does exist and we do not meet even for these desirable purposes". I said, "If that is the case, we could certainly have a look at the law and see whether, without opening up the possibility of holding an umbrella over improper actions, actions which it is desired to prohibit, we could make it clear that consultations confined to one or more of these desirable purposes, could be exempt, as it were, from the provisions of the act—or rather, whether it could be made clear that such consultations alone do not constitute an offence".

Accordingly, we drafted a section, which was included in the draft bill of last session. Objection was taken to that on all sides, not only on the side of business, that we had thereby placed an unfair onus of proof on the person who would be in the position of an accused. So we have changed the drafting of the section to provide now that where a prosecution is launched under subsection (1)—which is the subsection which defines a combination—where a presecution is launched for the offence of having formed a combination, then:

> ... the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

—and then are listed the activities which, if exclusively the objective of the cooperative arrangement, will not constitute an offence. I purposely leave out (*g*) because I want to come to subsection (3).

We have doubly safeguarded against the holding out of an umbrella under which illicit actions can take place, by the provision in subsection (3), which makes it clear that even although the parties may have met for one of the desirable purposes, that does not take them out from under the operation of the act if, in addition to discussing an arrangement under one of those purposes, they have actually formed a combination that has one of the results within the purview of subsection 32(1). That is, it is not open to an accused to say, "In the course of the consultations we discussed pooling of resources for research."—he may raise the defence, but he could not succeed with that defence if the crown proved that in addition, he made an arrangement which was, in fact, a combination and is prohibited by section 32(3) of the act. We outlined the sort of thing which, if proved, would deprive him of the benefit

of a defence which he is otherwise given; and we enumerated those in subsection (3):

> subsection (2) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:
> (*a*) prices,
> (*b*) quantity or quality of production,
> (*c*) markets or customers, or
> (*d*) channels or methods of distribution,
> or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade or industry.

If the arrangement has included any one of those things he does not succeed in his defence.

Having examined the enumeration, in subsection (3) of the things that will vitiate the "defences" given in subsection (2), although "defences" is technically not be correct word—let us return to clause (g), which says:

> some other matter not enumerated in subsection (3).

That means, if his consultations with other companies have been confined not necessarily to only one of the matters which we have been able to pinpoint by our earlier enumeration in (a) to (f), but has related exclusively to a matter not enumerated in subsection (3), where we have set out what are harmful types of combination or agreement, he may still have a defence.

In other words, if he can show that he held cooperative discussions with other companies and that those discussions have not in any way related to, and have not in any way had the effect of creating a combination, as defined, then the mere fact that he held discussions with others will not convict him of having formed a combination.

Mr. McILRAITH: When you say "combination," it would be a combination to do the things enumerated in subsection (3)? That is all he has to show now, to have a valid defence?

Mr. FULTON: No, I do not think so.

Mr. McILRAITH: That is the point. That is the last part of your remarks, the very last part of your remarks.

Mr. FULTON: I may have come at this by what I might call an inverse approach.

Mr. McILRAITH: That is the point that was concerning me.

Mr. FULTON: The point I want to make is this: even if the agreement only relates to one of the things that we have enumerated in subsection (2) (*a*) to (*g*), if it actually has the effect of being a combination or forming a combination, and has the effect outlined in subsection (3), then they may still be convicted.

Mr. McILRAITH: That point I understand, and that is clear so far. Now, if you go one step further, bearing in mind that in (*g*) we come to some other matter that is not enumerated, does that not have the effect of making legal all combinations except those referred to in subsection (3)? That is the point I am coming at.

Mr. FULTON: I do not think so, because you start with subsection (2), which reads—Perhaps we had better go back to subsection (1):

> Every one who conspires, combines, agrees or arranges with another person—

—to do any of the things enumerated—

> —is guilty of an indictable offence and is liable to imprisonment for two years.

Then you come to subsection (2), which says—

Mr. McILRAITH: Enumerates defences.

Mr. FULTON:

> Subject to subsection (3), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:—

Mr. McILRAITH: That is quite clear, so far.

Now, subsection (2) enumerated the defences, if I might quote it briefly. One of the defences, if I could change the language a little is, "any other matter not enumerated in subsection (3)." Does it not destroy the effect of subsection (1)? That is my point, over-simplifying the point. You have a defence to everything except those things enumerated in subsection (3)?

Mr. FULTON: Yes, Mr. McIlraith, if what you are saying is that you have a defence for a co-operative arrangement which does not relate to, and does not and is not likely to lessen competition unduly in respect of, prices, or quantity or quality of production, or markets and does not relate to, and does not and is not likely to lessen competition in respect of, entry into or expansion in a trade or industry, or customers, or channels or methods of distribution—then I think what you are saying is substantially correct.

Mr. McILRAITH: That is the point I wanted to get at.

Mr. FULTON: Yes. We did not see how a combination could be a combination, as defined, and be offensive if, in fact, it did not reduce competition or affect competition with respect to prices, quantity or quality of production, markets or customers, or channels or methods of distribution—or one other thing, lessen the opportunity of any person to enter into or expand a business in a trade or industry. I do not see how a combination could be a combination if it did not have one or other of those effects.

Mr. McILRAITH: That is my point. Without this new subsection (2) and (3) in this form there was only the one limitation of a combination. The limitation is set out, up above, in section 32 (1)?

Mr. FULTON: Yes.

Mr. McILRAITH: Now we have, by bringing forward legislation in what I might call an indirect form, in fact, reiterated the limitation—or, at least, we hope it is only a reiteration of the limitation.

Mr. FULTON: Well, you used the word "limitation". I will not quarrel with that word. But, even using the word "limitation" we have felt—and nothing has been said so far which has convinced me we were wrong—that in enumerating these things in subsection (3) we have covered the whole field in which any illegal combination could operate, and if it is not operating to have one of those effects, it is not an illegal combination.

Mr. McILRAITH: I do not quarrel with that part of your statement, because I do not see any cases outside of the area covered in 3 but, in any event, we have repeated or reiterated the type of combinations that are illegal.

Mr. FULTON: I think so.

Mr. STINSON: Mr. McIlraith is saying that there is nothing defined as an offensive agreement or arrangement in (3), which is really not prohibited under the subsections of 32(1). Is not that his objection? I would like to know.

Mr. FULTON: Yes, that is the effect of our discussion.

Mr. STINSON: I would like to know why, in that case, (3) is here, if not to explain, perhaps, or give subsection 2(*g*) something to attach to.

Mr. McILRAITH: Well, I think Mr. Stinson is coming to the point. I do not think the explanatory notes in the bill are adequate to explain this, and I wondered why the minister chose the method of repeating in what I might call the defence part of the section, by way of a negative, the offence part of the section. It is an unusual way to do it.

Mr. FULTON: I think I can do this by taking you back to one of the other indications I have given—one of the basic purposes of the bill. We have been told—and business has said for many years—that the combine law is uncertain and not precise; they do not know what it is directed at. They know it is directed to preserve competition but do not know what it makes illegal, and do not know what they can do or not do. They do not know in what fields they may or may not act in concert with other companies.

Subsection (3) has the effect of a further clarification, making it clear to business that no arrangement whatsoever that has an undue effect on prices or the other matters enumerated, can be entered into, no matter what its other incidental effects are. It cannot be entered into, because that is illegal, if you like, it is a further clarification. You might ask: why do you not define a combine as an arrangement having one of these effects.

The answer is that we did consider this for a time, but we came to the conclusion that we should not jettison all the jurisprudence built up under the cases based on the former definition. So, you will see that we have in section 32 (1) taken as a whole, retained the former definition to establish the basis of jurisprudence. We have then in subsection (2) made it clear there are certain activities that can be engaged in and, if engaged in exclusively, there will be no danger of conviction.

We have then, by subsection (3), attempted a further degree of clarification as to what it is that the prohibition of a combination is directed at—that is, it is directed at any activity which lessens prices, quantity or quality of production, markets or customers, channels or methods of distribution, or the restriction on the entry of somebody else into the trade or business.

Mr. CRESTOHL: Mr. Minister, I think you are on solid ground when you enumerate the various things against which one must start, but once you use this nebulous language "some other matter not enumerated in subsection (3)", I am a bit confused. You say yourself you are trying to cover here all forms that companies carry on which cannot be foreseen, but which persons sometimes feel and they cannot put their finger on. You are trying to foretell the future by inferring that something might be done by a group of people which is not enumerated, and you are attempting to cover that up by using these very nebulous words "some other matter not enumerated in subsection (3)."

I go along with you and say the crown is on solid ground, as long as you enumerate them; but I do not think the law should anticipate something in the future which cannot be foreseen now may be done by a group of people, and that you want to give them that protection which they seek. You have to take into consideration the plight of those unfortunate people who might feel that some things might be done by them which they do not think are offences, and yet they are. Later on, it might be difficult to interpret the law, when you are called upon to find out whether this is something that is covered by the legislation.

I think, Mr. Minister, if I may say so, with all due respect, we might be able to cover a great deal, and give protection and safeguards against many things, but I do not think it is possible for us to give safeguards against everything, even those things which we do not foresee today. I think you were over-generous in advising those delegations that come to you that you would try to understand them and cover them in the law. I think you are stretching the law beyond the economy of the law, and beyond what is customarily done. I know this was presented, with the very best of faith, on the part of the businessmen who presented this to you, and the draftsmen of this; but it is a little bit too phony for me.

Mr. FULTON: I appreciate your point of view and if, in fact, we had done what you say, then I think your point of view would be one which we would

have to take account of, and have another look. However, I do not think we have done it, when you consider section 32 as a whole. Firstly, we have retained the existing jurisprudence by retaining the existing definition. Secondly, we have stated, in what I submit is an absolutely complete and clear form, what it is that a combination cannot do—what it is that no cooperative arrangement can do, as in subsection (3). It cannot be permitted to lessen competition in respect of prices, quantity or quality of production, markets or customers, channels or methods of distribution, or to restrict any person from entering into or expanding a business in a trade or industry. I think we have made a clear and comprehensive statement there of what it is that the law is designed to prevent and, having done that, I think it is open to us to say that if a mutual arrangement is entered into that does not do any of these things, then an accused may defend himself if he can establish his arrangement does not do any of these things, but has only the effects enumerated in subsection (2).

We could not possibly enumerate every one of the arrangements that might be open to business that were not a contravention of the law. You could not do that. We named six obvious ones, which are the ones we think will be resorted to. What we have done, in (*g*) is to say "some other matter not enumerated in subsection (3)" by us, because we could not think of all of them which could be allowed as a defence. There could be others, as long as they do not have the effect of producing one of the effects which we have stated already, in a clear and comprehensive manner cannot be permitted. So, I do not think we have created an uncertainty in the law. I say that we have clarified the law as to what it is that persons cannot do. Then we said, provided their arrangements do not do any of the things they must not do, they may defend if they establish their cooperative arrangement related only to some innocent desirable purpose.

Mr. CRESTOHL: Quite right.

Mr. MACDONNELL: Would you answer this question? I see Mr. Crestohl's trouble and yet, as I have heard the minister, I wondered. I would like to ask Mr. Crestohl whether (*g*) is not an attempt to make this more generous to avoid, perhaps, something that has been overlooked. But, in the generality of the wording—and I was greatly troubled by it, to begin with—they protected themselves by this clarification in subsection (3).

Mr. CRESTOHL: Yes, subsection (3) was enacted to cover this section (*g*), but look at it in relation to another, such as this—"or, is likely to lessen". "Likely to lessen"; I can understand if it lessens competition, it is one thing, but when you use a language like this, "is likely to lessen"—

Mr. FULTON: This is directed against business. "Is likely to lessen" is making it more effective against business.

Mr. CRESTOHL: But, when I look at that section I want to see both sides of it, and I feel, when you use the words "is likely to lessen" in subsection (3), you are really—I do not know whether it is an attempt to cover subsection (*g*) again but, to me, it clashes.

Mr. MACDONNELL: Should not your criticism be directed against the word "likely" and so on, and not against (*g*).

Mr. DRYSDALE: Is not one of the difficulties that is facing us the fact that the words "conspiracy, combination, agreement" and so on, are used in a different sense in each clause? I suggest, in the first part of 32(1) they are used in the criminal sense, where you have obtained the conviction and, in the second clause they are, in essence, criminal, but you have made exceptions, so they do not become criminal, and by using the words "conspiracy, combination, agreement" and so on, in conjunction with "is likely" you are referring to an act that may become potentially criminal, and we have to keep this differentiation in mind in the various sections.

One of the difficulties we are having is that we are importing the words which are used in the first section technically, in a criminal way. In the third section we are examining, in the same way, although they refer to potentially criminal offences and, in that sense, that cannot, technically, be a conspiracy, combination, and so on.

Mr. BENIDICKSON: Are you saying that you think the matters referred to in subsection (2) are presently criminal?

Mr. DRYSDALE: If there is a criminal conspiracy it has to be criminal.

Mr. FULTON: I do not know whether I made my point clear. I do not know of a case where they have been prosecuted, where activity related to one of the matters in subsection (2), but we are told—and I think it is demonstrable —that in certain of these areas our economy is being deprived of advantages it might otherwise receive, because businessmen do not enter into these arrangements for fear, whether justified or not in their belief, of being prosecuted and convicted as a combine.

Now I, quite frankly, felt that it was the proper thing for me to do—to submit it to parliament, if I could produce a section with relation to combination which did not weaken the laws, and I said to these men who came to me throughout: we are not going to alter the per se rule, a combination will remain illegal, in so far as the jurisprudence has established it—and we have retained the jurisprudence by subsection (1). But, we felt, and I still feel, that if, without weakening the prohibition against a harmful combination, we could make it clear that business may engage in activities which would benefit the economy without producing harm, it would be a proper function for the Minister of Justice to clarify the law, to have that effect—and I believe this clarification will have that effect.

I have concentrated in this discussion mainly upon the pooling of facilities for research, because our companies do not engage in research activities to the extent we would like to see. I believe our economy would be benefited if they did, and if by this clarification we can encourage them to do so, and at the same time maintain the full rigor of the law against harmful combination, I think we will have done a beneficial thing for the Canadian economy.

Mr. DRYSDALE: Following up Mr. Crestohl's remarks, Mr. Chairman, in respect of the words "is likely", what is the standard or the test of something that is potentially a crime? Do you wait until it becomes a conspiracy actually and then prosecute under section 32 (1), or does the director decide these matters are likely to lessen competition? I have difficulty in my own mind in seeing what the test or standard is.

Mr. FULTON: I think subsection (3) makes it clear, that in order to avail himself of the defence, the accused person or persons would have to establish first that the mutual arrangement was one in the field enumerated in subclause (2). Secondly, that it did not lessen and was not likely to lessen competition with respect to prices, and so on. This is a safeguard, as I have said, against the umbrella.

Mr. DRYSDALE: So the court would then decide as to whether there was any potential lessening of competition inherent in it?

Mr. FULTON: Yes. I think I am correct in stating, that in order to avail himself of the defence he has not only to prove that his arrangement was confined to one of these innocent areas, but that his arrangement also did not lessen and was not likely to lessen competition in one of these other fields.

Mr. WOOLLIAMS: It seems to me that (c) makes this more generous to the accused.

Mr. MCILRAITH: That is the point precisely.

Mr. WOOLLIAMS: Well, of course, I am a little bit in favour of that.

Mr. CRESTOHL: Why?

Mr. FULTON: I am told by Mr. MacDonald that the burden on the crown as a result of subsection (3) is no greater in spite of the words, than it was if one merely relied on the definition in subsection (1). We are not creating a greater burden on the crown than already existed.

Mr. DRYSDALE: Would you have to prove beyond a reasonable doubt that it is likely to affect competition then in any particular respect?

Mr. FULTON: I do not think that is true. I think it is a question, is it not, of the ordinary laws in regard to the burden of proof? The crown establishes a prima facie case and the onus then shifts to the defence to establish a defence. Then the crown, of course, can take its chance and say that there has been no defence established, or the crown, if it feels that, as it were, a prima facie case had been made out by the defence, and perhaps the onus had shifted back to the crown, could disprove the defence, or rebut the defence. In rebutting the defence, if the crown proves that, notwithstanding that the main object of the innocent arrangement was as stated, it nevertheless had the effect, or is likely to have the effect, of lessening competition in one of the fields enumerated, then the crown would have rebutted the defence.

Mr. MCILRAITH: You are getting into a difficult area there when you are dealing with the onus of proof and the burden of adducing evidence. You get into a pretty technical area there. It is a matter of jurisprudence.

I would like to come back to (*g*). Would it be an oversimplification of the situation to say that in your effort to preserve the jurisprudence as to illegal combinations, but at the same time to clarify the situation with respect to combinations that may be described for our purposes now as legal combinations, you may have been guilty of repetition by using the method used in setting this out as you have done in subclauses (1), (2) and (3)? Subclause (3) may, to some extent, be a repetition of something that is otherwise provided, but for greater clarity you have chosen that method.

Mr. FULTON: Yes. I am not offended by what you have said, particularly bearing in mind that one of the objects was to clarify the law.

Mr. MCILRAITH: Yes, as I understand it that is the position. You were attempting to get clarification here, and you chose this method which could be referred to as a repetitious method.

Mr. FULTON: Our object is, firstly to preserve the jurisprudence, secondly to establish what co-operative arrangements, by themselves, are not illegal activities, and thirdly to clarify the jurisprudence, if you like, by saying what, in fact, an illegal combination is.

Mr. NUGENT: Subclauses (1) and (3) are in respect of jurisprudence?

Mr. FULTON: I think jurisprudence is covered in (1). The clarification, for a person who wants to read it, of what one may do, or what one may not do, is covered in (2) and (3).

Mr. NUGENT: But (3) is the test or the ultimate, or logical result of every one of the offences in (1)? It is spelling it out, is it not? Any one of the offences in (1) is bound to have the result of lessening competition as set out in (3).

Mr. FULTON: I think that is correct, yes.

Mr. MCILRAITH: That was your intention?

Mr. FULTON: Yes.

Mr. BENIDICKSON: Mr. Chairman, I appreciate the minister's outline as to the changes in the statute in respect of these offences, but I am not satisfied that, first of all, they were perhaps necessary. I do not think there has ever been a prosecution or conviction in regard to a combination based on activities

such as are outlined in (*g*). Goodness gracious, I do not think I know of any company that does not convene annually, or more frequently, and I can think of no one that does not have annual conventions in any line of business today, so I do not think there is—

An hon. MEMBER: Members of parliament do not.

Mr. BENIDICKSON: They see too much of each other.

I do not think there is really a genuine belief that these things, which would be discussed at their conventions, would actually bring trouble upon themselves from the combines branch. I do not think that any lawyer or any judge, with the fairly substantial change in the wording of the outline of the offences, would not consider that we have not retained the present jurisprudence. I think every lawyer and every judge would want to start all over again in connection with the argument in the law.

Mr. FULTON: You have said that we have not changed the law and have not done anything; and business could do all these things anyway. That is what you said first. On the other hand, by what you have said last, you are saying we have changed the law, and that businessmen are going to have to start to learn the law all over again. I do not think we have made really substantial changes in the law; we have clarified the law.

Mr. BENIDICKSON: I was not saying that. I said these people were doing these things now. I was saying that there was perhaps not a need for this, because all this was being done now without prosecution and without difficulty, and being done by practically everybody in business, particularly during annual conventions.

Mr. WOOLLIAMS: Mr. Chairman, even if this does not change the law, but clarified it, it will reduce the fear, because many of these things become evidence, such as the agenda of a convention; where they discuss prices. It at least reduces that fear because it is spelled out.

Mr. BENIDICKSON: Perhaps they will leave the discussion of prices off the agenda.

Mr. FULTON: Mr. Benidickson, in respect to the point you have made, if you are concerned with Subsections (2) and (3), and that we have changed the law so that a lot of jurisprudence will have to be made again, I would direct your attention to clause 22 on page 12 which has the marginal notation "effect of re-enactment. It reads:

> Except to the extent that subsection (1) of section 32 of the Combines Investigation Act as enacted by this act is not in substance the same as section 411 of the Criminal Code as in force immediately before the coming into force of this act, the said subsection (1) of section 32 of the Combines Investigation Act shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said section 411 of the Criminal Code.

Mr. BENIDICKSON: That is helpful.

Mr. THOMAS: Mr. Chairman, there were two suggestions made by the British Columbia forest products group. They wanted to have the words "within Canada" placed after the word "unduly" in the bottom line on page 6. That would make it read: or is likely to lessen competition unduly within Canada. This group pointed out that due to the competition in foreign trade, it might be in the national interest for the various corporations producing plywood and other lumber products in Canada to form a combination for the purposes of competing in foreign trade.

Mr. FULTON: Yes.

Mr. THOMAS: Therefore they thought the words "within Canada" should be placed after the word "unduly".

Mr. FULTON: Yes. I think their proposal with regard to subclause (3) related also and was ancillary to the proposal for the insertion of another subclause in (2).

Mr. MCILRAITH: That is right.

Mr. FULTON: They submitted that this would have the effect of creating a defence if the agreement related to export trade. That was the effect of it. Their actual submission was that there should be inserted in subclause (2):

> the allocation of markets and the creation of uniform prices and terms of sale in export trade to better facilitate the competitive position of articles exported from Canada against foreign competition,

This might be an appropriate place to deal with the questions of the submissions that were made that some amendments should be made to take account of the situation of companies engaged in export trade. We have given careful consideration to that both before and after we received these submissions. In this field of combinations—and I am referring now to section 32—we felt that if there was a real difficulty in holding out any umbrella, the difficulty would be that, in giving them any umbrella at all, you could not isolate the protection that that umbrella gave to the export field alone. I have not yet seen any way in which you can allow them to carry on activities which would otherwise be an illegal combination and say that the effects of that will be isolated in the export field, and that it will not spill over and have an effect on the domestic field. That is the first difficulty which I have seen with respect to putting in such a provision.

The second reason why we have not felt it appropriate to put in such a provision is that we have a case now before the restrictive trade practices commission, to which reference was made in the submissions, in Vancouver. It is, so far as I know, the first such case in which an inquiry is now under way as a result of allegations having been made with respect to activities which were primarily directed to the export field. I only mention that here because it has already been mentioned and referred to specifically. I refer, of course, to the fisheries case. We do not normally confirm or deny that inquiries are proceeding. We have this case, which is now before the commission, and it would seem to me to be premature for me to be suggesting legislation which is going to have very far reaching effects. As I have said, I was just concerned as to whether I could isolate the export field from the domestic section. I would think it premature to introduce that legislation when such a case is before the commission. And the commission, in its consideration, will, I am sure—and I speak now without consultation with the commission, because I think this is one area where it would be improper for me to consult with them because they are an independent body—I am certain that the commission, in its reviews and report, will address itself to this very question we are now discussing; and that is, whether arrangements having the design of facilitating or improving the position of Canadian companies in export markets can be carried on without having a possibly disadvantageous effect on the consumer in the domestic market. I think the commission will, as I appreciate the terms of the act and responsibilities imposed upon them, have to address its mind also to the public interest and to the question of whether the public interest is better served by allowing such arrangements at all, whether the general interest of Canada is better served by things that facilitate Canadian companies in export fields and, therefore, any detriment there may be in the domestic field may be outweighed by the general advantage to the economy of the country. It seems to me that is one of the things to which the commission must address its attention. In the light of the fact there is now an

inquiry before the commission in which these issues are relevant, it would seem to me to be premature for me to be recommending legislation at this time on that subject.

Mr. THOMAS: There was another suggestion by the metal mining association—

Mr. FULTON: May I just conclude, Mr. Thomas?

I think it is premature because I think the situation will be greatly clarified, and the members of the House of Commons as well as the government, in considering what legislation if any, should be introduced and enacted. will be assisted greatly in that task by the report of the commission.

Mr. DRYSDALE: In the meantime, would every consideration be given to these people competing in the world export market, provided their competition is such as not to affect the domestic market—because there is no indication, at present, as to when the decision is likely to come down in this case referred to, and it could be a matter of years? I was wondering if consideration could be given, in the meantime, to those who are engaged in this export field.

Mr. MACDONNELL: Consideration has been given to them for sixty years.

Mr. BENIDICKSON: Mr. Chairman, has the minister had time, since the representations were made by the Canadian metal mining association and others, on this point, to give it much consideration or to take it to his colleagues; or will he be able, perhaps, to review it between now and the committee stage of the bill in the house?

Mr. FULTON: I have reviewed it, Mr. Benidickson, and the conclusions I have just outlined, in reply to Mr. Thomas' question, were the conclusions to which we came as a result of that consideration. We were not unaware of the problem when we were initially drafting the bill. In fact, we did have a provision in the bill we presented last year, with regard to the export trade in the field of mergers. But when it was decided it would be more appropriate not to make a substantial change in the merger field, that was dropped. We were considering the position of the export trade with relation to the whole act. I was not able to find any way, in the combination field, that I was satisfied could insulate the effects of arrangements made with respect to export from their effect domestically. We do not have any advice from anybody as to ways of measuring the public advantage of one as against the other.

Mr. BENIDICKSON: I am sorry, but I was reading the act at the time when you made reference to the commission bringing down a report, and that this problem would be one of the points considered. What was the commission?

Mr. FULTON: The restrictive trade practices commission, which is now considering the fisheries case in Vancouver.

Mr. DRYSDALE: There is unlikely to be any further activity in the export field, provided there is no outward obvious violation of the Combines Act until this particular case is settled. I am not trying to pin the minister down to legal advice, but there is likely to be this period when there is nothing covering the export trade. I wonder if, without putting him on the spot, there is anything he could say to the committee which would indicate the position of exporters with regard to this competition?

Mr. MACDONNELL: Do you not think that actions speak louder than words?

Mr. FULTON: I find it hard to answer that without being "put on the spot".

Mr. DRYSDALE: I think that is fine, Mr. Minister.

Mr. FULTON: Mr. Benidickson, I have misinformed you in an answer I gave. I find we did not have any provision with regard to export trade in our earlier bill, as presented to the house. We had it in several of the drafts we had prepared.

