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Third Session—Twenty-eighth Parliament
1970

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

Banking, Trade and Commerce

The Honourable SALTER A. HAYDEN, Chairman

No. 1

WEDNESDAY, OCTOBER 28th, 1970

Complete Proceedings on Bill S-2,
intituled:
"AN ACT RESPECTING STATISTICS OF CANADA".

22963—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

Chairman: The Honourable Salter A. Hayden

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 27, 1970:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Robichaud, P.C., seconded by the Honourable Senator Carter, for the second reading of the Bill S-2, intituled: "An Act respecting statistics of Canada".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

22963—2

Minutes of Proceedings

Wednesday, October 28th, 1970.
(1)

Pursuant to adjournement and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider:

Bill S-2 "An Act respecting statistics of Canada".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Blois, Connolly (*Ottawa-West*), Desruisseaux, Everett, Gelinas, Hays, Hollett, Isnor, Kinley, Lang, Macnaughton and Molson—(15).

Present, but not of the Committee: The Honourable Senator McDonald—(1).

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

Witnesses:

Dominion Bureau of Statistics:

Walter E. Duffett, Dominion Statistician; L. E. Rowebottom, Assistant Dominion Statistician; H. L. Allen, Assistant Dominion Statistician.

Department of National Revenue:

H. F. Herbert, Assistant Deputy Minister, Systems and Planning.

Department of Justice:

D. D. Pratt, Legal Division.

Upon motion it was Resolved to report the said Bill without amendment.

After discussion and upon motion it was Resolved to reprint 10,000 copies of the Report of the Committee on the White Paper "Proposals for Tax Reform".

At 11:00 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, October 28th, 1970.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred the Bill S-2, intituled: "An Act respecting statistics of Canada", has in obedience to the order of reference of October 27th, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Wednesday, October 28, 1970

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-2 respecting statistics of Canada met this day at 9 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators we have one bill before us for consideration this morning Bill S-2 the Statistics Act. We have here Mr. Walter Duffett, the Dominion Statistician who will lead the panel in discussion.

Mr. Walter Duffett, Dominion Statistician: Yes, Mr. Chairman. I have some of my colleagues here to help me if necessary.

The Chairman: That is good. We also have Mr. Rowebottom, Assistant Dominion Statistician and Mr. Allen, Assistant Dominion Statistician. We have others in reserve in case your questions require more extensive coverage. I think possibly the best way to start would be to have some open remarks from Mr. Duffett.

Mr. Duffett: Thank you, sir. I welcome this opportunity to make a few introductory remarks on the statistics bill before you today. As Senator Robichaud pointed out in introducing the bill, it contains a variety of provisions designed to update the legislation, to meet the needs of users, and to protect the privacy of respondents.

Senators Connolly (Ottawa West) and Choquette in their remarks clearly identified the most important features of the bill, and I will confine my comments to these aspects. These points were, briefly:

(1) the penalty features of the legislation and the compulsion these imply;

(2) the rising cost of the statistical system;

(3) the burden of response, especially on small firms;

(4) the need to protect the privacy of businesses and individuals.

Penalties for non-response are a necessary feature of a statistical system but, fortunately, one which is not often imposed. Persuasion and assistance to respondents meet nearly all our needs. Prosecution of business firms has not been necessary in recent years, nor in the case of individuals except for a few isolated cases in connection with the census of population. Of course, it may be necessary at some time to consider prosecution of a few recalcitrant respondents where all other efforts have failed. The penalties have been adjusted to conform to rising prices and incomes, in order to preserve an incentive to co-operate, but the prison terms remain unchanged; the minimum penalties have in fact been eliminated altogether.

An effort to keep down rising costs and minimize response burden is evident in two main changes in the act. The first is designed to confirm and extend in a selective fashion the present structure of several hundred co-operative agreements by which D.B.S. and the provinces share identical questionnaire forms in meeting their survey needs. This avoids a great deal of possible duplication. The proposed changes take into account the growing needs and sophistication of the provincial statistical offices, and will encourage them to develop rigorous legislative and other protections to privacy.

The proposed use by D.B.S. of unincorporated business and personal income tax information for statistical purposes is an extension of a highly successful and quite acceptable system of using corporate income tax material which has been in operation since 1965. We believe that the new arrangements would enable us to eliminate some 10,000 firms from the present obligation to report under the annual census of manufactures, and that it could before long greatly reduce the reporting burden of some 60,000 to 80,000 other firms in a variety of fields.

The senators rightly pointed out the dangers of disclosure of income tax records and we would propose to ensure that whatever material was brought to D.B.S. would be stored under special precautions in a central location. I find it difficult to see that use of these records by D.B.S. for purely statistical purposes could constitute a precedent for wider use for other reasons. As Senator Robichaud pointed out last evening, D.B.S. is not really concerned with looking at individual records, but with aggregating them, and has had a good deal of experience in a variety of fields with information at least as sensitive as records of income. It may be of interest to honourable senators to know that income tax records have been successfully used for years for statistical purposes in the United States and Scandinavia without adverse repercussions.

I shall be happy to provide information about further features of the bill or about D.B.S. operations. The organization is a large and complex one and I have several of my colleagues here to assist in meeting your needs.

[*Text*]

The Chairman: Mr. Duffett, would you say that the statistics you have been producing to date are less beneficial than they would have been if you had had this income tax information that you are seeking now?

Mr. Duffett: Yes, they have been less complete, but most of all, they have been more costly.

The Chairman: How have they been less complete?

Mr. Duffett: The best illustration, I think, is in the fields of unincorporated businesses. Small businesses are of very widespread interest to legislators at all levels, and to trade associations.

Senator Isnor: For what reason?

Mr. Duffett: Because there is a feeling that small businesses need particular attention and particular help from government. Small businesses, it is felt, operate under certain handicaps, particularly in competition with large firms or, in particular, I suppose, firms from abroad.

The Chairman: You know, Mr. Duffett, that was a very interesting remark you made. We should have had it when we had our hearings on the White Paper on taxation. It may be a little late for that now, but we will keep a record of it.

Senator Connolly (Ottawa West): He certainly adopted the principle.

The Chairman: He certainly approved of the principle we were asserting.

Senator Isnor: What makes you say that the financial returns you now receive, which you say are confidential—what use do you make of those financial returns?

Mr. Duffett: From small businesses?

Senator Isnor: Yes.

Mr. Duffett: Small businesses are in total, if you had them all together, quite an important element in the Canadian economy and in particular fields such as services, transportation and construction, small firms still are very important. Obtaining information from small firms by conventional methods, sending questionnaires, is difficult for us, and is particularly burdensome to the firms themselves. In many cases, they do not have a permanent accounting staff, so it becomes necessary for the owner of the enterprise to prepare the forms himself, or to hire an accountant to do it for him.

Senator Isnor: In other words, you are adding to the expense of that particular individual firm.

Mr. Duffett: To some degree. In some degree we are adding expense to all firms, by asking them to fill out questionnaires. It is particularly burdensome in the case of small firms.

Senator Isnor: How many new forms have you sent out in the last twelve months, seeking additional information?

The Chairman: You mean, senator, additional forms?

Mr. Duffett: My colleague Mr. Berlinguette is more concerned with manufacturing. My impression is that there were very few indeed. The statistical system is a pretty mature one now and additional surveys tend to be relatively rare in the fields of manufacturing and merchandising. Mr. Berlinguette nods, so I gather this is the case.

Senator Isnor: In the last one you sent out, you inquired in regard to the number of employees. Then you went on—full-time, part-time. How do you account for the part-time if they are employed by two or three firms?

Mr. Duffett: We are primarily interested in the number of employees in each enterprise and there could be a certain duplication in the case of people who have more than one job. For example, I should think possibly seasonal employees—fishermen in Newfoundland perhaps who work part-time in fishing and part-time driving a truck. This is the case so far as inquiries directed to business enterprises are concerned. Other surveys are directed to households but in that case the individual who has more than one job will be counted only once.

The Chairman: Is the truck driver who also fished counted as two jobs?

Mr. Duffett: It is counted as two jobs. Also the civil servant who may have a job during the day with the Government and some spare time work in the evening has in fact two jobs.

Senator Connolly (Ottawa West): I was concerned when I spoke about this bill I must say that I did not read it until I was in the chamber so some of the things you have said have modified a good deal the remarks I made. This is the first time that by legislation a department of Government other than National Revenue, Taxation, has had access to corporate and personal income tax returns?

Mr. Duffett: Yes and no. The Dominion Bureau of Statistics has had access to corporate income tax returns—corporate income tax returns—since 1965.

Senator Connolly (Ottawa West: Individual ones?

Mr. Duffett: No, no, corporate returns.

Senator Connolly (Ottawa West): Individual corporate returns?

The Chairman: Individual corporate returns.

Mr. Duffett: All corporate returns above a certain size as specified in the Corporations and Labour Unions Returns Act. We use, for that purpose, the Corporations and Labour Unions Returns Act, since 1965.

Senator Connolly (Ottawa West): Is that a power conferred by statute.

The Chairman: Yes.

[*Text*]

Mr. Duffett: What happened was that the Corporations and Labour Unions Returns Act was passed in 1962 and involved the D.B.S., which administered it, in obtaining separate financial statements from corporations in addition to those already filed with income tax authorities. Many respondents, including some trade associations, suggested to us that it would be simpler and more effective if we simply utilized the returns submitted for income tax purposes. An amendment was brought in in 1965 which permitted this. There have been literally no complaints about this arrangement from business firms.

Senator Connolly (Ottawa West): Certainly from the point of view that it reduces the amount of paper work that the corporation does, it is beneficial. When you get a corporate return and now when you would get an individual return, would you continue, under this legislation, not to use it individually or to publish anything about the individual return, bur rather to deal with classes and groups?

Mr. Duffett: This is the case. This in fact is what we do with all the information we receive. We are forbidden by law to publish anything which will disclose the operations of an individual firm.

Senator Everett: Is this an exception to that rule? Do I not read in here that you can disclose actually, in relation to the provinces?

Senator Connolly (Ottawa West): I was going to come to that point, as it is important, but go ahead.

Mr. Duffett: It is part of the new bill. Under the present legislation, as I mentioned, we share surveys with the provinces. This is legal, because the respondent in each case signs a form indicating that he is prepared to have it used by both groups. This is provided for under the secrecy clause of the act. These arrangements will continue but there is another provision—in clause 10 of the new bill—which recognizes the fact that in some provinces the statistical offices are becoming more sophisticated and in fact obtain a large amount of information from the public. In cases of this kind, joint surveys will be permitted to continue, with the important exception that the respondent will not have to give his specific approval to the arrangement. This is a liberalization of the relationship with the provinces but it is surrounded by a number of qualifications.

The first qualification is that we would enter into an arrangement of this kind only by order in council and only in fact if we felt that the arrangements within the province were adequate to ensure secrecy. In fact, in clause 10 of the bill it is specified that an arrangement of this kind is dependent on the province having substantially the same legal requirements, legal conditions, as exist now at the federal level; that the provinces have the power to require firms to report.

I might say here that at the moment none of the provinces have sufficiently rigorous legislation to qualify under this provision. Some are very close to it and I would expect that a few of the provinces will amend their legislation accordingly.

Senator Connolly (Ottawa West): I take it that under the proposed law you will be furnished copies of every income tax return, if you so request.

Mr. Duffett: Not exactly. There is a difference between what happens under the Corporations and Labour Unions Returns Act and what will happen under the new arrangement. Under the Corporations and Labour Unions Returns Act we receive the actual income tax forms, hold them for a short time and then pass them on to the Department of National Revenue. Under the new arrangement the DBS staff would go to the Department of National Revenue and with their assistance extract from the forms, extract from the material, what it is that we need. There is a good deal of material submitted in the case of unincorporated businesses which would not interest us and we would make an extract of that. That would be returned to the Bureau of Statistics and kept in a centrally located place and handled by a relatively small number of people. But the individual forms we would not receive.

Senator Isnor: What type of information do you mean by that?

Mr. Duffett: The sort of information that would interest us is aggregates, total sales, total profits, elements of cost which are shown in any financial statement submitted to the income tax people. The inputs of labour, material, amounts set aside for depreciation—essentially the sorts of things that appear on an income tax statement, a business income statement.

Senator Isnor: You have been getting that information for years, the total sales of individual stores.

Mr. Duffett: Yes, we have. We have been getting quite a lot of this material for years, and it is our hope that we will be able to obtain it without going to the firms themselves. I mentioned that in the case of the annual census of manufacturers we believe that we can eliminate about 10,000 firms immediately from the survey obligation and 60,000 to 80,000 firms in other areas in due course.

Senator Connolly (Ottawa West): Do you keep the corporate income tax returns after you have extracted the information you want?

Mr. Duffett: No. The Assistant Deputy Minister of National Revenue, Mr. Herbert, is here and can explain in detail what happens on their side, but what happens is, as I understand it, that the forms come from the regional offices to the head office in National Revenue. On the way they pause briefly in the Bureau of Statistics where they are kept in a locked cage and under special security arrangements. We take from the forms the material we require and these are then passed on to the Department of National Revenue. Is that correct, Mr. Herbert?

Mr. H. F. Herbert, Assistant Deputy Minister, Systems and Planning, Department of National Revenue: Mr.

[*Text*]

Chairman, we are dealing with two separate things here. First there are the arrangements with regard to corporate returns which have been in existence since 1965, as Mr. Duffett has said. In the case of corporate material, because they are relatively few in number, being about 350,000 or so in number, we receive two copies of such returns from the taxpayers. One copy stays in our district offices where it is the main vehicle for assessment and dealing with the taxpayer from our point of view. The second copy comes to our head office in Ottawa via D.B.S., and, while it is on its way through D.B.S., they extract the kind of financial and other data they are interested in. That situation, as I say, has been running for over five years.

Senator Connolly (Ottawa West): Does that include the taking of the name, address and all the rest of it of the company?

Mr. Herbert: I think that in D.B.S. they have a file with the name and address in order to follow up on their responses. They have a master file on magnetic tape.

Senator Desruisseaux: Is that permissible under actual laws?

Mr. Herbert: It is provided for, senator, under the Corporations and Labour Unions Returns Act. Now we return to the new proposed legislation. In the case of individuals, because they number now almost nine million a year, and almost for the purposes of logistics, we require only one return from the taxpayer. This is filed directly to our data centre in Ottawa where we go through the necessary procedures to verify the correctness, and it is at this point, while it is in Ottawa briefly, that staff in our building would extract the extra data that D.B.S. are now seeking to get. The return would then go back to our district offices as it has always done.

The Chairman: That is, the D.B.S. staff would do the extracting?

Mr. Herbert: No, it would likely be our staff working under their direction. Perhaps it would be supervised to some extent by some of their key people who have to make sure that what is being extracted is being done properly. But the confidentiality of the returns remains intact. We have a secrecy provision and D.B.S. have an even more stringent secrecy provision, and I am aware of no situation where any taxpayer's affairs have leaked, if I may put it that way, because of the arrangements we have had.

Senator Molson: Would that information of individuals be identified in going from National Revenue to D.B.S.?

Mr. Herbert: I would say that most of the information that would go to them would be in magnetic tape form, aggregated, and unidentified as to any individual at all.

Mr. Duffett: May I interrupt for a moment? Some of it would have to be identified for the reason that, if we are going to use some of this information as a substitute for some of the things we now get from small businesses, it would be necessary to have the name of the enterprise in order to combine it with what we already get from small business firms. So some of it would have to be identified.

Senator Molson: That is small business. What about the case of individuals?

Mr. Duffett: In the case of individuals it is less necessary. The Department of National Revenue already produces a pretty substantial tabulation of personal incomes. We would hope to assist them to improve this. There might be occasions on which we would need to have the names of individuals —

The Chairman: Why would there be an occasion where the name of the individual would be important?

Mr. Duffett: Frankly, I cannot think of an occasion at the moment.

The Chairman: Neither can I.

Senator Connolly (Ottawa West): But the authority is there in the act now for you to do it.

Mr. Duffett: No, but it would be in the bill.

The Chairman: It is in the bill. It is not in the law now, Senator.

Senator Connolly (Ottawa West): It is in the bill. That is what I meant.

Mr. Duffett: Another case, for example, where we would not require names is in using income tax information to study migration from one province to another. In the present situation it is very difficult for us to determine the flow of people from one province to another and, consequently, to make a good inter-census estimate of the population. In that case we are just interested in the number of bodies moving from one place to another and, although it might be interesting to have information as to the occupation and other facts of that sort, the names of the individuals are of no concern.

Senator Molson: I do not see why you need the names of any individuals from individual income tax returns. I fail to see how that should be of any vital consequence to D.B.S.

Mr. Duffett: In general, I agree with you. On the other hand one hestitates to make an absolute commitment on something as important as this because there could conceivably be a situation or circumstances in which we wish to combine this material with other information we had in the Bureau of Statistics in order to produce more meaningful data.

The Chairman: What, for instance?

Mr. Duffett: For example if one wanted to take a sample of census information, which gives a great deal of information at quinquennial intervals about education and occupation and so on, it might be desirable to make certain studies which would combine the information available with the information obtained for income tax purposes and for that you would need names and addresses.

[*Text*]

The Chairman: But going back to this question, you want to gather information, I suppose, as to various classes of occupations and the income in those groups and then to aggregate that?

Mr. Duffett: Yes.

The Chairman: You do not deal with the individual?

Mr. Duffett: No.

The Chairman: And having aggregated that information, it has limited use.

Mr. Duffett: Perhaps it has limited use, but this is what statistics are. They are aggregations of individual returns, and the rules of the game are that you do not disclose individual records.

The Chairman: But having got to that point of the aggregate, I am trying to understand of what use and under what circumstances it might be desirable that you should get individual names and individual income reports.

Mr. Duffett: Well, as I was mentioning before, this is necessary if you are going to blend records obtained from National Revenue with those of the D.B.S. I mentioned this in connection with small businesses.

The Chairman: But we are talking about individuals.

Mr. Duffett: Right. In the case of individuals, we obtain a great deal of information, as I mentioned, through the census, and it might be desirable to take a sample of persons from a census and feed in certain additional information which would come from income tax returns.

The Chairman: But on a census return you do not get a statement of a man's income, do you?

Mr. Duffett: Yes, we do. But this is not what I was referring to. There are other characteristics which we learn from the census. There is information about education and occupation and the numbers of dependents.

Senator Everett: Mr. Chairman, is this checking to see if the information given on the census is correct?

Mr. Duffett: This might be of some interest to us, but I might say that it would not be of interest to the Department of National Revenue because the flow is one way.

Senator Everett: The Department of National Revenue might not be interested, but you, given certain returns from the census, might well use those returns with the income tax returns to check the accuracy of the returns given by the census.

Mr. Duffett: Well, for example, if we felt that the information on taxi drivers' earnings as submitted to one or the other was low, a comparison might be interesting and useful.

Senator Everett: But you were saying also you would like to check occupations and the number of people in the household. Why would you want to use the tax return to check that information?

Mr. L. E. Rowebottom, Socio-Economics Statistics Branch, Dominion Bureau of Statistics: It is not so much a question of checking, but a question of the adequacy of the questions asked to obtain information about occupation. This is an exceedingly difficult statistic to compile, and depending upon how you ask questions concerning occupations, you will get quite a wide range of answers. The way in which the questions are asked determines the validity of statistics of occupation. It is a very difficult question for an individual to respond to, and if you ask me what my occupation is, I may say that I am a civil servant which really is not my occupation but is the industry in which I work. The possibility of determining the way in which householders are able to cope with questions about occupation when asked one way and when asked another way is an important possibility in improving the way in which both we and the Department of National Revenue might formulate the questions we ask concerning occupation.

Another possibility, and my colleagues can correct me if I am wrong on this, of its importance as a way in which we might use the individual information, is that the Department of National Revenue is not concerned with the publication and calculation of statistics concerning family income, whereas from economic and sociological viewpoints and the structuring of government policy that income available to the family unit is a very important determinant and most of the DBS income statistics which we now compile from sample surveys relate to the family, and the possibility of using National Revenue information to compile family income statistics is an important addition.

Senator Everett: But don't you ask those questions on the census? You say you get income information on the census, but don't you ask those questions on a family basis?

Mr. Rowebottom: But the census is only once every ten years, and income statistics derived from the census become available only once every ten years.

Senator Everett: But here you are talking about using specific names and terms. Surely in compiling information in the years between the census you would be using the general information and there would be no need to have the individual names.

Mr. Rowebottom: The point I was trying to make was that to construct family income we would need it. The fact is, and I cannot think of an exception, that all our statistics that we publish are based on individual returns of one kind or another, and our whole business involves the additional aggregation of additional information, which is private to the individual who supplies it to us, into statistics which are very important describers of economic and social conditions and which do not reveal anything about the individual on which the statistics are based. That is the whole process.

[*Text*]

The Chairman: It occurs to me that statistics that National Revenue put out quite often are out of date. We had reason to study the latest ones available to us when we were conducting hearings on the White Paper and they were for 1967. Now in that you are given groupings, classes, such as doctors, lawyers, engineers and you are given the numbers, but you are not given the names, of course, and they do strike the average income related to that classification. Now what more is it that you want? Why are not those statistics good enough for your purpose?

Mr. Duffett: Well, they are good and they will continue, and I hope that when we can go to National Revenue and study with them individual forms and methods of improving individual forms that these will in fact become better. The Department of National Revenue is, however, not a statistical agency. It is an administrative agency; it assembles certain material up to a certain degree of detail and sophistication. Pure statistics is more concerned with the analysis and interpretation of material, and it is probable that we will utilize this power to come a good deal closer to income characteristics and so on in this way.

To answer your query more directly, there is the point that has been mentioned by Mr. Rowebottom, that for many purposes family income statistics are necessary. We would like to be able to combine the material from National Revenue in order to prepare statistics on incomes of families.

The Chairman: I am just wondering, will there not be a duplication? What you are really saying is that the National Revenue takes the bare statistical study along to a certain end which suits them, and then you come along and pick it up. Why do we need two agencies doing it?

Mr. Duffett: I can say that our relations with National Revenue are sufficiently close that I think duplication is extremely unlikely. There was the possibility of duplication, for example, when we obtained access to corporation income tax returns. The Department of National Revenue prepared something popularly known as the Green Book, which was a study of corporation incomes. In that particular case this job was transferred to the bureau and the bureau now does this. I do not think, however, that in this case we would take over the personal income tax studies they do. We would do certain things, they would do certain things, and I am quite satisfied they would not be the same things.

Senator Everett: What do you mean by saying that your relationships with the Department of National Revenue are sufficiently close? Could you enlarge on that and tell us how close they are?

Mr. Duffett: We see people in the Department of National Revenue very frequently; we work with them very closely. We do not at this point exchange information on personal records.

Senator Everett: You do not?

Mr. Duffett: No.

Senator Everett: Is it your intention, if this legislation goes through, that you will?