Mr. BENIDICKSON: I was going to ask you why it was not in this bill when it was in last year's.

Mr. MCILRAITH: If you have finished with that point of export, I want to ask some more questions about subsection (3), and the use of the word "unduly" placed as it is in line 43, page 6. It seems to me that is adding something new to the law as we presently understand it.

Mr. FULTON: I do not think so, Mr. McIlraith, because if you look at the definition in subsection (1), which is transported from the Criminal Code definition, the word "unduly" occurs in every one of the paragraphs.

Mr. MCILRAITH: I follow that, at least in section 32(1), in an effort to preserve the jurisprudence as it is; but it seems to me its importation into subsection (3) possibly enlarges the defences now available.

Mr. FULTON: Mr. McIlraith, I am sorry, but I missed your last question.

Mr. MCILRAITH: I quite understand the use of the word "unduly" in subsection (1) of section 32; that is following the law as it is, and the present jurisprudence. But it seems to me that in line 43 of subsection (3) its use there, in that context, is adding something additional to the law as it now is. I would be obliged if you would address yourself just to that point.

Mr. FULTON: That was my intention.

The point I was trying to make is that since the word "unduly" does occur throughout the definition section, then there is no change in the law when you insert the word "unduly" in a further subsection which is for the purpose of clarification, as we have previously discussed it. We are now trying to enumerate the kinds of activity, in more specific terms, which the law is designed to prevent. That is the undue lessening of competition, because that is the definition of the offence.

Mr. MCILRAITH: Perhaps I could leave it with a statement for the opposition? With deference, I suggest it adds a new limitation, and my reason for saying that is that if you look at paragraph (*b*), for instance, of section 32(1), you will note there that the "unduly" is related to

> —the manufacture or production of an article,—

but in subsection (3) the word "unduly" is related to "prices," and so on. That is a new dimension.

Mr. FULTON: But you have paragraph (*b*), Mr. McIlraith, in subsection (3), which relates to quantity or quality of production, just as you have in (*b*), above:

> to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof,—

And the word "unduly" is used in the definition. Therefore, it seemed to us that the word "unduly" should be used in the enumeration of things which the section is designed to prevent.

Mr. MCILRAITH: There was some point raised in one of the briefs as to the language used in this subsection (3), and I thought there was considerable merit in it, while I did not agree in total with what they said. I say that, because it seems to me that you place the word "unduly" in subsection (3) in such a relationship with the other words that it is now directly effective in adding something to the word "prices" in paragraph (a). That limitation certainly is not in the jurisprudence, as I understand the law at the present time.

Mr. FULTON: Well, in the definition section, paragraph (*c*):

> To prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property,—

You are lessening competition unduly with respect to the sale of an article. Would that not have an effect on prices?

Mr. McILRAITH: My point is that in subsection (3) you are going a step further and you are applying the word "unduly" to "prices" as well. You must now lessen the prices unduly.

Mr. FULTON: No, lessen the competition unduly in respect of prices. It seems to me the one is virtually a reproduction of the other.

Mr. McILRAITH: I was not happy on that point and I am not sure that I am on further discussion now.

The CHAIRMAN: You are happy now?

Mr. McILRAITH: No, I do not know that I am. Subsection (3), in my view, is not satisfactory. Perhaps I could let it go at that.

Mr. BENIDICKSON: Mr. Chairman, you know how reluctant some of us are to sit in a meeting more than two hours, and I believe you could not sit if the opposition members were not with you at this stage, because you would not have a quorum. I wonder if it would not be possible—and I do not know how many others have anything further to discuss on this matter—to carry it on division, or otherwise, and, similarly, the other clause, and perhaps agree with some unanimity to try to conclude this particular sitting?

Mr. FULTON: Would it be your view we should rise as soon as we carry this one and the earlier one that was stood?

Mr. BENIDICKSON: If we could have an agreement on that.

Mr. MACDONNELL: I want to ask a question which, I am afraid, would be mainly a rhetorical question. The more we talk about section 32 the more I am convinced that it is going to be a lawyers' paradise. It is difficult, if things are not gone at directly by retaining the old wording; and I suggest it is difficult to question that the benefit of retaining the old wording is very great. Does there come a time when you pay a penalty for it? Is it possible in this case it might have been approached directly instead of indirectly?

Mr. FULTON: It was certainly considered, Mr. Macdonnell, and on balance we decided that it was questionable whether we were able to write an entirely new definition section that would not jettison the jurisprudence built up by the courts over the years in a multitude of cases.

Furthermore, we came to the conclusion, as a matter of policy, that we did not desire to weaken the per se rule which, if I understand it correctly, has been built up by the courts, in the application of the present definition section. And, for those two reasons, in this field of combinations, we came to the conclusion it was desirable to preserve the original definition.

Furthermore, I put to you a lawyer's argument—and it has been put to me by many of the lawyers,—that you should not go disturbing things which are already established, because then you really do create a field day for the lawyers. I remember what Joe Sedgwick said about the Criminal Code revision. He said if you contented yourself with reproducing the section you would not change it, but when you start tinkering around and changing a few words to words which you think might suit the purpose better, you may not think you have changed it, but you have.

I can only reiterate that we came to the conclusion, for the reasons I have given, that the preferable course was to preserve the jurisprudence by keeping the present definition, then to clarify the areas in which innocent activities could be carried on, and further clarify by subsection (3), what it is that the law is designed to prevent.

Mr. THOMAS: Mr. Chairman, there was one point I wanted to raise. The Toronto board of trade and the Canadian metal mining suggested the word "unduly" should again be repeated after the word "has", in the fifth line of page 7—if a conspiracy, combination, agreement or arrangement has unduly restricted, or is likely to restrict.

Mr. FULTON: We discussed that yesterday. This came up in connection with one of the earlier sections, and I pointed out that we had considered that, and felt that the restriction on activities which these words were designed to prevent, was an absolute one—that if you had a combination or conspiracy to restrict somebody else entering into a trade or business, that was, in itself, an offence, and you do not want to restrict the absolute nature of that prohibition by the use of the word "unduly", which would be quantitative, in effect, or qualitative, whereas with respect to the other matters—prices, quantity or quality of production, markets or customers, channels or methods of distribution,—the use of the word "unduly" was entirely appropriate and well established.

The CHAIRMAN: Does subsection (3) carry?

Mr. CRESTOHL: You are still on subsection (2).

I do not want to hold you up but, with respect to subsection (2), as far as I am concerned, I would prefer to see it carried on division, and I would like to go on record as being opposed to (g).

Mr. FULTON: May I ask you this question. Is that your main—I was going to say "only"; perhaps that is not a proper question—is that your main objection to this particular subsection?

Mr. CRESTOHL: Yes. I do not seem to be able to digest it, although I followed your explanation very carefully. Believe me, I do not seem to be able to accept it, without further clarification made—and I would like to have that made.

The CHAIRMAN: Shall subsection (2) carry?

Mr. CRESTOHL: On division.

The CHAIRMAN: Shall subsection (3) carry?

Some HON. MEMBERS: Carried.

Some HON. MEMBERS: On division.

Mr. DRYSDALE: I wonder if we could go back to the earlier one.

I think the feeling of the committee was that since section 33 is relatively innocuous, we might carry it and revert to 31—and I wondered if mens rea is an ingredient in this particular section—not 33A, just the straight 33. The only question I had was whether mens rea was an ingredient. I raised this question earlier at one of the discussions, but there was no response.

Mr. FULTON: I think the answer is that mens rea is always an ingredient of an offence of this nature. The question arises, I suppose, when you come to analyze what it is that he intended to do.

Mr. DRYSDALE: The reason I raised this, Mr. Minister, was the fact there has not been any interpretation of this section, and the combines act is partially criminal in nature, and partially civil. There has been one English case that has taken the attitude as to where the punishment, in essence, is civil, although it may be contained in a criminal act, it would be, in essence, civil, which I think might be the case here —that mens rea is not necessarily an ingredient, and I wondered if any consideration had been given to this. I tried to tie it in yesterday with the definition of merger, and to bring it in with this section. I do not know if there is any possible clarification.

Mr. FULTON: I think the answer to your question is that it is within the jurisdiction of parliament to enact and the federal government to enforce. Combines legislation arises under the criminal jurisdiction of the federal parliament, and whether it be in the Criminal Code, as such, or in the Combines Investigation Act exclusively, the jurisdiction under which we enact it and enforce it is the same. So, I think mens rea must always be an element of an offence under this statute.

Mr. DRYSDALE: I thought it might become a personal problem.

Mr. FULTON: The statute is civil in nature only in respect to what I might call incidental matters.

Mr. MORE: Mr. Chairman, could we consider the amendment to section 12?

Mr. DRYSDALE: Do you want to carry this one first?

Mr. MORTON: 33. Not 33A; just 33.

The CHAIRMAN: Is that agreeable to the committee? Shall section 33 carry?

Some Hon. MEMBERS: Agreed.

The CHAIRMAN: Then, we go back to the amendment.

Mr. DRYSDALE: I will move the amendment, if this is necessary, under section 31.

Mr. MORTON: I will second it.

The CHAIRMAN: It has been moved by Mr. Drysdale and seconded by Mr. Morton that the following subsections be added to section 31.

(2a) The attorney general or any person against whom an order of prohibition or dissolution is made may appeal against the order or a refusal to make an order or the quashing of an order

(a) from a superior court of criminal jurisdiction in the province to the court of appeal of the province, or

(b) from the court of appeal of the province or the Exchequer Court of Canada to the Supreme Court of Canada

as the case may be, upon any ground that involves a question of law or, if leave to appeal is granted by the court appealed to within twenty-one days after the judgment appealed from is pronounced or within such extended time as the court appealed to or a judge thereof for special reasons allows, on any ground that appears to that court to be a sufficient ground of appeal.

(2b) Where the court of appeal or the Supreme Court of Canada allows an appeal, it may quash any order made by the court appealed from, and may make any order that in its opinion the court appealed from could and should have made.

(2c) Subject to subsections (2a) and (2b), the provisions of part XVIII of the Criminal Code apply *mutatis mutandis* to appeals under this section.

Does the amendment carry?

Mr. CRESTOHL: Just a minute. Maybe we are moving a little bit too fast.

This amendment (a) speaks of appeals being made from a superior court of criminal jurisdiction. In the section, you do not speak of superior courts only; you speak of a criminal court, I think, and you may have a conviction which will not be by a superior court of criminal jurisdiction; you may want to appeal and, if so, you could not. Oh, I see; I beg your pardon.

Mr. FULTON: I think your point is taken care of.

Mr. CRESTOHL: Yes; I am sorry.

Motion agreed to.

Mr. FULTON: Would it be your wish that we go back to the clause on monopoly, where there was an amendment suggested yesterday. I might say we have had a look at it, and the department feels that it is adequate to accomplish the purpose. That is 1(f), which was stood.

Mr. MORTON: Everyone wanted that.

Mr. FULTON: There was no opposition to that amendment being inserted. I can read it. It is this:

That the semicolon at the end of line 32 on page 1 be deleted and the following be added:

", that a situation shall not be deemed a monopoly within the meaning of this paragraph by reason only of the exercise of any right or

enjoyment of any interest derived under the Patent Act, or any other act of the parliament of Canada.

The CHAIRMAN: That is clause 1, subclause (f). Does it carry as amended?

Mr. FULTON: I think you have to carry the amendment first. It was moved by Mr. More.

Mr. DRYSDALE: I would second it.

Mr. FULTON: It is seconded by Mr. Drysdale that the amendment be adopted.

The CHAIRMAN: Does the amendment carry?

Amendment agreed to.

The CHAIRMAN: Does paragraph (f) as amended carry?

Mr. FULTON: It may be safer to say: does clause (1) as amended carry?

The CHAIRMAN: Does clause (1) as amended carry?

Clause (1) as amended agreed to.

Mr. FULTON: Thank you very much, gentlemen.

Mr. CRESTOHL: Did someone say we were adjourning until 8 o'clock tonight?

The CHAIRMAN: No, we are adjourning until 8 o'clock on Thursday night.

EVIDENCE

THURSDAY, July 14, 1960.

The CHAIRMAN: Gentlemen, we have a quorum; would you come to order? We have finished section 33A.

Mr. MORTON: Carried.

Mr. HOWARD: Mr. Chairman, before 33A is carried, or other members of the committee get carried away with their desire to have it carried, it would appear to me this should have been the section under which you should have tackled this so-called problem resulting from loss leaders and, in discussing this with certain people around Ottawa, who are in business, it is the feeling that most of the problems of the retailer arise from price discrimination.

If you read (a), while it sounds good, there are a couple of words in it which pretty well undo all the good it seeks to accomplish.

> Everyone engaged in a business who
>
> (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles . . .

Now, this would be the retailers, for argument's sake.

> . . .from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is available to such competitors in respect of a sale of articles.

Perhaps, it should stop there and say: so far as it goes, what it means there is that if Mr. Fulton, for instance, has a business, and I am a supplier or manufacturer, and I sell him 1,000 articles, and I sell Mr. MacDonald 1,000 articles, I should sell them at the same price. This was not what it seeks to get at—that I shall not discriminate against one or the other; it says "of like quality and quantity", and it is the use of "quantity" in there that allows for price discrimination. This happens.

Mr. Regier put on record in the house, where some suppliers on the west coast had four or five different price lists—a, b, c, d and e, and that these differing ones were not based on quantity but on the relationship that that retailer may have had—the friendly relationship—with the manufacturer or the supplier, in the first place. It is the use of this end quantity that, I think, allows for this price discrimination.

When you shake your head, I do not know whether or not you are shaking it in negation of what I am saying.

Mr. FULTON: I will answer your question.

Mr. HOWARD: Yes, you will have an opportunity, I am sure.

However, this is what occurs, and it is under here that this price discrimination is allowed to take place. This is why a retailer lodges a complaint in regard to what he thinks is a loss leader. One retailer may buy a quantity at a certain invoice price. Another one may get them at a lower invoice price and sell them just above his invoice price which, in fact, is lower than the invoice price paid by the first person. The first person then calls it a loss leader because it is sold at less than the first person's invoice price

of that particular article when, in fact, it is not a loss leader; it is merely because of discriminatory pricing practices of the supplier in the first instance that allows it to happen.

We had Sunbeam Corporation here before us, and they said they make no discount, and sell one article at exactly the same price as they do 1,000 articles, to a supplier. However, they make special discounts, not in terms of a less price, but by giving free gifts of 1,000 frying pans, if they handle a certain quantity. This takes place in the form of free gifts of merchandise rather than the form of a separate price because of quantity purchased.

Mr. WOOLLIAMS: Have you any evidence to that effect.

Mr. HOWARD: I can dig it up for you.

The Sunbeam man was right in saying they sold at the same price. I have one of their price lists here. If I have not, it is upstairs. They are quite right in saying they have one price list for their commodities.

Here is a Sunbeam dealer price list of February 27, 1960, and they list a Rollmaster electric shaver in deluxe gift and travel case, weighing 20½ ounces. Then, there is a suggested dealer price—a fair retail value, and the dealer margin, and they do not set up different prices for quantity. In that regard, this is true. However, I have seen them make other arrangements with retailers.

Mr. MORE: Is that a complete price list which you have?

Mr. HOWARD: It is called a dealer's price list, effective across Canada, dated February 27, 1960, and it states that it supersedes all previous ones.

Mr. MORE: What is the price of a Sunbeam floor conditioner, or polisher, which I call it?

Mr. HOWARD: Well, they have shavers, hair clippers, baby bottle warmers, electric can openers, and so on, but I do not see any floor polishers.

Mr. MORE: No floor polishers or conditioners?

Mr. HOWARD: This may not be complete. I am only talking about one article.

But, on the surface, it is correct; they make no differentiation in price for quantity, but they make these other arrangements of gifts and, as I say, 1,000 frying pans, if a person will take a certain amount of commodities.

The CHAIRMAN: Mr. Howard, have you any evidence to that effect, or is this all hearsay? You are making a statement that they give gifts. What is the basis of your statement?

Mr. HOWARD: My basis, Mr. Chairman, is my own personal knowledge.

Mr. WOOLLIAMS: How do you base that personal knowledge?

Mr. HOWARD: It is personal knowledge that I have. If the committee desires, I can prove it.

Mr. MACDONNELL: Well, it is making this virtually untrue.

Mr. HOWARD: No. The gentleman from Sunbeam was not allowed to be cross-examined on the comments he had to make. If we had been allowed to cross-examine him, this information could have been obtained from him without any difficulty.

The CHAIRMAN: Now, that is not correct. I called Mr. Benidickson to order because he was asking for the financial statements of the Sunbeam Corporation, which I thought was unfair.

Mr. HOWARD: I do not know if you represent Sunbeam Corporation or not, Mr. Chairman.

The CHAIRMAN: And, that is unfair.

Mr. WOOLLIAMS: That is uncalled for.

Mr. HOWARD: If it is, so is the comment from the chair too, for that matter.

I am making these comments about this price discrimination question which exists, and if this government wants to tackle the problems which the small retailer is facing, they should have tackled it under this particular provision, the same, perhaps, as in the United States. Then, we could have dealt with that question and not allowed the manufacturer to practise price discrimination, thereby putting one retailer in a different position than another —not on the basis of like quality and quantity, but on the basis of a straight difference because of a relationship with him.

Mr. FULTON: Under the circumstances that you have outlined, and on the basis of what you say Mr. Regier said—that a supplier sold the same quantity of an article to different purchasers at different prices—the same quantities of the same article—and sold them so purchasers who were competitors of each other—I would say *prima facie,* and assuming of course that it was a practice, there is an offence. I am quite amazed, knowing the readiness of retailers who think there are offences to write us about them—and quite properly—I am amazed at their not getting in touch with the director or the minister. I am amazed that such a situation was not drawn to our attention, if as you said Mr. Regier knew of a case where the same quantity of the same article was sold to two competitors at different prices.

I say this because *prima facie*, there would be an offence under the section.

Mr. HOWARD: I stand corrected, if I said the same quantity.

Mr. FULTON: You certainly did.

Mr. HOWARD: If I did, I did it inadvertently. This is because of the use of the words "and quantity"—that is how they get around it. They make a slight difference in the quantity of sale, and set up discriminatory pricing not on the basis of quantity, but on the basis of a relationship between the manufacturer and the retailer, who adjusts the quantity so they can get out from under the provision of this act.

Mr. MORE: You spoke about them giving, along with the regular price on the article, free saucepans, or something of that nature. Is not that, indirectly, another advantage, and is not covered under this section? It says "directly or indirectly" and "other advantage".

Mr. FULTON: I am amazed, when you say you have personal knowledge of it, that it has not been brought to the attention of the director or myself. I would say that, *prima facie*—only until we know all the facts—such a circumstance would be an offence against the section. I can only urge, if you do have personal knowledge of these circumstances, that you bring it to our attention, with the details, which will enable us to make an inquiry.

Mr. HOWARD: The words "and quantity" is the loophole, and this is how they get around it.

Mr. FULTON: Could you give me a specific case where they got around this by giving free gifts of 1,000 frying pans? That is the illustration you gave.

Mr. More has drawn your attention to the words, which read:

> or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is available to such competitors. . . . .

I certainly would say that a free gift of 1,000 frying pans would be "other advantage." And, I say again, if you have this personal knowledge of this situation, I regret you have not drawn it previously to the attention of myself or the director.

Mr. HOWARD: The minister fails to understand or appreciate the value of the words "and quantity", and it is by using different quantities they get around the provisions of the act.

Mr. WOOLLIAMS: Mr. Howard seems to misunderstand the minister. He says if you have that evidence, bring it to the attention of the director or himself.

Mr. HOWARD: What value is it, because they are on different quantities, and they adjust the quantities to suit themselves—and that is what happened.

Mr. MACDONNELL: On the other hand, you introduced the question of these frying pans; they must have some part to play in it. I thought you introduced them as an indication of another advantage.

Let us leave the words "and quantity" aside, and deal in the question of the other advantage, in the shape of a frying pan.

Mr. HOWARD: Yes, which, connected with the end quantity, makes it outside of the provisions of this act. That is what I am getting at. There are a number of cases that go on like this. It is part of this complaint that articles are being disparaged, and sold at lower prices. For instance, Bulova Watch Company has a subsidiary called Trans-Canada Precision Instruments Limited. They make an identical watch to one of the Bulova watches; they call it by a different name, and it is sold under Trans-Canada Precision Instruments Limited at a vastly different price, although it is precisely the same watch.

Mr. FULTON: Yes.

Mr. HOWARD: What is done by jewellers is just another example of approaches of manufacturers to sell at lower prices exactly the same commodity or article that they sell under a different name to somebody else, and then complain about the price being undercut.

Mr. FULTON: But if the purchaser of the other named article was not offered the same quantity of those articles at the same price as competitors of his were offered, there would be an offence under the section, always assuming it is a practice.

Mr. HOWARD: It is true that this is a different subject matter, but I am talking about the disparaging of articles. It is another approach—the manufacturer complaining about his articles being sold for lower prices than he himself sets up, and a separate company would produce the same one and call it a different name.

Mr. MORE: I think in the case you mentioned, there is the national advertising which they do for Bulova.

I have a case here, and I want to bring this to the attention of the committee.

Here is a full page ad from the *Journal* of Wednesday, the thirteenth—and this is what I have been talking about. I quote:

> Now Sunbeam!
> Below wholesale!
> And Absell can prove it!

And, on another page of this ad there is a Sunbeam floor conditioner, which says:

> Retail, $51.75
> Absell cash price, $33.51

I took the time out to go down there. They had one on the floor. I looked it over, found a little scratch on it, and let on I was interested in buying it. I picked it up and, pointed to the scratch, and asked if he had another one of these. He said: this is the only one we have here; we will have more. I said: that is a pretty low price—below wholesale. "Yes", he said, "it is", and he mentioned some price of $35 and something wholesale. I said: you say you

can prove it; he said: that is the wholesale price. He did not show me any papers or any proof whatsoever. I left.

Now, there is an ad; is that a loss leader or not?

Now Sunbeam!
Below wholesale!
And Absell can prove it!

Mr. FULTON: It sounds like a come-on device.

Mr. MORE: Yes, and it is not in the interest of the consumer.

Mr. FULTON: You went into the store and found just one of these articles, and it was not in first-class shape. Is that correct?

Mr. MORE: I found a little scratch on it. I would not say that it was not in first class shape. But I had to have something on which to ask my question.

Mr. HOWARD: Is that not more properly covered under the misleading advertising section?

Mr. MORE: That is a loss leader. I have been told that you cannot define a loss leader except that it is under the invoice price.

Mr. FULTON: I think that the discussion of that point might more usefully come under the amendment of section 34.

Mr. MORE: Mr. Howard started off about loss leaders.

Mr. CRESTOHL: We have no information as to the quantity that the retailer originally purchased.

Mr. HOWARD: Is there anything else advertised in that add?

Mr. MORE: Yes, a frying pan at $15.99, right in the centre of the page in the same ad.

Mr. HOWARD: I gave my copy to the reporter.

Mr. FULTON: It says fry pan 11½ inches, $15.99; retail price, $25.95.

Mr. MORE: These things are going on all over, yet we are told here by witnesses that there is not much of it.

Mr. FULTON: In connection with section 33(A) it might be helpful if the director made a short statement on the intent and operation of this section, and why it is amended by inserting the words "or tendency" in paragraphs (b) and (c). Paragraphs (b) and (c) are directed against abuses by individual merchants and (a) against the possibility of abuse or discrimination by suppliers, where the manufacturer or the wholesaler is selling on different terms in relation to the same quantity or quality.

A study has been made by the branch under this section to see if any effective action could be taken, and that study indicated the necessity for an amendment to the section. So I would like Mr. MacDonald to explain the situation and the effect and purpose of the amendment.

Mr. FISHER: Might I ask first how this section has worked previously?

Mr. T. D. MACDONALD *(Director of Investigation and Research, Department of Justice)*: Should I deal with paragraph (a) as well as paragraphs (b) and (c)?

Mr. FULTON: I think so.

Mr. MACDONALD: This section has not seen a great many cases. We have not received a great many complaints, at least complaints of a specific character under (a).

Our interpretation of (a) is that if a manufacturer is selling to two trade customers who are in competition with each other, and if he offers to one of them a certain quantity of a certain article at a particular price, then the section imposes the obligation upon him to offer the same terms, that is the same quantity at the same price to each competing customer.

So that one of the essential ingredients under (a) is that the customers—the two customers—be in competition.

Now, if they are actually in competition, the manufacturer cannot, in my understanding of the section, get around the section by drawing up some kind of price structure which classifies them differently and results in a practice of offering one of them a better price for the same quality of an article than he offers another. If they are in competition, and if he is dealing with them, then they have to get the same terms, that is, the same price on the same quantity.

Mr. CRESTOHL: But if they are not in competition, but are, let us say, in different cities, what happens?

Mr. MACDONALD: If they are not in competition, then paragraph (a) would not apply.

Mr. FISHER: How do you define competition? By region, by locality, or by area?

Mr. CRESTOHL: Or by the proximity of the stores?

Mr. MACDONALD: Whether or not they are competitors has to be determined on the facts of each particular case where the question comes up.

Mr. FISHER: Do you think there is any factor in the result that there has not been much action taken under this particular section?

For example, in the grocery trade, let us assume all the people involved are dealing with wholesalers or distributors who are liable to them for credit.

Mr. MACDONALD: I am not sure that I follow your question.

Mr. FISHER: When you take a credit relationship—this has been put to me by one grocer, a friend of mine—that one of the difficulties in raising hell about deals that are going on is that you receive terms from people that are selling to you, and that most of the grocers—that is the independent variety—are always running with an overdraft at the bank to some extent, and also that with their debt they must pay so much off on it at regular times to the people who are selling to them. Could this be an important factor in the situation where you have not had much action under this section?

Mr. MACDONALD: I would not like to speculate about that. If what you are asking is whether, because of being indebted to suppliers, certain customers are deterred by fear of reprisals from coming to us with complaints that they otherwise would come with, I do not know about that.

Mr. FISHER: You do not want to speculate; but one of our difficulties as members is that we can only speculate from examples close to us, as Mr. More has been doing, and other members.

But you have no details in this particular field in relation to this section to give us a bit more background as to why this has not been used more?

Mr. MACDONALD: There is the report of the restrictive trade practices commission, on discriminatory practices in the grocery field, with which I am sure you are familiar.

Mr. FISHER: Yes.

Mr. FULTON: And might I add that the report was made as the result of a reference by you, Mr. MacDonald, and that a general inquiry was made under section 41, was it not?

Mr. MACDONALD: Under 42; that is correct. I might add that the material which I presented to the Commission, and which was in effect published as the Report, was gathered and prepared by Dr. Skeoch who appeared before the committee several days ago.

Mr. FULTON: And you made reference to the commission, and the commission carried on its study on the basis of the director's report.

Mr. MacDONALD: The report found that the principal area of discrimination in the grocery trade lay in the field of special discounts and allowances. That was where most of the price discrimination in the grocery trade took place. Might I go on to paragraphs (*b*) and (*c*)?

Mr. FISHER: I would like to ask more questions about paragraph (*a*)?

Mr. MITCHELL: I was going to ask the director if that survey or investigation that he referred to was made recently?

Mr. MacDONALD: Yes, very recently, within the last couple of years, in 1958.

Mr. MITCHELL: Then it is since the report published in 1954 or 1955, of the restrictive prices investigation?

Mr. MacDONALD: The loss leader report was published in 1955.

Mr. MITCHELL: I maintain that it is worse now than it was then.

Mr. FISHER: Are you suggesting that this section really covers something in which there is very little evidence to your knowledge that these things are happening?

Mr. MITCHELL: You may ask your questions of the director. I have no reason to answer them.

Mr. FISHER: Very well, I shall ask the director if he has made an investigation under this section and yet nothing much has developed under it—I mean prosecutions, or anything like that? Is that an indication that here is not much going on in this particular field as covered by this paragraph?

Mr. MacDONALD: I do not think that I should try to answer that. I do not think my opinion is any better than yours. I must say that we have not received a very large number of specific complaints under paragraph (*a*), and let it go at that.

Mr. CRESTOHL: Have you received any?

Mr. MacDONALD: Yes, we have received some.

Mr. CRESTOHL: Have you conducted any prosecution?

Mr. MacDONALD: There has not been a prosecution conducted by the department under this paragraph.

Mr. HOWARD: May I ask if Mr. MacDonald knows what the activity has been under the Robinson-Patman Act of the United States, which covers this same sort of ground in its price discrimination section—I think it is 3; may I ask if he knows what the activity has been in the United States under the anti-discrimination section, the present section?

Mr. MacDONALD: There has been quite a lot of activity in the United States under that section of the Clayton Act which is familiarly known as the Robinson-Patman Act.

Mr. HOWARD: Do you know why this might be so? Is their legislation different to ours?

Mr. MacDONALD: There is a difference between the two pieces of legislation, yes.

Mr. HOWARD: If our act clearly followed the wording of the Robinson-Patman Act, do you think we would perhaps be in a better position to pursue this problem here, or might there be more complaints arise?

Mr. MacDONALD: What is that?

Mr. HOWARD: Do you know whether there might be more complaints arise?

Mr. MacDONALD: I am inclined to think there would be more complaints.

Mr. MITCHELL: There are some states in the United States where retail price maintenance is practised, and is legal under their fair trade act, or law. Is that correct?

Mr. MACDONALD: Yes, the situation very briefly is this: that there is a provision in the federal anti-trust legislation of the United States which exempts certain products which are in competition with other products from any possible application of the federal anti-trust laws on account of resale price maintenance, if resale price maintenance is sanctioned by a state law.

Mr. MITCHELL: That applies in certain states, but not in all of them.

Mr. MACDONALD: As I remember, there were about three states, and the District of Columbia which have no fair trade law, or whatever they may call it from state to state; I can think of Vermont, Missouri, the District of Columbia.

Mr. MITCHELL: What about California.

Mr. MACDONALD: No, I do not think it is California, but there is one more. In addition to these exceptions I believe that the fair trade laws in several other states have been invalidated in whole or in part by actions brought in the state courts whereby the laws were declared unconstitutional, or to have certain other defects. It is my impression that actions took place of that kind in 15 or 16 states.

Mr. MITCHELL: In other words I am led to believe, and in fact I think I can state it as being correct, that these states that have that legislation say that a 25 cent article cannot be sold at less than 19 cents. I am taking that as an example. This prevents loss leadering, shall we say, in selling the 25 cent article, and in that same ratio up to larger selling prices.

Mr. MACDONALD: I thought that we were talking about legislation that permitted manufacturers or other suppliers to set and enforce resale prices. It seems to me that the kind of legislation that you are speaking about now is of a different character.

Mr. MITCHELL: I am referring to the fair trade law.

Mr. MACDONALD: I am not sure that the kind of legislation you have just mentioned is called "fair trade legislation", although it is probably a matter of terms.

Mr. FULTON: Perhaps I should just explain that the purpose of the amendment to this clause is found in paragraphs (*b*), and (*c*), actually. Those are the only changes we are making. We have inserted the words "or tendency", which were not there before, because under the review that was made, it became clear to us that before any offence could be established you must be in a position, as it were, of having a body to bring into court. You had in a sense, to be able to produce the bankrupt businessman to show that the effect of the unfair or discriminatory price policy alleged had had the result of driving him out of business. That is why I say you had virtually to be in the position of being able to bring the body into court; but it is not much use to a man if you have to wait until after he is dead before you take any action. That was the situation, because the only words were: having or designed to have the effect of substantially lessening competition or eliminating a competitor. We felt this imposed too great a burden and was not of sufficient assistance to people it was designed to assist, so we have inserted the words "or tendency" in the two paragraphs, (*b*) and (*c*). Now both have the words "having or designed to have the effect or tendency".

Mr. PICKERSGILL: That is not underlined.

Mr. FULTON: It now reads: "—having or designed to have the effect or tendency of substantially lessening competition—".

I beg your pardon, Mr. Pickersgill?

Mr. PICKERSGILL: It is not underlined.

Mr. FULTON: It is not underlined, but the paragraph is lined at the margin indicating that it has been re-numbered and amended. The explanatory note, Mr. Pickersgill, on the opposite page draws your attention specifically to the fact, and I read now:

> The proposed section 33A is section 412 of the Criminal Code, strengthened by the insertion of the words "or tendency" in paragraphs (*b*) and (*c*) of subsection (1) and amended in subsection (3) to include a reference to "wholesale" members of cooperative societies. The text of section 412 appears opposite page 11.

Mr. PICKERSGILL: Yes, I read that.

Mr. FULTON: I thought from your comment that you had indicated that you were not able to understand where the amendment was.

Mr. PICKERSGILL: No.

Mr. FULTON: Thank you.

Mr. PICKERSGILL: I thought it would have been a little clearer if it had been underlined.

Mr. HOWARD: Mr. Chairman, I am not sure whether Mr. MacDonald is now proceeding with (*a*), (*b*), and (*c*) with the explanation as to what occurs or not, but it seems we got into a discussion of (*b*) and (*c*) by way of the minister. I would like to ask a question or two here.

Mr. CRESTOHL: I thought we were still on (*a*).

Mr. HOWARD: Yes. Before I ask questions in regard to (*b*) and (*c*), in respect of (*a*) there was some evidence in regard to the Sunbeam company, and I would like to indicate to Mr. Woolliams and others who wondered about my personal knowledge of sales at different prices, that I have here—I will not read all the words of it—a pamphlet which is entitled "get acquainted with the all new Sunbeam automatic electric can opener! Model 64S with stand $15 model 64 without stand $14". It explains what it is, and what the suggested dealer price is in each case, and then it says: "when you buy three Sunbeam automatic electric can openers model 64 and/or 64S at your regular price you are automatically entitled to buy one Sunbeam can opener, model 64 or 64S for only $10." This is contrary to what the Sunbeam representative told us in respect to the fact that they always sell their articles at exactly the same price.

Mr. MITCHELL: The same price to all purchasers.

Mr. WOOLLIAMS: It is the same price.

Mr. HOWARD: The complaint is that the gentleman from the Sunbeam corporation told us that if they sold one item, or a number, they sold them at the same price.

Mr. WOOLLIAMS: As I understood the evidence, they said they sold the article at the same price to everyone, not at the same price.

Mr. HOWARD: No, he said they were sold at the same price regardless of quantity. He said they did not have quantity discounts. I merely wanted to put this on the record indicating that the gentleman is incorrect in that they do have quantity discounts. This is not a discrimination, it is available to all.

Mr. MITCHELL: It is available to all individuals who can purchase three.

Mr. MORE: But his evidence was not to that effect.

Mr. HOWARD: I just wanted to point out that there was a conflict there. I would submit that my reference to the thousand frying pans is equally accurate.

Mr. DRYSDALE: Is that pamphlet put out by the Sunbeam house?

Mr. MITCHELL: It is printed under their heading.

Mr. DRYSDALE: I know it is printed under their heading.

Mr. HOWARD: The address shown is the Sunbeam Corporation (Canada) Limited, 220 Islington avenue south, Toronto 18, Ontario. That is the address you are directed to mail this to.

Mr. MITCHELL: Could I ask another question referring to "or tendency". What would be the procedure of a competitor who felt that he was being discriminated against by unfair competition of pricing, or whatever it may be? What would be his procedure in respect of the words "or tendency" to prove to the director or the commission that he was in this unfair position? How would he go about it?

Mr. MACDONALD: He would come forward, Mr. Mitchell, with a complaint which indicated the prices that he complained about and the price that he was paying for the article, and the price that he could sell it for, having regard to his buying price. If that information appeared to raise a cause for an inquiry—if there appeared to be substance for his complaint—then we would find out from the manufacturer or supplier, and the complainant, and the competitor of whom he complained, the full information as to the buying and selling prices.

Mr. MITCHELL: Then would he have to go further with the commissioner by showing his financial statement, and how it was affecting his business to the point that he may become bankrupt at some time? That is what I am driving at.

The CHAIRMAN: He would not have to go that far.

Mr. MITCHELL: I am referring to the words that were added in here, and I am trying to relate them to the position a man will find himself in if he complains under this act. I would like to know how far this man must go in order to establish a legitimate complaint and thereby receive some protection from the commission.

Mr. MACDONALD: It is difficult to generalize without a particular set of facts, Mr. Mitchell.

Mr. FULTON: I wonder if I might try to answer that at least from the point of view of what we were trying to accomplish by this. You will notice here that paragraphs (b) and (c), which are the ones where the words "or tendency" appear, refer to persons who engage in a policy of selling articles in any area at prices lower than those exacted by him elsewhere, or in any area at prices unreasonably low. Then both paragraphs go on to say, where it appears that this policy has or is designed to have the effect or tendency of eliminating a competitor, then there is an offence. So he would have to establish under (c) that the prices of his competitor are unreasonably low. As Mr. MacDonald says, that would presumably have some relation to his ordinary buying prices. Then he would have to go on from that and say that this policy—not just an occasional act because, you see, we do not eliminate the opportunity for taking care of surplus stock by clearance sales, and other legitimate practices of that sort—this policy of selling articles at prices unreasonably low, or lower in one area than in another area, has or is designed to have the effect or tendency of eliminating the competitor.

What we tried to get at is the situation where somebody uses the power of his purse; he may be a big person in business and he can afford to take a loss over a lengthy period, and it becomes apparent from the consistency with which he indulges in this policy, that his objective is to take a loss in order to eliminate competitors. We felt that it was not good policy for us to have to wait until the competitors were eliminated before we could go to the commission, or the court in the light of what has happened and prove that the competitors had been put out of business. What we wanted

to do is to be able to protect these competitors by saying that if such a practice is persisted in which is going to have the tendency of eliminating competitors, there is an offence, because we are concerned about situations which will have the effect of putting the whole of a business in the hands ultimately of the one big powerful merchant. That is the reason why we put in the words "or tendency".

However, as I say, the complaining person will have to establish the fact that the prices are unreasonably low or lower in one area than another. Secondly he will have to prove that this was a persistent policy, and thirdly that if it is persisted in or allowed to continue it will have the tendency of driving competitors out of business.

Mr. MITCHELL: Mr. Chairman, in that case the supplier or the wholesaler would not be the one whom the onus was upon if a man deliberately continued to have loss leaders. The onus would not be on the supplier or the manufacturer.

Mr. FULTON: No. In this case the onus, I think, rests upon the competitor whose competitive position is endangered, to make a complaint to the director in respect of the policy of the other person being unreasonable.

Mr. MITCHELL: Yes, that is what I was getting at. You get the complaints from the small merchants?

Mr. FULTON: Yes.

Mr. MITCHELL: Or perhaps the complaints come from the investigators of the commission. Is the commission policing this situation?

Mr. FULTON: Mr. MacDonald detailed the ways in which an inquiry can be instituted the other day. There are three main ways. Many inquiries have been started as a result of an alertness, shall I say, of the director and his staff in spotting possible contraventions of the act. An inquiry may also be started as a result of private complaints, or by certain facts being drawn to the director's attention by individuals. It is quite open for a merchant to write to the director bringing to his attention facts which, in the view of the merchant, indicate that a contravention is being committed.

Mr. MITCHELL: That is what I am getting at, exactly. If this particular procedure becomes common knowledge then it would be much easier for the commission to carry out his protection. I am afraid that the person who is being harmed does not possess sufficient knowledge in respect to the way of going about it. If this procedure could be brought to the small merchant's attention I feel the commission will receive all sorts of complaints.

Mr. FULTON: That may be so, Mr. Mitchell, but I know the director has received a number of letters from individual complainants about situations from which they believe themselves to be suffering, but as a result of experience in regard to the section it was felt offences could rarely be proved under the section. So we have strenghtened the section by the inclusion of the words "or tendency".

We rather expect that as a result of the discussions in regard to this bill both here and in the House of Commons the provisions of the act will become fairly widely known to the persons affected, so that they will know, or at least have a general knowledge, of the changes.

Mr. DRYSDALE: Mr. Fulton, there is also another alternative, and that is that any individual who is injured, can lay an information and proceed by way of a private prosecution.

Mr. FULTON: That is correct.

Mr. DRYSDALE: I was involved in one such private prosecution under the provisions of the Criminal Code.

Mr. FISHER: You were involved?

Mr. FULTON: As counsel, I take it.

Mr. DRYSDALE: Yes, as counsel.

Mr. FISHER: Oh!

Mr. FULTON: You could always lay an information, and proceed by private prosecution.

Mr. DRYSDALE: That could account for Mr. MacDonald not being aware of this section being used because, I presume, he would be more inclined to be aware of those sections which were drawn to his attention. There is nothing to prevent an individual laying an information, and proceeding himself by way of private prosecution.

Mr. HOWARD: I hope Mr. Drysdale does not set his legal fees by conspiracy or arrangement with other members of the board.

Mr. FULTON: It might interest you to know that in British Columbia the law society sets a scale of maximum charges, not minimum, as is the case in some other provinces.

Mr. MITCHELL: It is nice to have a tariff to go by.

Mr. HOWARD: Mr. Chairman, I wonder, perhaps, if we could have an explanation on this.

It appeared to me there should be some attempt at consistency in wording the effect of various activities such as this, and I wonder if it would not be more desirable, in view of the fact that the proposed definition of merger, which you already dealt with, makes reference to—and I quote:

> whereby competition is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others.

I wondered whether it might not have been more advantageous to include a wording similar to that in (*b*) and (*c*)—"having designed" or something of that nature, "whereby competition is or is likely to be lessened to the detriment or against the interest of the public, or by eliminating a competitor in such part of Canada" and, again, the same wording in so far as (*c*) is concerned.

It is my thought that the use of the same words all the way through would allow for an easier interpretation by the courts.

Mr. FULTON: It is my understanding that this particular paragraph, which is not new but merely amended in the respects I have outlined, was directed not only to the interest of the public in the maintenance of competition generally; it was also directed toward protection of individual competitors, because I direct your attention particularly to subparagraphs (*b*) and (*c*), both of which refer to eliminating a competitor—that is, an individual competitor. As I understand it, parliament felt, as well as those who designed this section, that where you are trying to protect an individual, you can hardly qualify it by saying "to the detriment of the public", because who then is going to apply that test, and decide whether the elimination of this competitor is to the detriment of the public, or whether the elimination of that one is not? That would be a difficult test to expect the Combines branch or any court to apply.

Mr. HOWARD: Perhaps I was trying to sort of reword this orally, which is a difficult thing to do. However, it would be my thought that we could have the reference, "whereby competition is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others." Then, we can follow up, "or eliminating a competitior in such part of Canada". In that way, you would get a uniformity of wording, and also protect the individual.

Mr. FULTON: Well, I do not say there is nothing at all to your point, but I must rest my case on the fact that this is directed against specific practices of price discrimination "designed or having a tendency of lessening competition or eliminating a competitor," and I must say that I do not see why you have to

qualify those words in that section directed against those practices by another word such as "unduly" or "to the detriment of the public". I am prepared to say that any such practice is undue and to the detriment of the public.

Mr. HOWARD: But, here is the point; there has been no litigation under this.

Mr. DRYSDALE: There is.

Mr. HOWARD: Well, I am sorry; I understood otherwise.

Mr. PICKERSGILL: It was only under (*a*) we were told there was none.

Mr. HOWARD: But there has been under (*b*).

Mr. FULTON: There was a reference to the commission under (*b*) or (*c*).

Mr. MACDONALD: I said "we" had had no prosecutions. At least, that is what I intended to say.

Mr. FISHER: But, you would not know about private prosecutions.

Mr. MACDONALD: I am aware, Mr. Fisher, that there was a prosecution in the province of British Columbia some time ago under section 412 of the Criminal Code. It is my impression that, as far as yielding any valuable jurisprudence is concerned, it was inconclusive.

Mr. HOWARD: Perhaps my initial understanding applies so far as the effect is concerned, because the courts would then be able to determine what the words "substantially lessening" mean, and how they would apply it, whereas there is a great amount of confusion in so far as what "competition to the detriment or interest of the public" means, as well as the word "unduly"—and I understand they are somewhat synonymous, as far as the courts are concerned.

Not being of a legal mind, perhaps it is a help for me to misunderstand things this way, but it would appear to me making uniform the words "to the detriment or against the interest of the public", would allow the courts a better opportunity to determine just exactly what this section means.

Mr. WOOLLIAMS: It might be a help in your understanding, as well.

Mr. HOWARD: Perhaps Mr. Drysdale could arrange to be counsel in another case.

Mr. DRYSDALE: While it might be to the interest of the public in the form of low competition, it might not be to the person who is being driven out of business, if you use that wording.

Mr. HOWARD: How about eliminating "a competitor in such part of Canada"?

Mr. FULTON: As I have said before, it seems to me you have a section directed against specific discriminatory practices. We already have the word "unreasonable" in the one subsection, and lower in one area than in another in the other subsection, and I do not see that you would strengthen the section by the insertion of the further qualifying words which Mr. Howard suggests—and I do not know if it is proper for me to ask Mr. Howard to suggest how it would be strengthened. However, I do not see how it would strengthen the section at all. I think it might be a qualification that would rather weaken the section.

The CHAIRMAN: Does 33A carry?

Mr. PICKERSGILL: No.

Mr. Chairman, I wanted to draw attention to the language used in both (*b*) and (*c*) which, as far as the words with which I am going to deal, is exactly the same. I express some surprise at how you derive any meaning from these words, when you take out the alternatives. Presumably, all these clauses with "ors" in them can be read without the "ors", and you would then read this—"designed to have the tendency"—and I would like to know

how, in the English language, you would "design to have a tendency". It really does seem absurd.

Mr. FISHER: Semantically, it is nonsense.

Mr. PICKERSGILL: Surely, the "designed to have", or the "tendency" is—

Mr. FULTON: If I may interrupt, I do not think so at all. Let us read them as alternatives.

> engages in a policy of selling articles at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor.

Now, the other alternative.

> a policy of selling articles at prices unreasonably low, designed to have the effect or tendency—

Mr. PICKERSGILL: "Designed to have a tendency"—

Mr. FULTON: Well, let me finish. In the one case, you have to prove a present effect—having the effect or tendency; in the other case you have to prove a possible effect, or a design; a design to take place, perhaps, some time in the future. They are clear alternatives.

Mr. PICKERSGILL: They were always clear alternatives, but you have to leave both "ors" out, and be able to read either part of it separately, and when you read it—"designed to have the tendency"—

Mr. FULTON: I have never heard that as a rule of grammatical construction at all.

Mr. PICKERSGILL: Well, it is sheer nonsense. You should take a course in rhetoric.

Mr. FULTON: I have taken a course in grammar.

Mr. BELL (*Saint John-Albert*): Legislation would be better for Mr. Pickersgill.

Mr. MCILRAITH: Although I cannot qualify as a rhetoric, and I have taken no course in grammar, so I cannot qualify in that, it seems to me these words "or tendency" as used here do not cover the situation which the minister has explained he is seeking to cover, and it is not a happy choice of a phrase to achieve the purpose he has intended to achieve.

Mr. FULTON: Well, I do not claim to be perfect, nor do I claim our draftsmen are infallible; I can only say that the combines staff, the draftsmen and so on, as well as the director and myself worked on it for some time, and we could not produce a better set of words.

Mr. PICKERSGILL: The Criminal Code is better.

Mr. FULTON: The director reported to me that the sections, as presently worded, were not effective enough to protect those whom we felt we should protect, and it was for that reason we felt we should introduce some amendment.

Mr. PICKERSGILL: Well, they might have a "tendency" to correct.

Mr. MCILRAITH: I think you made it clear what we are seeking to do to the existing legislation. I follow that; but what I am concerned with is the interpretation, and the confusion that will arise in the courts on seeking to interpret the words "or tendency" as used here. That is what bothers me. I wonder if I might ask if there was any other alternative phrase that you specifically considered in substitution of the words "or tendency". Did you examine, for instance, the use of the words "may have", instead of "having tendency"?

Mr. FULTON: Yes. My recollection, confirmed by the director, is that we discussed a number of alternatives, certainly including the words "likelihood", "possibility" and "probability", and we felt we could not come up with a better

expression than the word "tendency". And, with due respect to Mr. Pickersgill, it seems to be quite permissible to substitute one alternative for the word "effect". The only alternative we have made is the alternative of "tendency". So, the only new alternative created is that between "effect" and "tendency".

Mr. PICKERSGILL: If I may make a suggestion, it is this, and this stems out of Mr. McIlraith's comment. Surely, if you cut out "or tendency" where you have it, and put in "tendency to eliminate a competitor" you would be saying what you really wanted to say.

Mr. FULTON: Well, that is said, I think—the "tendency of substantially lessening".

Mr. PICKERSGILL: Or, "tending to eliminate". "The effect of substantially lessening competition or tending to eliminate a competitor". Surely, that is really what you are trying to say.

Mr. FULTON: I think it is another way of saying it.

Mr. FISHER: Or, "having a tendency".

Mr. FULTON: We say "having or designed to have the effect".

Mr. FISHER: Well, I taught grammar, Mr. Fulton, and I quite agree with the criticism made; if you want it to be grammatically sound, you have to have your verbal force right next to your noun.

Mr. FULTON: Mr. Fisher, before I answer, may I say I defer to you as a teacher of grammar, but do not necessarily subscribe to your teaching.

Mr. FISHER: And I do not subscribe to your argument on this. To me, the other one is sound.

Mr. FULTON: We may not be able to arrive *ad idem*, but I will read it as it previously stood. It read:

> Having or designed to have the effect of substantially lessening competition or eliminating a competitor.

The words were perfectly clear then. It meant having the effect of substantially lessening, or designed to have the effect of substantially lessening. Now, the only addition is that of the words "or tendency" so, it is now "having the tendency", as an alternative to "having the effect", and "designed to have the tendency", as an alternative to "designed to have the effect". I believe the courts will be able to appreciate that there are two sets of alternatives. This is quite clear.

Mr. PICKERSGILL: There are more than two sets, because there are two "ors", which makes four sets of alternatives, but the whole point is if you have two sets of alternatives, you have four propositions.

You are saying "a tendency of substantially lessening competition" which is another bit of nonsense. What you really want to make "tendency" modify is "eliminating a competitor", and the way to do it is put it in before "eliminating".

Mr. FULTON: That is not the only thing—

Mr. PICKERSGILL: Well, perhaps you could at least let me complete my sentence—"having or designed to have the effect of substantially lessening competition". "Having the effect of substantially lessening competition" is one thing; "designed to have that effect" is having a tendency, in that direction, obviously, so that covers that. Then, take the other side, "having or designed to have the effect of eliminating a competitor". Now, "having or designed to have the effect of tending to eliminate a competitor", you do not have to have him dead, as the minister said in his apt illustration—just the tendency to eliminate a competitor. That is what you are concerned with.

Mr. FULTON: We do not want to have the word "tendency" only modify the "eliminating of a competitor"; we want to have it apply to the "lessening of competition", as well.

Mr. FISHER: From a grammatical point of view, Mr. Minister, what does "tendency" modify?

Mr. FULTON: "Tendency" modifies the phrase, certainly, of "substantially lessening competition or eliminating a competitor", just as "effect" also applies to the phrase "of substantially lessening competition or eliminating a competitor".

Mr. FISHER: What is its verbal connection?

Mr. FULTON: Would you explain your question to me?

Mr. FISHER: What verb or adverb is it controlled by?

Mr. FULTON: Both "having" and "designed to have".

Mr. FISHER: Well, this is what does not make sense to me, and this is where I agree with Mr. Pickersgill. I do not see how you can have something that is designed to have a tendency. To me, "designed" states there is an "effect," and there will be a "tendency" in the "effect".