Mr. Duffett: In a one-way sense, in that we will have access, as has been described, to income tax information on individuals for the purposes we have been discussing. It should be pointed out, however, that this is a one-way street. The Department of National Revenue understands and accepts the fact that information which we obtain is covered by the Statistics Act and cannot be made available to them.

The Chairman: Are you satisfied that this will not create a duplication which will cost the taxpayer more money?

Mr. Duffett: I am satisfied. In fact, the present bill contains one additional duty that was implied before but is now specified, and that is that the duty of the Dominion Bureau of Statistics is to endeavour to avoid duplication.

Mr. Herbert: I wonder if I could respond to the senator's question about the relationship between National Revenue and D.B.S. I would not want the impression left that we have some cosy information exchange arrangement. We have in fact never been able to get any information out of D.B.S. That is point number one. Our relationships are very close in this way. We rely upon their sampling experts, for instance, to help us design our own samples, not only for producing statistics but for other work we do. We have a close relationship with them in the passing of aggregated data from our Green Book material, which they wish to manipulate and use in other ways for their production of national accounts and so on. There is a continuing relationship because there is a relationship with corporation returns.

Senator Everett: Both comments relate to the flow of information from the bureau to National Revenue. I am more interested in the information that goes the other way, from National Revenue to D.B.S. Would you care to comment on that? I know you are talking about the Green Book, but would you care to comment further on that? Do you consider yourself an agency of D.B.S.?

Mr. Herbert: No, only in this sense, that the Government has established the Dominion Bureau of Statistics as a statistical agency of government, and when requests come from the private sector or from provincial governments, from research workers to D.B.S. concerning the compilation of some kind of special statistical run on taxes and income, they are the group that will come to us and ask, "Can you run your computer and produce this compilation", which will often have some bearing on the kind of thing now in the Green Book. But never is any information about any single taxpayer ever passed.

Senator Everett: Under this bill there could and probably would be.

Mr. Herbert: Under this bill the sampling experts of D.B.S. would probably want to look at individual returns

[*Text*]
in order to construct the kind of data they want us to pass to them, usually in magnetic tape form.

Senator Everett: Do not you feel uncomfortable about that?

Mr. Herbert: No. We have had five years experience now under the system involving corporation material, and I can recall no instance of any taxpayer complaining or saying that the affairs of his corporation had ever leaked.

Senator Connolly (Ottawa West): Can I carry this a step further? Under the bill, as Senator Everett has pointed out this morning, detailed information under an agreement with the province can be passed on by D.B.S. to the province. Would that also include this particular kind of information that we are now discussing?

Mr. Duffett: No, it would not. Clause 16(3) (a) specifies that any information we obtain from a department of government cannot be further utilized without their express permission, and I am sure that permission would not be forthcoming in this case.

Senator Connolly (Ottawa West): Why?

Mr. Duffett: Because they do not wish, I assume, to have income tax information used beyond the Dominion Bureau of Statistics.

Senator Connolly (Ottawa West): What you say and what they say now depends upon the attitude of the individual, the approach of the individual, to existing law. If the existing law is broadened and we do not have conscientious public servants like yourself and the people you deal with in National Revenue doing it this way, under the law it could be completely wide open and the provinces could, as I understand what you are telling me, get an individual's income tax returns as well as corporate returns.

Mr. Herbert: The provinces for which we collect taxes, which are nine out of ten, now have full access to any return if they wish. They do get data from us, and each province gets a magnetic tape each year of its particular taxpayers, their incomes and names.

Senator Connolly (Ottawa West): That is a good answer.

Mr. Herbert: We are only agents for them in the collection of their taxes. These are their returns.

The Chairman: Mr. Herbert, the thing bothering me was that if you deal with individuals and D.B.S. now goes to the individual returns and gets the names and incomes, the amounts, this is all information that you aggregate by classes now. They are coming in under your study and your computerizing and aggregating of income tax returns?

Mr. Herbert: I think what Mr. Duffett said was that in a very few cases they may wish to accept the actual name more for long range purposes and identification in some of their own records, than for any interest in the name itself.

Mr. Rowebottom: I think it would be fair to generalize on this. The D.B.S. collaborates closely with many government departments and uses their records which under the law are available for statistical purposes. We collaborate now closely with national revenue for the production of statistics which are not done by national revenue. Most of the statistical production will continue to be done by national revenue, but the possibility of our collaborating with them more closely would be substantially increased if we were allowed to look at individual returns for statistical purposes.

We were talking a moment ago about the flow of information from national revenue to D.B.S. We have a flow now of individual imports and export invoices from national revenue to D.B.S. for the purposes of compiling important export statistics. This is the only instance I am aware of—it is the only instance—where any information comes from national revenue. But we do have access and we do work with the individual export and import invoices and this access is provided under the law and by Governor in Council.

The Chairman: We were asking you the uses or the purposes and the point served by having access to individual returns. You mentioned some study on family income?

Mr. Rowebottom: Yes.

The Chairman: If you look at the income tax returns, about the only source of family income study there would be are the returns filed by married people on the basis of a single person—in other words, they are not entitled to the marriage rate.

Mr. Rowebottom: That is correct.

The Chairman: So that would be the only group, the only combination of tax returns, of individual returns.

You have married returns of single persons, single persons who have certain dependency deductions, married persons who file as married persons and get exemption, and that must be on the basis that that is family income. Then you have a married person who files as a single person because his wife has an income over and above the permitted amount. You do not need to look at all the income tax returns to get information on the family unit. You need only one grouping.

Mr. Rowebottom: I think you would have to bring together the individual tax returns which do comprise the family unit.

The Chairman: Because the income tax division now, in its statistics does that. We are able to extract from that, all these groupings that I am talking about.

Mr. Rowebottom: My colleagues can correct me. My understanding is—

The Chairman: We have material filed illustrating all the different groupings that I have mentioned to you this morning. So it is there in some form. Certainly, we do

[*Text*]
not profess to be geniuses but we were able to have it extracted for us, without any assistance from the Income Tax Division.

Senator Lang: Presumably a married couple who would have children under 21 could have them getting an income and not claim it as a deduction by the spouses. That would not show on the return.

Mr. Rowebottom: The methodology of that is fairly complex but it does involve bringing together tax returns which comprise the family unit beyond those which are currently brought together.

Senator Hays: In the field of agriculture, what information would you be receiving under this proposed legislation, that you are not receiving now? D.B.S. sends out a questionnaire to each agriculturalist in Canada. What will you be receiving that you are not receiving now? What will be the additional cost to the agriculturalist as a producer? What will he have to do that he is not doing now?

Mr. Rowebottom: I cannot think of anything. Nothing. The possibility of his doing less is the important possibility. I quite frankly confess not to know with precision ways in which current surveys, which we now take from the agriculturalist, could be replaced by the returns of national revenue. But that is a distinct possibility. And, looking in the years ahead, over the next ten to twenty years, it could become a very substantial possibility. I can conceive of no way in which this bill could increase the reporting responsibilities for farmers.

Senator Hays: So the possibility would be that he would have less to report?

Mr. Rowebottom: That is correct.

Senator Hays: What countries have an act now on their books and what countries do not?

Mr. Duffett: A statistics act?

Senator Hays: A similar act.

Mr. Duffett: Almost every country that I can think of has a statistics act. Even very small countries like Trinidad, Barbados, Guyana and Ghana have a statistics act. In a sense, perhaps, this is more important in the developing countries, because most of those countries are engaged in various kinds of economic planning. In order to do this, they require information. In order to get the information they have statistics acts. Virtually every country I can think of has one.

Senator Hays: Is this bill patterned almost the same as the statistics act in Great Britain and the United States?

Mr. Duffett: They tend to be slightly different. They contain the same elements but may tend to be a little different, because in the United States you have a fragmented system, a system in which the Bureau of the Census, the Bureau of Labour Statistics, the Department of Health, Education and Welfare, the Department of Agriculture, all collect statistical information. The legal foundation for that is usually built into their own acts. Virtually every act in every country has two important characteristics—one is an obligation to report to the statistics office, but there is a counterpart, that is the promise of secrecy, which means that when an individual or a farmer does report, he is assured that the information will not be used against him. So there is this in common.

Senator Hays: Are there clauses in this bill being introduced which are not in the act in the United States?

Mr. Duffett: Not that I am aware of. For example, the Americans have had access to income tax statistics for quite a period of time. The statistics acts of the provinces in Canada are gradually coming closer to this form. The acts of the Province of Quebec and the Province of Alberta are very similar. The one in Quebec is, I think modelled on this.

Senator Hays: So why have we not had this act before?

Mr. Duffett: We have had this act. This is simply a revision really of the existing act. It is an extensive revision, so it becomes a new act. It has been in existence since 1918, when the Bureau of Statistics was formed. The act passed in 1918 was an assembly of bits of legislation scattered through different departments.

Senator Hays: So this is tidying it all up?

Mr. Duffett: This is tidying it up.

The Chairman: Do you prepare statistics on grants made to students to pursue university studies, to get special degrees such as a Ph.D., and things of that kind?

Mr. Duffett: We have an education statistics division in the Bureau of Statistics, which comes under Mr. Rowebottom. Perhaps he would care to say something.

Mr. Rowebottom: We do periodically compile a publication called "Awards for Graduate Study", which describes the nature of the awards which are available to students for pursuing post-graduate work.

The Chairman: Do you specify it under the heading of the nature of the graduate study that is to be pursued?

Mr. Rowebottom: My recollection is that there is a classification of the awards by subject of the study.

The Chairman: All you do, however, is compile them.

Mr. Rowebottom: Yes.

The Chairman: The authority by which the grant is made exists elsewhere.

Mr. Rowebottom: Entirely. This is a compendium of awards that are available. It is merely an information function that we are performing—which is, of course, our total function.

The Chairman: When you are getting even the individual information from National Revenue, you get it

[*Text*]

at the stage of the individual reporting. You do not get the results of the action by the department in making the assessment.

Mr. Rowebottom: Not at all.

The Chairman: Whether that increases or decreases the income figure.

Mr. Rowebottom: Well, yes.

The Chairman: You do not get that information?

Mr. Rowebottom: I would assume not.

The Chairman: Is that correct, Mr. Herbert?

Mr. Herbert: Yes, Mr. Chairman. Even the statistical data which we extract for our Green Book is only based upon the return after it has had that quick assessment that we do at the data centre. All of the changes to returns that are made as a result of audit or as a result of other action appear later in other kinds of statistics but not in the Green Book. It is such a small percentage of the total that it is not significant, although it may not seem that way to the individual taxpayer.

The Chairman: An individual might have a different view.

Mr. Herbert: Yes, I think he might.

The Chairman: He might think it was very heavy.

Senator Gélinas: Mr. Chairman, would it be possible for the Department of National Revenue to supply data or statistics required by D.B.S. by computer instead of having to go to the files of the individuals to get the information they request?

Mr. Herbert: With respect to the kind of data that the D.B.S. data centre now gathers under the Corporations and Labour Unions Returns Act, the only way we could pass that to them by computer is if we were to do the extract work, and a lot of this material is of no interest to us whatever for income tax purposes, and this is why the return flows through them.

Mr. Duffett: There is a point, though, that in the case of personal income tax returns it is altogether likely that the information which would be extracted for the use of D.B.S. would be on magnetic tape.

Senator Everett: Clause 10, subclause (4), reads:

> (4) Where any information, in respect of which an agreement under this section applies, is collected by Statistics Canada from a respondent, Statistics Canada shall, when collecting information, advise the respondent of the names of any statistical agencies with which the Minister has an agreement under this section and to which the information received from the respondent may be communicated under that agreement.

What happens in the case of a statistical agency that collects that information—the information is already collected, but you have an agreement to pass it on to a province? That statistical agency could presumably have collected the information without informing the respondent. They would not be required to do so under the act.

Mr. Duffett: I am not quite sure of the picture you have in mind. The sort of thing intended here is that a province, having, in accordance with the specifics above, acquired an acceptable statistics act, would approach us for a joint agreement of this kind. If their proposal was acceptable, an Order in Council would be passed. Under these circumstances common forms would begin to be used and on the form it would say that this information was being collected for the benefit of the Dominion Bureau of Statistics and for the Bureau of Statistics in the province of "X". This is what this act says. It says that the respondent must know that the Bureau of Statistics in his province is a party to the arrangement.

Senator Everett: That is correct, but let us deal with the Department of National Revenue, for example. They might want to pass on information.

Mr. Duffett: This clause refers only to statistical agencies of the province. Under clause 10 (1) it says that the minister may enter into agreements with the government of a province for the exchange with, or transmission to, a statistical agency of the province.

Senator Everett: Right.

Mr. Duffett: So that the two parties to this are the Dominion Bureau of Statistics and the statistics office of the province. The Department of National Revenue is not a party to it.

Senator Everett: Let us assume you want to get information from a respondent. You are required by that clause, are you not, to inform him that that information is going to be transmitted to the statistical agency of the particular province?

Mr. Duffett: That is correct.

Senator Everett: But if you are using information, if the information you are transmitting is information that was obtained by another department of the federal Government, then presumably you would not be able to follow—

Mr. Duffett: Subparagraph (4) here envisages and applies, I think, only in the case of information obtained by an individual. Let us say, a company in the province of Quebec.

Senator Everett: I am sorry, I do not understand your reply.

Mr. Duffett: What happens under this particular clause is that the information is being obtained by an entity, an individual or a company in a province. This individual receives a form on which it is stated that this information will be used by the Dominion Bureau of Statistics and the statistics office of the province of, for example, Quebec.

Senator Everett: The information is obtained by that person or from that person.

[*Text*]

Mr. Duffett: From that person, yes.

Senator Everett: You are saying in clause 10 (1) that the fact that the minister can enter into an agreement with a province to transmit applies to any specific statistical inquiry.

Mr. Duffett: Yes.

Senator Everett: It would seem that you could transmit to a province information, for example, on individual tax returns under that agreement.

Mr. Duffett: I think not.

The Chairman: Subclause (2) may have some application, Senator.

Senator Everett: It may well.

Mr. Rowebottom: Perhaps it would help if I were to illustrate the sort of arrangement which is contemplated under this clause.

Senator Everett: I think we know the sort of arrangement contemplated, Mr. Rowebottom. We understand the sort of arrangement. We are now talking about the legal sufficiency of the act. In other words, whether it is properly drafted. It is required under clause 10, subclause (4) that the respondent be informed, and any information that he gives may be passed on to the provinces under an agreement between the minister and the particular province.

Mr. Rowebottom: That is correct. May I add this qualification, however, that in this situation and under this agreement the respondent is in effect providing the information to both agencies—both, for example, the Quebec Bureau of Statistics or the Alberta Bureau of Statistics and the Dominion Bureau of Statistics at the same time.

Senator Everett: Is there anything in clause 10, though, that says that is the fact? That is your intention, but is there anything in clause 10 that says that that is actually the fact?

Mr. Rowebottom: Yes.

Senator Everett: Is there anything in clause 10 that would preclude you from entering into an agreement with the province to provide the province with the specific information collected, say, by the Department of National Revenue.

Mr. Duffett: There is in fact section 16(3)(a) which is the secrecy clause. It specifies that information collected by the Dominion Bureau of Statistics shall be passed on only to the extent agreed upon by the collector thereof, which in this case would be the Department of National Revenue which retains control over the information.

Senator Everett: But if National Revenue agreed to pass it on, what then?

Mr. Duffett: Well, there are two considerations here. The first one is as Mr. Herbert has pointed out that the provinces already have this information.

Mr. Rowebottom: They are prohibited from using the information from tax returns for any purposes except the administration of income tax.

Senator Everett: The point is well taken, but first of all you are already passing on that informatin if they request it, and secondly they are very hobbled in the way they use it. I am not necessarily dealing with National Revenue although I am using that as an example. What I am saying is this; I can envisage under this clause a situation where a department of government like National Revenue can obtain information from a respondent without informing the respondent it was going to be passed on and then the federal authority could enter into an agreement with the provincial authorities to pass that information on so that clause 10(4) could not be complied with.

Mr. Duffett: I think we have traced this one down. Subsection (4) refers to statistics collected by Statistics Canada—collected by what is now the Dominion Bureau of Statistics, and we do not collect income tax statistics.

Senator Everett: So what you are saying for the record is that the only information that could be passed on to the province is that information that is collected directly by Statistics Canada from respondents.

Mr. Duffett: Yes.

Senator Everett: And any information collected by the proxy of anybody else is not available to be passed on to the provincial authorities.

Mr. Duffett: Not under this clause.

Senator Everett: Is there any clause in the bill, and I want this on the record, that would permit you to pass on information obtained by proxy?

Mr. Rowebottom: May I say that we could not do it because the respondent would not know we were doing it, and the law says he has to know.

The Chairman: Well, Mr. Rowebottom, if you stop right there for a moment; there is a further limitation and that is as to the type of statistical information that may be the subject matter of such an agreement. I mean the province, for instance, must have the right to collect that information itself before it can be the subject matter of an agreement with the Dominion.

Mr. Rowebottom: Yes, and if I may generalize on this point, whenever any information comes to the Dominion Bureau of Statistics from some other originator—and we do receive a great deal of such information, some of which is very personal, and a large proportion of it comes from the provinces, from registrars of birth, deaths and marriages, from police officers, courts, mental institutions and, of course, from federal agencies too, such as the import and export invoices which are referred to—the bill says, and it is very explicit on the

[*Text*]

point, that in no instance may D.B.S. pass such information to anyone without the agreement and consent of the original collector, and if anyone came to us and said "We would like information which you derived from somebody else," we would ask them to go back to that person who supplied it to us, say a registrar, or Health and Welfare, or the Department of Agriculture. We would say "You go and talk to them and if they will provide us with a written statement saying 'We would appreciate it if on our behalf you would make such information available' we will do it," but in that instance we are clearly an agent of the originator and we would not do it without their precise instructions.

Senator Everett: Looking at clause 29 which is the penalty clause, can you tell me whether clauses 29 and 30 vary from the wording of the corresponding sections in the present Statistics Act?

Mr. Duffett: I think they are almost identical. If you like I can read you the section in the present Act. It is section 35 of the present Act. They are identical except for the amount of the fine.

The Chairman: They appear to be.

Mr. Rowebottom: Yes, they are identical. Imprisonment in both cases is for three months but the fine has been increased from $100 to $500.

The Chairman: Let us clarify that by giving the section numbers. The witness has correlated clause 29 of the bill with section 35 of the present act.

Senator Everett: He states they are identical except for the amount of the fine, but is the same true of section 30?

The Chairman: Clause 30 of the bill would appear to relate to section 36 of the act.

Senator Everett: Is it identical?

The Chairman: Again the penalities are increased.

Mr. Duffett: Clause 30 of the bill and section 36 of the act are, I think identical except for the fact that the fine is different. The minimum fine has been dropped. There was a minimum fine in the act.

Senator Everett: And is clause 21 identical to the corresponding section?

Mr. Rowebottom: Excuse me a moment, Mr. Chairman. For the record I think it should be made clear that clause 30 is identical except that a minimum fine is no longer compulsory. That has been dropped.

Senator Everett: I think I understand that.

Mr. Duffett: May I make a correction to what I have said before. Clause 30 of the bill is not absolutely identical. The word "department" has been inserted in addition to corporation. In the old act there was reference to "access to documents of corporations". In this case departments of government have been added.

Senator Connolly (Ottawa West): That in effect is the one that refers particularly to the tax department.

The Chairman: That is right.

Mr. Duffett: Well, to all departments.

Senator Connolly (Ottawa West): It would refer to all departments, but our primary concern this morning has been in connection with the tax department.

Mr. Duffett: It is a broader issue than that though. It gives us the legal basis for obtaining information from all kinds of government records. It is quite important to the act. There was an inquiry about clause 31?

Senator Everett: Clause 21.

Mr. Duffett: Clause 21 in the new bill represents a consolidation of a number of statistical fields that were mentioned throughout the previous act. It consolidates about six or seven sections.

The Chairman: The main one being section 32.

Mr. Duffett: Section 32. I think it is important to realize that section 21 of this bill, which is a list of statistics we may produce, is really illustrative, because it says that we may collect statistics on "all or any of the following matters".

The Chairman: It says more than that, Mr. Duffett.

Mr. Duffett: Yes, "any other matters prescribed".

The Chairman: It says:

> any other matters prescribed by the Minister or by the Governor in Council.

Mr. Duffett: Yes.

Senator Everett: It starts without limiting the generality of the foregoing. However, I think we use the *ejusdem generis* rule. Is it your view that anything not included in items (a) to (f) would require the authority of the Governor in Council?

Mr. Duffett: Or the minister.

Senator Everett: The minister or the Governor in Council.

Mr. Duffett: Item (u) specifies:

> any other matters prescribed by the Minister or by the Governor in Council.

Senator Everett: Is it your view that to obtain details of statistics not included in items (a) to (f) you would have to have such authority?

Mr. Duffett: Mr. Pratt, who is the departmental solicitor, is here, and perhaps it would be more appropriate for him to comment on this.

Mr. D. D. Pratt, Deputy Director, Legal Services, Department of Industry, Trade and Commerce: You are referring to paragraph (u) in clause 21?

[*Text*]

The Chairman: Yes, that is correct, is it not, Senator Everett?

Senator Everett: I am sorry, I was using paragraphs (a) to (f). It should be (a) to (t). That is correct, I am referring to paragraph (u), and the preamble to the clause.

Mr. Duffett: I think the question is whether we could inquire into items other than those mentioned here without the formal prescription by the minister or the Governor in Council in accordance with paragraph (u).

Mr. Pratt: As I understand it, the intention is that you can require any other matter with the approval of the Governor in Council.

Mr. Duffett: Or the minister.

Mr. Pratt: Or the minister.

Senator Hays: It covers the waterfront.

The Chairman: I think another way of putting it is if you took paragraph (f), which was referred to, concerning immigration and emigration, anything that relates to that subject matter may be inquired into by the department on its own initiative and under the authority of this clause. It would only be a subject matter that is not enumerated.

Mr. Pratt: That is correct.

Senator Everett: But if the subject matter were not enumerated would the words "without limiting the duties of Statistics Canada" require the authority of the minister or the Governor in Council?

Mr. Pratt: I do not really understand the question.

Senator Hays: Use an example.

The Chairman: Pollution.

Senator Everett: The list is so wide that I do not think you could find anything not included in it.

The Chairman: What about ecology?

Senator Everett: I am sure ecology is there somewhere. Assuming for the moment ecology was not there and you wanted to get some statistics on ecology, do you feel that the power in clause 21 would be sufficient to permit Statistics Canada to ask for information, or do you feel they would have to go to the minister or the Governor in Council to get authority?

Senator Connolly (Ottawa West): Let us take a practical example. Let us take the number of chemical firms, pulp and paper firms, companies in that category, that are actually putting waste directly into rivers, lakes and other bodies of water. Would you get that without invoking paragraph (u)?

Mr. Rowebottom: No.

Mr. Duffett: Probably not. I suppose it might come into health and welfare.

The Chairman: Or water utilities.

Senator Connolly (Ottawa West): Is that there?

The Chairman: Yes. Mr. Pratt, maybe you would agree if you look at clause 3 as well as clause 21, clause 3 provides the area within which the authority of D.B.S. can operate.

Mr. Pratt: Yes.

The Chairman: Its study or its inquiry or search for information under clause 21, under any of it, would have to fit within the boundaries prescribed under clause 3.

Mr. Pratt: You are not limiting the duties under clause 3, but as I understand it there is no intent for any change from section 32 of the present act.

The Chairman: No.

Mr. Pratt: It would permit an inquiry into any subjects, with the approval of the minister or the Governor in Council.

The Chairman: There is a limitation on you as well, I would think, such limitation as clause 3 imports.

Mr. Pratt: In the field of statistics?

The Chairman: Yes.

Mr. Pratt: In the scope prescribed in clause 3.

The Chairman: That is the broad limiting section.

Mr. Pratt: I think that is correct.

The Chairman: Any other question?

Senator Isnor: This perhaps has nothing to do directly with the bill, I was wondering if Mr. Duffett would put on the record his budget for 1970.

Mr. Duffett: For 1970-71?

Senator Isnor: Yes.

Mr. Duffett: The total amount is $38,421,000. This includes an amount of $5,220,000 for census purposes, the preparation of the census. The reason I cite the census is that it is something that fluctuates from one time to another.

The Chairman: What is the increase as against the previous year?

Senator Isnor: That was my next question.

Mr. Duffett: Before the census or after?

The Chairman: What figure for 1969 would relate to the figure you gave of $38 million?

Mr. Duffett: $32,393,000.

The Chairman: Is the $5 million for the census included in the figure of $38 million?

[*Text*]

Mr. Duffett: Yes.

The Chairman: So you are pretty well holding yourselves to your expenditures or estimates of the previous year.

Mr. Duffett: If you remove the census, there is still an increase.

The Chairman: Not very much.

Mr. Duffett: Not a great deal. For 1970-71, *ex* census, it was $33,201,000, and the previous year it was $29,146,000. The increase of course covers a number of things, including salary increases.

Senator Hays: With this additional access to information will you be able to reduce your budget?

Mr. Duffett: It has been suggested to us that we should start with agriculture, but we have resisted.

The Chairman: It may be that one of the statistical studies that should be made in the compilation of information would be a study on ways and means of reducing expenditures.

Mr. Duffett: A study is made annually within the Bureau of Statistics, I can assure you, on that subject.

The Chairman: I am giving it a broader connotation than that. I mean, every place where public money is spent.

Mr. Duffett: I am not sure that a bureau of statistics would be qualified to do that.

The Chairman: There could be a comparative study and an analysis as to the things that cause changes and what are the elements whih enter into them.

Mr. Duffett: It could apply...

The Chairman: You have not undertaken that yet. It may be we could add that clause to the bill as one of your duties.

Senator Connolly (Ottawa West): I would like Mr. Duffett to comment, first of all, on the secrecy provisions as they affect people in the statistics field and will, under this bill counterpart the secrecy provisions that apply to the Department of National Revenue. I would just add one further suggestion, that he might also let us know whether or not the use of the magnetic tapes and the computers in any way opens the door to a broadening of the receipt of information by people who perhaps would not be authorized to have it and who may not be covered by the secrecy oath—if there is such a thing.

Mr. Duffett: Perhaps I can refer to the second question first. Information on magnetic tape is entirely processed within the Bureau of Statistis. We have our own computer centre. Computer centre employees, and employees of the Bureau of Statistics in every respect execute the same responsibility as this, and this material is entirely processed within the D.B.S.

Senator Connolly (Ottawa West): In other words, you have a data bank there and that data bank is for you alone and no one else has access to it?

Mr. Duffett: That is right.

Senator Connolly (Ottawa West): What about the data bank which the Department of National Revenue, Taxation, has? Is it in the same category?

Mr. Herbert: We are in a corresponding situation. All our employees are sworn to secrecy under the Income Tax Act and all our computing process is dealt with in our own system by our own employees.

Senator Connolly (Ottawa West): And no one else has access to the data?

Mr. Herbert: No.

Senator Connolly (Ottawa West): And it does not hook up to any other data system?

Mr. Herbert: No.

Senator Connolly (Ottawa West): Any system that transmits information?

Mr. Herbert: No.

Senator Connolly (Ottawa West): Is there any technical way in which this can be done? We hear talk about infiltration in high places, public organizations. Could there be infiltration into your data bank by some technical method?

Mr. Herbert: I have read one or two articles dealing with national security in the United States, where they were concerned about exotic methods by which spies could tap a line—where they tap a telephone line and draw the data off. We are not on any interception lines. There are no lines coming into our computer that would allow that.

The Chairman: Do you run tests or studies or surveys for the Department of Finance?

Mr. Herbert: We run tax models.

The Chairman: I am thinking of information in connection with the White Paper.

Mr. Herbert: We have a tax model computer which is a magnification of any identified tax data in it, which we run off on our computer or on another computer in Ottawa, by a company, on the basis that there is no personal information and no possibility of leakage.

The Chairman: They are an aggregate of the classes. Mr. Duffett, what about the additional information that is required now under Bill C-4 that was passed in the last session, the Canada Corporations Act? This information will be returned to the Department of Consumer Affairs. Will you get it from the Department of Consumer Affairs?

Mr. Duffett: No. There is no connection at all between our operations and the operation of that bill.

[*Text*]

The Chairman: Under this bill you can get it by agreement, can you not?

Senator Connolly (Ottawa West): It is another department of government, and you can ask for it.

Mr. Duffett: In fact, we already have entirely satisfactory information under the Corporations and Labour Unions Returns Act, much richer than that.

The Chairman: There is not much secrecy about it in your department unless the way in which you put it forward, when the same information is filed in another department and open to the public.

Mr. Duffett: The information that is filed under the Corporations Act, of course, would apply only to a federally incorporated company.

The Chairman: That is right.

Senator Connolly (Ottawa West): I think you said earlier that your secrecy requirements are more stringent than those of National Revenue. Is that so?

Mr. Duffett: This is a statement by Mr. Herbert.

Mr. Herbert: The penalties are somewhat higher.

Senator Connolly (Ottawa West): The penalties against people divulging information?

Mr. Herbert: That is so.

The Chairman: Have you had instances where you have had to apply penalties?

Mr. Herbert: No sir.

The Chairman: Or where you have applied them?

Mr. Herbert: My knowledge is from 27 years of National Revenue work. No information leak, and no prosecution for leak. We strengthened the act a few years ago, when we suddenly realized that the secrecy provisions did not embrace people who had left our employment. We have extended it now to them as well. We did once attempt to introduce some partnership basis in regard to tax appeal cases and we were roundly ticked off by the chairman, where one partner did not agree with the other as to the shares of income. That is the only instance I know of of that kind of leakage.

The Chairman: You have people who worked in the department and leave the department and may practice in this same general area. Is your oath such that it still covers them and that they have responsibility to observe secrecy?

Mr. Herbert: The law now says that if they disclose any information they obtained while they are in our employ, they can be prosecuted.

The Chairman: Honourable senators, are there any other questions? Are you ready to report the bill? Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Chairman: Honourable senators, could I have a motion from the committee. We printed 12,000 copies of our report on the White Paper and we have less than 200 copies left. There was a big distribution to government stores. The suggestion now is that we might print another 10,000. The cost of printing another 10,000 would be about $3,300. If we printed 5,000 more, it would cost about $2,500. I think we could anticipate that there will be a second substantial demand, as and when we get to legislation time, next year. I think we should get the copies printed now. Is that approved?

Hon. Senators: Agreed.

The committee adjourned.

Queen's Printer For Canada, Ottawa, 1970

Third Session—Twenty-eighth Parliament
1970

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

Banking, Trade and Commerce

The Honourable SALTER A. HAYDEN, Chairman

No. 2

WEDNESDAY, NOVEMBER 4th, 1970

Complete Proceedings on Bill S-4,

intituled:

"An Act to implement an agreement amending the Trade Agreement between Canada and New Zealand".

REPORT OF THE COMMITTEE

23017—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 28, 1970:

"Pursuant to the Order of the Day, the Honourable Senator Urquhart moved, seconded by the Honourable Senator Laird, that the Bill S-4, intituled: "An Act to implement an agreement amending the Trade Agreement between Canada and New Zealand", be read the second time.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

With leave of the Senate,

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

The question being put on the motion, it was—

Resolved in the affirmative."

ROBERT FORTIER,

Clerk of the Senate.

Minutes of Proceedings

Wednesday, November 4th, 1970.
(2)

Pursuant to adjournment and notice the Standing Senate Committte on Banking, Trade and Commerce met this day at 9:30 a.m. to consider:

Bill S-4 "An Act to implement an agreement amending the Trade Agreement between Canada and New Zealand".

Present: The Honourable Senators Hayden (*Chairman*), Blois, Burchill, Carter, Hollett, Isnor, Kinley, Macnaughton and Molson—(9).

Present, but not of the Committee: The Honourable Senator Urquhart—(1).

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

Witnesses

Department of External Affairs:

Mr. J. R. Roy, Acting Head, Commonwealth Policy Division;
Mr. W. H. Montgomery, Legal Division.

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

At 10:00 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, November 4, 1970.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-4, intituled: "An Act to implement an agreement amending the Trade Agreement between Canada and New Zealand", has in obedience to the order of reference of October 28, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 4, 1970

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-4, to implement an agreement amending the Trade Agreement between Canada and New Zealand, met this day at 9.30 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, we have a quorum. We just have one bill this morning, Bill S-4, an act to implement the agreement amending the Trade Agreement between Canada and New Zealand.

We have here Mr. Roy, who is Acting Head, Commercial Policy Division, Department of External Affairs. On his right is Mr. Montgomery of the Legal Division of the Department of External Affairs. Mr. Roy is going to carry the ball so we will ask him for an opening statement on the purpose and effect of the bill. Senator Urquhart, you sponsored the bill; have you anything to add?

Senator Urquhart: No, I have nothing further to add.

Mr. J. R. Roy, Acting Head, Commercial Policy Division, Department of External Affairs: This bill is required to put into effect the Canada-New Zealand trade Protocol, which amends the 1932 Trade Agreement between Canada and New Zealand. The trade Protocol was signed on May 13, 1970, in Wellington by the Prime Minister and the Right Honourable Keith Holyoake, Prime Minister of New Zealand. The Protocol does not alter the basic framework governing the conduct of our bilateral trade with New Zealand. However, it does update the present agreement and provides for certain benefits of mutual advantage.

There is a new provision on anti-dumping, which will allow Canada to fulfil its obligations under the International Anti-Dumping Code. At the same time it provides for roughly equivalent treatment of Canadian goods by the New Zealand authorities.

The Protocol also includes an amendment which provides for an undertaking by Canada to seek, through administrative arrangements, to minimize difficulties to New Zealand exporters arising from the requirement of the 1932 agreement to ship direct to Canada in order to obtain British Preferential tariff treatment.

Thirdly, a new article on consultations and the establishment of a joint Canada-New Zealand consultative committee will provide the means and mechanisms for dealing more effectively with a wide range of bilateral problems. The consultative committee will meet either at the ministerial or official level not less frequently than once every two years and would be free to discuss subjects of mutual interest and concern. However, these would be mainly economic.

Fourthly, the Protocol provides for consultation in advance of major changes in preferential tariff treatment that one or the other government might contemplate.

Since the original trade agreement between Canada rand New Zealand, signed in 1932, was introduced in Canada as an act of Parliament, the amending protocol must be introduced as amending legislation. In approving the protocol for formal acceptance by Canada, the Cabinet decided that the required amending legislation should be introduced in Parliament as soon as the legislative timetable permits, and this is the reason for the introduction of the bill at this time.

I have no more comments to make in the form of introduction.

The Chairman: What does Canada do, if anything, in this amending agreement in relation to the provisions in the anti-dumping legislation? I am thinking particularly of the provision there for countervailing duties and for surtax in certain circumstances. Is there anything in this bill that would bargain away those rights?

Mr. Roy: No, I do not think so. We have, of course, accepted the anti-dumping code, implementing Article VI of GATT, and the terms of the original agreement, I understand, were in conflict with this new obligation, i.e. this obligation as recently adopted by Canada. Accordingly, in order to set the matter straight we have requested and obtained a modification to the trade agreement with New Zealand.

The Chairman: Then this agreement is really to update the earlier New Zealand agreement, and to remove any conflict there might be between that earlier agreement and our anti-dumping legislation. Is that right?

Mr. Roy: That is correct.

Senator Molson: There is no explanation here of the articles being amended. For example, Articles IV and V of the agreement are deleted. Frequently when legislation is prepared the changes are shown. In this case we have got blanks on the explanation side.

The Chairman: Would you address yourself to that, Mr. Roy? I have the original articles here.

[*Text*]

Senator Molson: What do they deal with, Mr. Chairman?

The Chairman: This is in the original legislation of 1932.

Senator Burchill: Which is being deleted in this bill.

The Chairman: Yes. New provisions are substituted in Article II. Article IV in the original reads:

> Goods entitled to entry under Article I hereof shall not be subject to Section 6 of the Customs Tariff of Canada unless previous notice has been given by the Government of Canada to the Government of New Zealand that the importation of such goods would prejudicially or injuriously affect the producers or manufacturers of similar goods in Canada, and if, at the expiration of a period of thirty days from the date of such notice, remedial measures satisfactory to the Government of Canada are not put into effect by the Government of New Zealand, then the provisions of the said Section 6 may be applied to such goods.
>
> At the option of the Government of Canada any importation thus complained of, other than perishable goods, may be held in bond during the said period of thirty days.

That reference to Section 6 of the Customs Tariff is the provision that we had in relation to dumping until we dealt with the changes proposed by the principle which is asserted in GATT; that is, under section 6 all you had to do was prove that the price on the home market was higher, and then you did not have to prove damage or injury, that was dumping. You have now taken that out and added:

> "treatment no less favourable than that accorded to goods the growth, produce or manufacture of [other] countries."

Senator Carter: Does this new agreement represent a liberalization of trade greater than was possible under the old agreement?

The Chairman: No. What I understood Mr. Roy to say was that principally it was to update the earlier agreement and bring it in line with our new anti-dumping provisions, which conform to the requirements of GATT, to which we were a party.

Senator Carter: When I listened to what you read out of Article IV of the old agreement and compared it with the one we are replacing it by, it seemed to me that there was a liberalization as well.

The Chairman: Mr. Roy, would you regard it as being a liberalization?

Mr. Roy: I am not sure that with respect to Article IV there is any greater liberalization, but I think we can read some liberalizing tendency into the new bill, that is the Protocol of agreement with respect to direct shipments. Direct shipments had to be certified, the bill of lading had to be certified if a direct shipment was impossible in order to enjoy British preferential treatment in Canada. This is now no longer necessary; a simple general statement is acceptable. This to some extent means that we have made our procedure somewhat more flexible.

Senator Carter: Any liberalization is incidental. The main purpose is to bring it up to date?

Mr. Roy: That is the main purpose of the protocol, yes.

The Chairman: I read to you the old Article IV.

Senator Molson: What about Article V?

The Chairman: Article V says:

> Goods entitled to entry under Article II hereof—

That is the earlier agreement—

> shall not be subject to Sections 11 and 12 of the Customs Amendment Act, 1921, of New Zealand, unless previous notice has been given by the Government of New Fealand to the Government of Canada that importation of such would prejudicially or injuriously affect the producers or manufacturers of similar goods in New Fealand, and if, at the expiration of a period of thirty days from the date of such notice, remedial measures satisfactory to the Government of New Zealand are not put into effect by the Government of Canada, then the provisions of the said Sections 11 and 12 or either of them may be applied to such goods.

This is just the old Article IV in reverse. Article IV had the act of force being the Government of Canada; in Article V the act of force is the Government of New Zealand giving the notice. Those are deleted, and what you have in their place is this "treatment no less favourable", which you find in Article II of the new treaty, the amending treaty. That is correct, is it not?

Mr. Roy: Yes, sir.

Senator Molson: Are there any changes other than direct shipment?

Mr. Roy: Yes, but in what sense do you mean?

Senator Molson: Well, it is a change that is not spelled out in the schedule, is it not? Are there any other changes in requirements that would occur in keeping with this?

Senator Urquhart: The only two substantial changes have to do with the anti-dumping provisions and the direct shipments.

Mr. Roy: That is right. Otherwise the only other substantial matter is in relation to the consultative committee and to consultations.

Senator Burchill: What are the latest figures covering trade between Canada and new Zealand?

Mr. Roy: The latest figures I have for the whole of 1969 in our trade with New Zealand are: exports of $37 million by Canada to New Zealand, and imports of $41.2 million from New Zealand.

[*Text*]

Senator Burchill: About fifty-fifty then.

The Chairman: Skimming through this amending agreement, Senator Molson, these are the particulars in which it would appear they change the existing agreement; that is, bringing the agreement into line with our new concept of anti-dumping and also to deal with direct shipments.

Senator Molson: Direct shipments are not peculiar to New Zealand. It is a modification that is occuring elsewhere, is it not?

Mr. Roy: I believe that is true, yes.

The Chairman: This is not what you would call special treatment being accorded only to New Zealand. Is that right?

Mr. Roy: No. That is right.

The Chairman: This is in line with Government policy and getting away from the direct shipment concept.

Mr. Roy: Yes.

Senator Molson: What about the old Article 6—deleted?

The Chairman: The old Article 6 ties in with Articles 4 and 5 of the old agreement and says:

> Subject to the provisions of Articles 4 and 5 hereof, nothing in this agreement shall affect the right of either party to this agreement to impose any special duty or tax on goods imported into Canada or New Zealand provided that, except for specially arranged between the Governments of Canada and New Zealand, such special duty or tax does not exceed that imposed upon similar goods imported from Great Britain.

This has been deleted and I take it that there has been nothing substituted in place of this?

Mr. Roy: That is correct.

The Chairman: What is the rationale behind the deletion?

Mr. Roy: The way I read this article is that we do in fact give British preferential treatment to New Zealand in so far as special duties or taxes are concerned and this is now limiting the preferential aspect. That part is gone.

Senator Macnaughton: Under Article 4(2) the two governments shall implement procedures, including the establishment of a joint Canada-New Fealand consultative committee. Under subsection (1) is says "on any related trade or economic matter of interest". Under what department would that committee fall? Would it be External Affairs, the Department of Trade and Commerce, or which department?

Mr. Roy: This committee would fall under External Affairs but it would of course involve other departments that have an interest in the dialogue between Canada and New Zealand, especially in so far as it relates to economic and trade affairs.

Senator Macnaughton: The reason for the question is that, with the proposed entry of Great Britain into the common market, New Zealanders are extremely disturbed in regard to meat export. Is there any indication of that in this joint committee to explore ways and means of increasing trade, for example in meat, or any other product, between New Zealand and Canada. That is a very serious question for New Zealanders.

Mr. Roy: The committte as I envisage it would be able to consider such questions. It would be able to have officials or ministers on both sides who would be able to discuss such matters.

The Chairman: This would be an *ad hoc* committee, would it not?

Mr. Roy: No, this would be an established committee.

The Chairman: This does not propose to make use, so far as Canada is concerned, of the anti-dumping tribunal, to which special powers are being assigned in the bill now before the Senate to deal with related trade and economic matters?

Mr. Roy: No, it is not. It concerns the whole range of trade problems and could go beyond that, but it is not specifically related to the anti-dumping tribunal.

The Chairman: By subscribing to Article 4, has Canada tied its hands in relation to any reference by the Minister of Finance or the Governor in Council to the anti-dumping tribunal which is set up under the new bill that is before the Senate; and in the case of anything of trade, related to trade and commerce, must that, if it affects New Zealand, go to this point committee rather than be a reference by Canada on its own part to the anti-dumping tribunal?

Mr. Roy: No, I do not think so. I do not think it must go first to the committee.

The Chairman: It could go to the Canadian committee, on the basis of gathering all the necessary information, I suppose?

Mr. Roy: The committee exists only when it meets jointly. There are no members specifically indicated on the Canadian side of the committee that would hold meetings separately from time to time.

The Chairman: I understand.

Mr. Roy: I would presume that that is your suggestion.

The Chairman: I understand that. I was asking the question whether this agreement in Article 4 would preclude a reference by the Governor in Council of Canada to the anti-dumping tribunal of one of these questions, after this agreement becomes law and after the new anti-dumping provisions become law.

Mr. Roy: I do not think so. No.

[*Text*]

Senator Carter: Does Article 5 mean that New Zealand and Canada would work out between them preferential tariffs which would not apply to the regular preferential tariffs with Commonwealth countries, which would be different?

Mr. Roy: I do not think that is the purpose of Article 5. I think it is a consultative article, meant to focus attention on any proposed changes in preferential treatment that the two countries grant one another. This permits us to consult with New Zealand and vice versa, should consideration be given to the proposing of major changes in such treatment, granted reciprocally.

Senator Hollett: What are the principal exports to New Zealand? I understand that there are $31 million of them.

Mr. Roy: For 1969 I have the figure for the total exports by Canada, $37 million.

Senator Hollett: What do they consist of mostly—the big values?

Mr. Roy: The big exports for Canada are sulphur, aluminum pigs and bars, aircraft and parts, potash, copper piping, tubing, plastic and synthetic rubber, plastic film and sheet, asbestos fibres. Those are the items that account for trade over $1 million in 1969. Sulphur is over $5 million.

The Chairman: And the imports?

Mr. Roy: The imports for 1969 are beef and veal, sausage casings, wool, lamb. Those are the items that are over $1 million in 1969.

Senator Hollett: There are imports from New Zealand? Beef, and so on?

Mr. Roy: Yes.

Senator Kinley: Is there any seasonal condition in this? I notice lamb, a large import from New Zealand.

Mr. Roy: I cannot say; I do not know.

Senator Kinley: Adopting this, it means you will not sell a thing cheaper than the price in your own country. I take it this bill places dumping in the field of discussion and negotiation. If you have dumping you have to have a conference on it with the committee? Is that the idea of the bill?

Mr. Roy: I do not think that is the case, but we are obliged to consult, once we have initiated action.

Senator Kinley: You cannot be absolute about it, you must consult about it?

Mr. Roy: Yes, you must consult on request.

Senator Kinley: It is a good bill.

Senator Hollett: Does that P. E. Trudeau have anything to do with our Prime Minister? I notice the signature is P. E. Trudeau; I take it it is the Prime Minister.

The Chairman: Well, obviously it is the same name.

Senator Hollett: I mean was he Prime Minister then?

Mr. Roy: The Protocol was signed on May 13, 1970.

Senator Hollett: He was Prime Minister then all right.

Senator Molson: Keith Holyoake was also the Prime Minister of New Zealand.