Mr. FULTON: You see, you have the other quite common device; you would admit, I think, that you could have a tendency—and, you see, the words are there, "having—" as I read them, and as the draftsmen designed them. One of the offences is to indulge in a policy "having the tendency of substantially lessening competition."

Mr. FISHER: To me, you have two parallel constructions here.

Mr. FULTON: I think, perhaps, the best thing to suggest—since we are obviously getting into grammatical argument here and I am not sure that reason is going to prevail—is to ask those who think our drafting is faulty—and I make this suggestion seriously—to give us their suggestions.

Mr. PICKERSGILL: Mr. Chairman, I was going to suggest that we let this section stand, and go on to where we can discuss something substantial and, perhaps, leave it to the draftsmen, having heard these suggestions.

Mr. FULTON: We will be glad to do that.

Mr. PICKERSGILL: I suggest we do that.

Mr. FULTON: But by way of an aside with regard to the question of discussing something substantial, may I point out that one of the offences is "substantially lessening competition".

Mr. PICKERSGILL: Well, something substantially more instead of something substantially less.

Mr. FISHER: Put in the one phrase; have either "the effect" or, "the tendency".

Mr. FULTON: We will look at it. If anyone would care to have a shot at writing something out, in this manner, we would be grateful.

The CHAIRMAN: Well, will we let (*a*), (*b*), and (*c*), stand?

Mr. CRESTOHL: Just before you do, Mr. Chairman, I would like the minister to explain to us, since this is an illegal trade practice, just who it is we are after, and who can be found guilty of this offence?

Mr. PICKERSGILL: Nobody, apparently.

Mr. CRESTOHL: Exactly; because of the "effect or tendency of substantially lessening competition or eliminating a competitor". There are so many protective clauses, I would like to know just who it is that can be convicted. Surely it is not everyone who engages in business; you would not convict the sales clerk, or the shipper who ships out the merchandise; they would not be found guilty of this offence; or are they presumed to know all the details of pricing, costing, and all the surrounding details that are used here, so that you could prosecute those people?

I am speaking now purely as a lawyer examining it, and I must say that I do not know whom you can prosecute.

Mr. FULTON: I think you have stopped just short of the words which would make it clear. May I read those four lines:

> 33a (1) Everyone engaged in a business who (*a*) is a party or privy to or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantages granted—

So, in the first place the person has to be the one from whom the articles are purchased, and it seems to me that that implies in itself that a clerk in the store is not the person against whom the section would operate. It would be the owner of the store where such a policy is followed, because the articles are not purchased from the clerk personally.

Mr. CRESTOHL: Assuming that someone owns a store and is absent from the country. He engages a manager to run that store for him, but the proprietor himself may be resident in Florida. Surely no purchases are made from him; the purchases are made from his staff. But would you prosecute the manager or the owner?

Mr. FULTON: The owner.

Mr. CRESTOHL: I do not know if this is criminal law you are talking about.

Mr. DRYSDALE: Prosecute them both and be on the safe side.

Mr. FULTON: They might join both, but the courts would show sense in applying the penalty.

Mr. DRYSDALE: That is the trouble with these hypothetical illustrations.

Mr. FISHER: In connection with paragraph (*b*) I would like to ask Mr. MacDonald if the problem of transportation costs has ever come up as a factor in any defence under that section?

As an illustration, I live in an area which is distant from most manufacturing centres. There is very little manufacturing done in my area, but it is a distribution centre.

Quite often we meet with complaints from consumers about the effect on goods they are buying, and their having to pay so much higher prices, only to be told it is because of transportation costs which make the difference between what the purchaser in Toronto, for example, from Kraft, would pay, and the purchaser in Port Arthur.

I wondered if transportation costs have ever been offered as a defence in this particular case.

Mr. MACDONALD: I do not remember it ever having been so offered.

Mr. BELL (*Saint John-Albert*): You would make a good criminal. That is very ingenious.

Mr. WOOLLIAMS: Does someone have to be a criminal just because he is ingenious?

The CHAIRMAN: Will you please state your question?

Mr. FISHER: I wanted to know if there had been any interpretation in the courts in regard to this question of pricing lower than those exacted by someone elsewhere in Canada.

Mr. FULTON: We have not had a case in the courts in which a specific inquiry was made. When the Edmonton Cigarette case came before the commission the latter, while finding that the prices complained about were not, in the circumstances, unreasonably low, also pointed to the fact that, up to the time of the hearing, no competitor had actually been eliminated, thus indicating that they would have regarded the case as not proven for this reason also.

Mr. FISHER: The aim of the section is to do something about distributors or sellers who are in the Canadian market—I mean in the national market;

but how is the purchaser, the retailer purchasing, let us say, in Port Arthur to know how to be able to make a case from evidence in a distant point? I wonder what the commission has done in order to keep an eye on these differences across the country.

Here you have a system which must be based in so far as action in court is concerned upon regional comparisons. I would like to know what means are adopted by the director in his branch to handle this?

Mr. MACDONALD: I do not remember the point being brought to our attention, Mr. Fisher.

Mr. FISHER: Does that mean that this whole matter—this whole subsection —has been ineffective or inoperative?

Mr. DRYSDALE: It just has not been used, that is all.

Mr. MACDONALD: It means, as I said, that we have not had complaints under it, that I can remember, which raised the point you are making.

Mr. FISHER: This comes back to what Mr. Mitchell raised in his question, and it seems to me that this section demands a great deal of specialized knowledge, and almost a bit of research on the part of individual purchasers in one area of the country. I wondered if any consideration had been given by the minister or by the director to making comparative information available?

Mr. PICKERSGILL: I have a question which could be answered at the same time. If I understood the minister correctly, he said that the purpose of this section was not to protect the broad general public, but to protect competitors. Surely the purpose of a section like this, under the Criminal Code, is not to have somebody looking all over the country for potential criminals, but rather to enable an aggrieved person to make a complaint; and not to put the taxpayers to the expense of supervising the whole country for potential complainants. That would seem to me to be a very paternalistic way to approach this whole problem.

Mr. FULTON: I think you have put in one form the sort of answer I would have given to Mr. Fisher. The public is interested in the preservation of competition and, as a result, in protecting individuals from unfair discriminatory practices being used against them. But I think we must take the position indicated by Mr. Pickersgill that we cannot undertake, without a staff which is swollen out of all proportion, to take the initiative in constantly canvassing individuals for such information. Consequently we have to rely here largely on receiving complaints from individuals who believe themselves aggrieved. And if we get such a complaint, then we could look into the situation in the various areas of Canada with reference to that specific complaint.

Mr. MITCHELL: I would like to ask this question: suppose for argument's sake that a price war should break out in a certain area, let us say Montreal; and there is a large mail order house, or a large retail organization—you know who I am driving at without mentioning the name—and it may want to meet that price war in Montreal. But they have stores in Toronto, Winnipeg, and all across the country. Could they be prosecuted for meeting these price-war prices in Montreal and for not selling the same articles in Winnipeg for the same price.

Mr. FULTON: No, I do not think so, not unless it could be shown that they lowered their prices in Montreal for the purpose of driving somebody out of business or of eliminating competition.

Mr. MITCHELL: That is not the way I read this section.

Mr. FULTON: If somebody only lowered his prices to meet competition, surely you do not suggest he could be found guilty of having engaged in the policy of selling at prices unreasonably low and designed to have the effect of lessening competition.

Mr. MITCHELL: He wishes to meet competition in Montreal, and he is selling some articles at what he feels is a proper retail price at one of these other retail outlets—not in the same city. Therefore he would be lessening competition in that way, but he would not be liable to prosecution?

Mr. FULTON: Well, as I say, if the reason for which he did that in the Montreal area was to meet competition there, then I do not see how he could be convicted under this section even though he sold at prices lower in Montreal than he sold in Toronto.

Mr. MITCHELL: Is that the way you read this paragraph?

Mr. FULTON: I would think that the person who might be liable under the section would be the person who started the price war. If he started and pursued a policy of selling at prices unreasonably low, having or designed to have the effect or tendency of eliminating a competitor; he might then be liable under the section; but the person who lowered his prices for the purpose of meeting the competition would not be liable.

Mr. HOWARD: What if the first individual who lowered his prices, with the design to have the effect of eliminating the competitor, then found that his competitor lowered his prices even more and drove the first person out of business? What would happen there?

Mr. FULTON: I think we are getting into situations where I would prefer not to express an opinion. I would have to leave that to the courts and judges to decide on the basis of the facts.

Mr. MITCHELL: Similar conditions have arisen, and in this day of great competition they will probably arise again.

Mr. FULTON: Well, Mr. Mitchell, I think also that I could properly say that some discretion is left, not only to the courts, but to the administration. If they found a case where somebody, with deliberate designs to drive others out of business, had lowered his prices and followed that as a policy, and he found that someone else had lowered his prices to meet competition and thus created the effect on the first person of driving him out of business, we would hardly prosecute the second person who lowered his prices.

Mr. CRESTOHL: I would like to know whether there have been any prosecutions against anyone who did start a price war.

Mr. FULTON: Having regard to the specific form of that question the answer would be no. There have been a number of inquiries into complaints with regard to price wars, but in almost every case, at least since I have assumed office, the director has reported that he found no evidence to warrant a statement of evidence being placed before the commission—no evidence of contravention which would warrant such a statement.

Mr. CRESTHOL: I am using "price war" merely as a formula in an attempt to embrace anyone who started to undersell within the ambit of section 412 of the Criminal Code.

Mr. FULTON: Mr. Drysdale points out to me, as he has done before, that there was a private prosecution in British Columbia. There was an inquiry into, not what I would call a price war, but a number of complaints in Edmonton with regard to the alleged unreasonably low selling price of certain commodities. That was the case where the commission pointed out the evidence had not disclosed that somebody had actually been eliminated.

Mr. CRESTOHL: There would be an offence if there was a tendency to eliminate?

Mr. FULTON: Yes, but it still has to be established that the prices were unreasonably low and were having or were designed to have that effect or tendency.

Mr. CRESTOHL: You would not require evidence that someone was actually put out of business?

Mr. FULTON: That I believe would not now be actually necessary.

Mr. MACDONNELL: Mr. Chairman, Mr. Howard raised a question earlier in the evening with regard to the words "and quantity" on page seven, line 21. I do not think that has been answered. It seems to me to be a substantial point, and it seems to me it might be an escape hatch. It seems to me we were driven away from this point.

Mr. FULTON: I do not think I was driven away. I think I was led away by the subsequent questions. I did not intend to evade any question or answer.

Mr. MACDONNELL: Well, led or driven; let us just say moved.

Mr. FULTON: I think the committee moved away from this point.

I think the answer to the point is that this legislation is not based on the policy of cost justification as is the American legislation. In other words, this legislation recognizes that a competitor or purchaser who buys, say in ten thousand unit lots, may thereby be entitled to receive a larger discount than the purchaser who buys in one thousand unit lots.

Mr. MACDONNELL: It seems to me *prima facie*, if the quality was very different; but if you have the quality and quantity being the same, it seems to me to be *prima facie* that you have got an escape.

Mr. FULTON: As I say, this legislation does recognize that purchasers of a particular quantity may receive a discount above that of the purchaser of small quantities. That is quite correct. It is my information and understanding that the philosophy upon which that is based, is that producers who realize that they are going to have orders for say ten thousand unit lots can design their production schedules so that they can produce more cheaply than if they are designed to produce small unit lots. In fact, therefore, there is a saving in costs of production of larger quantities which it is proper to see reflected in the discount offered to the purchaser of the larger quantities. That is the philosophy behind the legislation. Our legislation does not require a direct mathematical relationship between the discount and the saving. If there were that relationship required then that would be what is called the cost justification principle, and that principle is not present in this legislation, and never has been.

Mr. HOWARD: Mr. Chairman, the philosophy is, as I think the minister said, that the principle is designed to reflect the fact that you can produce one hundred thousand units at a lesser cost per unit than ten thousand units.

Mr. FULTON: Yes.

Mr. HOWARD: This, therefore, should be reflected in the selling price of these ten thousand units and the one thousand per unit basis, but the cost justification principle, which is embodied in United States law, is not contained here, although the United States law covers this precisely. Perhaps, if I could read from the anti-trust law amendment, which I got from the library, it would show this. This is public law number 592 of the 74th congress, an act to amend. This deals with price discrimination, but the key point is this:

> Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery

This is the key point around which I think this should rotate, and this should be embodied in our legislation to insure that they can sell at different prices, or discriminate in the selling price if the selling price reflects the lower distribution cost, or lower manufacturing cost, and so on.

I think perhaps to put it formally before you, Mr. Chairman, I would move that in section 33, subsection 1 (*a*) at line 21 we should delete the words

"and quantity" and substitute therefor, "except that nothing herein contained shall prevent differentials which make only due allowances for differences in cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such articles are sold or delivered to such purchasers."

You will note that I have altered this from the U.S. law, which makes reference to "commodities", whereas our law makes reference to "articles". This alteration is made to conform with the references in our act.

Mr. FULTON: Mr. Howard, may we study your amendment and bring you an answer, unless the committee wishes to deal with this at this moment.

Mr. PICKERSGILL: I would like to make an observation about this.

Mr. FULTON: I would just like to say this; there were only two groups that recommended that this principle be inserted in our legislation out of all those persons who appeared before this committee. There were only two out of all those who made representations who wanted this inserted. Mr. MacDonald says that he can only remember two who made this recommendation. In our view it would not be sound in principle to introduce this formula into the legislation without at least further consideration. I am not certain actually that Mr. Howard's amendment would even accomplish what he himself would like to have accomplished, but that is my immediate comment.

Mr. PICKERSGILL: I would like to express my own view in this regard. What Mr. Howard seems to be seeking to do, if I understand him correctly, is to say that it is immoral not to make a profit. That is not my view.

Mr. HOWARD: Do not be silly.

Mr. PICKERSGILL: If you take due account of the cost of manufacture and you make a profit then you say it is not immoral. This is a new doctrine for the CCF, but it is very interesting.

Mr. FISHER: When it comes to new doctrines, my friend from Bonavista-Twillingate should be the last one to mention it.

The CHAIRMAN: These last few remarks are out of order.

Mr. HOWARD: They are not only out of order, but those made by Mr. Pickersgill are completely asinine and silly.

The CHAIRMAN: That is fine, but I am afraid they are out of order.

Mr. HOWARD: Perhaps they reflect his personality.

Mr. PICKERSGILL: Are you suggesting, Mr. Chairman, that what I said was out of order, because if you are making a ruling to that effect I intend to appeal your ruling. I understood when we passed the bill of rights through second reading the other day, we provided for freedom of speech even in committees.

The CHAIRMAN: The remarks that I referred to as being out of order were the remarks having reference to CCF policy.

Mr. PICKERSGILL: Is it not possible to talk about that?

The CHAIRMAN: I think we are not now dealing with CCF policy.

Mr. DRYSDALE: I would like to discuss this bill, if I am not out of order.

Mr. PICKERSGILL: I think I have the floor. If the chairman wants to reconsider this judgment of his and save me appealing it, I will be very happy to leave it that way.

Mr. WOOLLIAMS: Where do you go to appeal it?

Mr. PICKERSGILL: I do not know. We will have to get the rules and find out.

Mr. MORE: I object to this whole discussion. We are sitting long hours these days, and this talk across the floor is completely out of order. I think the meeting should be kept in order.

Mr. FULTON: May I suggest, Mr. Chairman, in respect of this amendment, that I would not want to turn it down out of hand, but I do not think I could accept it without at least a great deal of further study and consideration. I know the point that Mr. Howard has in mind in making this suggestion, but could the point involved therein be left to stand, and I will report back at the next meeting?

Mr. HOWARD: Gladly, gladly.

The CHAIRMAN: Is that satisfactory to the committee?

Mr. MORE: Mr. Chairman, is the amendment in respect of paragraph (*a*)?

Mr. FULTON: Yes.

Mr. MORE: The amendment has regard to the words "and quantity"?

Mr. FULTON: That is right.

Mr. FISHER: May I ask a question in regard to paragraph (*c*)? I missed a number of meetings for various reasons and I wondered if there have been any discussion in regard to the meaning of "unreasonably low". I would like to have the views of Mr. Fulton in that regard.

Mr. FULTON: I do not think there have been any discussions in that regard, Mr. Chairman, at least not while I have been here.

As I appreciate the reason for the inclusion of those words, it was a safeguard against action being taken against persons who sell at lower prices, but who do so because of their buying price or efficiency or in the course of legitimate sales. There are occasions when merchants have to have clearance sales. They have to clear old lines off their shelves, and so on, and therefore, the price which is low is not unreasonably low if it is an instance in the course of a genuine sale. But if it is a policy of selling at low prices, which is followed constantly and has certain designs or tendencies with respect to eliminating competition, then those prices could be looked on as unreasonably low.

Mr. FISHER: Yes, that is fine.

Mr. FULTON: I am told that the words have been there since 1936. That is my understanding of the reason for their being inserted.

Mr. FISHER: How many prosecutions have there been under this section, or is this a particularly used part?

Mr. FULTON: We have had none. The director recalls no prosecutions in this regard since he became director.

Mr. FISHER: So that in regard to some of the things included in these three paragraphs, this has been a part of the act which has been used very rarely?

Mr. FULTON: It has been used very rarely. We came to the conclusion that one of the reasons why paragraphs (*b*) and (*c*), were not effective, was the reason that I outlined before; that one virtually had to produce a corpse or a body of a merchant who had been driven out of business before it could be effective, and that is why the words "or tendency" were put in.

Mr. FISHER: These hardly seem to be major changes. Do you feel that the insertion of that phrase will enable the section to be more workable?

Mr. FULTON: May I ask the director to answer that?

Mr. MACDONALD: There were a number of inquiries where it was felt that the evidence indicated prices that might very well be argued to be unreasonably low, but where it was impossible to establish a direct nexus between the use of those prices by a particular competitor and the effects complained about the words "or tendency" should help overcome this difficulty.

Mr. MITCHELL: Mr. Chairman, could I ask the director a question? In the wording "engages in a policy", what would be your understanding if this did not relate to one article? We will say the individual started to sell blankets

at a terrifically low price and stuck with blankets, then you would say that was a policy; but if the individual jumped to a different article each week, or each day, would you consider that also a policy, even though it was a different article?

Mr. MACDONALD: I would consider that a court might readily take the view that it was a policy although it was not restricted to continuous use of the one article.

Mr. MITCHELL: Yes.

The CHAIRMAN: Paragraph (*a*) is to be left standing. Can we carry paragraphs (*b*) and (*c*)?

Mr. FISHER: In so far as this question of semantics, (c) would still be open because you have this same problem.

Mr. PICKERSGILL: Which (*b*) and (*c*) are we talking about?

The CHAIRMAN: We are dealing with section 33A (1) (*b*) and (*c*). Perhaps we should deal with (*b*) first.

Mr. DRYSDALE: Agreed to.

Mr. PICKERSGILL: I thought those were the items we are standing over. They were the only two I thought any problem arose over, and I refer to the small letters (*b*) and (*c*).

Mr. DRYSDALE: Mr. Howard moved an amendment to (*a*).

Mr. PICKERSGILL: A previous suggestion was made by me, which I thought was accepted. I thought we were going to stand all three paragraphs over and look at the suggestions for amendments instead of drafting them in here.

Mr. FULTON: Then 31A (1) (*a*) would stand, is that your request?

Mr. PICKERSGILL: Yes.

Mr. WOOLLIAMS: Just before we leave this, and I do not want to start the discussion again, but in regard to the words "quality", and "quantity", you might take into account the situation where you had ninety thousand dozen and called that quantity. What do you mean by quantity? If you had another one dozen or another one, what would that be?

Mr. FULTON: Well, we will consider that.

Mr. MORE: Mr. Chairman, from my own knowledge—I should not say that because it is not—I have been told that the T. Eaton Company have a policy that when they advertise a group of, say, lawn chairs—which is a particular incident I know of—at a sale price, they must have a certain quantity of those available, and 50 per cent of that group will be of the quality named in the price. If they show up to so much, then 50 per cent of that group will be at the top price that was in the ad. That is the policy, I understand. I happen to have had an experience, where there was some niggling around on the deal by the floor managers, and I was there when it came through. There was no fooling about.

Mr. FULTON: We will consider it, Mr. Woolliams, and will give you a more considered answer, if you like. But I think the only kind of answer likely to come up to your question is that both the administration and the courts would take a sensible view of what is meant by the words "like quality and quantity".

Mr. FISHER: Are there any variants to the punishment, other than two years?

Mr. FULTON: A fine, if it is under that section of the Criminal Code.

Mr. FISHER: That is the maximum?

Mr. FULTON: Yes.

Mr. DRYSDALE: And/or a fine.

Mr. FISHER: Two years and/or a fine?

Mr. FULTON: Yes.

Mr. FISHER: But no imprisonment has ever taken place; no fines have ever been levied?

Mr. FULTON: Not to my knowledge, under this section.

Mr. DRYSDALE: There have been no cases.

Mr. FULTON: There was the one case in Vancouver that has been referred to; but the prosecution was not successful.

Mr. DRYSDALE: The defence was very successful!

Mr. FISHER: With regard to imprisonment under this legislation, has anyone ever been imprisoned under that part of the Combines Investigation Act?

Mr. FULTON: The director says, not to his recollection.

Mr. BELL (*Saint John-Albert*): Have there been prosecutions in the States? I would say, just by way of interest, that there were quite a few prominent industrialists put in jail in the States, and some suicides as a result.

Mr. FULTON: It is in the discretion of the court, however; the penalty is in the discretion of the court.

Mr. FISHER: Including the amount of the fine? What would be the highest fine that could be levied?

Mr. FULTON: There is now no limit on the fine that could be levied.

The CHAIRMAN: Does (2) carry?

Agreed.

The CHAIRMAN: Does (3) carry?

Mr. FISHER: I would just like an explanation of this a little bit more than is given here.

Mr. FULTON: The amendment here is the inclusion of the words "or wholesale" in line 43.

Mr. PICKERSGILL: Otherwise it is exactly the same as it is in the Criminal Code?

Mr. FULTON: That is correct. We had a representation from the cooperative union of Canada, that without these words it might be that their larger association of cooperatives which carried on wholesaling, or practices similar to wholesaling, might be caught—which was not the intention.

Mr. FISHER: This is not a new development; these cooperative wholesale associations have existed for a long time. This is just something you put in to cover a possible eventuality that has not come up before, but might come up?

Mr. FULTON: That is correct, Mr. Fisher.

The CHAIRMAN: Does (3) carry?

Agreed.

The CHAIRMAN: 33B.

Mr. FISHER: I would like some explanation, especially of the last sentence of the explanation in the text.

Mr. FULTON: What was your question, Mr. Fisher?

Mr. FISHER: I would like a fuller explanation, especially of this last sentence of the text on the opposite page:

> The purpose of section 33B is to prevent such discrimination and, at the same time, discourage promotional allowances by providing—

This "discourage promotional allowances" is the part I would like explained.

Mr. FULTON: You may recall, Mr. Fisher, that the Stewart commission on price spreads of food products, in one section of its report pointed out that in their view one of the causes of the spread between the prices which producers

received for their products and the prices consumers had to pay when they were purchased from stores, was that there were wasteful forms of activity going into those products between the time they left the producer and the time they reached the consumer.

One of these wasteful forms of activity was by way of promotional allowance. A promotional allowance, as I understand it, is an allowance which is demanded by a distributor, or a retailer; generally speaking, although not exclusively, a large type of retailer—it is an allowance which he demands from the supplier to him of those goods, and in return for which he says: "I will promote the sale of your goods". In other words, he says, "It is to your advantage to have your goods handled by me, because I can handle them in large quantity. I will advertise them extensively; I will arrange special displays on my shelves, and so on. Thus, your goods will receive a consumer acceptance and a widespread sale, which will be in your interest".

The finding of the Stewart commission was that although as a result of this allowance the merchant selling the goods was able to buy them at a lower price, that lower price was not passed on to the consumer, because it was taken up in the promotional activities carried on by the merchant in return for the allowance that he got. Their finding was that this kind of activity did not benefit consumers, and their specific recommendation—if I recall it correctly—was to the effect that it would be desirable if competition were to be restored to price competition, rather than taking the form, as it is increasingly taking the form, of competition by way of advertising represented by a promotional allowance.

They said that if competing merchants would compete with each other by offering goods at the lowest price at which they could properly offer them, then the consumer would benefit and the public would benefit; but no one really benefits from competition when they only compete with each other by the amount they spend in promoting the goods. So the Stewart commission said that in their view it would be desirable to discourage promotional allowances.

There was another report, which is also referred to in the explanatory note. It was a report of the restrictive trade practices commission concerning discriminatory pricing practices in the grocery trade. That report also indicated that promotional allowances by manufacturers were a source of discrimination between different types of trade customers.

Mr. FISHER: But a *bona fide* promotional allowance is not what you are getting at; it is the kind of promotional allowance which is really not what it seems; is that it?

Mr. FULTON: May I put it this way: we find that promotional allowance does create discrimination. It tends to be granted to the big retailer, the chain type of concern, because they can go to a supplier or manufacturer and say, "I can handle a great volume of your goods, and I will do it, if you will give me this allowance". In some cases there is the suggestion that this kind of allowance is almost forced from the manufacturer, or the supplier; whereas the small merchant, who obviously cannot handle them in volume, cannot go and force an allowance from the supplier. Therefore, the big merchant is able to buy at a lower price than the small merchant.

Mr. FISHER: You mean, the allowance is on volume?

Mr. FULTON: The pressure to persuade the supplier to grant the allowance is on volume, yes.

Mr. FISHER: But if a promotional allowance was on advertising, for a specific advertising purpose, what is the position then?

Mr. FULTON: I should perhaps amend my answer by saying that the pressure is by virtue of the buying power.

Mr. MACDONNELL: Is that not what you allow in 33A?