Senator Carter: I am still a little puzzled with respect to the answer to my question relating to article 5. It was purely consultative, but it is consultative with respect to changes. What is the purpose of consulting if you are not going to bring in changes? That implies that there is going to be a different set of tariffs for New Zealand than preferential tariffs for other Commonwealth countries.

The Chairman: I would take it, Mr. Roy, that the contents of the agreement is the arrangement that must be observed between New Zealand and Canada unless they get together, consult and agree to certain interpretations. Is that correct?

Mr. Roy: Presumably the consultations can lead to adjustments whereby if damage is being done this is pointed out to the party concerned, if it is within the power of that party to make rectification, that rectification, hopefully, will be made and the injury or supposed injury will disappear.

My understanding is that if that is not possible, then the regulations of each country enter into force.

Senator Blois: Is it not possible that if special agreements are made between the two countries, they and our anti-dumping bill will work against each other. Who would make the final decision in such a situation?

The Chairman: You will notice in article 2 of this amended agreement that there is provision that the Government of Canada, in the application of its anti-dumping legislation and regulations, shall accord to goods the growth, produce or manufacture of New Zealand treatment no less favourable than that accorded to goods the growth, produce or manufacture of countries signatory to GATT.

Now, this is using many words to say that New Zealand will be treated no less favourably. That simply means, as I take it, that whatever our anti-dumping law is, it will not apply in a different manner to New Zealand than to other nations.

Should such an article be contained in the agreement, would it not follow that if this is our law it will be applied even-handedly? That is about all it means. It does not contradict and cannot contradict what we have agreed to in GATT and the implementing legislation.

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

Agreed.

The Committee adjourned.

Queen's Printer for Canada, Ottawa, 1970

Third Session—Twenty-eighth Parliament
1970

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

Banking, Trade and Commerce

The Honourable SALTER A. HAYDEN, Chairman

No. 5

TUESDAY, NOVEMBER 10th, 1970

Complete Proceedings on Bill S-5,

intituled:

"An Act to amend the Anti-dumping Act",

REPORT OF THE COMMITTEE

Third Session—Twenty-eighth Parliament
1970

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

Banking, Trade and Commerce

The Honourable SALTER A. HAYDEN, Chairman

No. 3

TUESDAY, NOVEMBER 10th, 1970

Complete Proceedings on Bill S-6,

intituled:

"An Act to amend the Anti-dumping Act".

REPORT OF THE COMMITTEE

23136—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, November 4, 1970:

"The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Blois resumed the debate on the motion of the Honourable Senator Hayden, seconded by the Honourable Senator Bourget, P.C., for the second reading of the Bill S-6, intituled: "An Act to amend the Anti-dumping Act".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative."

ROBERT FORTIER,
Clerk of the Senate.

23136—2

Minutes of Proceedings

Tuesday, November 10th, 1970.
(3)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 A.M. to consider:

Bill S-6 "An Act to amend the Anti-dumping Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Blois, Carter, Connolly (*Ottawa West*), Hays, Hollett, Isnor, Kinley, Macnaughton, Molson and White—(12).

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

Witnesses:

Department of Finance:

R. K. Joyce, Director,
International Economic Relations and Trade Policy Division;
J. P. C. Gauthier, Vice-Chairman,
Anti-Dumping Tribunal.

Department of National Revenue:

H. D. MacDermid, Chief,
Valuation Section,
Customs Appraisal Division.

Upon motion it was Resolved to amend Clause 3 of the Bill.

Note: (The full text of the amendment appears by reference to the Report of the Committee immediately following these Minutes.)

Upon motion it was Resolved to report the said Bill as amended.

At 11:00 A.M. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Tuesday, November 10, 1970.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-6, intituled: "An Act to amend the Anti-dumping Act", has in obedience to the order of reference of November 4, 1970, examined the said Bill and now reports the same with the following amendment:

Page 2: Strike out lines 10 to 15, inclusive, and substitute therefor the following:

"16A. The Tribunal shall inquire into and report to the Governor in Council on any other matter or thing in relation to imports that might be injurious to the trade or commerce of Canada that the Governor in Council refers to the Tribunal for inquiry and report."

Respectfully submitted.

SALTER A. HAYDEN,
Chairman.

23136—2½

Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, November 10, 1970

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to give consideration to Bill S-6 to amend the Anti-Dumping Act.

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

The Chairman: Honourable senators, our witnesses this morning are Mr. R. K. Joyce, Director, International Economic Relations and Trade Policy Division, Department of Finance, Mr. J. Craig Oliver, International Economic Relations and Trade Policy Division, Department of Finance and Mr. J. P. C. Gauthier, Vice-Chairman, Anti-dumping Tribunal. From the Department of National Revenue we have Mr. H. D. MacDermid, Chief, Valuation Section, Customs Appraisal Division. So, honourable senators, you will see we have a good panel.

Would you care to make an opening statement, Mr. Joyce, and then we can get down to the business of the meeting?

Mr. R. K. Joyce, Director, International Economic Relations and Trade Policy Division, Department of Finance: Mr. Chairman, and honourable senators, this is a relatively short bill. Its primary purpose is to broaden the powers of the Anti-dumping Tribunal so it can inquire into and report to the Governor in Council on any other matter in relation to the trade and commerce of Canada that the Governor in Council refers to it for inquiry and report. The bill also provides for a number of other technical amendments, most of which are based on the experience gained in the operation of the present act for the last 22 months.

If I might deal first with the proposed additions to the powers of the tribunal, in clause 3 of the bill it is proposed to amend the present act by adding immediately after section 16, which deals with investigations by the tribunal, a new section 16A which will permit the tribunal on reference from the Governor in Council to inquire into other cases where dumping is not involved. The concept here is similar to that of subsection (5) of section 4 of the Tariff Board Act under which the Tariff Board has the duty to inquire into, "any other matter or thing in relation to the trade or commerce of Canada that the Governor in Council sees fit to refer to the Tariff Board for inquiry and report".

The Chairman: Perhaps we should stop there for a few minutes because this is the main clause in the bill. When I was giving the explanation on second reading, I had assumed, and I have been confirmed since in my assumption, that the granting of additional authority to the Anti-dumping Tribunal was intended so that the Governor in Council might refer to the tribunal matters relating to imports and Canadian production where there is no question of dumping but where the complaint is that there may be injury or threatened injury to the trade of Canada.

Now, if that is the purpose, and I understand it is, this is really broadly drawn, so that without any relation to imports, any item that comes under the description of trade and commerce may be referred by the Governor in Council to the Anti-dumping Tribunal. Now you may say, "Well, there is a discretion in the Governor in Council", but one always likes to be able to put one's finger on the principle of the bill to see that the bill gives effect to that. In the memorandum which I had from the department and in the illustration which I gave to the Senate on second reading, that illustration was as to why it was touching on the point of injury or threatened injury to production in Canada by reason of the financing being done by developed countries on the basis that the Canadian company which secures the financing must purchase the products in that country that does the financing. Now there is no question of dumping there.

Senator Connolly (Ottawa West): Mr. Chairman, would you deal with that again. I did not hear the beginning, and I apologize.

The Chairman: Which part of it?

Senator Connolly (Ottawa West): The part about the credit from the foreign country.

The Chairman: The memorandum which I referred to on second reading went along this line; that some foreign governments have begun to offer their export financing facilities to support sales to developed countries on condition that machinery and equipment to be purchased with the proceeds of the loan be obtained from producers in the country which guarantees the loan.

Then it says:

> When Canadian borrowers arrange financing for all or part of the cost of a major development through such foreign government export financing facilities and consequently make their purchases of machinery and equipment overseas Canadian manufacturers of machinery and equipment lose opportunities to supply this particular part of the Canadian market.

It goes on to say that part of the complaint of Canadian manufacturers is that some of these Canadian producers who are securing these foreign loans are also under the benefit of the Canadian Government's Regional Economic Expansion scheme, so that they are getting grants from the Canadian Government as well, and the Canadian manufacturer was complaining that in those circumstances he is threatened with injury so far as his production is concerned.

I gather that this was one of the reasons which prompted the government to introduce this additional authority of reference, where there is no question of dumping but of what shall the policy be, because of injury or threat of injury to Canadian production in these circumstances. That is a fair statement, is it not, Mr. Joyce?

Mr. Joyce: Yes, sir, I would not disagree with it at all, except to say that the intention is perhaps a little broader. The case you cite is obviously one of the more important cases, but there may be other instances which do not involve concessional financing where it may be judged by the government that there is injury or threat of injury to Canadian producers as a result of imports. There may be no dumping involved whatsoever. The government would propose in these cases to take action against imports, possibly through surtax action, which it would be justified in doing under the international rules of the General Agreement on Tariffs and Trade.

At the moment the determination as to whether or not there had been an injury would be made by the Governor in Council, possibly with a departmental inquiry.

What is being suggested now is that since we have a tribunal set up, admittedly to deal with cases of dumping, but whose job is to address itself to the question as to whether or not there has been injury or threat of injury—a tribunal which presumably has acquired, over the course of the last 22 months, a certain expertise in looking into this question—it would make sense, in other instances where the government might wish to take action against imports which were threatening injury, to ask this tribunal to make the determination.

The Chairman: That is exactly the point I am making. The illustration I gave about foreign countries financing is only one type, and I was not attacking it on that basis. I was saying that the avowed purpose—and you have confirmed that—is to make use of the expertise which the Anti-dumping Tribunal has obtained. This is what the memorandum which came to me said. It said:

> To date determinations of injury required as a basis for action under these sections of the Tariff . . .

. . .which I read to the senators when I was explaining the bill, where it only requires action by the Governor in Council . . .

> . . .have been made administratively with the approval of the Governor in Council. However, with the increasing experience of the Anti-dumping Tribunal in determining injury under the terms of the Anti-dumping Act, we feel that its expertise could be usefully employed in making injury determinations in these other situations as well, and thereby contribute to the more effective operation of these particular provisions of the Customs Tariff.
>
> Under the present legislation the tribunal is not authorized to make such determinations.

All I am saying is that if this is the purpose, then why do we not say, it, instead of creating an authority in the Anti-dumping Tribunal where you could either use it or the Tariff Board for the same purpose?

Senator Beaubien: Once the matter has been referred to the tribunal, who takes action? Does the tribunal just recommend or does it take action?

The Chairman: The Anti-dumping Tribunal?

Senator Beaubien: Yes.

The Chairman: On this extended authority they are being given . . .

Senator Beaubien: They just recommend to the government?

The Chairman: It is to inquire and report. That is all they do. The decision whether the surtax or countervailing duties will be applied is a decision that the Governor in Council has to take afterwards. He may or may not take it, as he sees fit.

Senator Beaubien: In other words, this bill does not change anything as far as government action is concerned?

The Chairman: No.

Senator Beaubien: It is just to be referred to this tribunal, and they are to report back?

The Chairman: Under this new section 3 you can get a determination of injury through the reference to the Anti-dumping Tribunal. What I am saying is, if that is the intention, then that is what the section should say. It should not be so broad that you could refer any matter of trade and commerce, whether it relates to an import or not, to the Anti-dumping Tribunal.

Senator Molson: Why is not the word "injury" included in the clause?

The Chairman: I do not know.

Senator Molson: Reading from your memo you said "injury determination".

The Chairman: Yes.

Senator Molson: This is, as you say, so broad it does not have to be in relation to any of these things we are discussing.

The Chairman: It does not have to be in relation to imports; it does not have to be in relation to injury.

Senator Connolly (Ottawa West): Would the earlier parts of the section answer Senator Molson's question? In

other words, reading this in isolation, perhaps we are a little restricted in our consideration.

The Chairman: Under the present bill—well, we will turn up section 16.

Senator Hays: While you are looking that up, could I ask a question?

The Chairman: Certainly, Senator Hays.

Senator Hays: You said in your opening remarks "in light of experience," Mr. Joyce. What specific experience did you have that made you want to amend the act?

Mr. Joyce: I think perhaps the Vice-Chairman of the Anti-dumping Tribunal might be better equipped to speak to that.

Mr. J. P. C. Gauthier, Vice-Chairman, Anti-dumping Tribunal, Department of Finance: Mr. Chairman and honourable senators, the experience that the tribunal has had is over a very varied number of sectors of the industry, over the past 22 months. Although we cannot say that it has been terribly brisk sometimes, business has certainly picked up over the last eight or 10 months. We have had types of cases such as those at this moment. We have just completed the transformer case, and we are going to consider glycol and the imports of chlorine next week. So we can jump from imports of glace cherries from France to work boots from eastern countries, to transformers from the United Kingdom, Germany, Sweden, France, Italy and Japan, and imports of chemicals from the U.S. So the expertise acquired is over varied sectors and also over a wide variety of imports.

Senator Hays: Let us get back to the cherries. You said we could use this provision. How could we have used it previously? Do you mean there is an over-production in the United States, and this sort of thing?

Mr. Gauthier: No. This case was against France, and the producers of glace cherries in Canada complained that they had been dumping from France, which is the main exporter in the world, not only to Canada but also to the U.S. and European markets.

Senator Hays: These are the cherries that go into martinis?

Mr. Gauthier: Those they call maraschinos.

Senator Connolly (Ottawa-West): These go into old fashioneds.

The Chairman: Senator, how can you think of that so early in the morning?

Mr. Gauthier: The glace cherries go to the bakery trade. So, in studying a case of dumping which might affect Canadian production, we have access to all of the information—the marketing information, the financial information, the distribution information—that forms the structure of an industry in Canada. Incidentally, when cases of dumping come to the attention of the tribunal it considers only those that affect a wide sector of an industry. For instance, if one producer, whose production would represent only 5 or 6 per cent of the total Canadian production, complained of dumping then we would be precluded by the provisions of the act from considering injury, so when we do consider injury it is on account of dumping affecting whole sections of industry, or the majority of producers.

Expertise is gained by a study in depth of that sector of the industry and the international ramifications governing the distribution of its product to different countries, and we also gain an insight into the organization of a foreign industry.

An example of this is the case of transformers in regard to which a decision was rendered last Friday. Seven countries and all of the Canadian industry were involved in this case. The hearings lasted 32 days. We wanted to see how the other producers in Sweden, France, the United Kingdom and Belgium were organized, and what type of management they had, what their business philosophy was, and what their research and development resources were, which we did over a very short period of time because we were still limited by the 90 days in which we have to give our decision.

We gained an insight on this occasion into a rather important sector of heavy manufacturing in Europe. I think it is through this exposure, through different business philosophies, different approaches, and different resources that we acquire this expertise.

Senator Hays: Do you not have the power under the present act?

Mr. Gauthier: Only as regards dumping.

The Chairman: These cases, Mr. Gauthier, about which you are talking, and in respect of which decisions have been made, have been considered under the existing act which was passed in 1968-69, and they were considered because there was an element of dumping. "Dumping" is defined as occurring when the price at which the imported article is offered for sale, or is sold, in Canada is lower than the market price for like goods in the country of origin. This is the dumping feature. But, what we are talking about this morning is a situation in which there is no dumping. We then look at the circumstances under which these imports come into Canada, and the allegations that their entry is threatening or causing injury to Canadian production. This is a new authority.

Senator Hays: Yes, it broadens the whole act.

The Chairman: Yes, but not as to making a decision, but as to making a study and report as to whether there is injury or a threatened injury by reason of these conditions in relation to imports.

Senator Hays: Even before the matter is brought before the tribunal. Are you not prejudging what might happen?

The Chairman: No, because all that the tribunal, with the added authority that is being given to it, does in a case of this kind, where there is no dumping alleged, is to hear all the evidence and make a report as to whether it finds that these imports in these circumstances are

causing or threatening injury to Canadian production. That decision goes to the Governor in Council, and then it is up to the Governor in Council to decide whether a surcharge or countervailing duties will be applied. This is an added power.

The whole point I was raising for discussion here was if this is the intended additional jurisdiction, why is it taken so broadly that they can hear and report on any item in relation to the trade and commerce of Canada. There is no limitation on it. If this is why they want the authority then why do they not take it in that fashion?

Senator Blois: Mr. Chairman, I objected strenuously in the chamber to the fact that this is so broad. It has nothing to do with dumping at all, as I see it. It seems to me that they can look at the freight rates charged on grain. It is much too broad as it stands at the present time, and it could be worded differently so that it has something to do with dumping. As it is presently written they could look into the fares charged airline passengers, because it says "anything in relation to the trade or commerce of Canada".

The Chairman: A wording that I would suggest for your consideration is, "in relation to imports that might be injurious to the trade or commerce of Canada".

Senator Blois: That, I think, would cover it.

The Chairman: Yes, that would cover the situation.

Senator Kinley: Mr. Chairman, the other day when we were dealing with the New Zealand trade agreement we made special provisions about anti-dumping, and it seemed that dumping would be a matter for consultation between the two parties. Has that any relation to this bill?

The Chairman: No. Perhaps you could explain that, Mr. Joyce.

Mr. Joyce: I am sorry, Mr. Chairman, but I did not follow the question.

The Chairman: We had before us the other day the updating of the New Zealand Trade Agreement, and there was reference in it to a consultative committee which, as I understood it, was to resolve differences if Canada complained to New Zealand about the way certain products were coming into Canada, or New Zealand complained to Canada. Machinery was provided in that trade agreement for the purpose of attempting to resolve the difficulty, but that does not mean that they were giving up any rights they might have under the Anti-dumping Act that we have in force. This was just providing machinery for resolving those differences; is not that right?

Mr. Joyce: Yes. We have that with both New Zealand and Australia in the original trade agreements with those countries. You are quite right. It is just a provision for consultation prior to taking action. The problem now is that the international anti-dumping code which we agreed to in the GATT does not really provide for that sort of consultation, and therefore to the extent that one deals with dumping cases involving New Zealand goods on the basis of the trade agreement with consultation, and does not so deal with the imports of goods from other countries on that basis, it can be charged that one is discriminating in favour of New Zealand. So, following negotiations with the New Zealand Government it has been agreed now that the trade agreement will be amended, in effect, to take out that advance consultation procedure so that imports from New Zealand will be treated in the same manner as imports from any other country so far as the anti-dumping provisions are concerned.

Senator Kinley: Are there any seasonal conditions in this bill?

Mr. Joyce: No, sir, there is nothing specifically dealing with seasonal distribution. The Anti-dumping Act as such applies to any goods. This bill, of course, simply amends the act and does not affect the basic features.

Senator Kinley: It is the question of seasonal implication when we compete with the United States.

Mr. Joyce: You are quite right; there are many problems not strictly in relation to dumping. These have to be overcome outside the provisions of the dumping legislation. One of them is the problem of seasonal importations of fruit and vegetables.

Senator Connolly (Ottawa West): Mr. Chairman, I have a double-barreled question which I will ask in two parts. It relates to the matter you raised originally. I will ask the question by way of an example.

Let us say that a Canadian organization decides to go to West Germany to buy some production equipment which is available in Canada. There are export encouragement laws in West Germany which permit long term credit to the Canadian buyer. He can obtain this machinery over a long period of time, perhaps three or four yours or longer, at a very much reduced rate of interest. Let us say that the prevailing rate in Canada today is 9 per cent or 10 per cent, he might obtain it for 4 per cent or 5 per cent. Therefore they are subsidizing exports.

This is a situation where relatively the same type of machinery is produced in Canada. I suppose that in such a case the Canadian manufacturer could appear before the department and ultimately the tribunal and report the loss of this business, resulting in injury. Is that the fact?

Mr. Joyce: Yes and no, sir. If these export credits were such as to create a dumping situation and the Deputy Minister of National Revenue could establish that dumping had occurred, then, of course, it could be referred to the tribunal for an injury determination.

The Chairman: Without this bill.

Mr. Joyce: Without this bill.

Senator Connolly (Ottawa West): Could I stop you there? A producer in Germany buying this equipment would probably have to pay the going rate, because it is going to be used in Germany for production purposes.

For instance, he would have 30 days or 90 days at 10 per cent. The Canadian buyer is bonused to the extent of a 4 per cent or 5 per cent rate and a longer term because the West Germans wish to encourage the exports and earn the foreign exchange.

Is that a dumping situation?

Mr. Joyce: It could be.

The Chairman: Well Mr. Joyce, it might be a subsidy.

Mr. Joyce: There are the two aspects. It may be a subsidy, but whether it is a subsidy or not it could still be dumping, and vice versa.

The Chairman: That is right.

Mr. Joyce: The problem here is the method of determining whether in fact it is dumping within the ground rules laid out in the act. In other words, nominal value versus export price.

Senator Connolly (Ottawa West): Is the sale in this case not being made at a price lower to the Canadian manufacturer in view of the terms, interest rate and length of time, than is available in the country of origin?

Mr. Joyce: I would like to refer the question to Mr. MacDermid of the Department of National Revenue. However, before doing so I might say in general that such a case might well involve an element of dumping. The problem is the method of calculation. The two prices have to be brought to a comparable basis. Then the decision must be made whether in fact the price in the home market is the same or higher than the price at which sales would be made in the Canadian market.

There is a technical problem with respect to the performing of this calculation.

Senator Connolly (Ottawa West): If the price is the same but the terms are better, is it dumping?

Mr. Joyce: I would say there is a *prima facie* case there, the export price being less than the nominal value.

Mr. H. D. MacDermid, Chief, valuation section, customs appraisal division, Department of National Revenue: Mr. Chairman, I think the answe given by Mr. Joyce is correct, that there is a *prima facie* case of dumping in such a situation if the terms to the Canadian importer are preferred to those granted on sales in the domestic market.

We have had no actual experience under the Anti-dumping Act related to this type of situation. However, if a complaint were lodged under the Anti-dumping Act we would in all probability find dumping.

Senator Connolly (Ottawa West): But this is a practice that has been developed in many foreign countries in an endeavour to develop export sales, is it not?

Mr. MacDermid: Yes it is, sir.

Senator Connolly (Ottawa West): And the test in this case, I take it, is the fact that for this particular equipment, which can be manufactured in Canada, a Canadian producer would lose the business and that is where the injury takes place?

Mr. MacDermid: Yes.

The Chairman: You would have to establish that there is injury, or threatened injury.

Senator Connolly (Ottawa West): Yes, but he has lost his sale.

The Chairman: It depends on who he is and what the relationship of his production is to the total Canadian production. Those are all factors to be taken into consideration by the Anti-dumping Tribunal.

Senator Connolly (Ottawa West): With those considerations, which I accept, let me take it a step further and visualize a situation where a Canadian importer is carrying on a very large operation. He requires financial assistance to compete and finds that he obtains better terms for his equipment because as the result of its installation and this new capital expenditure in the country where he buys it, he is going to make sales of his product of tremendous value.

Now, there is injury, for instance, to Canadian General Electric with respect to certain transformers they might have sold to this man had he not decided to buy in West Germany. On the other hand, West Germany will take the product resulting from this capital investment and we as a country will have export sales of that commodity.