Mr. FULTON: No, that is a price discount; 33A is a price discount—which, after all, does, it is arguable, benefit the consumer, because this price discount is not given in return for any promotional or other activity. It is given only in return for the volume of buying, and in principle that can, and should be, passed on to the consumer. But an allowance given in return for promoting the sale by way of advertising, display, et cetera, is not passed on to the consumer, because the allowance is supposed to be taken up in the promotional activities engaged in. So when you are considering the benefit to the consumer, it is arguable—and, I believe, demonstrable—that quantity price discounts are passed on, in general, to the consumer; whereas promotional allowances—which are, in effect, another form of discount—are not passed on to the consumer.

Mr. FISHER: There is a second step here, though, is there not? If the promotional allowance is successful—that is, if it is used for advertising, leading to greater volume, then the consumer, in the second step, could have the advantage of cheaper prices?

Mr. FULTON: That might be the case; but it seems to me that if we are going to have this kind of thing—and it is arguable whether the manufacturer should do his own advertising: that is, perhaps, getting into theory—the greater objection is that you still have discrimination. The small man does not get this type of allowance at all, or to the same degree and therefore it results in discrimination and in worsening the competition of the smaller retailer as against that of the larger one.

Mr. MACDONNELL: And you think you have evidence that that, in fact, does happen?

Mr. FULTON: We think we have. The restrictive trade practices commission report indicated that it was a source of discrimination; the Stewart commission report indicated that it was undesirable from the point of view of the consumers.

Mr. PICKERSGILL: I wonder if the director could tell us how he proposes—this is a new piece of legislation, this particular section—to go about enforcing this section; because it is one thing to make laws, and it is another thing to enforce them, as we have seen from this long discussion we have had on article 412 of the Criminal Code, under which there has not yet been a successful prosecution.

Mr. FULTON: Just before the director replies, may I amend the effect of my general discussion, to this extent: I may have created the impression that these promotional allowances are never passed on. If I created that impression, I was going too far. I think there are cases where an allowance given as a promotional allowance may be passed on in the form of a price reduction. But that is not the general case; and, as I say, where that is the case, you have the other feature, or discrimination as between purchasers.

Mr. PICKERSGILL: I wonder if the director could answer my question before we go on with another matter.

Mr. MACDONALD: On 33B we would depend upon complaints from the trade.

Mr. PICKERSGILL: Yes, you would depend upon complaints from the trade; but what do you do about their complaints?

Mr. MACDONALD: Supposing we get a complaint from a particular merchant, and he says, "Here, I cannot give you all the facts, because I cannot get all the facts relating to the conditions under which my competitor buys; but here is what I believe to be persuasive information to show you that I am not getting proportionately what he is".

If that information were persuasive, even though it did not disclose all the facts, we would go to the competitor and the manufacturer, and say to the manufacturer, "Please give us a complete picture over a relevant period of your sales to 'A', and your sales to 'B'; and your promotional allowances to 'A', and your promotional allowances to 'B' ". And that would give the story.

Mr. PICKERSGILL: And you are satisfied that this is quite enforceable legislation—or would be? It is not legislation now; it is not in force yet.

Mr. MACDONALD: Well, I do not think that anybody should be asked to predict the result of a particular section, Mr. Pickersgill; but if this section were given to me to enforce, I see no reason why I could not make it effective.

Mr. FISHER: It is now 10:00 o'clock and I thought we were going to adjourn at 10:00.

Mr. MORE: Before you adjourn, may I ask if consideration has been given to this clause in respect to the representations of the Toronto board of trade? Did you see any validity in their arguments?

Mr. FULTON: We considered it very carefully, but we have not been able to convince ourselves that there is sufficient reason for not passing the section. May I put it this way: we are not able, in our view, to regulate promotional allowances, in the sense of detailed regulation and supervision of how they may be granted. We cannot step in and regulate trade and industry in that way, because we do not have that power under the federal jurisdiction. All we can do is to provide that they must be uniform in the sense of being non-discriminating.

That is the course we have adopted, that they must be proportional. Now we are told this will create difficulties for business in maintaining promotional allowances, and perhaps they cannot be continued. If that is the case, then, as a matter of policy, this will give effect to one of the recommendations of the Stewart commission. We cannot do it by regulating them as the Stewart commission recommended. But if it discourages them, it will have the same effect. If it does not, at least it will make them non-discriminatory.

Our view is based on those two reports I refer to, that it would not be at all disadvantageous to the Canadian economy.

Mr. PICKERSGILL: Might I ask a supplementary question? Would the minister describe this as temperance legislation rather than prohibition?

Mr. FULTON: It is legislation against discrimination.

The CHAIRMAN: It was agreed to adjourn at 10:30. The minister will be busy all tomorrow on the Columbia basin matter.

Mr. FULTON: Except tomorrow night.

The CHAIRMAN: Would it be agreeable to the committee to meet at 9:30 on Monday morning?

Mr. FISHER: I thought it was decided that our meetings should be on Tuesday, Thursday and Friday.

The CHAIRMAN: I was trying to work in a meeting, to substitute Monday for Friday, when we normally would have had a meeting.

Mr. PICKERSGILL: Why are you not having a meeting on Friday?

The CHAIRMAN: I just explained that the minister is busy on the Columbia negotiations.

Mr. PICKERSGILL: I am afraid that I did not hear you.

Mr. FULTON: We have set our meeting at 9:30 tomorrow morning for the Columbia negotiations.

Mr. FISHER: We have had four meetings this week, so I think we should turn back to three meetings.

Mr. CRESTOHL: Next Tuesday morning would be all right.

Mr. DRYSDALE: I think we met a week ago Monday.

The CHAIRMAN: Yes, we met on Monday.

Mr. PICKERSGILL: The trouble with Monday meetings is that a few conscientious people turn up at 9:30, but for part of the time we are waiting for a quorum.

The CHAIRMAN: I do not think we had that trouble last Monday here.

Mr. BELL (*Saint John-Albert*): I would like to mention that while we may have been busy today in other activities we only have sat two hours tonight, so it is not fair to call it a full day, is it? If you are going to make it a three-day-a-week matter, we have not overdone things this week.

Mr. FISHER: No, we have just had four meetings.

Mr. DRYSDALE: What about Monday afternoon at 3:00 o'clock?

Mr. PICKERSGILL: If we could get from the house leader a firm commitment about what would be taken up in the house, instead of this weathervane attitude, it would make it a lot easier.

Mr. DRYSDALE: I move we meet at 9:30 on Monday morning. Do I have a seconder?

Mr. BELL (*Saint John-Albert*): I second the motion.

Motion agreed to.

Mr. MACDONNELL: I have some other work I want to do too.

Mr. FISHER: I can promise you that although we do not know what is coming up in the house, we will try to be here if we can.

Mr. FULTON: The house is not meeting until 11:00 o'clock on Monday.

Mr. FISHER: I assume that the 9:30 meeting will set up an afternoon meeting?

Mr. DRYSDALE: That is what I had in mind.

Mr. PICKERSGILL: I do not think that these mental reservations count. We will settle that later.

Mr. DRYSDALE: We will be meeting on Monday morning and we can decide it then. I move we adjourn.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

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STANDING COMMITTEE

ON

BANKING AND COMMERCE

Chairman: C. A. CATHERS, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 13

Respecting

Bill C-58—An Act to amend the Combines Investigation Act and the Criminal Code

MONDAY, JULY 18, 1960

INCLUDING EIGHTH REPORT TO THE HOUSE

WITNESSES:

Honourable E. Davie Fulton, Minister of Justice; and Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act).

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23566-3—1

STANDING COMMITTEE

ON

BANKING AND COMMERCE

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Vice-Chairman: E. Morissette, Esq., M.P.

and Messrs.

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Allmark
Asselin
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Rynard
Skoreyko
Slogan
Smith (*Winnipeg North*)
Southam
Stewart
Stinson
Tardif
Taylor
Thomas
Woolliams

Antoine Chassé,
Clerk of the Committee.

REPORT TO THE HOUSE

TUESDAY, July 19, 1960

The Standing Committee on Banking and Commerce has the honour to present its

EIGHTH REPORT

Your Committee has considered Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code, and has agreed to report it with the following amendments:

Clause 1

In subclause (2), delete the semicolon at the end of line 32, page 1 of the Bill, and add the following:

", but a situation shall not be deemed a monopoly within the meaning of this paragraph by reason only of the exercise of any right or enjoyment of any interest derived under the *Patent Act*, or any other Act of the Parliament of Canada;"

Clause 12

In subclause (1), immediately following line 33, page 5 of the Bill, add the following subsections to subsection (2) of proposed Section 31:

"(2*a*) The Attorney General or any person against whom an order of prohibition or dissolution is made may appeal against the order or a refusal to make an order or the quashing of an order

(*a*) from a superior court of criminal jurisdiction in the province to the court of appeal of the province, or

(*b*) from the court of appeal of the province of the Exchequer Court of Canada to the Supreme Court of Canada

as the case may be, upon any ground that involves a question of law or, if leave to appeal is granted by the court appealed to within twenty-one days after the judgment appealed from is pronounced or within such extended time as the court appealed to or a judge thereof for special reasons allows, on any ground that appears to that court to be a sufficient ground of appeal.

(2*b*) Where the court of appeal or the Supreme Court of Canada allows an appeal, it may quash any order made by the court appealed from, and may make any order that in its opinion the court appealed from could and should have made.

(2*c*) Subject to subsections (2*a*) and (2*b*), the provisions of part XVIII of the *Criminal Code* apply *mutatis mutandis* to appeals under this section."

Clause 13

In proposed Section 33A, page 7 of the Bill, delete lines 22 to 31, inclusive, and substitute the following:

"(*b*) engages in a policy of selling articles in any area of Canada at prices lower than those exacted by him elsewhere in Canada,

23566-3—1½

having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; or

(c) engages in a policy of selling articles at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect,"

Clause 14

(1) On page 9 of the Bill, add the word "or" immediately after the semicolon at the end of line 8; and

(2) On page 9 of the Bill, the semicolon and the word "or" at the end of line 12 to be replaced by a period; and

(3) Strike out lines 13 to 15 inclusive, on page 9 of the Bill.

A copy of the Committee's Minutes of Proceedings and Evidence, respecting Bill C-58, is appended.

Respectfully submitted,

C. A. CATHERS,
Chairman.

MINUTES OF PROCEEDINGS

MONDAY, July 18, 1960.
(32)

The Standing Committee on Banking and Commerce met at 9.40 a.m. this day. The Chairman, Mr. C. A. Cathers, presided.

Members present: Messrs. Bell (*Saint John-Albert*), Benidickson, Cathers, Drysdale, Macdonnell (*Greenwood*), Martin (*Essex East*), More, Morton, Pascoe, Skoreyko, Southam, Stewart, Tardif, Thomas—14.

In attendance: From the Department of Justice: Honourable E. Davie Fulton, Minister; Mr. T. D. MacDonald, Director of Investigation and Research (Combines Investigation Act); and Mr. Marc Lalonde, Special Assistant to the Minister.

The following letters were referred to by the Chairman:

(1) A letter from Barnett and Politic, Toronto, respecting evidence submitted to the Committee by certain witnesses.
(2) A letter from Professor Brewis, Carleton University, requesting that certain corrections be made in the Committee's Evidence No. 8.

Agreed,—That the above mentioned letters be taken, as read, into the record.

The Committee resumed detailed consideration of Bill C-58, An Act to amend the Combines Investigation Act and the Criminal Code, the Minister and the Director answering questions thereon.

On Clause 13:

Proposed new sections 33B and 33C were adopted *on division.*

On Clause 14:

On motion of Mr. Drysdale, seconded by Mr. More,

Resolved: That Clause 14, be amended by inserting the word "or" immediately after the semicolon at the end of line 8, page 9 of the Bill; that the semicolon and the word "or" be replaced by a period at the end of line 12, and that lines thirteen to fifteen inclusive, page 9, be deleted. The Clause as amended was adopted *on division.*

Clause 15 was allowed to stand.

Clauses 16, 17, 18, 19, 20, 21, 22, 23 were adopted *on division.*

The Committee reverted to Clause 13.

Discussion continuing on Clause 13, the Committee adjourned at 10.30 a.m. until 3.00 p.m. on this day.

AFTERNOON SITTING

The Standing Committee on Banking and Commerce resumed at 3.10 o'clock p.m. this day, the Chairman, Mr. C. A. Cathers, presiding.

Members present: Messrs. Aiken, Bell (*Saint John-Albert*), Benidickson, Caron, Cathers, Drysdale, Horner (*Acadia*), Howard, Jones, Macdonnell (*Greenwood*), More, Morton, Pascoe, Pickersgill, Southam, Tardif, Thomas, Woolliams—18.

In attendance: Same as at morning sitting.

The Committee resumed detailed consideration of Bill C-58, the Minister and the Director answering questions thereon.

Mr. Tardif, on a question of privilege stated that his attendance had not been properly recorded in the Committee's Minutes of Proceedings.

The Committee turned to further consideration of Clause 15.

On Clause 15:

Mr. Pickersgill moved, seconded by Mr. Tardif,

That Clause 15 be amended by inserting "(1)" after "35.", and adding the following subsection:

"(2) In determining whether any offence under Section 32 or 33 has been or is being committed, the court shall consider the best utilization of Canadian resources to meet the requirements of the export trade and the development of markets outside Canada."

Following discussion, the said amendment was negatived on the following division: Yeas, 3; Nays, 10.

The Clause was adopted.

The Committee reverted to Clause 13.

On Clause 13:

Mr. Howard's proposed amendment to Clause 13, presented on July 14, reads as follows:

That subsection (1)(*a*) of proposed Section 33A be amended by striking out the words "and quantity" in line 21, page 7 of the Bill, and substituting therefor the following:

"except that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such articles are sold or delivered to such purchaser"

The said amendment was negatived on the following division: Yeas, 1; Nays, 10.

Paragraph (*a*) of subsection (1) of proposed Section 33A was adopted *on division.*

Mr. Drysdale moved, seconded by Mr. Morton,

That paragraphs (*b*) and (*c*) of Subsection (1) of proposed Section 33A be deleted and the following substituted therefor:

"(*b*) engages in a policy of selling articles in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; or

(*c*) engages in a policy of selling articles at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect,"

The amendment was adopted.

Proposed Section 33A was adopted as amended.

Clause 13 was adopted as amended *on division.*

The Preamble, the Title, and the Bill as amended, were adopted *on division.*

The Chairman was instructed to report the Bill, with amendments, to the House.

At 5.00 p.m. the Committee adjourned to the call of the Chair.

E. W. Innes,
Acting Clerk of the Committee.

EVIDENCE

MONDAY, July 18, 1960.

The CHAIRMAN: Gentlemen we have a quorum.

I have two pieces of correspondence here. One is from Barnett and Politi, wholesale tobacco people in Toronto. It objects to Rosenbluth's statement about robbers, and so on. The letter reads as follows:

Dear Sirs:

The enclosed newspaper clipping has prompted me to write, in complete disagreement with statements of professors H. D. English and G. Rosenbluth.

To accept the advice and suggestions of these two worthy gentlemen, would be to brand those in business as nothing more than criminals, burglars or drunks, rather than flesh and blood human beings, the same as professors, farmers, doctors, bankers etc. One can almost sense an inference that small business is entirely responsible for the high cost of living and everything else that ails our economy, in much the same way that Hitler blamed everything on those who happened to be Jewish, possibly because the Jews were a minority group with no proper organization to refute the false accusations with which he charged them.

Not too long ago, university professors and lecturers received sizable pay increases. I do not recall that the public of Canada was asked for opinions on this matter. Had it been, I am sure an overwhelming majority would have preferred a decrease rather than an increase, which could not help but raise costs in education, thereby depriving many the opportunity of a university education, as well as increasing taxes, which many already feel are too high. Had such a thing happened, a "great injustice" could have been done to many deserving individuals. In the same way, a "great injustice" has already been done to many thousands of small businessmen and the members of their staff. I do honestly believe that Mr. Fulton has made a determined effort to help small business in a fair and legitimate way and only where rank injustices have been allowed to flourish has he attempted to make changes.

A suggestion is made that we should adopt laws similar to the U.S.A. A quick fact finding survey would show that there is a gradual but definite return to price maintenance in the U.S.A. under such laws as "fair trade" etc., the obvious reasons being that undue hardship was brought on many thousands of small businessmen without nearly the real savings to the remaining public that was expected.

In conclusion: I am sure that more than 80 per cent of small business in Canada favours the amendments suggested by Mr. Fulton—surely with those odds, we are entitled to consideration based on truth, which is all we are asking.

Very truly yours,
A. R. Politi.

Urge New Angle For Gov't Study of Retail Trade

OTTAWA—(CP)—Two university professors told the Commons banking committee that the Government should attack retail trade problems from a new angle.

Professors H. D. English of Ottawa's Carleton University and Gideon Rosenbluth of Queen's University, were witnesses before the committee in its study of the Government's amendments to the Combines Investigation Act, modifying, the law banning resale price maintenance.

"These amendments," said Professor English, "seem to be entirely the result of the advice received from the business community and its legal representatives."

"To accept the advice of trade associations on how the Combines Investigation Act should be amended is a little like asking burglars to amend the law on theft or basing liquor control legislation on the advice of alcoholics," said Professor Rosenbluth.

SIMILAR TO U.S.

Canada should adopt a law similar to that of the U.S. which permits manufacturers to offer special discounts to retail outlets which place large orders, when the increased volume of production and distribution results in real cost savings, he said.

Manufacturers should not be permitted to discriminate in their prices to retail outlets on any other grounds, he said.

Present law in Canada bans discrimination between purchasers of similar quantities of goods, but can be avoided for the large chain and department stores placing large orders.

MAKING EXCEPTIONS

Professor English said that in making new exceptions to the resale price maintenance ban in the Combines Act, the Government is opening the way to more argument in court over details that do not touch on the meat of the law.

"Mere definition of terms, exchange of information on credit practice, and the other sorts of activity listed in the proposed section have seldom if ever been an important consideration in a conviction," he said.

"But to put in a specific section listing allowable co-operation of this kind is to invite prolonged courtroom debate over features of the law that have no relation to its main purpose, but which may be used to frustrate this purpose."

The bill permits a manufacturer to withdraw his product from a store's shelves, if he feels the store doesn't offer reasonable servicing facilities.

"Whether the consumer wants a low priced product without services or a higher priced product is surely not the business of the manufacturer," Professor English said.

"In particular, the idea that the manufacturer should be permitted to determine 'the level of servicing that purchasers might reasonably expect' is an intrusion upon their freedom," he added.

Mr. MARTIN (*Essex East*): Where does he come from, Kamloops?

The CHAIRMAN: I said from the fair city of Toronto.

Mr. TARDIF: How does he arrive at the percentage, I wonder?

The CHAIRMAN: We have a letter from Professor Brewis who, you will remember, was here with Professor English. He asks for a couple of corrections in the record.

His letter is as follows:

Dear Mr. Cathers:

I noted in the minute of proceedings and evidence number 8, on page 500, that the reporter has made one or two unfortunate errors in describing what I said in my testimony. You will recall perhaps that I mentioned that the sums involved in the legal failures in retail and wholesale trade amounted, in 1958, to some 23 millions. Total investment in the economy in that year was of the order of 8 billions. I made the point that in comparison with total investments this failure rate was trivial. The reporter has described it as "terrific", which makes nonsense of the statement. The second point: where he refers to 367 failures he missed the point that this figure referred to failures in the construction industry. That same year, 1958, there were 356 failures in total manufacturing, and 882 in retail and wholesale trade. The statement as it stands in the proceedings and evidence is just nonsense.

I don't suppose it is possible to insert any corrections at this stage, but I should like you to make a note of them at least for your own purposes.

Yours sincerely,

T. N. Brewis,
Associate Professor of Economics.

Mr. MARTIN (*Essex East*): Are they corrections of substance that we should be told about?

The CHAIRMAN: Yes, they are. It was just that "terrific" was the word used instead of "trivial".

Mr. MARTIN (*Essex East*): That is a substantive change.

The CHAIRMAN: Gentlemen, we were considering 33B when we adjourned.

Mr. MACDONNELL: Mr. Chairman, I have a copy of a letter addressed to you from Mr. Atkinson dated July 13. I do not know if it is of any substance.

The CHAIRMAN: Yes. That was incorporated into the evidence.

Mr. MACDONNELL: I see, it is already in.

The CHAIRMAN: Yes.

Does 33B carry?

Agreed.

The CHAIRMAN: Does 33C carry?

Mr. MARTIN (*Essex East*): Mr. Benidickson I think has something to say in respect of 33B.

Mr. BENIDICKSON: No, I do not have anything in that regard.

The CHAIRMAN: Does 33C carry?

Mr. MORTON: This is the one in regard to advertising?

Hon. E. D. FULTON (*Minister of Justice*): This is in respect of misleading advertising, yes.

Agreed.

Mr. MARTIN (*Essex East*): All these things are being carried on division.

Clause 13 agreed to.

On clause 14—

The CHAIRMAN: Does clause 14 carry?

Mr. FULTON: In this clause, Mr. Chairman, I have indicated that we are prepared to drop paragraph (*e*) under subsection 5. The amendment would be that on page 9 the word "or" be inserted after the semicolon in line 8, the semicolon and the word "or" at the end of line 12 be replaced by a period, and lines 13 to 15 be deleted. The reason is that a number of briefs have suggested that the words in this subsection are too indefinite and not capable of precise interpretation, and, therefore, they either will open the door to abuses or will create uncertainty and misunderstanding. I think some of the criticisms go a little too far but I think there is some ground for what is said. Inasmuch as we think that the effect that we are trying to accomplish in (*e*) is probably accomplished under (*a*) and (*b*) above, I am quite prepared to suggest the deletion of this subsection.

The CHAIRMAN: Shall I read the amendment again?

Mr. MARTIN (*Essex East*): Would you mind reading it?

The CHAIRMAN: On page 9 the word "or" be inserted after the semicolon in line 8, the semicolon and the word "or" at the end of line 12 be replaced by a period, and lines 13 to 15 be deleted.

Mr. MACDONNELL: I take it that in respect of (a), (b), (c) and (d), one is entitled to read the word "or" after each of them?

Mr. FULTON: Oh, yes.

Mr. MACDONNELL: That is the proper construction, is it?

Mr. FULTON: Yes.

The CHAIRMAN: All those in favour of the amendment? Those opposed? It is unanimous.

Amendment agreed to.

Mr. MARTIN (*Essex East*): There is just a protest against the whole procedure of this committee.

The CHAIRMAN: Does clause 14 carry as amended?

Clause 14 as amended agreed to.

On clause 15—

The CHAIRMAN: Does clause 15 carry?

Mr. MARTIN (*Essex East*): This should be referred to the bill of rights committee.

Mr. FULTON: This is just a change in the wording made necessary by rearrangement of sections, and there is no change of substance.

Mr. MARTIN (*Essex East*): Just a minute now.

Mr. FULTON: You see, before, section 35 read:

> Sections 32 and 34 shall not be deemed to deprive any person of any civil right of action.

We have rearranged the order of the sections and they are now in part V, so if we say: "nothing in this part shall be construed to deprive any person of any civil right of action" it has the same effect.

Mr. MARTIN (*Essex East*): I hope the bill of rights will not destroy the value of this.

Mr. FULTON: Certainly not. The bill of rights will reinforce it.

Mr. MARTIN (*Essex East*): Mr. Chairman, I wonder if I could ask your indulgence. Mr. Pickersgill had an amendment he proposed to move in respect

to section 35, but he has been detained on important public business. Could we ask to refer to this again.

May I just confer with one of my colleagues?

Mr. Chairman, Mr. Pickersgill is not here. I just call your attention to the fact that he had an amendment to propose. I think what we will do is move this amendment in the House of Commons. I do not like to do it in his absence.

The CHAIRMAN: Will Mr. Pickersgill be here this afternoon? We could stand it over until then.

Mr. MARTIN (*Essex East*): That is very considerate of you. I shall certainly see him before then. Thank you very much.

Mr. FULTON: That is in respect of clause 15?

Mr. MARTIN (*Essex East*): Yes.

The CHAIRMAN: Yes, clause 15.

Mr. FULTON: Clause 15 of the bill. We can stand that over.

The CHAIRMAN: We will stand that over.

Mr. MARTIN (*Essex East*): Thank you very much.

Clause 15 stands.

On clause 16—

The CHAIRMAN: Shall clause 16 carry?

Mr. FULTON: This is just a new arrangement of the act.

The CHAIRMAN: Shall it carry?

Mr. FULTON: Clause 16 creates part VI. This is just the heading.

Clause 16 agreed to.

On clause 17—

Mr. FULTON: Here again, in subsections (2) and (3) the only change are in the cross references. Subsection (4), however, is new.

Mr. MORTON: This is a case of adding new procedures?

Mr. FULTON: Yes, it refers back to section 31(2), and gives a discretion, to institute proceedings either by way of an information under that subsection or by way of prosecution.

Mr. DRYSDALE: Does this preclude a private prosecution?

Mr. FULTON: No, it would not.

Mr. THOMAS: I move it is adopted, Mr. Chairman.

Mr. MARTIN (*Essex East*): The fact we are not offering any observations does not mean we agree with this section. We have already stated our position, particularly on (4); and there will be an opportunity, of course, of discussing this when we get back to the house. So our silence should not be construed as approval of this section, or of the minister in particular.

Mr. FULTON: I do not mind your being silent about the section; but I am a little worried about your silence as to the minister.

Clause 11 agreed to.

On clause 18—

The CHAIRMAN: Clause 18; evidence against a participant.

Mr. FULTON: This, again, is consequential. The only change is in the cross-reference.

Clause 18 agreed to.

On clause 19—

The CHAIRMAN: Clause 19, jurisdiction of Exchequer Court.

Mr. MARTIN (*Essex East*): The minister has no thought of changing his views about the authority given the Exchequer Court, which is really a non-punitive tribunal, in the light of the representations that have been made, particularly by the Leader of the Opposition?

Mr. THOMAS: There is another matter there, also—

The CHAIRMAN: Let us deal with this question first, please.

Mr. FULTON: I think, Mr. Chairman, my recollection—and this does not really change the effect of what Mr. Martin said—is that the Leader of the Opposition was not really overly critical of this, but that it was Mr. McIlraith.

Mr. MARTIN (*Essex East*): Mr. Pearson said the Exchequer Court was a body that dealt mostly with civil matters—in fact, entirely with civil matters; and that as the Combines Act had punitive aspects, indeed, criminal aspects, we would be taking away much of the sting of its effectiveness by giving the Exchequer Court jurisdiction which, under certain sections of the act, traditionally has been reserved for either the criminal courts or the quasi-criminal courts. It is just that we were, bit by bit, tapering off the sanctioning power of the various sections of the act that seek to curb and arrest combines that are not in the public interest. That was the gist of it, anyway.

Mr. FULTON: In so far as that was the point of view you are seeking to reiterate, I have considered that, Mr. Martin. I have come to the conclusion that inasmuch as the powers of the Exchequer Court to deal with persons who may be brought before it under these changes are the same as the powers of an ordinary trial court, I cannot agree we are weakening the combines legislation. Indeed, in my view, we are strengthening it by providing a forum in which proceedings may be brought to a conclusion more quickly. There will be fewer stages before you get a final decision, on the basis that most of the cases, the important cases, go to the Supreme Court of Canada, in any event. We are not weakening the provisions of the act with respect to the fines or orders for dissolution, et cetera. So, I am afraid, I have not been able to accept the point of view that was expressed.

Mr. MARTIN (*Essex East*): You have not given consideration to the fact that this step will likely result, because of the limited members on the Exchequer Court, in that court acquiring admittedly great experience over the years? The court will be composed of judicial personalities who will become experts in this field. That, in itself, can be a very dangerous development because they will become identified—and this does not in any way reflect upon their integrity, of course—but they will become identified with an economic jurisprudence that is not as important or as desirable as a judicial jurisprudence.

The fact that combines cases now in our criminal courts are determined by different judges who happen sporadically only to sit on these proceedings, gives them a freshness, from the point of view of imposing sanctions which are very difficult in this measure. That also was the principle of an observation made by the leader of the opposition; but, I take it, notwithstanding that, the minister does not feel that he wishes to make any change?

Mr. FULTON: No, Mr. Chairman, because with respect, I do not think the point is well taken. For instance, the Exchequer Court frequently hears cases under the Patent Act, and they do not identify themselves with the patentees. Again, there are some very punitive sections under the Income Tax Act, and the country, as a whole, has a very great interest in seeing that the treasury is not defrauded or otherwise deprived of revenues that taxpayers should properly pay under that act. In the interest of enforcement, there are some very punitive sections indeed in that act. They go to the Exchequer Court, and the Exchequer Court does not identify itself with the interest of

the taxpayer as against the national treasury. I am not able to believe the Exchequer Court will identify itself, in the sense in which Mr. Martin uses the words, with the interest of business or those against whom we may bring proceedings under this act. I think here we will have a fair and proper forum to try the issues. In so far as you build up a body of experts, I have never before heard it suggested that would be a disadvantage.

Mr. MARTIN (*Essex East*): I did not want my words to be misconstrued, and I know you did not intend they should be. This is not in any way a reflection upon the Exchequer Court; and I am sure the minister will readily accede that that is not my suggestion.

Mr. FULTON: No, but I think your point is not well taken.

Mr. BENIDICKSON: What is the difference in the United States in this anti-trust field? Do they have courts which are special for this matter; or are they referred to any court, as is possible here, alternatively?

Mr. T. D. MACDONALD (*Director of Investigation and Research, Combines Investigation Branch, Department of Justice*): They are heard in the ordinary federal courts, Mr. Benidickson. But my impression is that there is a certain amount of specialization, because you do find the names of noted judges in the United States recurring in connection with anti-trust cases.

Mr. MARTIN (*Essex East*): That is true, surely, only in the Supreme Court? There is an article by Dean Erwin Griswold of Harvard Law School, in which he gives a list of judges who have sat on anti-trust cases in the last 20 years, and the variety is very noticeable. You know that article?

Mr. MACDONALD: I do not remember it at the moment, but I have seen it.

Mr. MARTIN (*Essex East*): I would feel that that statistic on the hearings shows that in the United States these cases, the anti-trust cases—which I think are enforced much stronger than we have ever done—go before a great variety of judges. In Canada it is also true, I think, that all our combine cases have not been heard in one province repeatedly by the same judge; and the result has been a fresh consideration, in any event.

On our main point here—and I think there is something in it, and I excuse myself for repeating it, because the minister has already commented on it—that the Exchequer Court was hitherto largely devoted to income tax cases—as the minister has observed—but, more particularly, to expropriation cases, and is a court that has traditionally been looked upon as a judicial body that acts in matters of direct pecuniary interest to the crown. The combines legislation is of a different character. That is something that has a direct interest to the public interest, and anyone who violates the provisions of a Combines Act violates public law, in a sense. It is true that income tax is a public law; but it is, as one of the judges said, a law having public effect; it is directly connected with the interests of the crown as such.

I feel that, certainly at the beginning, it could be that if the Exchequer Court is given authority in this matter there will be a developing tradition that is not now present; but what we are doing now is to take the matter out of the atmosphere of the criminal courts into a quiet, sheltered, pleasant court room in Ottawa, where there may not be much public interest, where there will not be the same scrutiny on the part of the press, and so on. That will be the situation at the beginning; that is our concern, and I can only restate it.

Mr. FULTON: Mr. Chairman, I think there are one or two things on the other side which should be pointed out with respect to what Mr. Martin has said.

Perhaps the first thing is to suggest that it be kept in perspective: it is not the case that we are conferring exclusive jurisdiction on the Exchequer

Court; it is an alternative method of procedure, and we have been careful—and I should like to emphasize that we have been careful—to preserve the alternative of the ordinary procedure by way of a prosecution leading to a conviction. Nor is it our intention at all to suggest that every case goes to the Exchequer Court: it is simply that we think there are certain types of cases arising under this legislation which the Exchequer Court is as competent to deal with as trial courts, and that in those cases you get the advantage, in addition, of a more expeditious settlement of all the issues involved.

Nor does it follow that every case in the Exchequer Court will be heard in Ottawa. Mr. MacDonald directs my attention to another point here in section 41A, which perhaps I should read. It is section 41A(3):

> (3) For the purposes of Part XVIII of the *Criminal Code* the judgment of the Exchequer Court in any prosecution or proceedings under Part V of this Act shall be deemed to be the judgment of a court of appeal and an appeal therefrom lies to the Supreme Court of Canada as provided in Part XVIII of the *Criminal Code* for appeals from a court of appeal.

But that I think the main point to be remembered is that it is not every case that will go to the Exchequer Court.

Mr. MARTIN (*Essex East*): No; the minister says it is not every case that will go to the Exchequer Court. Indeed, in subsection (4) it is pointed out:

> —no prosecution shall be instituted in the Exchequer Court in respect of an offence under—

this part:

> without the consent of all the accused.

That is, to me, irony. Surely it will not be very difficult to persuade all the accused that that is where the trial should take place. One would sooner have it take place there, as we know from a recent case, rather than in the criminal sessions, let us say, in the courts in the city hall in Toronto, where the last big proceeding was taken.

I cannot conceive of the accused ever being reluctant to have their cases heard in the Exchequer Court.

Mr. FULTON: Of course, the reason for that was twofold: first of all, there may be cases—as the act provides—where you have an individual charged, and an individual, under the Combines Act, can elect trial by jury. That is not possible, of course, to arrange in the Exchequer Court. That was one reason why we considered it was essential to give the accused the right to say whether he will go to the trial court or the Exchequer Court.

But another factor that should be borne in mind is that it is quite true that if you do go to the Exchequer Court, you have only a two-stage disposal; you have only one appeal, and that is to the Supreme Court of Canada.

Mr. BENIDICKSON: If somebody is aiming to get a Supreme Court judgment?

Mr. FULTON: Yes. But if it goes to the trial court, he has three stages; the trial court, the court of appeal of the province, and the Supreme Court of Canada.

For these two reasons we felt it was only proper that the accused should have the right to say whether he wanted it to be in the Exchequer Court; and if he said, no, he preferred it tried by the trial court, and possibly by jury, we should not be able to force him into the Exchequer Court.

By the same token, we felt that if there was to be an option for the accused, the crown must reserve an option too. The accused should not have the right to say, "I demand to go to the Exchequer Court", if we felt it was a

case that should properly be disposed of by way of prosecution, looking to a conviction. So, balancing all those factors, we came to the conclusion that trial in the Exchequer Court should only be with the consent of the accused and the crown.

Mr. MARTIN (*Essex East*): May I ask the minister—and perhaps Mr. MacDonald, through the minister—what was the real reason for this provision? It has not been difficult to get a hearing in these cases. Surely, the administration of justice has not in any way suffered, even in the province of Quebec, where the lists are long and the judges are extremely far behind? I understand there has been no difficulty in getting these cases heard.

Mr. FULTON: You want Mr. MacDonald to answer?

Mr. MARTIN (*Essex East*): Either you, or Mr. MacDonald. I just addressed the question to you.

Mr. FULTON: I think the answers are those, in part, which have been given before. I start by saying that the experience is that this type of case does tend to tie up trial courts for very lengthy periods. Secondly, I say again that, with respect particularly to certain types of issues that arise under combines legislation and in combines cases, it is, in my view, quite desirable to develop a body of expert experience. Many of these issues are economic, or largely economic. Not all of them are by any means, and we reserve the right to go to a trial court where we think the proper procedure is prosecution leading to conviction.

But there are types of cases where the issues and factors involved seem mainly to be economic, and we think it is advantageous to build up a body of experts in that field.

There is a third advantage: that it does give you a greater flexibility with respect to the choice of counsel, both by the crown and the accused. If you are going to proceed in a provincial court, counsel who appear must ordinarily be members of the bar of that province, whether they appear for the crown or for the accused. If you proceed in the Exchequer Court, any lawyer practising anywhere in Canada can appear for either the crown or the accused. So we think it has those distinct advantages, in addition to the ones I have mentioned.

Mr. MARTIN (*Essex East*): Has there not been a case where the crown was represented in Ontario by a British Columbia lawyer? There is no difficulty in getting the consent of the court to having a lawyer domiciled in another province appear. That can be done, with the consent of the court. It cannot be done as a practice; but there is no difficulty, in an *ad hoc* case.

Mr. FULTON: I am advised by Mr. MacDonald this has occurred in the past. I suppose, since I have not personal knowledge of it, I might ask Mr. MacDonald to make a comment on this.

Mr. MACDONALD: I just remember one case, at the moment, in one province, where crown counsel was of the bar of that province and, as the case proceeded, it became apparent he was getting considerable assistance from a lawyer from another province who was with him, but unrobed. My impression is that the suggestion originally came from the trial judge that the second lawyer should robe and participate actively in the case. It was not possible, however, to make such an arrangement with the bar of the province in which the case was being tried; and crown counsel did not have the assistance of the other lawyer with him as a robed counsel.

The CHAIRMAN: Have you a question, Mr. Thomas?

Mr. THOMAS: Mr. Chairman, the question I was going to ask has been partly answered, by implication.

When the B.C. Forest Products made their presentation they suggested there should be the right of appeal from a decision of the Exchequer Court, in these cases, to the provincial appeal court.

I wonder if the minister could tell us why a provincial appeal court was passed over, and why an appeal from the Exchequer Court should be taken directly to the Supreme Court of Canada.

Mr. FULTON: I think we covered that when we were dealing with an amendment to an earlier section.

The point is that we only go into the Exchequer Court by consent, for prosecutions. In the case of an order under section 31(2) there is now the same right of appeal—on the same grounds—from the Exchequer Court direct to the Supreme Court of Canada, as from a provincial trial court to the provincial court of appeal, thence to the Supreme Court of Canada.

Since any prosecution however can only go into the Exchequer Court, by mutual consent, and since the objective is to shorten the proceedings and get a final determination as soon as possible, we did not feel we should accede to their request and provide for an intermediate appeal to the provincial court of appeal even though the appeal from the Exchequer Court to the Supreme Court of Canada is on a more restricted basis, in a case of prosecution, than an appeal from a provincial trial court to the provincial court of appeal.

Mr. DRYSDALE: I was just wondering what the reason is for the provision under section 41A(4), whereby the accused does not have any choice in regard to a prosecution under 31(2). In other words, the consent of the accused as to Exchequer Court proceedings is required for all of part V, but is not required under 31(2). The only point that bothered me was, in the case of an application, say for a dissolution of a merger, occurring, say, in provinces like British Columbia and Newfoundland which would be a considerable distance from Ottawa. I can see a lot of difficulty if there were a great many interlocutory applications because, presumably, you would have all the documents and materials there in that particular province. I was wondering what the reason was as to why, in these important matters, the consent of the accused was not also required.

Mr. FULTON: Well, I suppose, it becomes a matter of opinion.

We felt, where it was a case of prosecution that, for the reasons I have given—the liberty of the subject being involved as well as liability to heavy fines and so on—the reference to the Exchequer Court should only be by consent. But where we are applying for a dissolution order or similar remedy, it seemed to us it was fair and proper to provide that the crown could take its option, and go to Exchequer Court, if it wished.

One of the objects of this may be speed. It may be the view of the administration that what is being done is harmful, that this may have become apparent, and they want to get the issues disposed of, perhaps, before further harm may result, or, possibly, in order that you may get a restraining or dissolution order before the action taken becomes too irrevocably committed to make it possible to unwind it. We think the procedure in the Exchequer Court would be quicker, and there are advantages to have the right, on the part of the crown, to put that kind of case to the Exchequer Court rather than to the trial court.

Mr. DRYSDALE: I presumed your desire for speed would be tempered, in the case where a merger had been existing for several years. However, it is obvious there are difficulties in British Columbia and Newfoundland, as opposed to other provinces.

Mr. FULTON: I think so, and it will have to be worked out. If it is demonstrated that it is unfair to the parties against whom an order is sought, to put them in the federal court instead of a provincial court, because of the reason

of distances, I think the crown would have to take cognizance of that. But since, in our view, there may be an overriding interest on the part of the crown, in going to the Exchequer Court, for the purpose of speed, and so on, we felt we should retain some discretion in that type of case. But, as I say, if the parties could demonstrate it would be unfair to them to do it, then we could reconsider the matter.

Mr. MACDONNELL: On page 10, line 6, it says:

—except section 33C—

Has that been commented on?

I am referring to lines 6 and 7:

—or part V, except section 33C—

Is there any specific significance to that?

Mr. FULTON: Well, because of the nature of the case contemplated in section 33C, which is the misleading advertising provision, it was felt it was not one where you should go to the Exchequer Court of Canada—and especially, since that section provides that such a person is guilty of an offence, punishable on summary conviction.

That did not seem to us to be an appropriate type of case to put in the Exchequer Court.

I have one further comment. I have referred to it in the course of my earlier replies—but I think it is relevant in the light of the questions asked by Mr. Thomas and Mr. Drysdale recently—and it is this: it should be remembered and emphasized that the Exchequer Court does not sit exclusively in Ottawa. It does sit outside Ottawa. I think it sits in all the provinces of Canada. In any event, it certainly has jurisdiction to sit in any province in Canada.

Mr. DRYSDALE: But it may not be there when the problem arises. I realize it would be there a couple of months of the year.

Mr. MARTIN (*Essex East*): But, its locale is Ottawa, and it is only under extraordinary circumstances that it does travel. As a matter of fact, not all the judges travel, or want to.

Mr. FULTON: Your last observation may be true, but I would not agree it is only under extraordinary circumstances that they do travel. They have been making a practice of holding sittings in the provinces, outside of Ottawa.

Mr. MARTIN (*Essex East*): One judge.

Mr. FULTON: One at a time, but more than one judge has held sittings outside Ottawa.

Mr. MARTIN (*Essex East*): I think you will find they do not want to, and only one of them regards it as a happy combination that he can travel and, at the same time, do his job.

Mr. FULTON: Of course, I do not think it would be proper to quote judges here, but my interpretation of their attitude is quite opposite to yours. I think the validity of my views is evidenced by the increasing frequency with which they sit outside of Ottawa.

Mr. DRYSDALE: I have one question on 41A(2), in a case where it involves both individuals and corporations. Would that mean, under this particular section, that the individual will lose his choice of trial by jury?

Mr. FULTON: No. It says simply:

> The trial of an offence under part V in the Exchequer Court shall be without a jury.

We cannot have trials by jury in the Exchequer Court. That is one of the reasons for the right to elect whether he goes to the Exchequer Court;

and if he was an individual and wanted a trial by jury he could say he wants to go to a provincial court.

Mr. DRYSDALE: What would be the situation in the case of a corporation and an individual?

Mr. FULTON: I think the policy in that regard would have to be developed; but I am reminded that frequently now where you have an individual and a corporation charged together, and the individual elects trial by jury, there are two trials. My own personal opinion is it is something we should avoid if possible; but one would have to see exactly how the thing developed. It might be decided to have one trial or two trials.

Clauses 19, 20 and 21 agreed to.

On clause 22.

Mr. FULTON: This is the transitional section to preserve the jurisprudence under section 411 of the Criminal Code.

Clause 22 agreed to.

On clause 23.

Mr. FULTON: This relates to the inquiry in the fish case at Vancouver and preserves the status quo regarding their practices until December 31, 1961.

Clause 23 agreed to.

On clause 13.

Mr. FULTON: Now, Mr. Chairman, I think we stood proposed section 33A. Mr. Howard moved an amendment to section 33A(1)(a) which would, as I understood his suggestion, have had the effect of introducing the cost justification element into our law regarding nondiscrimination in price discounts. When Mr. Howard proposed the amendment I came to the conclusion, without prejudice to the ultimate decision as to whether or not it is a sound proposal, that it was a very far reaching one indeed which would require a thorough investigation, and, I think, notice to all interested persons. It is not, therefore, in my view the kind of amendment that we should introduce at this stage of the consideration of a bill. For those reasons I have regretfully to say that I am unable to recommend the acceptance of Mr. Howard's amendment.

Mr. MARTIN (*Essex East*): Was there only the one reason—that you did not feel adequate notice had been given to interested parties?

Mr. FULTON: We felt on the ground of policy it should not be accepted because it would be a far reaching principle to import into our legislation, without more thorough investigation.

The CHAIRMAN: We will vote on the amendment of Mr. Howard.

Moved by Mr. Howard and seconded by Mr. Fisher that:

> Subsection 1 (a) of proposed section 33A be amended by striking out the words "and quantity" in line 21, page 7 of the bill, and substituting therefor the following:
>
> "except that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such articles are sold or delivered to such purchaser".

Mr. MARTIN (*Essex East*): Mr. Chairman, I really to do not understand this. Unfortunately, I have not been able to attend all the meetings simply because of the fact that other committees have been meeting, the house, and so on. I do not know anything about this and cannot understand it. I find that my confrères beside and in front of me do not understand it either. In view of the fact that this afternoon we will consider Mr. Pickersgill's amendment, would it not be possible to have Mr. Howard here at that time also on this amendment.

Mr. FULTON: That is agreeable to me, Mr. Chairman, if the committee so desires. Then, perhaps, we could leave subsections (b) and (c) until the same time. We have an amendment which in my view would go a good distance toward disposing of the argument on grammar and construction which we had the other day in connection with those two subsections. I could move the amendments this afternoon.

Mr. DRYSDALE: Would it not be helpful if we had them now?

Mr. FULTON: I can read them to you. In subsection (b) it would be that lines 24 to 27 on page 7 be deleted and the following substituted therefor—and I think probably we would delete the whole of subsection (b) and substitute the following:

> (b) engages in a policy of selling articles in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada or designed to have such effect; or

Then subsection (c) would be deleted and the following substituted:

> engages in a policy of selling articles at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor or designed to have such effect.

So that in substance the word "tendency" would no longer be modified by "designed to have". I will have this typed and available for distribution this afternoon.

The CHAIRMAN: We will adjourn until three o'clock this afternoon.

—The committee recessed.

The CHAIRMAN: Gentlemen, we meet this afternoon to consider an amendment from Mr. Howard and one from Mr. Pickersgill and one of the governments under section 33A—

Mr. TARDIF: Mr. Chairman, before you go into that, on a question of privilege, several times I have attended meetings of this committee when I have not been recorded as being here. I fully appreciate I am not making, perhaps, the full contribution to these meetings that I could, because of lack of experience, but I would like my name recorded. Two of the sessions were those when we listened to Mr. Gilbert of the retail merchants' association.

The CHAIRMAN: I appreciate your interest in having your name recorded, but I do not keep the attendance book myself; and if you have been left out, I assure you it was not my fault.

Mr. DRYSDALE: I think it is now on the record, Mr. Chairman.

The CHAIRMAN: Perhaps we could go on with Mr. Pickersgill first, as Mr. Howard is not here.

Mr. PICKERSGILL: I have an amendment I would like to move, seconded by Mr. Tardif. But before doing so, I would like to say that some of my friends and I on this committee were very much impressed by the representations that were made to the committee by a number of witnesses, expressing the hope that if the act was to be amended, as was the government's intention, some express provision could be put in the act to make it abundantly clear what everyone, I think, recognizes has always been in fact the situation, namely, that the purpose of the legislation was to prevent combinations within Canada respecting trade within Canada and was not intended, in any way, to cripple our export trade; and that if certain types of combination or arrange-

ments were necessary for the promotion of our export trade they should not be hampered by this legislation.

Now I recognize—as I am sure every member of the committee does—how frightfully difficult it is to draft provisions which will make that position abundantly plain to the courts, without, in any way, having any ancillary effects or any serious ancillary effects which would enable it—as we thought might be the case with some of these new provisions that it is suggested should be inserted into one of the other sections, section 32—to be used as a cloak for combinations that are clearly intended to be against the law.

However, we do think that an amendment might be made to clause 15; and I must say that in proposing this, I am not absolutely wedded to this particular wording. It is the best, with such resources that were available to my friends and myself, we were able to come up with at the moment; but we would certainly appreciate any suggestions from any member of the committee that might make it more acceptable to the government.

In the present circumstances, when it is perfectly evident to everyone that we are not going to have the kind of sellers' market for our exports we have enjoyed most of the time since the second world war, we do think it is of the utmost importance, in the national interest, that we should do everything possible and everything reasonable both to promote our exports and to make sure, by the laws of our country, that we are not providing any obstacles, even if only psychological obstacles, that can easily be removed.

It is in that spirit, therefore, that I move, seconded by Mr. Tardif:

> that clause 15 be amended by inserting "(1)" after "35," and adding the following subsection:
>
> (2) In determining whether any offence under section 32 or 33 has been or is being committed, the court shall consider the best utilization of Canadian resources to meet the requirements of the export trade and the development of markets outside Canada.

Mr. AIKEN: Mr. Chairman, I wonder if the amendment could be read again, and a little more slowly?

Mr. PICKERSGILL: Would you like the chair to read it, or shall I?

Mr. AIKEN: Perhaps the chairman would.

Mr. THOMAS: One word at a time, so we can write it down, Mr. Chairman.

The CHAIRMAN:

> I move that clause 15—

—this is moved by Mr. Pickersgill and seconded by Mr. Caron—

Mr. PICKERSGILL: Mr. Tardif. You seem determined not to notice him.

The CHAIRMAN:

> I move that clause 15 be amended by inserting "(1)" after "35," adding the following subsection:
>
> (2) In determining whether any offence under section 32 or 33 has been or is being committed, the court shall consider the best utilization of Canadian resources to meet the requirements of the export trade and the development of markets outside Canada.

Mr. BENIDICKSON: Mr. Chairman, I think all of us have shown a considerable interest in some possible amendment that might meet this objective.

I might start by saying that perhaps this stems from representations that were made to the committee on June 22, in the advancement of the brief of the forest industries, the fisheries council and the Canadian metal mining association. I recall that Mr. Thomas, at a meeting for which we have not yet

received the printed evidence, brought this up last week. Subsequently, I asked the minister about some possibilities along these lines. I think that was on Wednesday of last week.

Then the minister very frankly said that he thought there had been in the proposed legislation of last year, in the sections relating to mergers, some amendments that might be helpful to the export industry. Then he very properly and frankly said, afterwards, that he had reconsidered that because he has to read a lot of things, and he said that he was mistaken; that it was not in the draft bill of last year, but it was in, as we all understand it, a number of draft bills that come to the minister before he actually perhaps present them to parliament.

Hon. E. D. FULTON (*Minister of Justice*): That is correct.

Mr. BENIDICKSON: But I think it related solely to the merger field.

Mr. FULTON: That is correct.

Mr. BENIDICKSON: The minister indicated that he had some worries and concern as to whether or not we could, with respect to combinations, do something which I think we all want to do, and allow some more coordination that might not result in domestic detriment. I think that was the minister's concern.

I think we can. Last week I showed some disparagement of the fears of industry, generally, when they said the law as it stood was such that they just hated to have a conference over anything. I said we were all aware that even, perhaps, the shoe shiners—and I do not disparage them, but almost every trade has an annual convention these days, and I cannot think that any of these conventions do not discuss a lot of matters which some will say they were afraid to convene over for that purpose. I think that we could make some safeguarding provision here for the important industries of export.

Mr. AIKEN: Mr. Chairman, I am entirely in accord with the principles that lie behind this amendment, in doing anything we can for our export trade. What bothers me about the wording is that it seems too broad for a court to interpret. I could see it as an excellent generalization for parliamentarians or politicians in expressing a principle; but it seems to me to be almost impossible for any court to apply. I think if we were going to consider the principle we would certainly have to consider a more precise wording.

Mr. MORE: Mr. Chairman, has this not been done with previous clauses, where amendments have been suggested—that they have been referred to the minister and his department for consideration and a report?

Mr. FULTON: I would like to make some remarks on that point, Mr. More.

Mr. JONES: I think, Mr. Chairman, the course Mr. More suggested would be a good one, particularly in view of the wording of this amendment which, on the face of it, seems to open the door to combinations getting off unscathed on the pretext that there is some export element in their combination. I think this has to be looked at very carefully, to see we do not weaken the legislation in that regard.