Now, is the tribunal to set a balance between one and the other and rule that the overall injury is minimal? Sure you lose the value of the sales of the transformers, but you get the value of the export product which is produced from the use of this equipment and other equipment, of course, in the sales to the foreign country that produced the transformers. It is a double-barreled question.

The Chairman: Both those barrels seem to be moving in a line that is parallel to what this bill purports to cover, and since parallel lines meet at infinity, that is a long time to wait. The point here is that the amendment does not involve any question of a finding as to dumping; it is to give an additional authority to the Anti-dumping Tribunal to make a determination of injury where there is no allegation of dumping.

Senator Connolly (Ottawa West): Well, let me take Canadian General Electric as an example. When they or some other manufacturer of this type of product are involved and you try to determine injury to Canadian trade and commerce, are you going to look only at the loss of the sale of the equipment or are you going to look at the whole picture and say that in the end we are going to gain?

The Chairman: Well, Mr. Gauthier, the Chairman, is here. Certain guidelines have been fully formulated, and I would imagine that the transformer case as and when you have finished with it will establish some guidelines

that may be a direction to industry. I am not sure you want to pronounce on what your guidelines may be in advance.

Mr. Gauthier: Mr. Chairman, we certainly have not established guidelines with respect to the text of the amendment or the new act at this stage. In answer to Senator Connolly, however, I think that the crux of the problem has been touched on in the sense that in determining injury under the present act, we have to consider only injury to production of like goods in Canada. We don't consider injury, for instance, to consumer interests. According to the present act, as it presently reads, it is the production of like goods in Canada. Therefore we will not be in a position and our terms of reference will not permit us to take into consideration consumer interests or trade interest or economic interests.

Under the proposed amendment the question is quite different as you have put it down, Mr. Chairman. It is to report to the Governor in Council on any other matter or thing in relation to the trade and commerce of Canada. In my own mind and in the minds of my colleagues I believe we had interpreted this as being injury to industry from other causes. I do not want to detract from the objectives that the Department of Finance might have, but having discussed this with my colleagues, I think our own frame of mind is such that we considered the amendment as being aimed at injury from other causes to Canadian industry.

Senator Molson: I do not want to step ahead of Senator Hays, but my question is exactly on the point developed by Mr. Gauthier. I would like to ask what is the purpose of this parallel. Obviously the Department of Finance has some purpose in suggesting this amendment. They must have had some purpose in making the wording as vague as they have done, and they must have some designed use for the act as amended by this paragraph. Now I think we are all fumbling and saying, "why is this for injury?" and "What is the effect of this?" But we do not know what the purpose of the paragraph is, and I would like Mr. Joyce to tell us why the paragraph is suggested as it is.

The Chairman: Mr. Joyce has to keep in mind the letter sent by the Department of Finance to me in preparation of the explanation on second reading in which they do state a purpose which I read this morning.

Senator Molson: I am afraid I am not entirely clear. Would you read it again, Mr. Joyce?

Mr. Joyce: Might I attempt to deal with it? It is possible that the letter sent to Senator Hayden was not precise enough in its explanation. Let us distinguish between the immediate problem and problems that might occur in the future. The immediate problem we see, and the immediate reason we are suggesting that this clause should be included, is that there are cases where no dumping is involved, but where Canadian producers are injured or threatened with injury as a result of the importation of like or directly competitive products.

In these cases the Government of Canada has the authority under domestic law and is entitled by virtue of international agreements to take certain actions, notably the surtax act or to impose countervailing duties if there are export subsidizations. In those cases, however, to meet the requirements of international law one must establish that there has been or is a threat of injury. This at the moment is done by the Governor in Council.

The purpose of this clause—the immediate purpose of clause 3—is to provide that in future the Governor in Council can refer this type of question to an independent body for an injury determination, and the independent body the Government has in mind is the Anti-dumping Tribunal, because they do precisely this type of job in relation to dumping cases. So we are really saying that that would be the logical independent body to refer the question of injury determination to in non-dumping cases. This then brings up the next question as to why the wording is so broad. I think there are two or three possible remarks I could make on that. There is a tendency, as I am sure you are aware, for legal draftsmen to seek refuge in established terminology, and this is the type of wording used in the Tariff Board Act where, for completely different reasons, it was decided that the Tariff Board could be used as an independent tribunal to look into questions even though the Government was not specifically asking it to consider whether or not tariffs should be changed.

I think I can mention the most recent report on knitwear as a case in point. This was a general reference to the Tariff Board to look into the situation in that industry. It is a reference which would not have been made at all to the Tariff Board if the Textile Review Board had been in a position to do so. This is one reason why it is adopting similar type of wording to that of the Tariff Board Act. It may not be an adequate reason, but it is a reason.

Now, apart from that, I think another reason for keeping the wording fairly broad is pointed up by the remarks of Senator Connolly. If this were worded in such a way as to deal specifically with the case I mentioned, the immediate intention, namely to deal with cases of injury where there are imports but not necessarily dumped imports, there is a danger that that might be too limited, that one would be thinking of injury in whatever terms injury might be defined in international parlance—namely, injury to producers. But it could be that at some point in time the government might wish to see whether imports were causing injury to consumers. This would not necessarily mean that the government could then take tariff action or surtax action because under the international rules this might not be permissible, but it is conceivable there might be other things the government might decide to do, given that it had been established by an independent tribunal that there had been injury to consumers, if not to producers.

Senator Connolly (Ottawa West): Or to foreign trade.

Mr. Joyce: Yes, sir, this was the other point I was coming to, that you had mentioned, the possibility that though there is injury to Canadian producers, in meet-

ing that injury you may in fact be damaging export interests of other Canadian producers.

The Chairman: Mr. Joyce, do you not think that is drawing a long bow? What particular aptitude would the Anti-dumping Tribunal have to deal with a matter which does not involve injury in relation to dumping or otherwise, of the nature that you must find in order to get action under the Anti-dumping Act? They are going to have two or three sets of guidelines, are they, with a vehicle already established—the Tariff Board, which has been doing this kind of work?

Mr. Joyce: I am simply saying that the tribunal—and as Mr. Gauthier pointed out the example of the transformer case—as a result of its investigations, acquires a knowledge and expertise that may be useful to be brought to bear on certain questions, and these questions conceivably might be a little wider than the specific question as to whether there has been injury as a result of the increased imports.

Senator Molson: I cannot see it would be other than in the case of imports though.

Mr. Joyce: Quite frankly, sir, I cannot either, at the moment.

The Chairman: Right on this point, when you bring in the question of the consumer, the Governor in Council, even under section 7(1)(a) of the Customs Tariff now, where he may apply surtax, is limited to the case of where the conditions are such as to cause or threaten serious injury to Canadian producers of like or directly competitive products. So if your conception is that in this section you are going to give the Anti-dumping Tribunal authority to study that relationship by reference, to committees, where is action going to take place?

Senator Hays: And how are you going to do it?

The Chairman: Yes, how are you going to do it?

Senator Hays: Where you are protecting the consumer and the producer in an act dealing with dumping.

Senator Macnaughton: Where the tribunal finds there is no dumping or injury, is the government bound to accept that finding?

The Chairman: That is a double-barreled question, senator.

Senator Macnaughton: Yes—or can the government say, "Thanks very much for the information, but we are going ahead."?

The Chairman: Let us take, first of all, if they find there is no dumping and no injury.

Mr. Joyce: In the first place, the tribunal does not find whether or not there is dumping. That is a decision of the Deputy Minister of National Revenue. The tribunal addresses itself only to the question of injury.

The Chairman: It may express an opinion, I think, under the original act.

Mr. Joyce: It may express an opinion in certain cases, about whether goods are of broadly similar characteristics; but, by and large—I was trying to simplify—the job of the tribunal is to address itself to the question of whether or not there has been injury.

I think the government has to accept, where the tribunal has determined there is no injury...

Senator Macnaughton: "Has to" or "should" accept? The government has authority to refuse, I presume?

Mr. Joyce: Yes, I say the government has to accept—has to "recognize" may be a better way of putting it. I think it is still open to the government to disagree and itself to determine that there was injury.

Senator Connolly (Ottawa West): When you say the government, what you mean is the Department of National Revenue?

The Chairman: No, the Governor in Council.

Mr. Joyce: I mean the Governor in Council.

Senator Connolly (Ottawa West): I know, but it is on the recommendation of the Department of National Revenue.

Mr. Joyce: It depends. If you are talking about surtax action, it is on the recommendation of the Minister of Finance. Nonetheless, it is the Governor in Council, and this means a decision by ministers, if you like.

I think the government retains its power to determine whether there has been injury or not, but I think that this would seriously restrict it in the exercise of its power. If, in fact, an independent tribunal has ruled there is not injury, I would think the government would find it rather difficult to proceed with surtax action, invoking in defence of that surtax action that injury has occurred. It is certainly within its powers to do so, but I think it might find it somewhat embarrassing, certainly in international circles. Does this answer your question?

Senator Macnaughton: Yes, it does.

The Chairman: It is not an order of the Anti-dumping Tribunal under this proposed section; it is just a report.

Mr. Joyce: I suppose one could draw a parallel with the Tariff Board, where the Tariff Board may recommend certain action with respect to the tariffs, and the government may choose to implement or not implement, on the basis of this and other things it takes into consideration.

Senator Macnaughton: I guess the Prime Minister is the only one to give a final answer.

Senator Hays: I was a bit confused on the consumer where you said the tribunal may be interested in the consumer aspect.

The Chairman: Mr. Joyce suggested that as being a "way out" reason—I do not mean that unkindly—for giving this very broad power.

Senator Hays: I am thinking of something that has not been brought before the tribunal, Danish bacon. In Denmark they have a two-price system, and we have a great surplus of bacon today, the price being half what it was a year ago. The last time I was in the market you could buy Danish bacon much cheaper than they are selling it to the Danish people because they do have a two-price system. They make as much money on it as they do in servicing the other, but the consumer is buying at a cheaper price and the producer is injured by this importation. I think it is dumping, but I do not know who would bring it forward. Would the consumer be injured or would the producer be injured?

The Chairman: The only test under existing legislation—and that is not being changed here—is injury to the producer.

Senator Hays: I would think that the tribunal would not be interested in the other part. It would be interested just in the dumping part.

Mr. Joyce: Let us assume that there is a dumping situation here. What you are saying is that the producers may or may not choose to initiate a request.

Senator Hays: They may be so fragmented.

Mr. Joyce: However, an investigation can be initiated by the Deputy Minister of National Revenue on his own responsibility. The fact that Canadian producers, because they are fragmented, do not choose to initiate an investigation, an investigation might still be initiated.

If I may, I should like to go back to the consumer question. Senator Hayden said it was far out, and I do not think he was far wrong. You were pressing me, in a sense, and I was trying to envisage what one might consider at the extreme, but it is quite clear that the intention at the moment is to deal with those cases where there are importations which do not necessarily involve dumping but where the Government might wish to take action on the ground that there has been injury. The real purpose of broadening the powers of the tribunal is to provide that the Governor in Council can ask an independent tribunal, namely, the Anti-dumping Tribunal, to make an injury determination and to make a finding as to whether or not there has been injury.

The Chairman: That raises again the question that I put to you originally. In those circumstances, if this is the area of operation, why should we expand section 3 to a depth that covers anything in relation to the trade or commerce of Canada, whether it is imports or not?

Mr. Joyce: I have two answers to that. One is that to the extent that you word it tightly there is always a danger that one might find that inadvertently one has limited the terms of reference or the powers of the tribunal to deal with the case that one wishes it to deal with.

The Chairman: Mr. Joyce, on that point, if you are going to draft legislation that goes into all those points, you will never get anything finalized. This would appear to me to be the main purpose for which this extension of authority is being sought. If it does not go far enough then you can come back. How you could anticipate situations arising where you would need this broad authority in reference to the Anti-dumping Tribunal is beyond me. I just cannot comprehend why a tribunal as specialized as this tribunal would be the one selected to deal with matters that do not involve its specialty.

Senator Connolly (Ottawa West): Mr. Chairman, what about the example I gave of where even if there was a possible element of dumping, the net result—to use Senator Isnor's word—or overall result is beneficial to Canada because of the increase in the foreign exchange that is generated by Canadian sales to the country where the equipment is purchased? Would not this broader wording allow the tribunal to consider both factors—not only the injury to the manufacturer, but the ultimate benefit in the form of increased trade to the country?

The Chairman: But, senator, there is nothing in the legislation that deals with the overall result. It deals with injury to the producer.

Senator Connolly (Ottawa West): But if you say "in relation to the trade or commerce of Canada" your wording is pretty broad.

The Chairman: What I was saying was that the function or specialty of the Anti-dumping Tribunal is dumping and injury.

Senator Hays: That is right.

The Chairman: They now want the additional authority to deal with injury where there is no dumping. Is that all right? They can have it, but they come in and want to have jurisdiction in relation to any other matter or in relation to the trade or commerce of Canada, and that is a large order because the Anti-dumping Tribunal has a specialty.

Senator Molson: It is not even external, which is perhaps a weakness.

Senator Hays: The terms of reference are pretty wide. They are away out in so far as dumping is concerned.

The Chairman: Can we resolve this? What is the view of the committee? If we were seeking to have this proposed section deal with the situation that the Government wishes to cover—that is, no dumping, but a determination of injury to the producer in Canada by reason of imports where there is no dumping—then I suggest we could put in three or four words so that that phrase would read "in relation to imports that might be injurious to the trade or commerce of Canada". That would give them all that jurisdiction.

Senator Molson: Do you need anything other than "in relation to imports". Why should this tribunal not consider any matters relating to imports?

The Chairman: It is a question of injury.

Senator Molson: But this is a broad investigation. I really cannot see what would be harmful as long as it

concerns imports. The only thing that disturbs me here is that it seems to include interprovincial trade.

The Chairman: If there was any intention to get a finding—and Mr. Joyce said there was—under section 7(1)(a) of the Customs Tariff where there is no dumping but injury or threatened injury by reason of the importation of certain products, then the finding of the tribunal must be a finding of injury, or the minister would not have support for invoking the surtax. Up to the present time the minister and the Governor in Council make both decisions—that is, they decide there is injury, and then they apply the surtax. The idea now, as I understand it from Mr. Joyce, is to divide those functions, and have the Anti-dumping Tribunal make the determination of injury or no injury. If they determine injury, then either Senator Molson or Senator Macnaughton asked: In those circumstances, does the minister or the Governor in Council have to accept that finding. Mr. Joyce's answer was very fair. He said that international relations being what they are, if you have a finding of an independent body that there has been no injury, it would be very difficult for the minister and the Governor in Council to go against that finding and apply the surtax.

Senator Macnaughton: But, on the other hand, he could.

The Chairman: Oh yes, he could.

Senator Isnor: Why should they not have that authority?

The Chairman: They have the authority. I am saying that if that is the authority they want then that is the authority we are prepared to give them.

Senator Isnor: That is what we have been arguing about.

The Chairman: No, Senator Isnor, we have been arguing about the fact that in order to have what they are asking they do not need as broad a section as they have in this bill.

Senator Isnor: It does not do any harm.

The Chairman: That would be a simple way of approach to all legislation; whatever it is we could say: Let them have it, it does not do any harm.

Senator Hays: I think the terms of reference are too broad. If the tribunal deals with dumping then its jurisdiction should be confined to dumping and injury to producers.

Senator Macnaughton: I like your wording, Mr. Chairman. Would you repeat it?

The Chairman: My suggestion was that after the words "in relation" we insert the words "to imports that might be injurious to the trade or commerce of Canada."

Senator Connolly (Ottawa West): Mr. Chairman, I hark back to the example in which as a result of an importation there could be injury to the trade or commerce of Canada in one sense, and that is in the fact that this particular sale is lost. However, in the long run there may be advantage to the trade and commerce of Canada greater in value than the loss of the sale.

Now, why not say both imports and exports?

Senator Macnaughton: Your wording would cover this case.

Senator Molson: The tribunal does not function with respect to exports.

Senator Connolly (Ottawa West): The wording suggested, Senator Macnaughton, would restrict the test of injury to whether or not the Canadian producer lost the sale.

The Chairman: That is the only way in which the surtax can be applied. Under the present law, the Customs Tariff Act, not this bill, there must be injury to the Canadian producer.

Senator Connolly (Ottawa West): But suppose that in the broader context there is an ultimate net advantage to the trade and commerce of Canada, then the test will not be the ultimate value but did they lose this sale?

The Chairman: More law would be needed in that case, because the minister or the Governor in Council now have to apply surtax where there is injury or threatened injury to the Canadian producer in relation to imported goods.

Mr. Joyce: I am not sure though, Mr. Chairman, with all due respect, that it should be tied too closely to surtax. This is obviously the immediate problem, but the development of other problems can be conceived. It may be that although the Government does not have in mind taking surtax action it is concerned with regard to the general situation in an industry where there is import competition. It wishes the tribunal to consider that industry and decide whether or not there has been injury in the broader sense of the term, not necessarily in the limited sense that would be necessary in order to justify surtax action.

The Chairman: To stop right there, this is what the Tariff Board does now, is it not?

Mr. Joyce: One can make reference to the Tariff Board on those grounds because the provision in the Tariff Board legislation is as broad as the provision suggested for this.

The Chairman: Maybe that is where it belongs.

Mr. Joyce: Possibly, sir. However, if you include in this legislation a clause as broad as that in the Tariff Board legislation, then you leave it up to the Governor in Council to decide whether or not that reference should be made to the Tariff Board or to this tribunal.

It would depend partly on the workload and partly on the relative expertise of the two tribunals.

The Chairman: With respect to your latter ground, the expertise of the Anti-dumping Tribunal is in the area of injury or threatened injury to the producer. The Tariff Board has a basis of experience and has dealt much more broadly along the lines you have indicated in this question.

Senator Molson: I see one difficulty in Senator Connolly's premise. There are probably two different industries affected. One is injured and the other benefiting. However, it would be rather improbable that it would be an injury and a benefit to the same industry in the same transaction.

Senator Connolly (Ottawa West): That is quite true; it is obvious in my example. The injury would be to a manufacturing organization in Canada; the benefit would be to an exporter who used the imported goods to produce foreign exchange by exporting to the country where the equipment was manufactured.

Senator Molson: We would need a Solomon to deal with that.

Senator Connolly (Ottawa West): I do not think so; it seems to be a matter of policy.

The Chairman: That brings us into the area of national policy of balancing exchange as an element against injury to the Canadian producer.

What is the feeling of the committee with respect to clause 3?

Senator Blois: I move we amend it as you suggested.

The Chairman: I have suggested this limitation, which is in line with the present intention for the use of this extended authority. Does the committee support that change?

Senator Connolly (Ottawa West): I certainly do not wish to vote against the chairman, because he carries us so far on these matters. What does Mr. Joyce think? Does it restrict?

Mr. Joyce: I am a little concerned about it, for two reasons. One is that it may be difficult to word the section in such a way as to allow the tribunal to perform even the immediate task contemplated, which is the determination of injury in cases where there are importations but no dumping.

However, more broadly I would suggest to you again, senators, that there may in fact not be as great a danger as you see in providing powers to this tribunal as broad as those provided in the Tariff Board Act. In both cases the reference has to be made by the Governor in Council. Leaving this clause stand would give the option to the Governor in Council to refer a broad question to this tribunal rather than possibly to the Tariff Board.

Senator Connolly (Ottawa West): Is it not more than that, Mr. Joyce? Are you not giving an importer who has perhaps been found to have imported goods that attract dumping an opportunity to go to this particular tribunal, which is primarily charged with considering dumping matters?

Mr. Joyce: At present.

Senator Connolly (Ottawa West): At the present time, and allowing that tribunal to weigh this particular allegation of injury against a possible benefit in another area of trade and commerce?

The Chairman: Well now, senator, if you read section 16 of the act, which deals with dumping, and then the determination the Anti-dumping Tribunal must make as to whether there is an injury, the only manner in which a producer can benefit is by establishing injury.

You are suggesting that, have made that decision, the same question in substance could be referred under this authority. What kind of decision would you expect to be made by the Anti-dumping Tribunal on the wording we have here? They have already decided that there is or is not injury; would you have them make two different decisions?

Senator Connolly (Ottawa West): They may decide, for example, that there may be injury in respect of the equipment imported because it may be manufactured in Canada.

The Chairman: Then we must broaden the authority as to the basis upon which they can proceed. Guidelines would have to be established to say that even if they have made a finding of injury under section 16 there is this general reference that they are not bound by that finding. In my opinion that creates an impossible situation.

The Chairman: Those in favour of the amendment please indicate? Contrary?

Carried.

Now, Mr. Joyce, I think the other items in the bill are just tidying-up items, are they not? I notice you have changed "three months" to "90 days". That is simply to be uniform in your language, I presume.

Mr. Joyce: Yes, I think there is another small point there in that three months is not necessarily always the same because it can depend on the length of the months, and with this change, everybody will be treated on the same basis. "Ninety days" is a more appropriate term.

The Chairman: Then in clause 4 you provide that where there is a finding of no injury and that terminates the proceedings, if the importer has put any money up in the interim, he gets it back.

Mr. Joyce: He gets the money back if there is a no injury finding even at the present time, but he will get it back more quickly under section 4 because it will be automatic. Under present arrangements, National Revenue still has to make a finding and a final determination

which may take some time. In the meantime his money is tied up.

The Chairman: Then in section 7 you have only added the words "any enquiry under section 16," providing for the confidential nature. Was that not in the original bill?

Mr. Joyce: I think section 7 should be read in conjunction with section 6. I think taking the two together the problem essentially here is that the original bill does provide for confidentiality in respect of hearings before the tribunal. The problem is that there are provisions under which the chairman of the tribunal can designate a particular member of the tribunal to hold hearings or receive information, and there is a further provision that when that member of the tribunal has held such hearings or has received such information, that he shall not only report to the chairman but that he will give copies of his report to the interested parties.

The problem is that conceivably there could be confidential information in that report, and this is simply to provide that in these cases as in the case of hearings before the tribunal that confidentiality shall be respected. I am quite sure that in fact it has been respected, but this is intended to give a legal guarantee.

The Chairman: Then in section 8 you are making an amendment to the French version. What is the purpose of that?

Mr. Joyce: The problem there is, as you know, that in the English version dealing with the annual report, it is provided that it be tabled within 15 days, "or if Parliament is not sitting" etc. Unfortunately in the French version the expression used is "si le Parlement n'est pas alors en session". Now I pass on the question of whether or not that is a good translation, but I suggest it is misleading. It is proposed to change the French version to "si le Parlement ne siège pas à ce moment là". Using "siège" for a sitting seems to solve the problem.

The Chairman: Then your reference to section 9 is to accommodate the revision of the statutes.

Mr. Joyce: That's right, sir. I am sure you are far better informed on this than I am.

The Chairman: Yes. Now is there anything else in this bill that you should direct our attention to?