All of us, I am sure, would like to see the interests of our export trade fostered, but we want to be sure, at the same time, we do not do it at the expense of our consumers in Canada.

Mr. CARON: Can Mr. Aiken give us any clarification about what he said a while ago, that it would be very hard for a court to decide on these matters?

Mr. AIKEN: The amendment provides that the court shall consider the best utilization of Canadian resources to meet the requirements of the export trade. My submission is that it would be almost impossible for a court to decide what the best utilization of Canadian resources would be. They are not directed in what field to make enquiries.

Mr. FULTON: I would like to say a word or two on the amendement, if I might, Mr. Chairman. We are all concerned over export trade; and I know all members of the committee are equally concerned, whatever side of the house they sit on. Certainly, the government is as concerned as any member of the committee. We have taken a very careful account of the representations that were made in various submissions with regard to the position of industries in the export trade. And I am pleased to note that the effect of this amendment is to indicate that Mr. Pickersgill, in moving it, admits there can be something done to improve the position of Canadian industry without weakening the effects of the combines legislation. That is the first and most important thing that appears from this amendment. And I am delighted to have this indication of agreement by the official opposition with the stand of the government, that we can indeed make certain changes which will improve and benefit the position of industry, and thus of the economy generally, without weakening the terms and objectives of the combines legislation. That is one of the main objectives of the present amendments. I am delighted to have this endorsement of those objectives.

Secondly, however, I would say that I am not quite certain that the objective that Mr. Pickersgill has in mind—of doing something for industries concerned in the export trade, without damaging the domestic interest—is, in fact, accomplished by the amendment that he has offered. I say this, without in any way criticizing his objective in offering this amendment.

However, may I point out to you that the amendment, by its wording, affects both combinations, on the one hand, and mergers and monopolies on the other, because the amendment refers to section 32 or 33.

Now, section 32 concerns itself with what are technically known as combinations; section 33 concerns itself with the mergers and monopolies. As I indicated to the committee earlier, I have been concerned, particularly with respect to the combination branch of this problem, with the difficulty of finding some means of allowing such arrangements to operate with reference to export trade without extending the export umbrella in such a way as to have disadvantageous effects on domestic markets.

I indicated to Mr. Benidickson earlier, as he pointed out, that in a former draft of the bill we in the department were considering a provision under the merger clauses which might, we thought, have the effect of allowing arrangements to be made for export markets that could be insulated or isolated from disadvantage in the domestic market. But, when we rejected the idea of changing the merger provisions in any substantial way, we dropped that proposal. So, I come back to the fact that this amendment would affect both the combination provisions and the merger and monopoly provisions, and I have not been able to convince myself yet that we have been able to devise a proposal that would insulate arrangements in export trade, under the combination heading, from effects on the domestic market which might be disadvantageous to domestic Canadian interest. And, in analyzing the proposed amendment from this point of view, I direct your attention to the wording of the amendment itself, asking you to bear in mind that it affects combinations.

Would you let me take you through it in detail. It reads:

> In determining whether any offence under section 32 or 33 has been or is being committed the court shall consider the best—utilization of Canadian resources to meet—

And now I ask you to drop, for a moment, the words:

> —the requirements of the export trade and—

and go on to:

> —the development of markets outside Canada.

There are two things the court would have to consider: the best utilization of Canadian resources to meet the development of markets outside Canada

—and if you ask the court to apply their attention to that proposition, with respect to combinations, it seems to me the courts would then be invited to conclude that, notwithstanding the effects domestically, if the arrangement could be shown to have any advantage with respect to export, then the domestic interest is set aside, because the court would be invited to consider the best utilization of Canadian resources to meet the development of markets outside Canada. Now, it is true that is not the only thing the court is invited to consider. It also is invited to consider the phrase which I asked you to delete from your attention for the moment, "the requirements of the export trade and". However, just what weight the court is to give to those two considerations, I do not know.

Our bill has been criticized on the basis that it introduces certain vague and indefinite criteria. I could not very well envisage anything more vague and indefinite than "the requirements of the export trade and". So, if you ask the court to consider the factors mentioned in the amendment you are opening up a very broad field, without any attempt to bring the court's attention to the question of which is to be given priority: the requirements of the export trade, or the development of markets outside Canada, or the interests of domestic consumers.

Now, I make these criticisms without, for a moment, attempting to criticize the motives with which the amendment has been offered; but I do suggest to you that this proposed amendment is open to every one of the criticisms which my friend, Mr. Pickersgill, has advanced against the bill which we have offered. And, indeed, it is open to more of those criticisms, because it puts before the court three and, by inference, four considerations which the court has to balance, without even directing which one shall have priority in its mind.

Further, I would be concerned about the effect of this amendment, since it refers to section 32, on the use of the word "unduly". How do you reconcile the amendment with the words:

To limit unduly the facilities for transporting—

and so on, or:

—limit or lessen, unduly, the manufacture—

and so on, or

—restrain or injure trade or commerce unduly in relation to any article.

So, for all these reasons, but mainly because I do not think this amendment, as worded, contains sufficient safeguards in the interest of the domestic market and of consumers in Canada, I suggest the amendment be not accepted.

However, I am prepared to say that, welcoming as I do the indication from the official opposition that improvements could be made in the situation of Canadian industry, without weakening the effect and intent of the combines legislation, I am prepared to consider this question of export trade further and to see whether between the time when this bill may be reported and the time it may come up for consideration in the house we, ourselves, can come up with an acceptable amendment to deal with the position of the export trade.

For the reasons I have given, I do not think this amendment, as presently drafted, meets the criteria which this committee, or any government concerned with the welfare of Canadian consumers, could adopt.

My suggestion is that the amendment be rejected, but that the principle be re-examined to see whether a proposal consistent with the interests of Canadian industry in the export field, and the overriding interest of consumers domestically, can be devised. And, if it can, the government would be happy to suggest such an amendment in the house.

Mr. BENIDICKSON: That, Mr. Minister, is very much along the line of a hint that I passed to you last week.

I asked the minister whether or not he had exhausted all the initiatives and ideas he might have to reach an objective such as Mr. Drysdale, Mr. Thomas, myself and some others had said were very desirable. Unfortunately, he gave the impression that he had gone at this so thoroughly he did not think there was any other road he could pass over prior to consideration in the committee of the whole in the House of Commons.

I think Mr. Pickersgill invited legal criticisms with respect to it, and I know that everybody would be very pleased if, between now and next week, the minister would have another look at some drafting which might be extremely helpful, when we are all so concerned about our position in this hectic trading treadmill, and the competition we have to face up to.

Mr. PICKERSGILL: I agree with what Mr. Benidickson has said. I think the minister is being very reasonable in his attitude today about this matter, and very reasonable in his criticism of the amendment.

If the committee does, in fact, accept the minister's advice and reject my proposal, I do hope that the government will be able to find one that will be acceptable to all of us.

However, I would like to make, if I may, one or two points. I do feel that in order to have the point reported definitely, I will press my amendment to a vote. In saying that, I must say that if anyone here has any verbal suggestions as to improvements in the language of it, I would be very happy to make any changes that commend themselves to me as being better than what we presently have in mind.

In regard to the minister's comment about the official opposition, it is understandable, and we take no objection to it. It is understandable that someone in the official opposition should initiate the suggestion that this legislation —I do not mean this bill, but the legislation—which we are seeking to amend, could be improved. We in the Liberal party believe in the infinite perfectibility of all legislation, but we do not think that anything we put on the statute books is the last word.

There are two considerations I would like to make in respect of this, as compared to other things. We in the Liberal party do not think that the interest of domestic consumers should be sacrificed in order to safeguard the interests or to protect, or—to use another word—to make things cushier for producers or suppliers. We think the first concern should be for the Canadian consumer, in so far as the interior of our country is concerned, but I can foresee circumstances in which, in my opinion, it would be in the national interest and the ultimate interest of Canadian consumers as well to go on supplying the foreign market when there was a short crop of something, even to the extent of letting Canadians go short in order to preserve that market—and anyone who has had any superficial knowledge of the fish business will understand what I mean. Therefore, I say that there are circumstances in which I would not hesitate—and I think that is true for most of my friends—to say that the overriding national interest would be to take whatever steps were necessary to retain and, perhaps, sometimes even to expand an export market to the extent of shorting the Canadian market in peace time. Of course, we did it in war time, but that was different.

The other point was that the minister has rather assumed that all the considerations would be, in the minds of the court, of equal weight. Our amendment would not suggest that. The offence would be one of combining or making an illegal merger, and all the other things, it seems to me, in the plain meaning of the words, would be extenuating circumstances. I cannot conceive that any court would say, because some tiny little miniscule export might be prompted, that would be an excuse for a combination that was clearly intended, primarily and mainly, to cause restrictions in the domestic field.

But there are trades in this line, such as wheat, fish, and wood products, where our exports are really very important not only from the point of view of industry, but that of the whole economy of the country, and that means the income of the Canadian people.

Our exports are vastly more important than some small change, even some small disability that there might be of a deprecatory nature to domestic consumers.

Therefore I cannot really feel that what I am proposing here would cause the courts as much difficulty as the minister would seem to think. I would feel that, for the overriding interest that we have, particularly in these difficult times in the export field, I should like to press my amendment.

Mr. FULTON: I am delighted to have had this illustration from Mr. Pickersgill, as to his approach, and I am particularly delighted to know that he believes there may be extenuating circumstances which the court should take into account in considering whether or not an offence has been committed.

I assume that I may take Mr. Pickersgill at his word when I ask him to apply that approach to the amendment in regard to section 32 which Bill C-58 would bring about. What we have asked be done, in that amendment, is to recognize that there are arrangements, or types of co-operation, which can benefit the economy as a whole without harming the consumer as such. I am glad to find that Mr. Pickersgill agrees with that approach too.

Mr. PICKERSGILL: No, no.

Mr. FULTON: You mean you use your argument only when it suits you?

Mr. PICKERSGILL: No, that is not an analogy at all, and when the minister has finished, I shall show him how false his analogy is.

Mr. FULTON: It will be interesting to know how you would differentiate in principle between the two.

I think that another interesting point which has developed from the argument raised is that it indicates the concern of members of the committee to see that the position of Canadian business is clarified, and that their proper interests are recognized, as long as that can be done without overall damage to the Canadian economy.

But what does concern me in respect to this matter of export trade is that nobody as yet has come up with any clear ideas as to how this arrangement in the export field might be arrived at and be isolated from damage to the domestic market.

With respect to wheat, which is one of the examples which Mr. Pickersgill mentioned, I would remind the committee that the whole wheat business rests upon federal government legislation. The marketing of wheat is under the exclusive agency of the Canadian wheat board; and be it fortunate or unfortunate, it is scarcely a parallel.

But I come back again to what I said earlier: if we can find between now and the time when the bill comes up in the house, any amendments which would protect the primary interests of the Canadian consumer, and which would allow arrangements in the export field, we would be glad to consider them further.

In the light of Mr. Benidickson's suggestion, I would make the comment that one of my concerns in respect to one of the fields covered by Mr. Pickersgill, in respect to combinations, is that we have an inquiry under way now in the matter of the fish industry. So, as I have said, I think it would probably be premature for any government to recommend to parliament legislation along those lines, dealing expressly with agreements in the export field, and trying to isolate them from their impact upon the domestic economy, in advance of the report of the commission which is now conducting its inquiry into that very matter.

I would think that this is one of the very things that the commission must direct its attention to; and having directed its attention to this problem, and having made a report on it, we would then be in a much better position to introduce legislation, at least in so far as the field of combinations is concerned, after that report, than we would be now, before that report has been delivered.

This is one of the reasons I said I thought we should not recommend to parliament legislation in this field at the present time. But these are all things which are subject to debate, and they are points upon which there can be differences of opinion, and if by reconsideration of the matter in the light of Mr. Pickersgill's amendment, and bearing in mind the philosophy now enunciated by a member of the opposition, we should be able to come up with any different conclusion, I would be glad to do so.

But when referring to the philosphy as enunciated by a member of the opposition, I would again refer to the fact that an amendment to combines legislation designed to improve the position of industry can be enacted without necessarily doing damage to the Canadian economy, or to the interests of the Canadian consumer.

Mr. PICKERSGILL: I would like to say a word about that analogy.

Mr. MACDONNELL: May I be permitted one word?

Mr. PICKERSGILL: Yes.

Mr. MACDONNELL: I am rather hesitant to make this comment, because it is supported only by what the leader of my party once called the immortal ground of common sense; and I am sure that it falls far below the Liberal doctrine of perfectability. But I do wish to suggest that we have another good look to see whether there is not a lot to be said for leaving things as they are.

We have got along pretty well, and I also understand that as far as Mr. MacDonald is concerned, he is not going to rush about and bring all kinds of things into court. So I hope we may be able to leave it.

And one other comment: if judges are going to have to deal with this section, then they should all take courses in economics first.

Mr. PICKERSGILL: There is a good deal in what Mr. Macdonnell has said. I admit that point. But I would, of course, draw to the attention of Mr. Macdonnell, and the other members of the committee, that there is a great deal of difference between perfectability and perfection.

Now, to go back to this question, of the analogy: the minister attempted to make an analogy between sub section 2, and the proposed section 32, and I think he showed how inaccurate that analogy was, by his own words.

He said that these things that were set out here were things that were not against the law anyway. If that is right, of course it is not on all fours at all with this amendment; because this amendment does expressly intend,—whatever it might accomplish,—it intends to make it very clear that certain types of combinations, certain types of mergers might, in order to maintain or promote our exports, be in the public interest.

Mr. FULTON: Regardless of their effect on the domestic economy?

Mr. PICKERSGILL: No, no, not at all, because it modifies the main proposal. It only modifies it.

Mr. HOWARD: In other words, is there an inconsistency between the amendment of these words and being opposed to the proposed changes to section 32? I think the minister is quite correct in drawing that comparison.

I think what Mr. Pickersgill is trying to get at is this: if we could read section 32 (2) in this regard and say that subject to subsection 3, in a prosecution under subsection 1, the court shall not convict the accused if the

conspiracy combination agreement or arrangement, relates only to one or more of the following, and then put in an extra one, and say if it is for the utilization of Canadian resources when meeting the requirements of the export trade and to develop markets outside of Canada.

Secondly, to my way of thinking—because we cannot apply our Canadian combines law extraterritorially, it would appear that if there were a combination or an agreement which related only to the export market, it would not run afoul of the combines law at the moment.

Mr. FULTON: May I ask you a question?

Mr. HOWARD: So it appears to me that if it related only to the export market, it would not run afoul of the combines law; but it might do so if there were a conspiracy in effect internally, and within Canada. But in any event I am inclined to be opposed to the motion itself, and to the amendment. I am inclined to be opposed to the attempt to alter the Combines Investigation Act to deal with this specific question.

The minister mentioned, and I agreed with him, as to how difficult it is, or, to put it the other way, how easy it is to have a group which combines or agrees on an export market, and to have their combination agreements spill over into the domestic market.

This is what Dr. Skeoch called the osmosis effect, of activity in one field spilling over into another. But as to how far in the public interest we should go to deal with this, is something beyond me. The export market question itself is important, yes. But I do not think this is the place to tackle it, in our anti-combines law. I would rather see it tackled by the establishment of a crown agency, or by export boards who would deal with the broad question of exports, and not leave it to private industry to make agreements among themselves to deal with this question of export markets.

I believe that as much as possible the resources of Canada should be utilized; and it is only in respect to multi-lateral trade agreements such as we have just signed with Russia, that this question should be placed where the Canadian government should be in the position of making these arrangements, and not have them done by private industry at all.

If we had set up such export boards, we probably would not have run into the difficulties that we had in respect to the sale of motor cars to China, or the question of the aluminum company being reluctant to sell aluminum to China, for fear of reprisal from their parent company in the United States. I call it their parent company, but they say it is not.

If we had export boards to deal with these specific things, we would find that on balance it would be in the best interests of Canada and the development of her resources, because we would be doing it on a uniform basis. But I think this is the wrong place to tackle it.

Mr. MACDONNELL: Does that not mean that what would follow would be state trading?

Mr. HOWARD: No, I do not think so. We are talking about the field of exports now, and the influence upon it and upon our economy of such industries as our lumber industry, which has a tremendous effect on the economy of British Columbia, and the pulp and paper industry, and the fishing industry.

Mr. FULTON: There is one point which I think should be answered, because I think you have fallen—if I may say so with respect—into some of the same errors as the submission made by some of the organizations, and that is, that if the arrangement were related exclusively to the export trade, it would somehow at the present time be outside the purview of our present combines legislation; that is, if it related exclusively to the export trade.

But it is my view that this is an erroneous conclusion. The combines legislation makes it an offence to engage in combinations, mergers, or monopolies that lessen competition unduly or are otherwise detrimental to the Canadian public. The fact that an arrangement related to export trade alone would not in itself take the arrangement outside the purview of the combines legislation, if the arrangement had the effect of unduly lessening competition to the detriment of Canada. That is my point. The mere suggestion or statement that it relates primarily to the export trades does not of itself take it out of the purview of the combines legislation if, in fact, the arrangement is made in Canada and it results in one of the offences enumerated in section 32, or is a merger as defined in the definition section. That, I think, is the error that the export associations fell into.

I think, too, one has to bear in mind that an agreement solely related to the export field should still be looked at from the point of view of the Canadian economy. If the only purpose for which they got together was to increase their profits, the arrangement might result, for instance, in lower employment in Canada. If they entered into an arrangement with some foreign cartel for a nice slice of the export market, which gave them an assured portion but, nevertheless, was a smaller portion than if they had carried on really competitive practices, that might be demonstrated to be contrary to the interests of the Canadian economy. You cannot say that just because the arrangement relates to export activities it takes it out of the purview of the Combines Act.

That has been my difficulty, to find some way of taking certain situations out of the purview of the Combines Act, because they relate to the export field, and still provide protection for the national interest. I say that because we have, in fact, national interest in the widest sense in the export market, if by competition we could have a larger portion of the export market. These are the sorts of difficulties we have been confronted with in trying to devise an amendment, even having in mind the amendment Mr. Pickersgill has suggested.

Mr. HOWARD: I think that is what I was getting at, though I did not, perhaps, phrase it very properly. It all hinges on the basic amount of words in the present definition of combines—that which operates to the detriment or against the interest of the public. This is what you tie a prosecution into if there is a prosecution?

Mr. FULTON: Yes.

Mr. HOWARD: This is what I was getting at.

Mr. FULTON: I wonder if I could ask Mr. Pickersgill a question for clarification, because I am interested in his amendment and in his objectives, as I have indicated. The amendment seems to me to contemplate an arrangement between companies, whether it be a combination or a merger, having as its objective better facilities for competition, better arrangements for competition in the export trade. If such an arrangement were entered into under the auspices of such an amendment as this, or some other amendment we might devise, would it be your view, Mr. Pickersgill, because of our concern with its effects domestically, that we should require such an arrangement to be registered with the combines branch or some other government agency?

Mr. PICKERSGILL: I would certainly feel myself, if some kind of amendment of this sort were acceptable to the government and that kind of provision were included, that there would not be any objection, because I cannot imagine we want to do anything that is going to enable secret combinations to be made that may have other ulterior purposes.

Perhaps by an illustration I could indicate what I am primarily concerned about, speaking as a member of Parliament for a particular constituency. I observed over the last few years that a larger and larger share of the

world market for salt cod fish is not being taken by Canada. In fact, our possible exports are declining, not very much, but they are declining a little. The expansion of the industry is all going to our international competitors. I cannot help but feel that one of the reasons for that—and here it is not because of the combines legislation, because there has been, up to now, no real attempt on the part of the Canadian trade to combine—but I cannot help but feel that if we are going to maintain this market some kind of combination is going to be necessary as, in my opinion, it was necessary in the wheat industry.

Unlike Mr. Howard, I am not in favour of having those things done by the state, if they can be done by private initiative. I think that perhaps that illustration will indicate what I have in mind. The minister's observations to Mr. Howard about the present state of the law did seem to me to suggest that the law, if rigidly enforced, was rather more rigorous than I think even those witnesses who came here from the great export industries—the fisheries council, the forest products industry and the metal mining industry—had apprehended it was.

I suppose the fact is this, that the combines branch, having a lot of things to do, does not go around looking for things in the export field that do not have any real domestic effects. I would certainly hope that would be true. But if it is a mere matter of tolerance, and if we could find some words that removed it from that field into the field of law, I think that would be an improvement. Indeed, I think that last observation of the minister did strengthen my feeling that whether we accept this amendment or not, we ought to try to find some way of meeing this problem.

Mr. FULTON: I am very much interested in what you have said there because one of our problems has been the one you touched on; namely, how you define in the legislation what is permissible and what is not permissible in specific terms. Therefore, one of our problems has been to leave a certain discretion to the court. I think that is the approach of your present suggested amendment.

Mr. PICKERSGILL: Quite.

Mr. FULTON: I think that is open to as much criticism, if that criticism be valid, as some of the amendments we have put in the bill. If you are going to leave it to the discretion of the courts, then you have to have words capable of general application. The courts have to assess wherein the public interest lies, whether in strong export business or preventing any sort of combination in restraint of trade in the domestic field.

What has been difficult for us to resolve is that if you make a blanket exemption, somewhat along the lines of the words used in this proposed amendment, then, bearing in mind the fact that you have industries where the bulk of the product goes into the export market, would you be opening the door to such an extent that simply because the bulk of this industry is engaged in the export trade you make possible a situation in which the whole industry is controlled by one giant combine or one giant merger?

Mr. PICKERSGILL: This is as in the wheat industry?

Mr. FULTON: Yes, but the wheat industry is under the aegis of government legislation, and we certainly do not want that in the other fields. That is the problem we are faced with in the legislative field, that we do not want to set up a regulatory board for the fish industry or the lumbering industry or any other industry in Canada. This then gives rise to the difficulty.

All I can say, again, is that if we could find any form of words that recognizes legitimate activities in the export field and does not hold out such a shield or cloak as works against the best interest of the Canadian economy or the Canadian consumer, we would be delighted to introduce such a definition

into the combines legislation. We have not been able to find one yet, but if we can find one between now and the time it comes up in the house, we would be glad to do so.

Mr. PICKERSGILL: I admit the vagueness of the language when I say this, but it is vague for this very reason, that it says, "the court shall consider," and does not say, "the court shall examine," or anything of that sort. Of course, I am not a lawyer, and I have never appeared in the courts, except to answer one or two traffic charges. So I do not know much about what the courts do consider; but it would appear to me this is only something that could be used by the defence, and anyone who had obviously created a combination, alleging that it was necessary for the export field, but it obviously operated in the domestic—that the onus of proof would certainly be on the accused to prove it really did fulfil this requirement.

Mr. FULTON: Exactly as it is in section 32, in our proposed amendment.

Mr. PICKERSGILL: Section 32, the minister maintains that those things are not against the law anyway; and section 32, as far as I can make out, is a kind of bill of rights for industry. This is something substantive.

Mr. FULTON: A combination or merger that produces a certain result in the export field and does not operate to the detriment of the public domestically is not against the law either. I might retort to you if what you have envisaged is not against the law, why are you asking for an amendment? I think the main gravamen of the criticisms of the export associations appears to be that we do not clarify the law. As you know, yourself, no formal investigation has been launched against anybody in the export field, except in one specific case where it was alleged it had operated to the detriment of the Canadian public. I think the same answer is open to your amendment as you have previously brought by way of criticism to my amendment. Maybe both of them contain within them the genesis of some good ideas. I am prepared to give your amendment, in principle, the benefit of the doubt; and I only suggest that you give our amendment the benefit of the same doubt.

Mr. PICKERSGILL: I am not in a bargaining mood.

The CHAIRMAN: Certainly, I think the committee is in accord with the spirit of your amendment, but probably not with the words. Would you be satisfied with the undertaking the minister has given, that they will take a look at it, and withdraw your amendment?

Mr. PICKERSGILL: No, I think we will put the amendment.

Mr. AIKEN: Before the amendment is put, I would like to make a suggestion as to wording. I am not proposing this be accepted, nor am I stating I fully concur in Mr. Pickersgill's motion. But when I raised the objection initially to the wording I was asked by Mr. Caron where the wording was short. I drafted up something here I think strengthens what Mr. Pickersgill has in mind, and it is a suggestion the minister might consider after the amendment has been dealt with. If I might just read it, it could perhaps be considered. Subsection (2), that Mr. Pickersgill proposed, should read, in my view, something like this:

> In determining whether any offence under section 32 or 33 has been or is being committed, the court shall not find the accused guilty if it is of the opinion that the offence charged relates mainly to the export trade and the development of markets outside Canada, and that the offence charged does not otherwise contravene the provisions of the act, as it affects domestic markets within Canada.

I realize that that wording represents one difficulty, and that is that the situation where a group of persons is combining for export which would not affect the domestic market, would be very rare indeed, and it may be so

difficult the amendment would not be practical. However, I think if it were practical, these words might, at least, spell out the intention to give a break, if you would have it, to those engaged in the export trade, provided they are not interfering with the domestic market.

I would ask if the minister might give this some consideration.

Mr. JONES: In commenting on Mr. Aiken's suggested amendment, if the amendment which was to be put forward was to clarify the law, the word "mainly" should be struck out, and the word "solely" should be inserted in its place.

As the minister pointed out, it is possible for combinations to occur if they do not affect the Canadian consumer at all within Canada at the time. Therefore, the word "solely" would be a clarification of the law, whereas the introduction of the word "mainly" might open the amendment up to some of the objectionable features contained in Mr. Pickersgill's amendment.

Mr. AIKEN: In answer to Mr. Jones, I specifically considered that, because there are two things that must be considered by the court: first, that the offence charged relates mainly to the export trade and, secondly, that the offence charged does not otherwise contravene the provisions of the act as it affects domestic markets within Canada. However, it seems to me, at least, to spell out the intention.

Mr. FULTON: Well, Mr. Chairman, Mr. Aiken's ideas, with the suggested modification by Mr. Jones, along with the amendment of Mr. Pickersgill are, in my view all excellent ideas. They are assertive of principles, but would have to be specifically and quietly studied in so far as being viewed as an amendment.

As I say, I am not prepared to accept the amendment at the moment—and I know I will be accused in the house of having rejected a suggestion which would improve the position of Canadian industries in export trade. However, I am sorry, but I am going to have to accept that onus. I know that Mr. Pickersgill will not modify his criticisms, and that he will say that.

I regret, at the moment, I am not prepared to accept this amendment, or even the modification suggested by Mr. Aiken, as a specific amendment. I am prepared to accept the idea, and have another look at it to see whether we can translate these ideas into legislation without doing more damage to the Canadian economy, industry and the Canadian consumer, than we do good. I regret, but I cannot go further than that. And. if I am accused of being rigid or harsh, I can only say that here is an illustration of the fact that we, as a government, have the concern of the Canadian consumer at heart, and we are not going to accept an amendment, without consideration, which we think has in it some great possibility of affecting the interests of the Canadian consumer and the Canadian domestic market. I cannot accept it at the present time.

Mr. BENIDICKSON: We appreciate your position but, while you are conducting this review, would you look specifically at page 295 of the committee reports, at the evidence of Mr. Nicholson in connection with the forest products industry. It is the third last paragraph on that page:

> —so I say that along with this new proposed subsection (*g*), that if you put in after "unduly" the words "within Canada", you have served or gained the objective that you are after, which is not competition unduly within Canada.

Then, if you would look at the evidence of Mr. Wansbrough, at page 301, under the heading of "export trade":

> In our original submission we urged that there should be included in the bill a section specifically excluding export trade from the provisions of the act, with particular reference to trade arrangements in the export field where companies primarily engaged in export were endeavouring to conform to the recommendations of international bodies of which the government of Canada was a member.

Mr. FULTON: I do not quite see what specific passage you are referring to in Mr. Wansbrough's evidence.

Mr. THOMAS: It is at the bottom of page 6.

Mr. BENIDICKSON: It is directly under the italicized words "export trade"—the paragraph immediately thereunder.

Mr. DRYSDALE: I would like to comment briefly on Mr. Pickersgill's amendment.

The CHAIRMAN: Just a moment, Mr. Drysdale; the minister is considering this. Would you wait until he is finished.

Mr. FULTON: Well, to deal first with Mr. Nicholson's submission, it is my recollection, without being able to point to a specific passage in his evidence, that he was not quite able to come up with an answer to the question that was posed to him, and that was: how do you envisage such an arrangement being possible with respect to export trade that would not spill over into the domestic market? It is my clear recollection that he was not able to answer that question. This is the great question that confronts all of us, in dealing with this problem, and the president of the association, having a direct interest in the problem, was not able to assist us by giving a specific answer to that question. I do not say that because he could not give us an answer, there is not one. There may be an answer somewhere. I have not yet been able to find it. However, we will have another look at it.

In regard to Mr. Wansbrough's evidence—it seems to me he is suggesting that this should be done only by reference to arrangements made under the auspices of international bodies, of which the government of Canada was a member—this relates to the question I asked Mr. Pickersgill, to which he gave an interesting answer, but it seems to me if you accepted the implications of that suggestion, you would have to have registration and supervision of the activities of the companies which were engaged in the trade which was covered by those international arrangements. I am not rejecting this out of hand, but I think it is a far-reaching step for a government to take, to say: we will examine your books and arrangements, and discuss them with you—and have the right, almost, to veto any arrangement you make or propose to make with respect to the way you carry on your business. That is a very far-reaching step to ask any government to take, and this is a step from which, certainly, this government shrinks, believing as we do, in the general principle that what governments should do is lay down the climate and do what they can to improve the climate in which business carries on its activities; but to leave business to carry on its activities subject only to over-all legislation which, itself, will protect the public interest. But we do not want to get into the field of telling business how it shall carry on its affairs in detail.

Mr. DRYSDALE: I would like to comment on Mr. Pickersgill's amendment.

I am inclined to agree with the principles he is seeking, but I am not too sure of the exact wording he has before us.

One of the key questions, in my mind, appears to be that of providing some guidance or tests for the court as to what is a matter of public interest, or what is a matter of public detriment. I think Mr. Pickersgill, in accepting the

minister's suggestion of the possibility of registration, came very close to the United Kingdom restrictive trade practices act of 1956 and, I would like, while the minister is considering the problem, to refer him to the *Canadian Bar Review* for May, 1960 where there is an article entitled "The Enforcement of Competition in the United Kingdom" by Richard Gosse who, incidentally, was a former British Columbia lawyer. At page 174 of that article, it states:

> Once a restriction is before the court, it is to be deemed against the public interest unless the court is:
>
> (1) satisfied that at least one of seven specified circumstances exist, and
>
> (2) is further satisfied that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment, actual or likely, to the public or to certain persons not party to the agreement.

Mr. FULTON: Yes.

Mr. DRYSDALE: One matter which, I think, is of interest to the committee is the one they call section (*f*), which reads as follows:

> That, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business, including export business, of the said trade or industry.

And the person writing the article comments:

> Since the United Kingdom is a great exporting country, care has been taken in the legislation to specifically ensure that the national interest will not suffer in the export trade by the imposition of statutory controls requiring exporters to compete.

I think, Mr. Chairman, in essence, that is the problem we are up against. As a result of the Howard Smith case, I do not think, at present, that the courts would be entitled to consider the economical advantages or disadvantages that might accrue as a result of the combination, monopoly, or merger. I think what we require is some test along the lines of the United Kingdom legislation, setting out clearly what is considered in the public interest, or what is considered as to the public detriment.

I had assumed, up until the time the minister made his comment, that territorially the act could not apply to export trade but, as a result of his comments, I had the feeling that, perhaps, the minister was suggesting—and I hope he corrects me if I am wrong because, perhaps, I may have misunderstood him—that if the export business is likely to have any effect on the domestic trade—that, in effect, if a person was in the export business 100 per cent, and there was a similar commodity within Canada, and the effect of the export trade bringing part of the business in Canada would have the effect of reducing the price on this other article, and increasing the competition that, in effect, the person in the export business would have used as, perhaps, a lever in the domestic market—and that was the only way I could see the export trade would have its effect.

I see you are shaking your head so, perhaps, I have misinterpreted you. But, practically, the problem is one where the business is part domestic and part export, in varying percentages and at present, in my opinion, as long as even one per cent of the business was domestic, I think the courts would have jurisdiction over the matter; and, because of the statement in the Howard Smith case that we cannot consider the economic advantages or disadvantages,

I think some provision should be made in line with the United Kingdom suggestion so we could have restriction which might be of benefit to the Canadian public as a whole.

Mr. FULTON: Several comments, I think, could be made; probably four; I am trying to remember them.

First, the Howard Smith case was purely a domestic case; and the allegations and all the evidence related to domestic activities; so the court certainly did not have at that time—and I am not aware that any court has at any time had before it—a case where the allegation was based on the fact, demonstrably, of an arrangement primarily in the export field. So I do not think you are right in drawing the conclusion that in a type of case such as that the courts could not look at the overall effect on the economy.

Secondly, with regard to the United Kingdom, their legislation, and their restrictive practices court, was based in part on the results of a number of enquiries by the monopolies and restrictive practices commission under the previous legislation.

As you know, this is a rather new—or a comparatively new development in the United Kingdom. It is true that they adopted a different approach to ours; they adopted the approach of requiring a very wide range of agreements in restraint of trade to be registered with a government officer called the "Registrar". They recognized that such agreements in restraint of trade might operate to the public detriment and raised a presumption of illegality against them and required them to be registered.

The court passes on the question of whether or not they are in fact contrary to the public interest; and they have seven specific and one general criteria laid down by which to judge them.

There you have a body—the restrictive practices court—which passes on the question of whether or not these are in the public interest. It is a court, but a very special kind of court and the approach is quite different from the approach of the Canadian legislation, which we are preserving and following.

Our approach is that we lay down laws to define and protect public interest in the preservation of competition, and in so far as we can do it, set the limits within which business is free to act, and the limits beyond which, if they act, they are guilty of a contravention of the law. And we have left it to the ordinary courts to decide, whether or not there has been a contravention. We do not require arrangements to be registered with a commission, or a body, or a government appointed agency, before they get to the courts. So there is a considerable difference in the approach.

Thirdly, I think it is correct to say that with regard to the agreements which have been registered, and which have gone before the United Kingdom restrictive practices court, the score has been about six to one and one-half against the validity of the restrictions.

I am not able to say offhand, but I believe in fact those agreements, with one exception, do not relate substantially to the export trade. But I simply point out this to you as an indication that there does not seem to be much greater freedom of arrangement now granted to business in England under their approach than is the case in Canada.

Mr. WOOLLIAMS: Would you not say it is a little more restricted, because the government has its thumb on every agreement being made?

Mr. FULTON: Certainly, I would say it was potentially more restrictive. The body that passes upon the agreements is set up as a court. But the legislation does require registration of the agreements before they are brought before the court or otherwise dealt with.

When an agreement goes before the court it is looked at as a case in court, in exactly the same sense as we would look on a prosecution but with differ-

ent procedure and remedies in one of our courts. I think I said there were four points, but those are the only three that I can recall now, in reply to your suggestion, Mr. Drysdale.

I think that it comes down to this, that there is a difference in the approach in the United Kingdom from that in Canada, because there it is in part a matter of registration and I think arguably, of administrative policy; whereas ours is exclusively an operation of law as interpreted by the court without any prerequisite of registration, or an ad hoc action by a governmental agency.

Mr. DRYSDALE: That is the main thing which hampers me in making my remarks.

Mr. FULTON: Oh yes, this is the other point: we do not have jurisdiction in Canada, federally, to approach our combination, merger, or monopoly program on an ad hoc basis of trade and commerce, and the regulation of trade and commerce. That was tried and rejected by the courts.

We therefore have to rely on the basis of criminal law; and the approach I have outlined is an approach based on that premise, that you define the offence which is laid down for the courts to decide; whereas in the United Kingdom the situation is quite different. They have wide power to regulate trade and commerce; and whether or not they formally postulate their law on that principle, their approach is based on the fact that they have an entirely different jurisdiction there from that of the federal government in Canada.

Mr. PICKERSGILL: That would not be true of those industries which are predominantly export industries. There is no question that section 91 governs export industries.

Mr. FULTON: Yes, surely; but you would not argue that because we have the power to regulate export trade, we have the power to regulate companies and their practices in domestic trade, merely because they happen also to be engaged in export trade?

Mr. PICKERSGILL: The minister has heard of grain elevators, I suppose.

Mr. FULTON: They are within the field of an entire industry or business which has been brought specifically under federal jurisdiction and control. I would not care to claim jurisdiction with regard to general domestic business upon any such arangement as that.

Mr. DRYSDALE: My remarks were prompted by Mr. Pickersgill's agreement, that perhaps registration would be a good idea, in so far as those agreements are concerned; but in relation to the Howard Smith case, I would quote from page 315 of proceedings No. 4 of our committee as follows:

> In this connection reference might be made to the decision of the Supreme Court of Canada in Howard Smith Paper Mills Ltd. et. al. v. the Queen (1957) S.C.R. 403, where two of the judges of that court, Taschereau, J. at page 407 and Cartwright, J. at pp. 426-427, say in effect that, however, innocent or commendable a person's actions may be, the wish to accomplish a desirable purpose constitutes no defence in a case where an agreement or other act has been prohibited by statute.

That would be of great weight in any court interpreting it; and I would suggest that along the same line as Mr. Benidickson, when I refer again to page 315 and the definition under paragraph (g), which was also in the forest industry's submission, where they attempted to define detriment to the public by providing that consideration shall be given to all relevant economic factors. It reads as follows:

> (g) In determining whether detriment to the public of Canada has resulted from any conspiracy, combination, agreement, arrangement,

merger or monopoly, consideration shall be given to all relevant economic factors including all countervailing advantages which may result to the public.

Might I ask the minister if he would give consideration to that definition when reviewing these particular aspects?

Mr. FULTON: That suggestion was not restricted to the export trade; it was a suggestion as to what should be written into the act for overall application. The suggestion was that the paragraph be written right into section 2, the Interpretation section of the Act, and it would apply to all agreements, domestic or export.

Mr. DRYSDALE: In citing these two comments I think it is important to provide some method of giving the court an indication as to whether they think the matter is in the public interest or the public detriment, as an objective.

Mr. FULTON: Perhaps I should go back to this now before I conclude my remarks, and re-enforce what I have already said by repeating it as follows: that in respect to exploring the area of these problems, we have an inquiry now before the restrictive trade practices commission, and as I said on an earlier occasion, as I understand the act it is one of the obligations of the commission to consider public interest in the course of their inquiry, and not merely whether in their view competition has been affected in a particular respect.

I am quite certain that the commission will consider public interest in the very context we have been discussing it here: whether it is in the public interest to have arrangements in the export trade, which are of advantage to such trade, if that can be proved, even although they may have certain disadvantageous effects domestically; or, does public interest mean merely the preserving and safeguarding of the domestic position?

We have a situation where the commission is charged by parliament with the responsibility of making such inquiries and bringing in a report; so I think it may be premature for the government at the present time to be suggesting specific amendments to our legislation.

But I shall have another look at the whole problem, and I can only conclude by saying that I think any responsible government would take this position: that we do not like to act in advance of the report which we shall be receiving from the commission appointed to make this report, and that we have not, in advance of that report, been able as yet to work out an amendment with which we would be satisfied, or which, we believe, would preserve the domestic interest while advancing our interests in the export field.

So, not having yet been satisfied that we can do that, for all the reasons I have given, we place the interest of the consumer ahead of any other interest at least at the present time, and we are not able to accept a specific amendment such as that which has been put forward, without having another look at it; and if we can reconcile this conflict of interest, we will so report to the house, when the bill goes before the house.

The CHAIRMAN: All those in favour of the amendment as moved by Mr. Pickersgill?

The CLERK: Three.

The CHAIRMAN: Those against?

The CLERK: Ten.

The CHAIRMAN: I declare the amendment lost.

Let us now turn to Mr. Howard's amendment to section 33A, and deal with it.

Mr. FULTON: I explained this morning that the purpose of Mr. Howard's amendment is, as I understand it, to introduce into Canadian legislation the

principle known as the cost justification principle, in so far as it would apply to the giving of price discounts. There are arguments to be made both for and against that principle; but it is a far reaching principle to introduce into our legislation at this stage of discussion.

Therefore, while reserving my decision on the merits of the principle, I would say that it is not the kind of principle we should introduce at this stage of consideration of the bill. It does not affect specific matters raised by the present proposed amendments.

This would import a principle which I think should be discussed and examined fully and at leisure; so for that reason alone I am not able to accept Mr. Howard's amendment.

Mr. HOWARD: May I ask the minister if he thinks that the proposed amendment is put forward with a view to making profit immoral?

Mr. FULTON: I must say, Mr. Howard, I did not address myself to that argument. It was an argument of somebody else in the committee, and was not mine.

Mr. HOWARD: I do not think it was an argument either, but it was just a few words blurted out.

Mr. PICKERSGILL: It did seem to me to be a rather new and unusual principle for the C.C.F. to be arguing with. At any rate, there seems to be some obligation on the part of business to make a profit. I do not attach great importance to it.

The CHAIRMAN: With that exception does 33A carry?

Mr. PICKERSGILL: What about the amendment?

Mr. WOOLLIAMS: Mr. Pickersgill said that out of desperation, I think.

Mr. PICKERSGILL: I cannot say it is for quite the same reasons as the minister gave, but it does not commend itself to me. I suspect it would have the effect of tending to create a disadvantage for consumers. Therefore, I am against it.

Mr. MACDONNELL: As Mr Churchill said, the people we should get after are not those who make profits, but those who do not make profits.

The CHAIRMAN: Mr. Howard's amendment seconded by Mr. Fisher: that,

> Subsection 1(*a*) of proposed section 33A be amended by striking out the words "and quantity" in line 21, page 7 of the bill, and substituting therefor the following:
>
> Except that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such articles are sold or delivered to such purchaser.

Motion negatived.

The CHAIRMAN: Does clause 33(1)*a* carry without amendment?

Agreed to.

Mr. HORNER (*Acadia*): I wonder if the committee has given any thought to a suggestion made by Mr. Nugent at page 368 of a previous committee meeting? He suggested, about the middle of the page,

> This arises out of what Mr. Horner said in relation to section 33(1)(*a*) and your example of the soft drink company being able to purchase gas at a better price than the service station operators. Would you, Mr. Blair, agree with me, in respect of section 33(1)(*a*), that if the term "competitors of a purchaser of articles" meant competitors in purchasing from the suppliers as well as just competitors of the business, that that would give you—

—and that is the national automotive trade association—

> —all the protection you need?

Mr. Blair it would.

It deals with where section 33(1)(*a*) goes on to state,

> —discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him—

Mr. Nugent suggested there that you then put in,

> —against competitors of a purchaser of articles—

Mr. FULTON: We had considered that, and you will remember the example given. I think I can use it, because it was given by the automotive association, and it was that the oil companies who had sold gas and oil to them, the service station operators, had also sold it to companies like Coca Cola to operate large fleets of trucks, with the result that Coca Cola did not buy from the service station operator and, indeed, Coca Cola might be getting its supply of oil and gas at a lower price than it was sold to the service station operator. There is nothing in our law—and I do not believe there should be anything in our law—which would prevent oil and gas companies from supplying directly large-scale trade accounts such as Coca Cola. If you did have such a provision it would mean you would compel all these large accounts to go to the local service station to buy gas and oil. When they operate huge fleets of trucks, whether or not it is desirable in principle, it would, in addition, be getting into the realm of the regulating of trade and industry. You would be saying to the gas and oil company, as well as to the large-scale purchaser, "You cannot buy in bulk from a primary supplier. You must go and deal with a service station operator." I do not think we have the authority under our jurisdiction to compel that.

Then you come to the question: since you are not going to do that, is it equitable that the bulk purchaser should be able to purchase at a lower price than the retail outlet can purchase his supply from the supplier? Now, the very basis of our legislation is to preserve competition. The bulk purchaser from the main supplier is not in competition with the service station operator. He does not turn around and resell his oil and gas, but uses it for his own fleet.

Therefore, there seems to us to be no way in which we can get at that position under the legislative jurisdiction we have, and under laws making it an offence to restrict competition. How can you make it a criminal offence for the bulk purchaser to get his supplies at a lower price, when he is not a competitor of someone else in respect of those supplies?

Mr. HORNER (*Acadia*): My point is this, and I agree with Mr. Nugent: These bulk purchasers are not buying any larger amounts of gas and oil than a retailer might. A retailer might buy ten times as much as the bulk purchaser, because he may be selling that to other concerns. I am not referring mainly to Coca Cola, but I could name large farming concerns who can buy gas at a cheaper rate than the retailer can get it.

Mr. FULTON: How does it hurt the retailer?

Mr. HORNER (*Acadia*): It eventually gobbles up and takes away a slice of his market.

Mr. FULTON: You are really saying the bulk purchaser should be prevented from buying in bulk and should be made to deal with a retail outlet.

Mr. HORNER (*Acadia*): No, this amendment as I understand it now, this section, is against discrimination to the knowledge, directly, or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price—

Mr. FULTON: A discrimination between competitors by the same seller. But the bulk purchaser is not a competitor of the retail outlet.

Mr. HORNER (*Acadia*): In a sense he is a competitor of the supplier.

Mr. FULTON: He is not competing in the retail sales field of the outlet. The only basis on which such a regulation could be made, compelling the bulk purchaser to buy from a retail outlet, would be in the field of provincial jurisdiction where there is authority to regulate trade and business.

Mr. HORNER (*Acadia*): I disagree with you in this respect. I think the wholesaler, the oil company, in the first instance, if he can sell that gas to a bulk supplier at such and such a price, then he should be able to sell it to the retail outlet at the same price, or a competitive price. In other words, he can give a contract to the purchaser, the guy who agrees to buy only one type of gas and use it in his trucks continuously; but he can sell it at such and such a price, and he is giving him, in effect, a discount over and above what he is supplying it at to his own retailer.

Mr. FULTON: I think you would be opening the door there, even if we did have jurisdiction, to such a problem as you would find yourself unable to deal with. I say that, because you would be saying that a farmer, for instance, who sells to a feed merchant a thousand bushels of grain may not sell it—and I am excepting the wheat board from this—at any different price from that at which he sells 1,000 bushels of grain to a neighbour who wants to feed it to his cattle. When you get into that field you are regulating trade and industry in considerable detail, and, in my view, you cannot do it at this level. We can make it an offence for one seller to sell at different prices to two persons in competition with each other, because this is a law to preserve competition—

Mr. HORNER (*Acadia*): I think you are dealing mainly with quantity discounts in that regard. In many cases the retailer would handle ten times as much as the bulk purchaser would, buying from the wholesaler.

Mr. FULTON: But the retailer and the bulk purchaser are not in competition with each other, because the bulk purchaser is not reselling the gas and oil he buys; he is using it himself.

Mr. HORNER (*Acadia*): I realize that, but he is still competing to some extent, or should be competing to some extent. They are not competing, under the present arrangements, because the oil company is quite prepared to go out and sell at two or three cents a gallon less, as long as they are the sole suppliers to the farm or the company.

Mr. FULTON: But I say, the only way we can get at that problem is by regulating trade and industry, and the only basis upon which we attempt to legislate here, is to eliminate or make illegal, discrimination between competitors, so that one person cannot sell the same quantity at different prices to two different purchasers who are themselves in competition with each other. That is the criminal law position. To go further we would be getting into the field of regulating trade and commerce, and we do not have jurisdiction.

Mr. HORNER (*Acadia*): Is that not what you are doing?

Mr. FULTON: It is quite simple for the province to do that if it wants.

The CHAIRMAN: Mr. Horner, that point was fairly well discussed earlier. Have you some amendments to suggest, Mr. Minister?

Mr. FULTON: We have, to sections 33A(1) (*b*) & (*c*).

Because there is a record, which will be read, there is one other consideration I would like to put forward. I am very sympathetic to the problem and the position of the retail service station operators, but my point is that we have not the jurisdiction to meet their problem. The director has made

numerous inquiries, and it was his opinion, and it is my opinion, that we do not have the legislative jurisdiction to legislate and deal with the problem that confronts them. Even if we did have the legislative jurisdiction, at our level, what would we achieve by forcing prices to the bulk purchaser up to the same level as prices to the retail outlet, because the purchaser would not go to the retail outlet to buy the commodities. We would simply be forcing up the cost of the bulk purchaser doing business.

Mr. HORNER (*Acadia*): Either that, or you would be forcing the price down to the retailer, who would then be in a position, perhaps, to enlarge his market.

Mr. FULTON: He still would not sell to the bulk purchaser.

Mr. HORNER (*Acadia*): He could quite easily, if he could compete with the wholesalers price.

Mr. FULTON: I suggest to you, Mr. Horner, while I do not purport myself to be a businessman, or have too much detailed knowledge of how business is done, that you should consider for a moment the convenience and the saving which results when such purchases can be made on a bulk basis under a single account heading. You would not, in my submission, get the bulk purchaser to buy from the retail outlet. He still would not do that. You would be forcing the price up, and in turn forcing the price up to the consumer.

There is only one level at which this problem can be dealt with, as I say. If the provinces come to the conclusion, as a matter of policy, that this should be done, then they have the authority to do it. I do not think you can make a criminal offence out of the practice that you have in mind here.

Mr. HORNER (*Acadia*): I am glad the minister has given it a great deal of study, but I am a bit disappointed that an amendment could not have been made to bring about greater equality between bulk purchasers and retail outlets.

Mr. DRYSDALE: Mr. Chairman, I have just one small observation, which I think I should make. The minister has mentioned the difficulties that retail gas stations face. I wonder when the report comes in in respect of tires, batteries and accessories, if the minister could, perhaps in the light of that report, consider what, if any, amendment, could be made to this bill.

Mr. FULTON: Yes, we have a general inquiry in regard to that field, which relates specifically to the matter of tied sales. When we have that report, we may then be in a position to make a recommendation for an amendment, if we can find the jurisdiction to do it, and if the report indicates that it should be amended. That would be one of the problems service station operators are interested in.

Mr. Chairman, we have a suggesed amendment to section 33A, (1), (*b*) (*c*). I outlined the effect of the amendment this morning. I would like to put such an amendment before the committee now. There are some typed copies which can be circulated.

This amendment is suggested to achieve that which was put forward in the discussion we had a couple of days ago with regard to the alternatives in the words in subsections (*b*) and (*c*), namely: "having or designed to have the effect or tendency of substantially lessening competition or eliminating a competitor". My recommendation to the committee is that on page 7, lines 22 to 31 be deleted and the following substituted therefor: subsection (*b*) "engages in a policy of selling articles in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; or

(c) engages in a policy of selling articles at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect,".

Mr. PICKERSGILL: I might say, I think it is an improvement in the language.

Mr. DRYSDALE: I would so move that, Mr. Chairman.

Mr. MORTON: I would second that.

The CHAIRMAN: Mr. Drysdale has moved the motion to adopt this amendment, and Mr. Morton has seconded it. Is this carried? I suppose we had better have a vote.

Mr. FULTON: I would think it is unanimous.

Amendment agreed to.

The CHAIRMAN: Does 33A carry as amended?

33A as amended agreed to.

The CHAIRMAN: Shall the preamble carry?

Preamble agreed to.

The CHAIRMAN: Shall the title carry?

Title agreed to.

The CHAIRMAN: Shall the bill as amended carry?

Some Hon. MEMBERS: Agreed.

Mr. PICKERSGILL: On division.

The CHAIRMAN: Shall I report the bill as amended?

Some Hon. MEMBERS: Agreed.

Mr. FULTON: Shall we adjourn?

The CHAIRMAN: Thank you, Mr. Minister, and thank you gentlemen.