Mr. Joyce: I do not think so, sir. One of the sections you did not refer to is section 5. This is on the question of tabling or reporting the rules, and it is proposed to bring that reporting procedure or tabling procedure in line with the provisions for the annual report, namely that it be tabled within 15 days, or if Parliament is not sitting within 15 days of the next sitting. There we fell into the same trap on the English side as we previously fell into on the French side in the other section where it talked about 15 days after the commencement of the session next ensuing.

Senator Molson: Are they sitting days or calendar days?

The Chairman: Well it says "... on any of the first 15 days next thereafter that Parliament is sitting."

Senator Molson: But in another part it says "... within 15 days after the making thereof" and they do not agree.

Mr. Joyce: I am not a lawyer, senator.

Senator Molson: Neither am I, so perhaps we can talk about it.

Mr. Joyce: I would have thought this meant 15 calendar days if Parliament is sitting and if Parliament is not sitting within 15 days of the next sitting. On that last point I do not know whether or not it is calendar days.

Senator Molson: Perhaps we should ask our Law Clerk for his opinion at this stage.

E. Russell Hopkins, Law Clerk and Parliamentary Counsel: I would say it means calendar days unless it specifies otherwise.

The Chairman: A day is a day.

Senator Carter: This also appears in other statutes. How is it interpreted in the other statutes?

The Chairman: What other statute?

Senator Carter: I cannot tell you any specific one, but I remember coming across this clause on numerous occasions.

The Chairman: Well, you have dealt with it in the alternative, that is to say you have dealt with the situation if Parliament is sitting and if it is not sitting. That is what this section does. It is a clarification.

Senator Carter: Did we not come across it in connection with the Hazardous Products Act? I know there are many cases where reports must be tabled within 15 days.

Mr. Hopkins: It would be so easy put in "sitting days", but that apparently is not what is meant.

Mr. Joyce: I think this is the normal practice.

The Chairman: The reason for the amendment, I think, is clear if I read to you what it says in the act. It says:

> Copies of all rules made pursuant to subsection (1) shall be laid before Parliament within fifteen days after the commencement of the session next ensuing after the making thereof."

That could be a long period of time if it is the commencement of the session next ensuing. Now what would happen if you were to make the rules under the present act to read "... while Parliament was sitting". You would wait until the next session. The need for a change is obvious.

Mr. Joyce: It has been pointed out that it is calendar days under the Interpretations Act.

Mr. Hopkins: Unless the context otherwise requires, which would involve the wording "sitting" before the word "days".

The Chairman: Shall I report the bill as amended?

Hon. Senators: Agreed.

The Chairman: We have no further business this morning. The meeting is ajourned.

The committee adjourned.

Queen's Printer for Canada, Ottawa, 1970

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT
1970

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, Chairman

No. 4

TUESDAY, NOVEMBER 17, 1970
WEDNESDAY, NOVEMBER 18, 1970

Complete Proceedings on Bill S-5,

intituled:

"An Act respecting weights and measures"

REPORT OF THE COMMITTEE

(For list of witnesses—see Minutes of Proceedings)

23138—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, November 10, 1970:

"Pursuant to the Order of the Day, the Honourable Senator Lang moved, seconded by the Honourable Senator Paterson, that the Bill S-5, intituled: "An Act respecting weights and measures", be read the second time.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, November 17, 1970.
(4)

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

Bill S-5, "An Act respecting Weights and Measures".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Blois, Burchill, Carter, Connolly (*Ottawa West*), Hollett, Isnor, Kinley and Welch. (11)

Present but not of the Committee: The Honourable Senators Lafond and Urquhart. (2)

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

Witnesses:

Department of Consumer and Corporate Affairs:

The Honourable Ron Basford,
Minister.
G. E. Anderson,
Assistant Director and Chief Engineer,
Standards Branch.

National Research Council:

Dr. A. E. Douglas,
Director,
Division of Physics.

At 11.00 a.m. the Committee adjourned until later this day, and subsequently, until Wednesday, November 18, 1970, at 9.30 a.m.

Wednesday, November 18, 1970.
(5)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to resume consideration of Bill S-5.

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Flynn, Haig, Hollett, Isnor, Kinley, Molson and Welch. (14)

Present but not of the Committee: The Honourable Senator Lafond. (1).

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

Witnesses:

Department of Consumer and Corporate Affairs:

G. E. Anderson,
Assistant Director and Chief Engineer,
Standards Branch.

Department of Justice:

Paul D. Beseau,
Legislation Section.

Upon motion it was Resolved to amend clause 6 of the Bill.

Note: (The full text of the amendment appears by reference to the Report of the Committee immediately following these Minutes.)

Upon motion it was Resolved to report the said Bill as amended.

At 10.15 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, November 18, 1970.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-5, intituled: "An Act respecting weights and measures", has in obedience to the order of reference of November 10, 1970, examined the said Bill and now reports the same with the following amendment:

Page 4: Strike out lines 8 to 12, inclusive, and substitute therefor the following:

"(2) Notwithstanding subsection (1), the Governor in Council may not amend Schedule II in such a manner that

(*a*) the ratio of any one unit of measurement to any other unit of measurement is altered; or

(*b*) Canadian units of measurement are not authorized for use in trade."

Respectfully submitted.

Salter A. Hayden,
Chairman.

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Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, November 17, 1970

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-5, an act respecting weights and measures, met this day at 9.30 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, our witness is the Honourable Ron Basford, Minister of Consumer and Corporate Affairs. With him are Mr. R. W. MacLean, Director of the Standards Branch, Mr. G. E. Anderson, Assistant Director and Chief Engineer, Standards Branch, and Dr. A. E. Douglas, Director of the Division of Phyics, National Research Council.

Mr. Minister, would you care to follow the usual practice of making an opening statement?

The Honourable Ron Basford, Minister of Consumer and Corporate Affairs: I have a very short opening statement, Mr. Chairman, which may serve to refresh honourable senators' minds on this bill. In respect of honourable Senator Lang's statement, it is impossible really to add very much to what he said in moving second reading of the bill, because he gave such a very complete and full statement at that time.

Senator Connolly (Ottawa West): We will tell him about that, Mr. Minister.

Hon. Mr. Basford: Thank you, Senator Connolly. I presume honourable senators have read that very full and complete statement and that, therefore, there is not really much that I need repeat this morning. If I may just recapitulate the real principles of the bill. The purpose of the bill here this morning is really to update the existing Weights and Measures and Units of Measurement Acts which have been in force since 1951. This updating is necessary for several reasons. First, it will permit the regulation of new types of devices and new practices in the weighing and measuring field that are not presently covered by existing legislation such as coin-operated liquid-dispensing machines which are something new since the last act, and machines such as dryers or machines that are selling things on the basis of time, again which were not covered by the existing legislation.

The Chairman: I suppose you are referring to such things as laundromats.

Hon. Mr. Basford: The situation where someone is buying someting on time—for instance, where you put in a quarter for so much time; and it was that time of service which was not provided for in the old legislation.

Secondly, it will allow for the present inspections at fixed periods to be replaced by more efficient inspection programs based on sophisticated statistical sampling techniques. That is to say, Mr. Chairman, now under the legislation we have to go around every so many years and inspect every device. We feel on the advice of consultants and engineers that with the improvements in measuring devices and weighing devices, this can be done on a sampling basis and a statistical basis at a saving of expenses and costs and yet still give protection to the commercial community.

Thirdly, it will help to prevent fraudulent or undesirable practices connected with the delivery of fuel oil and odometers on automobiles. We will get into those sections later, section 28 and onwards.

Fourthly, it will streamline the enforcement with respect to short weight in prepackaged goods. That is to say, it will permit seizure and detention of goods at the factory level where there are contraventions of the act until corrective action can be taken rather than having to wait until the goods reach the retail level. The bill, as Senator Lang explained, is complementary to the consumer packaging and labelling bill which was introduced recently in the House of Commons. The provisions of the weights and measures bill will apply to all levels of trade, though it, like the companion bill, is intended above all to protect the interests of Canadian consumers. But I emphasize that the present bill is designed to ensure that in the market one gets true measure whenever one purchases by weight, by volume, by length, by area or by time.

While the packaging and labelling bill, which will come, of course, to the Senate when it has passed the House of Commons, is concerned principally with the consumer, the Weights and Measures Act and the Units of Measure Act which is combined with it are concerned with the measurement of commodities for all purposes of trade, so that no matter what someone is trading in, they can with safety rely on the fact that a pound is a pound or a yard is a yard. The bill before us makes it an offence to give short weight or measure and it provides for the proper use of scales and other measuring devices.

For example, before any type of scale or any measuring device can be used in Canada for trade, it must have been tested and approved by the Standards Branch of my Department in the laboratory we have here in Ottawa. It must be so constructed as to measure accurately and be likely to maintain its accuracy under normal use.

Finally, the bill sets forth the permissible units of measurement for trade use in Canada. It defines the basic

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units in scientific and legal terms in accordance with the latest internationally accepted system, the so-called Système International. Honourable senators may wish to examine Doctor Douglas, Director, Division of Physics of the National Research Council on the implications of that part of the bill receive his somewhat technical explanation of those features of the bill.

Both the customary Canadian units and what are generally referred to as the metric units will continue to be valid for use in Canada, although the Governor in Council may add new units of measurement or redefine existing ones in accordance with the needs of changing times. The use in trade of customary Canadian units, that is the yard and the pound, can only be curtailed by specific reference back to Parliament, and honourable senators will see that provided for in the legislation.

By bringing the existing act up to date and incorporating certain new features required by contemporary trade practices, the bill will increase the protection given to the consumer and bring Canada's legislation into line with weights and measures control in other developed countries of the world.

That is all I have to say by way of an introductory statement, Mr. Chairman, but I would be happy to answer any questions that honourable senators may have or to refer any more detailed questions to the officials I have with me.

The Chairman: Now, honourable senators, we are open for questions.

Senator Connolly (Ottawa West): Mr. Chairman, I understand that the United Kingdom is moving towards the metric system, to conform in other words to the system in use on the continent. There is some resistance to this which I can understand. Do you expect that we in this country and perhaps even on this continent would move towards that system of measurement in time?

Hon. Mr. Basford: Yes, I do. As you know, Senator Connolly, my colleague, the Minister of Industry, Trade and Commerce, tabled last winter—January or February—a White Paper on the metric system in which the advantages of that system were pointed out, and in which the Government undertook to put in motion certain steps which would lead us gradually at least to a conversion. Parliament also passed in the last session the bill establishing a Standards Council of Canada. As you will recall, one of the objects of that Council is to examine the implications of conversion to the metric system. My own view is that we should not be debating whether to convert or not, but how to convert in order to minimize the cost and the disruption. It is also obvious that we are going to have to move and convert somewhat, if I may use the expression, hand in hand with the United States because of our trade position with that country.

Senator Connolly (Ottawa West): Do you think they might be as quick to move as we might want?

The Chairman: Are you asking if there is any indication of that?

Hon. Mr. Basford: There is a good deal of agitation in the United States and, as I understand it, the Secretary of Commerce, Mr. Stans, has established an advisory committee composed of all those in the private sector who might in any way be involved in the question of conversion. The United States Congress has appointed a committee to examine the question as to whether the United States should convert or not. There is, I know, in the area that I am involved with on a day-to-day basis, the consumer area, a good deal of agitation among American consumer groups for conversion. There is a great deal of interest in the question in the United States.

Senator Connolly (Ottawa West): There would be some considerable interest in it for a nation like Canada which relies upon and is so heavily involved in foreign trade.

Hon. Mr. Basford: I think there is. I mention the consumer interests because the metric system makes for ease of comparability and ease of measurement. I think the truly important aspect is trade, and, of course, when Britain converts and if it enters the European Common Market, which it is trying very hard to do,—and as you know Japan has gone metric—we in North America are going to end up, as I said in a speech, as an island in a metric sea, which can be very costly. It can be terribly costly if our manufacturers have to produce in one measurement for domestic consumption and the North American trade, and another measurement for our export trade.

The Chairman: I think the date in the United Kingdom is 1975. Is that the objective date?

Mr. G. E. Anderson, Assistant Director and Chief Engineer, Standards Branch, Department of Consumer and Corporate Affairs: I think 1980 is their final deadline for complete conversion.

The Chairman: Well, there are two aspects, and I suppose they are equally important; one is the domestic situation which you have detailed and the other is the international aspect, and we must not lose sight of the importance of the international aspect.

Hon. Mr. Basford: There are, of course, some areas in Canada that already have converted. The pharmaceutical industry conducts itself pretty well metrically and I think by now over the last few years most Canadian hospitals have converted. So there is some conversion going on.

Senator Connolly (Ottawa West): Yes, if you go to a hospital nowadays they talk about milligrams.

Hon. Mr. Basford: And I would hope that this is something that the Standards Council in a voluntary way could promote—that the various sectors convert on their own.

Senator Connolly (Ottawa West): The very fact that the Australians have adopted the dollar system for their currency...

The Chairman: You mean the decimal system.

Senator Connolly (Ottawa West): ... with great difficulty and with a lot of criticism of the government, is a

move that indicates that changes in the system of measurement certainly can be achieved.

Hon. Mr. Basford: We at least, senator, do not have to go through the conversion of our currency.

The Chairman: At the present time, of course, you have all kinds of equipment and gadgets and whatnot that measure time and service and project measurements. When this bill becomes law, how do you propose to deal with those machines and equipment that are presently in use? How will you apply your testing techniques? Will they be required to get certificates before they can continue to operate?

Hon. Mr. Basford: The regulation power in the act allows us to set up the inspection procedures that are deemed necessary to protect accurate measurement. We can do two things; inspect and licence the particular measuring device, or we can go on as is done with scales and inspect every scale each year to make sure it is accurate. There is a section, for example, on parking meters which, of course, are selling time. We obviously do not propose to go around and inspect every parking meter in Canada. But there are six or seven manufacturers of parking meters, and we would call upon the manufacturers to produce their prototype and we would examine it to make sure it is a good measuring device as defined in the act.

The Chairman: Well, they might of course like you to put a nickle or a dime in every parking metre.

Hon. Mr. Basford: They might, of course, but we do not intend to do that.

The Chairman: There are two steps there, one is the testing of any new equipment that is coming out, and you mentioned that they would have to send their equipment to your testing laboratories in Ottawa in order to qualify for a certificate. I am more concerned at the moment about those things that are in existence and are operating.

Hon. Mr. Basford: There is not attempt to make the act retroactive.

The Chairman: No.

Hon. Mr. Basford: But I think what you are really concerned about is something that is already in place. Section 8, which covers devices, would, of course, apply to devices going on the market now.

Senator Connolly (Ottawa West): You are doing it at the manufacturers' level, or you are contemplating it?

Hon. Mr. Basford: This is for new things that are covered. This is what we do with scales. If the big scales manufacturers develop a new kind of scale...

Senator Connolly (Ottawa West): Without the thumb!

Hon. Mr. Basford: Yes. I am trying to think of the name of a scales manufacturer. Say Toledo, for example, develop a new scale. Before they market that new scale they come to our Standards Branch and get that new design approved as a measuring device for sale in Canada, and that allows them to sell it in Canada. Of course, if a butcher buys that new scale, he will have a weights and measures inspector come down every year to make sure that he has not been fiddling with the scale.

Senator Connolly (Ottawa West): Yes, "might"—if he is part of the sample.

Hon. Mr. Basford: Well, the new act will allow him to be part of the sample. Now we have to go and inspect at great cost.

The Chairman: I notice in section 8, Mr. Minister, in the "Use of Devices," the provision is that:

> No trader

—and that might be the butcher or grocer—

> ...shall use, or have in his possession for use, in trade, any device unless that device
>
> (a) is of a class, type or design that has been approved for use in trade pursuant to section 3;...

Hon. Mr. Basford: That is right.

The Chairman: I am still getting back to the machines and equipment that are presently being used. Does that contemplate, then, that it is the obligation of every trader to get in touch with the manufacturer of that machine to see if it is included in the class or type or design that has been approved by your department?

Hon. Mr. Basford: No. It is up to the manufacturer, before selling the devices, to have them approved pursuant to section 3.

The Chairman: No, I am talking about the ones that are out in the field now. Then this bill becomes law. Does he have to stop doing business until he can find out from the manufacturer of that machine whether it is in an approved class! Is there going to be some period of time, run-in time, after the act becomes law under which he can gather that information? As I read it, if it means literally what it says, then he had better stop doing business until he gets a clearance.

Hon. Mr. Basford: Of course, there is no problem when it comes to weight and measure, because these provisions have applied for years in Canada, for example, with scales. We are enlarging the act to provide protection for devices that measure time, and we willl have a regulatory power to allow some lead-in time on most devices that are already on the market.

The Chairman: Is it the intention to allow lead-in time in the regulations?

Hon. Mr. Basford: Yes.

The Chairman: I would not expect that at this moment you have given too much thought to the length of the lead-in time.

Hon. Mr. Basford: No.

The Chairman: It may be different in different types of equipment, but I think lead-in time would be necessary for those presently operating.

Hon. Mr. Basford: Yes.

The Chairman: What is the difference, Mr. Minister, in relation to weights, between this bill and the present law? Have the standards been changed or altered or added to?

Hon. Mr. Basford: There are the technical features of measurement which, if you wish, I will have Dr. Douglas explain. This is really the amalgamation of two bills: one the Weights and Measures Act and the other the Units of Measurement Act, which repeals the Electrical and Photometric Units Act.

Senator Connolly (Ottawa West): That is a federal act?

Hon. Mr. Basford: Yes. This is a new feature of the measurement of standards. If senators will turn to the schedule of the act, our reference standards for measurement in Canada used to be as set out in Schedule IV, where we kept in the National Research Council a measurement that was a yard long, against which all other yards were measured. Now—and this is where Dr. Douglas comes in—all our measurements in Canada are referred to the International System of Units which is contained in Schedule I. It is against those measurements that every Canadian measurement is made. That is a new feature and a very technical one which Dr. Douglas will have to help me out on. Have I made a mistake yet, Dr. Douglas?

Dr. A. E. Douglas, Director, division of Physics, National Research Council: No.

Hon. Mr. Basford: The other features are the system for the sampling of inspections rather than across-the-board inspections, the indices of time and volume, the part dealing with fuel oil truck measuring devices, which we will come to later in the bill, the parts dealing with odometers—those are all new features.

Senator Connolly (Ottawa West): When we were talking about the yard, it seems to me there was at one time, and perhaps there still is, in a case in Paris, under very strict conditions of preservation, a unit of measurement kept at a constant temperature, pressure, and all the rest of it. What is that?

Hon. Mr. Basford: We have one here in the National Research Council also, but I will ask Dr. Douglas to explain what they have in Paris, because this system of measurement goes back to the system in Paris.

Dr. Douglas: The unit of mass is still maintained as a physical quantity in Paris, at the International Bureau, and all other units of mass are related to that.

Senator Connolly (Ottawa West): Do we conform?

Dr. Douglas: We conform and we measure ours against theirs as precisely as possible, and maintain a secondary standard, which is essentially Canada's primary standard, here. With regard to other units, the unit of length has been changed and it is no longer a physical standard. It turns out to be the wave length of light which can be measured more precisely than any physical standard. This has been defined so that within the accuracy of measurement it conforms to the old physical standard, but the physical standard is no longer the primary standard.

The Chairman: Mr. Minister, was there any communication or discussion with those elements in the various industries, business and trade in relation to this bill, when it was in the course of preparation?

Hon. Mr. Basford: Not specifically during the course of preparation, although in terms of some of the technical features of the act we have had representations over the years from various groups. But it would be my intention, as it has been under all of these acts I have been introducing, that in the development of regulations under the acts—and it is, of course, in that area that people are generally basically concerned, particularly those who are in the business—that we would seek the advice of...

The Chairman: Manufacturers?

Hon. Mr. Basford: ...of those in the business on technical matters, such as tolerances. Where something has to be tested or measured as such and for certain purposes then trade tolerances are allowed either way from that.

Senator Connolly (Ottawa West): That arises because of shinkages or increases in weight by reason...

Hon. Mr. Basford: Yes, changes in temperature will change the volume or weight of certain substances. We can add additional units of measurements under this bill, and this would be done on the basis of representations from those in the trade. There may be representations that some customary unit of measurement should be added.

Then, as to the specifications for measuring devices, we would consult with the trade, the manufacturers of measuring devices, on the development of regulations. I have already agreed in writing with the Association of Scale Manufacturers to consultation on the development of regulations. That is, we have agreed that when we sit down to write the regulations we will consult with those in the business.

The Chairman: What groups do you contemplate you will consult with, or invite to make representations?

Hon. Mr. Basford: It will be the people who are principally concerned with the approval of measuring devices and, therefore, they will be the manufacturers of measuring devices. Here I am referring essentially to the Association of Scale Manufacturers. I am not sure whether there is, for example, an association of parking meter manufacturers. If there is then that association will be welcome to come in on these discussions. I have not heard from them, but if there is such an organization they are welcome to come in and consult with my officials on the drafting of regulations in relation to their products.

The Chairman: That type of measuring is pretty well straightforward. It concerns the sale of time, and it is either ten minutes or it is not.

Hon. Mr. Basford: Yes, but we would be concerned with the design of the measuring devices, and with any tolerances that might be allowed. On the average, electricity meters are inspected every seven years, but there may be changes in design so that they probably do not have to be inspected every seven years.

The Chairman: What does this mean? For instance, in Ontario the Ontario Hydro issues certificates as to the quality of equipment including measuring equipment, I believe. Is there going to be any conflict or any duplication here?

Mr. Anderson: The standards for measurement by electricity meters are set by the Standards Branch of the Department of Consumer and Corporate Affairs, and Ontario Hydro will insist that any manufacturer must supply them with equipment that will meet our specifications.

The Chairman: Am I to understand that a manufacturer must first get the approval of your department before the provincial authority will look at his product?

Mr. Anderson: On the measurement side, that is correct, sir.

Senator Burchill: How often are they inspected or tested?

Mr. Anderson: Electricity meters?

Senator Burchill: Yes.

Mr. Anderson: Every six or eight years, and then we have a statistical sampling program which will allow a good quality of meter that has been well maintained to continue on by two-year extensions, so some meters have remained out for as long as twelve years at the present time, and may go on for a longer period. But, the proof of the pudding is in the eating, and they must prove to us that they continue to meet our requirements.

Senator Hollett: I take it that it is not the intention of Canada to go into the metric system overnight.

Hon. Mr. Basford: No.

Senator Hollett: How do you get there? Does this bill give you the authority to change over?

Hon. Mr. Basford: No, it certainly does not. In fact, when the bill was read the first time in the Senate there were some press reports that that was its effect, but that is not correct. The bill provides that two systems of measurement can be in use in trade in Canada, one being the metric system and the other being the system with which you are all familiar. That cannot be changed without further legislation. There is no power in this bill to outlaw for purposes of trade either one of those systems, and particularly the foot-pound-second system.

Senator Connolly (Ottawa West): Mr. Chairman, I should like to ask the minister a question I asked the sponsor of the bill. In looking at Schedule II I notice that under "Measurement of Volume or Capacity" there are listed bushel, peck, gallon, quart, pint, and so on. The minister referred to the units that are in use in trade, business and commerce. What ran through my mind as Senator Lang was speaking in the House was the importance of the term "barrel", particularly in the oil industry. Very few people—and this includes myself—know exactly the volume of a barrel of oil, or whether a barrel of oil sold from the Canadian or American oil fields is the same size as a barrel of oil that comes from Venezuela or the Middle East. My point is that this is a unit that is very much in use in trade and commerce today—perhaps more so than some of the other units that are defined here—so why is it not included in the schedule?

Hon. Mr. Basford: I noted your question previously, senator. The Governor in Council under this legislation can define "barrel" as a unit of measurement. This is one of the changes in this bill. Previously a new unit of measurement could be added only by way of amendment to the act, but now we can define a new unit by order in council. So, Senator Connolly, we could define "barrel" as a unit of measurement for purposes of trade in Canada if we choose to do so, but I am advised that the situation is confused by the fact that there are many different kinds of barrels, the size of which depend upon the particular products with which one is dealing. You mentioned the oil industry which, as a matter of custom, has a certain size of barrel, but other industries use different sizes of barrel as a customary unit, and, therefore, we would have great difficulty in trying to regulate that.

Mr. Anderson, who is with me, is an expert on barrels, and he would be happy to give us a short discourse on the proliferation of barrel sizes.

The Chairman: I was wondering if Senator Connolly would limit the contents of the barrel about which you are going to speak to oil.

Senator Connolly (Ottawa West): I think the container for the other commodity which you have in mind is a keg.

Senator Hollett: Perhaps he was thinking of a barrel of fun. May I ask this question: Has Canada any representative on the General Conference on Weights and Measures?

Mr. Douglas: Yes.

Hon. Mr. Basford: Would you expand on that, Mr. Douglas?

Mr. Douglas: This is an international agreement to which Canada conforms, and we have representation on this General Conference, but all changes and amendments must go through the Department of External Affairs for the approval of the Canadian Government.

Senator Blois: I think I am correct in saying that although in the old days we bought oil by the barrel or by the gallon we now buy it by weight. The average barrel is equal to 45 gallons, but oil is also bought by weight rather than by the barrel or the gallon, is it not?

Hon. Mr. Basford: Perhaps that is the tendency, but I will ask Mr. Anderson to confirm it.

Mr. Anderson: When it comes in bulk cargoes, then it is by the ton.

Hon. Mr. Basford: In bulk cargoes oil is generally sold by the ton; in smaller quantities the gallon is still the conventional unit.

Senator Blois: I am not referring to fuel oil, but others, such as lubricating or wool oil. They are generally purchased in carloads but are sold by the pound rather than the gallon or barrel, by many manufacturers.

Mr. Anderson: This has not been our general experience.

Senator Connolly (Ottawa West): But you do hear of it being sold by the ton?

Mr. Anderson: Yes, in bulk.

Senator Blois: We bought a good many carloads, which were always by the pound. I know of many manufacturing industries in Canada selling special oils by the pound or ton.

Mr. Anderson: There is nothing in the act to prohibit that.

Senator Blois: It appears to be a more reliable method.

Mr. Anderson: You know exactly where you stand.

Senator Connolly (Ottawa West): It is measured at the time of delivery.

Senator Blois: It is weighed to check the weight, because there is variation.

Senator Burchill: What containers are used?

Senator Blois: The wooden barrel and the metal barrel are used; it depends on the firm it is purchased from. Sometimes the type of barrel can be specified.

Senator Connolly (Ottawa West): We were going to hear something about barrels. Will you include the barrels used by the apple growers in the Annapolis Valley?

Mr. Anderson: This is one of the difficulties. At the present time there exists legally in Canada only the excise barrel, which is 25 gallons, for the purpose of assessing excise. However, within the petroleum industry we have more or less permitted the use in trade of the petroleum barrel, which is exactly 42 U.S. gallons. This converts to 34.97 Canadian gallons, so that within the petroleum trade one barrel is 34.97 gallons, which is a defined unit and perfectly satisfactory.

However, in the United States the situation has developed that there are no less than seven different barrels: 31 gallons, used for excise tax on beer; 31½ gallons, used for most liquids; 36 gallons, used for rain barrels in estimating the volume of cisterns; and 40 gallons for the purpose of their proof liquors. There is a 42-gallon petroleum barrel, which is exactly 42 U.S. gallons. This as the apple barrel, which is equivalent to approximately 27 gallons. For some unknown reason they also have a barrel for cranberries, which is about 22 gallons.

We wish to avoid such a situation in Canada. We might permit one or two barrels, but they would have to be specified in terms of the Canadian gallon to make it perfectly definite to all.

Senator Connolly (Ottawa West): Does it really mean that commerce and its various branches will be permitted to use the word barrel but will be compelled to state the content?

Mr. Anderson: I think that would be appropriate.

Senator Connolly (Ottawa West): And the regulation would so provide.

Mr. Anderson: Yes.

Senator Connolly (Ottawa West): It appears to be the only sensible way of proceeding.

The Chairman: It could either be by gallon or pound measurement.

Mr. Anderson: Yes.

Senator Carter: My understanding was that the ordinary standard steel drum in which the fisherman buys his gas and diesel oil contains 45 gallons. I did not hear mention of that.

Mr. Anderson: There may be a 45-gallon barrel, but I have found seven different sizes.

Senator Connolly (Ottawa West): Believe me, there are 45-gallon barrels; I have to handle them across a lake.

Senator Carter: The fisherman buys a 45-gallon drum and receives 40 gallons of gas and 5 gallons of water.

Hon. Mr. Basford: Then he should report that to our regional office in Newfoundland. If it is sold as 45 gallons of gasoline and contains only 40 gallons, that is an offence.

Senator Connolly (Ottawa West): In addition, if the barrel contains five gallons of water, the gas is not very much good.

Senator Carter: Oh, yes; he gets down to the water eventually as he pumps it from the bottom up. He does not know how much water he receives until it is just about empty. It is too late then to prove a case.

The Chairman: He could stop pumping when the water arrives. I understand you to say that on the basis on which he operates the water would be the last to be pumped out.

Senator Blois: That is not correct, because pumping from the bottom the water might come out first, or mixed with the gasoline.

Senator Carter: Clause 13(1) reads:

> The Minister may designate as a local standard any standard that has been calibrated and certified in

relation to a reference standard as accurate within prescribed tolerances.

One of the witnesses referred to bulk cargoes. It is very often more convenient for the fisherman to buy salt by volume rather than by weight. The same is true of bulk cargoes of coal over the side of a ship, which is very difficult to measure. Therefore a standard-size barrel is used, of which 10 equal one ton.

What would happen to these measurements under this clause?

Hon. Mr. Basford: They are not units of measurement under this clause.

Senator Carter: They are convenient for purposes of selling; it is not convenient to use the weight measure.

Hon. Mr. Basford: That is a custom of the trade that has developed. It is not a unit of measurement under this bill.

Senator Carter: Then that is prohibited under this bill?

Senator Hollett: No; subclause (2) reads:

> Every local standard shall be calibrated within such periods of time as many be prescribed.

Hon. Mr. Basford: I should explain the meaning of the local standard referred to in clause 13. We have certain reference standards in our laboratory and in the National Research Council in Ottawa. We also have inspectors throughout Canada who carry what are known as local standards. When inspecting a scale they have a little kit containing weights. They place a 1-pound or 25-pound weight on the scale to test its accuracy. The weights are returned periodically to Ottawa to be tested for loss of weight, which does occur.

Senator Carter: We are now back to Senator Connolly's point though.

The Chairman: Senator Carter, when you referred to the fisherman getting a ton of coal, he must have a method of determining what is a ton when shovelling it over the side.

Senator Carter: That is right. They have to sell it by volume, they have to measure the tubs or barrels that they know the weight of, the average weight.

The Chairman: But they agree that ten of those will be a ton.

Senator Carter: They agree that ten barrels of coal will be a ton of coal.

The Chairman: The only question then is whether that measuring device multiplied by ten does produce a ton, but they have agreed that it does.

Senator Carter: But it does not prohibit them from using that type of measure.

The Chairman: I would not think so, no. I do not think these provisions come into that at all. They have agreed that this is a measuring device.

Senator Connolly (Ottawa West): If it were feasible they could put it in a paper bag, as long as they get the weight.

Senator Carter: As long as they agree they are getting the weight, yes. There is no standardization here for television tubes. An American 17-inch television tube is a different animal from a Canadian 17-inch television tube. Is there any way of regulating that? One store may sell a 17-inch tube which is quite different from the 17-inch tube sold by another store.

Hon. Mr. Basford: There is no way of dealing with that under this bill. The inches are the same, but one set is measured corner to corner and the other is measured horizontally across. The inches they are measuring it with are all the same inches, and those inches are provided in the bill. The description given to the television tube would not be dealt with in the bill; that is a custom of the trade, in which American sets are measured horizontally and Canadian sets are measured diagonally from corner to corner. Therefore, Canadian sets are smaller.

Senator Carter: Does it come in somehere? Does it not even come in under fraudulent advertising? I mean, two people are advertising two different things and saying they are the same.

Hon. Mr. Basford: Maybe if you were to ask that question when the packaging and labelling bill is before you I might be able to give an answer, because under that bill we may be able to say—I am not sure, I would like to examine the question—that television tubes will be measured horizontally. I am not sure and I would like to examine it. Certainly we would not and could not do it under this bill, and that is not the purpose of this bill.

Senator Carter: I notice that Schedule I contains all these scientific definitions. I suppose you have not yet arrived at the point where there can be a definition of the quality of cable television?

Hon. Mr. Basford: No.

Senator Carter: So that with cable television you buy a picture and they must provide a minimum standard of quality?

Hon. Mr. Basford: I suppose you could do that, but not under this bill, because that would not be a unit of measurement.

Senator Carter: There would have to be some sort of standard included in Schedule I related to the clarity or intensity of the image received by cable television.

Hon. Mr. Basford: I think we are confusing somewhat the purposes of this bill. For instance, the light bulbs here have a certain lightness, and I think, Dr. Douglas, that is determined by a unit of measurement provided for under this bill. Is that right?

Dr. Douglas: Yes.

Hon. Mr. Basford: The lumen. They are measured in accordance with that standard, No. 12. There is nothing

in this bill which says that light bulbs must be of so many lumens. We should need another bill to do that, a bill governing the quality of light bulbs.

Senator Aird: You do not consider that your inspectors have a power under clause 16?

Hon. Mr. Basford: No. This relates to a measuring device. It is to allow the inspector to make, pursuant to regulations that we pass, very minor adjustments, particularly in remote areas. Rather than having to send the measuring device to, say, Vancouver, Toronto or back to Ottawa, to correct it, the inspector can make minor adjustments to ensure that it is accurate.

Senator Aird: What concerned me about that clause was the use of the phrase "may be prescribed".

The Chairman: By regulation.

Hon. Mr. Basford: The key word is "device", which is defined in the bill in the definition clause as:

> any weight, weighing machine, static measure or measuring machine.

That is, a device is something that measures, and that is what it is limited to, so the inspector can make minor adjustments in that measuring device or measuring machine.

Senator Carter: I am a little intrigued by the wording of subsection (2) of clause 6:

> . . . the Governor in Council may not amend Schedule II in such a manner that Canadian units of measurement are not authorized for use in trade.

Why would you want to do that anyway?

Hon. Mr. Basford: That relates to the questions asked here this morning on whether this bill allowed for conversion to the metric system. The bill provides for the two systems of measurement. Yoy will notice that Schedule II sets out the customary Canadian units of measurement—a mile, an inch, and so on. Subsection (2) of clause 6 specifically prohibits the Governor in Council from doing away with those customary units, so we cannot convert to the metric system and cannot outlaw these customary units without coming back to Parliament.

The Chairman: You may end up, if you did not go to Parliament, with two systems, both of which would be valid.

Hon. Mr. Basford: We have two systems now.

The Chairman: That is right.

Hon. Mr. Basford: Both of which are valid. You can sell something by the metric measure or by the customary measure that we are used to, and both are legal. Neither can be made illegal without coming back to Parliament and Parliament so declaring.

Senator Aird: I should like to ask the minister about clause 36, and go back to the original questioning, wherein you indicated that there would be a time-lag. It seems to me that this clause answers the question in part, because it relates to the not marking business. It would seem to me that if one wished to have a device to be used in the trade, he would have to come to your department in any event to establish the validity of his product. Is that your interpretation?

Hon. Mr. Basford: This bill applies to measuring machines that are for use in trade. We have regulations that provide for what happens to measuring machines not used for trade. I am thinking of the bathroom scale, which must be marked as not for use in trade. If someone has a bathrooom scale that is not so marked, the onus is on him to prove that it is not being used for trade.

Senator Aird: He has to come to you for that evidence, is that correct?

Hon. Mr. Basford: What he should do is mark it "not for use in trade". If he has not marked it, it is a presumption that it is for use in trade and therefore it has to be inspected, licensed and approved by the department.

Senator Aird What you are saying is that the marking is in the manufacturers' discretion in the first instance.

Hon. Mr. Basford: Yes, but if he does not mark it he has to get it approved.

The Chairman: Senator, I should think that if you took bathroom scales that were not marked "not for use in trade", and were physically located in the bathroom, the onus could quite easily be shifted which might otherwise be on the owner of the scale. I am not suggesting that he was carrying on trade in the bathroom.

Hon. Mr. Basford: Funny things go on sometimes.

Senator Blois: In the last few days I have had several inquiries in retail stores with reference to devices for measuring yard goods. Can they continue to use the same ones or must they have them checked? Nearly every yard goods store uses them for measuring. I understand these devices are not inspected at the present time.

Hon. Mr. Basford: I am afraid I do not know in this instance.

Senator Blois: I think you must know. There are thousands of these used for measuring cloth by the yard.

Mr. Anderson: Are you thinking of the kind you run the cloth through and get a recording?

Senator Blois: That is right.

Mr. Anderson: Those are supposed to be approved devices and not to be used unless they are approved.

Senator Blois: They have been in stores for years. What do they have to do? It is worrying many of these people. I have had five inquiries within the last few days. Are they liable if they do not do something about it? There seems to be a lot of fear in the minds of some of these merchants.

Mr. Anderson: They should be approved devices. If not, they are illegal.

Senator Blois: One merchant contacted me and said that they had been using theirs for approximately 15 years and he does not know if they are accurate or not. They went to the trouble of putting in the device and then using a yard stick to check on it and the measurement was not the same, although there was not much variation.

Mr. Anderson: They could be violating the law.

Senator Blois: What should a merchant do in a case of this kind? Is there some action he himself should take?

Mr. Anderson: The inspectors visit all establishments when they believe there is any form of measuring device.

Senator Blois: One of these firms told me that to their knowledge there had not been any inspector visit their establishment to look at the machine.

Mr. Anderson: The onus is on the traders to draw it to the attention of the inspector. The inspector goes into a store probably to inspect the scales and will ask if that is all the measuring devices there are.

Senator Blois: Dry goods stores do not have scales.

Mr. Anderson: Then probably our inspector would not go into the store.

Senator Blois: This particular person was wondering if he would be held responsible if it was brought to the attention...

Mr. Anderson: If he gave short measure.

Senator Blois: What should he do? I don't think that the bill gives this information.

Hon. Mr. Basford: He should write to the Standards Branch of the Department of Consumer and Corporate Affairs in Ottawa, giving his name and address and giving the details about the device. He should inquire whether it is an approved device and request that an inspector visit his store to check it.

Senator Blois: Are you suggesting that the many thousands of stores would have to write to your department about every device in their shops?

Hon. Mr. Basford: If they have something that it is being used as a measuring device.

Senator Blois: I think that practically every dry goods store has these measuring devices. Surely you do not expect every store across Canada...

The Chairman: There is a simple alternative we discussed a while ago. The manufacturer of that device should be the one to clear it. If this device is of the particular kind or class which has received clearance by the manufacturer, then the retailer should be home free as far as any prosecution is concerned.

Hon. Mr. Basford: I am referring to section 8 of the act which says:

> No trader shall use, or have in his possession for use, in trade, any device unless that device (a) is of a class, type...

et cetera. This is why he should write to the department to find out if his measuring device is of a type already approved.

Senator Blois: Will there be any notice going out to these stores advising them that they must do this? These people are worried. I would like to advise them, but I do not know how to do it.

Hon. Mr. Basford: No, there would not. This act is not changing that situation. I am talking about the existing situation before this act was passed. If they are using a measuring device it must be of an approved type. This has been the law for the last 30, 50 or 100 years.

The Chairman: Mr. Minister, I think there might be appropriate advertising in the form of notices in regard to some of these points at the appropriate time. Maybe the regulations would provide for that.

Hon. Mr. Basford: Yes, although I think the manufacturers of measuring devices know the law. I think merchants surely know that they have to give correct measure.

The Chairman: They certainly should know that it is the law.

Senator Blois: Merchants are trying to protect themselves for the future.

Hon. Mr. Basford: This law is not changing anything relative to those dry goods stores.

Senator Blois: I realize that.

Hon. Mr. Basford: If they have a device that measures length it should be accurate, and that has been the case under the existing law even before this bill is approved.

The Chairman: Mr. Minister, there is a question I would like to raise with respect to section 35, which provides for punishment, et cetera, on summary conviction or on conviction upon indictment where the Crown elects to proceed by way of indictment. For years we have had a provision in the Income Tax Act similar to the proposed section where the Crown may proceed summarily in respect to charges involving false statements or evasion of taxes or elect to proceed by way of indictment. This provision is also in the Narcotics and Drugs Act, and it may be in a lot of other legislation. My concern now stems from the fact that it would appear that for the first time this right of election to proceed by way of indictment has been challenged in the courts. A county court judge has held that such a right of election by the Crown in the terms of this provision in the Income Tax Act is a violation of the Bill of Rights.

Now, undoubtedly the Crown is going to appeal that decision if it has not already done so. The Crown has a right to appeal to a single judge in Ontario and if not satisfied there, to proceed to the Appeal Court of Ontario. If it is not satisfied there it may go to the Supreme Court

of Canada, which is the end of the road. That envisages a fair lapse of time. All our troubles rose, as you know, from the *Drybones* case in the Supreme Court of Canada which ruled that in respect of intoxication the fine should not be greater for an Indian as such a provision was in violation of the Bill of Rights. The purpose of this section I think is to provide a greater penalty, depending upon the gravity of the offence, and method is encompassed in the right of election to the Crown to proceed by way of indictment. I think that is the hard core of the problem. It seems to me—and this is what I would like you to give some thought to—that if, instead of drawing this distinction between summary procedure and proceeding by indictment, you provided in the regular way for prosecution of an offender and the accused person would go into court and he could elect to be tried summarily or he could elect for trial by judge and jury, which he could afterwards change to a speedy trial before a county judge, you could accomplish all this if you just had the offence stated with your penalties reading a little differently, that is, that if the fine, in these circumstances that I have related, were made up to $5,000, instead of dividing it between $1,000 on summary conviction and $5,000 when there is a conviction when the election is to proceed by way of indictment and there is a conviction. The term of imprisonment could be made up to two years or both. Then you are putting the question of what is the proper penalty in the discretion of the judge and avoiding any question of conflict with the Bill of Rights.

I had intended to speak to you about this beforehand, but I did not have an opportunity. It is bothering me. All legislation that involves this sort of procedure is going to raise the same issue, until the question is finally decided. Whether we should go along, if we can do something that is just as good, from your point of view, is the question.

Hon. Mr. Basford: We are getting into something that is really out of my hands and in the hands of the Department of Justice. My advice is, of course, that we should continue. This is the advice we get from the Department of Justice, to continue writing legislation in this way. Should the case that you refer to, in which the Crown has taken further proceedings, not turn out the way that the Crown is arguing, then presumably some general corrective measure would have to be taken, relative to all legislation that has this in it—and this is a very common provision. I do not think the advice from the Department of Justice is that, half way, while this other matter is still before the courts, we start adjusting one specific piece of legislation.

The Chairman: No, but the point is, do we go ahead in the face of a legal decision which is the law at present time, until it is reversed and we enact something that has been declared invalid. Would you look at it from that point of view.

Hon. Mr. Basford: I wish, Mr. Chairman, you had spoken to me, because of course this is a matter on which I have to take the advice of the law officers. I do not have that advice at the present time, specifically.

The Chairman: I think we would have time today. I do not think we are going to be sitting very long in the Senate this afternoon. If we do not finish here with this bill this morning, we would simply adjourn until later in the day. As I understand it, our idea is to move this bill along as quickly as we can. It is that kind of legislation, that should be moved. I would like to get some expression of opinion from the Department of Justice. I do not want them to commit themselves on pending cases which they may be intending to appeal. But we have to look at it from our point of view, if we are asked to go ahead and enact something that, in the present state of the law, is invalid.

Hon. Mr. Basford: I would be happy to try to arrange for a representative of the Department of Justice to appear before the committee. I could not appear myself this afternoon.

The Chairman: It is only twenty minutes to eleven now. I wonder if it would be possible to get in touch with somebody there to see if he is available to come over at this time.

Hon. Mr. Basford: Yes. Mr. MacLean, would you ask if Mr. Thorson or someone near him can come over.

The Chairman: Shall we let that matter stand for the moment, until we get a viewpoint from the Justice Department? This is a thing that bothers me. I am not arguing the merits.

Hon. Mr. Basford: I appreciate that.

The Chairman: I am concerned because if we approved of this we would be approving something that has been declared by the court at the present time to be invalid.

I have another question I would like to ask you. It is in relation to the bottom of page 3, clause 6, about amending certain schedules. As you will note, Mr. Minister, I still say "schedules" (using sk-), although I may be part of the minority.

Hon. Mr. Basford: I do not know which is correct.

The Chairman: Here you have provided for the Governor in Council by order to amend Schedule 1 by adding to or deleting from Part I, Part II, Part III, Part IV or Part V thereof, as the case may be, any basic, supplementary, derived or customary unit of measurement. Exactly how would that be interpreted? Let us see—a derived or customary unit of measure, is that defined?

Hon. Mr. Basford: If one looks at the schedules, you will see that the courts...

The Chairman: Page 25.

Hon. Mr. Basford: Yes. Dr. Douglas may want to expand on what I say, but as you can see, this is a very technical matter. First, there is Part I, the basic units of measurement—six basic measurements. Then there are two supplementary ones. Then there are 13 derived ones. As I understand the state of physics, the quality or the state of definition of measurement and the kinds of measurement can change and advances can be made. This would allow the Governor in Council to take account of those advances. Can you add something to that, Dr. Douglas?

Dr. Douglas: I cannot add anything further, except to say that, without doubt, the international system of units will change. For example, I can say that within perhaps ten years the definition of the metre will not be precisely the same as it is now, it will be a more precise definition—which will not change it within normal trade practices.

Hon. Mr. Basford: There is the definition there.

The Chairman: Yes, I see that.

Hon. Mr. Basford: What Dr. Douglas is saying is that, over the years, with advances in physics and the ability to measure, that definition will change and improve.

The Chairman: I am trying to get to the position, in understanding this, where it may be said that, in making a change of this kind, whether in some fashion by alteration or by adding other words, you are not doing a legislative act. That is what I am trying to get at. We were all through that problem on another occasion.

Hon. Mr. Basford: Yes, I know we were, and I knew that that was what you were trying to get to, and of course I was not falling into that trap.

The Chairman: I can tell you frankly that I was not setting a trap. As a matter of fact, in the way in which I presented it, I thought I was looking to find a way in which this would be justified, but not as legislation.

Hon. Mr. Basford: It is not, of course, because what is proposed there, as Dr. Douglas says, is to change the scientific definition of metre—not to change the metre as a unit of measurement, but to change the definition of metre to take into account improvements in science, as might be agreed, for example, in the Conference on Weights and Measures. I must admit I do not understand what that definition of metre means, because we are into higher physics here.

Senator Burchill: In my ignorance, may I ask whether a wave length is always the same length?

Dr. Douglas: In accuracy as we know it today it is the most precise thing we have that a physicist can tie length to, and, therefore, this has been selected specifically because it is the same.

The Chairman: Mr. Minister, what I am getting at, really, is whether the descriptive words that you have used by adding or deleting are really the language that best describes the authority you are looking for. Or is that accomplished by changing? You do have the authority under regulations to make definitions.

Hon. Mr. Basford: But you may well want to add basic units of measurement, although for the moment I cannot think of one. But I would have to consult Dr. Douglas on that. But for example, the last one there, No. 6, as I recall it, the candela as a measurement of luminous intensity, it is a relatively new measurement. Is that not right, Dr. Douglas?

Dr. Douglas: Yes.

Hon. Mr. Basford: And there may well be new units of measurement developed.

Dr. Douglas: One could assume that perhaps some day a unit of sound measurement, a measurement of sound intensity, could be added to this list.

The Chairman: You are not helping me very much. You know the basic thing that is bothering me. If this is not an exercise in legislative authority, then it is perfectly all right. That is what I am looking for some help on.

Hon. Mr. Basford: I do not see that it is an exercise in legislative authority. It seems to me that it is a valid regulatory function in an extremely scientific area—determining units of measurement in accordance with the international system of units—in order to provide the executive with the power to take into account changes in definition and the establishment of new units of measurement and to put into the act by way of regulation those new units or those new definitions. One surely does not want to have to come back to Parliament merely to change a definition. For example, if one looks at the definition of "second", the unit for measurement of time, it is the duration of 9 192 631 770 periods of the radiation corresponding to the transition between the two hyperfine levels of the ground state of the caesium 133 atom. Now, I don't think if physics develops a better definition for "second" that Parliament wants to enact that new definition. It is properly a regulatory function rather than a legislative function.

The Chairman: It occurred to me that perhaps the proper place for this right to extend or change or vary should be right in the schedule itself.

Hon. Mr. Basford: I am sorry, but I do not follow you.

The Chairman: Instead of in the statute.

Hon. Mr. Basford: But surely, if you are going to change a schedule, the right to do so must be in the statute; not in the schedule.

The Chairman: Not if the statute provides the authority and approves the schedule in the form in which it is, and if the form provides for such variations as science may develop or make necessary.

Senator Pearson: Mr. Chairman, if you turn to page 28 of the bill, you will find that if you pass this act you are giving the Governor in Council the right to change a mile to 1,800 yards instead of 1,760 and so on down the line. I know it is not intended to do that, but I think it is rather stupid to say that under this subsection (b), page 4, the Governor in Council may amend schedule II by adding thereto or deleting therefrom any Canadian unit of measurement, together with its symbol or abbreviation and its definition.

Hon. Mr. Basford: What that refers to, Senator, is that we could, for example, going along with Senator Connolly's (Ottawa West) line of questioning, add "bar-

rel" as a unit of measurement and define that. And in respect of that, I have explained that there are so many different barrels in use...

Senator Pearson: But there is no barrel mentioned here. There are thousands of barrels, but they are not standardized.

Hon. Mr. Basford: We could make the barrel a standard unit of Canadian measurement, and, to the list of measurements by volume from A to L, we could add M, "barrel", and its abbrevation, and then define what the barrel is.

Senator Pearson: That is quite in order, but, if you read section (b), page 4, it says:

> (b) amend Schedule II by adding thereto or deleting therefrom any Canadian unit of measurement, together with its symbol or abbreviation and its definition.

Why should we give the Governor in Council the right to change, for example, the definition of mile or furlong or yard or inch, et cetera? Do you need that power? What do you want it for?

Mr. Anderson: Well, sir, I can see the difficulty which you raise. However, it was difficult for the Department of Justice to come up with a set of words which would accomplish what we required. The idea was that some unit may become obsolete in time. For example, the furlong is probably only used in horse racing. I do not think it is used in ordinary measuring by surveyors at the present time. It might be that we would decide to do away with some of these units. The rod, for example, being five and a half yards, is not a common unit today in surveying. It might be that in time we would decide to scrap that.

On the other hand, we might decide to add a new unit of length. For example, we might add a mill, which would be defined as 1/1000th of an inch, and we would make that a legal measurement for the benefit of some trade.

That was the idea, but I can see the difficulty that you raise that some fine day the Governor in Council might decide that from now on a foot will only be ten inches, or something like that. I can see that such a possibility exists.

Senator Pearson: Not that I think it is at all probable, but it still is there as a possibility, as you admit.

Mr. Anderson: Nevertheless I thought we had that covered by subsection (2) which says that:

> Notwithstanding subsection (1), the Governor in Council may not amend Schedule II in such a manner that Canadian units of measurement are not authorized for use in trade.

In other words, we could see that Parliament did not wish to surrender the power to some official who could perhaps ultimately say, "All right, we are scrapping the customary imperial system of measurement and from now on we are going to use meters, litres and kilograms, and they will be the only measurements we will recognize."

We thought we were preserving the right of Parliament, but perhaps we have rendered it somewhat weaker by this earlier subsection (b).

As I say, I can see the difficulty, but again this is someting that the Department of Justice should speak to, if you feel this is a serious matter.

Senator Pearson: I am thinking of public opinion. People may well ask what kind of stupid committee we have up here in Parliament when we recommend that an official can have power to change the definition of, for example, one mile from 1,760 yards to 1,800 yards or to 2,000 yards. Slightly different wording would be in order to solve the problem, perhaps.

Senator Burchill: Could that not be redrafted to meet that point?

Mr. Anderson: Yes, I think it might.

The Chairman: Honourable senators, the suggestion I make in relation to both section 6 and section 35 is that we stand them at the moment and then hear from somebody from the Department of Justice some time later today. This bill is too important to be hung up for any length of time. We should if possible try to clear it today if we get proper explanations on these points that give us some concern.

Senator Burchill: Why not adjourn until this afternoon?

The Chairman: First of all I want to know if there are any other questions in relation to any other matters in the bill on which senators would like information. The minister has to leave shortly. If there are any such questions, he would like to give the explanations.

Senator Hollett: I move the adjournment.

The Chairman: I suggest then that we adjourn, not to go back over all the things that we have dealt with but simply to hear further information in relation to clause 6 and clause 35. For that purpose we will adjourn until later this day. May I suggest that we resume when the Senate rises which could possibly be around 3 o'clock. We sit at 2 and I understand there is very little on the order paper.

Senator Blois: I understood that somebody was phoning to ask somebody from the Department of Justice to be here. If he comes and we are not here, that will be too bad.

The Chairman: So far as these particular clauses are concerned, it would be more convenient for us to deal with them when the Senate rises this afternoon. Furthermore there is another committee just starting now, the Legal and Constitutional Affairs Committee, to deal with the Federal Court Bill which is an important bill too. So, it will be possible to deal with that bill in the

other committee without delaying this one. Somehow or other we will continue with this one today.

Hon. Mr. Basford: I shall not be able to be back this afternoon.

The Chairman: Well, if any problems should develop, we will get in touch with you.

The committee adjourned until later this day.

Upon resuming at 4 p.m.

The Chairman: Honourable senators, we are without the witnesses that we expected. Even in the Minister's office they do not know at this time where the witnesses are; they could be in any one of three or four places.

I therefore suggest that we adjourn until 9.30 in the morning and we will see that they are given due notice as to the hour and the place, and if necessary we will even send a messenger to bring them over by the hand.

Is it agreed, honourable senators that we now adjourn?

Hon. Senators: Agreed.

The committee adjourned.

Ottawa, Wednesday, November 18, 1970

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-5, respecting weights and measures, met this day at 9.30 a.m. to give further consideration to the bill.

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

The Chairman: We adjourned our consideration of Bill S-5 yesterday leaving two sections on which we requested further information, section 6 and section 35. Now this morning we have here, as we had yesterday and it is much appreciated, Mr. Anderson, and in addition we have Mr. Scollin and Mr. Beseau from the Department of Justice.

I would suggest that we proceed first with section 6. Our difficulty in that section was, I think, primarily to find out what it meant, because if you do not know what it means, it is hard to make any decisions. That is no reflection on Mr. Anderson. Would you care to have another go at it, Mr. Anderson, or is Mr. Beaseau here to reinforce the situation?

Mr. G. E. Anderson, Assistant Director and Chief Engineer, Standards Branch, Department of Consumer and Corporate Affairs: Mr. Beseau, I think, has come up with a suggestion as to what wording might be altered. Would you like me to try to give you an explanation?

The Chairman: Yes, if you would, please.

Mr. Anderson: Honourable senators, the intention of the schedule in this act is to try to ensure that those units which we use in Canada have known relationships to the internationally accepted units. Now if those internationally accepted units should become larger or smaller, the Canadian units would become larger or smaller in always the same proportion. That is to say that we have defined the yard as 9,144/10,000ths of the metre, which is defined in terms of wave-lengths of light. If they should decide that they want to add a third decimal place in addition to the second decimal place, this would make the yard that much larger. It would then become 9,-144/10,000ths of the third place of decimals, which you can see is an insignificant fraction for all practical purposes, but from the scientific point of view it always keeps us in step.

The same is true with our pound. We have defined the pound as an exact mathematical relationship to the international kilogram. If the international kilogram should by any mischance be destroyed, they would attempt to reconstitute the international kilogram by getting the kilograms which have been distributed around the world to all the signatories of the general conference on weights and measures—there are some 40 or 50 kilograms throughout the word—and they would bring them back to Paris and get an average kilogram. Now that average kilogram might not be exactly the same as the original kilogram; it might differ by one part in a million, or one part in ten million or one part in 100 million, but our pound would have that same relationship to the new kilogram as it had to the old. This might mean adding one or two specks of platinum to bring it into line, but it would then have the same relationship as it had before. So this is what we mean when we say that the Canadian units shall be based on the international units.

The Chairman: That is in section 4?

Mr. Anderson: Yes. Now we say then in section 6 that he can add to or delete from Part I and if the definitions require changing, they will be changed. Similarly in section 2 which deals with the Canadian units, as I mentioned yesterday, it might for some reason or other be decided that we should drop the rod or that we should drop the furlong or it may be that we should add something like the barrel and define it once and for all, and this was to give us flexibility in making these adidtions or deletions.

Yesterday one of the senators raised the point that it would be possible theoretically for the Governor in Council to decide that there shall only be ten inches to the foot. I believe that was the essence of the point raised. Now I have spoken very briefly to Mr. Beseau on this subject, and whether he has had an opportunity to come up with a set of words which might overcome this difficulty, I am not sure.

The Chairman: Mr. Beseau, would you care to take over?

Mr. P. D. Beseau, Legislation Section, Department of Justice: Mr. Chairman, as Mr. Anderson mentioned a few moments ago, I have been trying to work out some kind of formulation of words where by changing a definition in either Schedule I or Schedule II the Governor in Council would not be authorized to vary the ratio of one unit to another unit in the same schedule, so that he would always have the same ratio between any two units of measurement that are set out in the schedules.

If I had a little more time I might be able to come up with suitable wording, but I would like to discuss it with

Mr. Anderson and make sure it fits into the wording for the department.

The Chairman: Since we are dealing in terms of measurement, maybe we could relate that to the amount of additional time that you feel you might need. Would it be later today or next week?

Mr. Beseau: I would hope that maybe within 15 or 20 minutes I could come up with some suitable wording.

The Chairman: All right. Then we will go on with the other section. Neither you nor Mr. Anderson is taking part in the discussion on that, so that we can excuse you and maybe by the time we are through with that you will be ready with some wording.

Mr. Beseau: Right.

The Chairman: Is that agreeable?

Hon. Senators: Agreed.

The Chairman: Mr. Scollin, we now have for consideration section 35.

May I just recall for you that in our discussion yesterday we were concerned about section 35 and the provision whereby the Crown, in prosecuting some person who has committed an offence under certain sections of this proposed act, may proceed by way of the summary conviction procedure or elect to proceed by way of indictment, in which event the penalties are increased under this section.

However, I should call your attention to the fact that what the section does, in those circumstances, is to establish maximum penalties, and there is a substantial difference between this provision and the provision in the Income Tax Act, because in the Income Tax Act, in addition to the penalties by way of fine and imprisonment being more substantial if the Crown proceeds by way of indictment, there is a minimum sentence of imprisonment, if you are convicted, which applies in any event, and if you are convicted there is no way around that and you have to serve the time.

We were considering yesterday the effect of the recent judgment which was based on a corresponding section, with that variation, in the Income Tax Act, which declared that provision invalid by reason of the Bill of Rights. We were considering whether we were in a position in which we should, in the face of that decision, approve a section of this kind or evolve some variation of it, because, as I pointed out yesterday, variations are very simple to effect, except I would suspect that since this section in this form, or some variation of it, exists in many federal statutes, the desire of the Crown may be to keep the provisions reasonably uniform.

That is the background as a result of which the minister said, well, he acted on the advice of the Department of Justice, which he is required to do as the minister, and he was not in a position to enter into discussion. So we said we would adjourn the matter and have someone appear from the Justice Department. Now Mr. Scollin is here to take on that responsibility. Would you proceed, Mr. Scollin?

Mr. J. A. Scollin, Director, Criminal Law Section, Department of Justice: Mr. Chairman and honourable senators, assuming—as I am respectfully not prepared to assume—that His Honour Judge Kelly's decision was right in the Conn Stafford Smythe matter . .

The Chairman: We are not assuming that either. All we are saying is that it is there.

Mr. Scollin: It is under appeal. One of the factors indeed,—as Senator Hayden has pointed out—that did motivate the court was this matter of the minimum two-month penalty of imprisonment which is imposed under section 132(2) of the Income Tax Act.

Indeed, Judge Kelly, in reciting the factors that affected him, pointed out that:

> The effect of Subsection 2 is that before trial, when there is only a prima facie case in the hands of the Attorney-General he can, by acting under Subsection 2, deprive the Court of its sentencing power, because there is a provision for a mandatory term of not less than two months.

So this was obviously one of the factors, and it is a distinction between that situation and the situation under section 35.

Really, honourable senators, I think Senator Hayden has already said anything else I could say. I do not think there is anything I can add to that. I think it is a valid distinction in so far as the reasoning of Judge Kelly is concerned in relation to the Income Tax Act. I do not myself think that the fact that there is an election is a valid reason for saying it is an infringement of the Bill of Rights, but that matter is before the courts, on a mandamus, and the judgment has not, as far as I know, yet been given.

The Chairman: The basis of Judge Kelly's decision was he was looking at the provisions in the Bill of Rights, and he decided, in the reference to his judgment which you made, that this sentence—which proceeded in any event, if there had been an election to proceed by way of indictment and there was a conviction—deprived the accused person of equality under the law. That is, the sentencing is in the discretion of the presiding judge, after conviction; but if the statute, as it does in the Income Tax Act, requires a minimum sentence, it is the statute that sentences the person who has been convicted and there is no exercise of discretion permissible.

If you committed the same kind of offence and the Crown does not elect to proceed by way of indictment, then there is not equality under the law. I am not expressing my opinion now; I am trying to interpret the judgment. I think this is the basis upon which Judge Kelly's Reasons for Judgment proceeded, that there was not equality under the law in those circumstances, because everybody is not subject to the same kind of penalty within the discretion of the judge. The committee may have a different view. I do not think it is part of our task here to analyze judgments. We simply look at the judgment, and if it is in point, whether there is an appeal pending or not, we then have to make whatever decisions we feel we should make in the circumstances. If it is not

in point then I do not conceive it to be part of our job to say: "Well, if this section 35 were in issue we think on the basis of Judge Kelly's judgment the conclusion inevitably would have to be the same." We are not a court of appeal.

This is only a personal view, but the furthest I feel could go would be to say that we are not going to pass a provision in respect of which there is a judgment outstanding declaring it to be invalid, regardless of the stage of the proceedings at which the judgment may rest. That was the position I took yesterday, but it appears to me that the difference in wording—that is, this minimum of two months in any event under the Income Tax Act—is a material difference. It is very material certainly to the person who is convicted in a case where the Crown has elected to proceed by way of indictment. It is very material because he does not have a right to make a presentation before sentence, which is a right of a convicted person, or his counsel on his behalf, to say why the penalty of the law should be tempered in such and such a way. He cannot. The Crown has precluded him from doing that by electing to proceed by way of indictment, but you do not have that situation under section 35.

Senator Flynn: Very frequently we find in our statutes a difference in the maximum penalties when the Crown proceeds either by way of summary conviction or by indictment. I do not think there has ever been a judgment saying that this is contrary to the Bill of Rights for the simple reason that there are two unequal penalties, one stiffer than the other if you proceed by way of indictment. I agree with the witness in this particular case. The fact that there was a minimum penalty if you proceed by way of indictment might have created an inequality under the law.

The Chairman: Senator Flynn, the ideal way of wording this section—but the Crown is not restricted to taking the ideal way—would be to provide for the offence and then provide on conviction for a maximum penalty.

Senator Flynn: I am not a specialist in criminal law, but I have never understood why they had this kind of provision which gives discretion to proceed by way of summary conviction or indictment, and providing a stiffer penalty if they proceed by way of indictment. I have never understood that. Perhaps the witness or Mr. Hopkins can help us in that regard.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: This is just a guess, but it seems to me that it would leave an option to the Crown in certain circumstances that seem to be more serious than others. The Crown can proceed in a serious way or a less serious way.

Senator Connolly (Ottawa West): It is a discretionary matter on the part of the Crown.

The Chairman: But there is a weakness in that kind of argument to support the distinction between proceeding by way of summary conviction or by way of indictment. The weakness is that the section only establishes a maximum penalty. The Crown might proceed by way of indictment but the judge may not take the same view as to the gravity of the offence, and the penalty he would impose might be the penalty provided for in relation to a summary conviction.

Senator Flynn: You might have a lesser penalty if you proceed by way of indictment than if you proceed by way of summary conviction.

The Chairman: Yes, that is right, it could end up in that way. So, where you have that possibility it is difficult to say that there is any basic unfairness to the accused person, although frankly I think the whole thing could be accomplised without this artificial structure. There could be simply an offence and a penalty which would be a maximum penalty, and the accused person could be allowed to go into court and elect summary trial, or trial by judge and jury.

Senator Carter: Is there not a principle here that under this section now the punishment fits the procedure rather than the crime?

The Chairman: Yes, that is right. I hope that Mr. Scollin is taking notice and notes of all the comments that are being made here this morning, because at some later date this may well be reflected in something that will be before us.

Senator Molson: Mr. Chairman, as a matter of academic interest, is not the whole of military law based on this same principle? I am thinking of the fact that the powers of the junior officer are limited, and if the matter proceeds to court martial then the whole scale of punishment is upgraded. Is this not for the purpose of limiting the powers of the junior or less sophisticated procedures, rather than the reverse which is what we seem to be discussing here? Am I not correct in my thnking?

The Chairman: I remember when we were examining the new National Defence Act and all those procedures some years ago that there was quite a discussion on this point. I think the basis of the discussion was that as the accused person went up the line of the various means of trial there were more benefits or protections afforded him.

Senator Molson: Yes, and heavier penalties.

The Chairman: Yes, but in order to get that result we defined the procedures much more carefully.

Are there any other questions?

Senator Carter: Just following along with Senator Molson's analysis on the military side, I would point out that there would be a court of inquiry before a decision was made as to whether they would proceed by way of court martial. So, there is that protection there which you do not have here.

Senator Molson: Yes.

The Chairman: Wait a minute. If the Crown elects to proceed by way of indictment the accused has to appear

before a magistrate. The only decision that a magistrate can make is as to whether there is a case to send on for trial.

Senator Molson: That would be the same as a court of inquiry.

The Chairman: Except with this big difference, that the magistrate in those circumstances cannot weigh evidence. That is correct, is it not, Mr. Scollin? He cannot weigh evidence. He has to decide whether there is a *prima facie* case, and that is why almost inevitably the accused at the stage of the preliminary hearing before the magistrate, where there is an indictment, does not offer any evidence. It is so difficult to refute the *prima facie* case.

Mr. Scollin: The onus is entirely different. In a preliminary hearing the doubt is resolved in favour of the Crown.

The Chairman: That is right. Are there any other questions? Is it the opinion of the committee that we should approve section 35 in the form in which it is?

Hon. Senators: Agreed.

The Chairman: Then that leaves just section 6. I see that our witnesses have been very diligent. Are you going to deal with this Mr. Beseau?

Mr. Beseau: Yes, Mr. Chairman.

The Chairman: We are now back to section 6.

Mr. Beseau: In relation to subsection (2) of section 6 we are going to propose for your consideration that it be rewritten as follows:

> Notwithstanding subsection (1), the Governor in Council may not amend Schedule II in such a manner that
>
> (a) the ratio of any one unit of measurement to any other unit of measurement is altered; or
> (b) Canadian units of measurement are not authorized for use in trade.

That would accomplish the dual purpose of preventing the complete change-over from Canadian system to metric system by order in council. It would also prevent the changing of a unit of measurement to alter the ratio between one unit as opposed to another unit, so that we would also have a balance between the different units of measurement.

The Chairman: I believe this was your concern yesterday, Senator Hollett?

Senator Hollett: Yes.

The Chairman: We suddenly might discover that there was a foot 10 inches long.

Senator Hollett: I think the witness is perfectly in order; I agree with it anyway.

The Chairman: I put a question to the minister yesterday, which he left as one of the items which his experts, as he referred to them, from the Department of Justice might deal with.

I asked him whether conceivably clause 6, the power to amend by adding or deleting from the schedule, is regulatory and not legislative in its effect.

Mr. Beseau: This is much more inflexible than it would be if it were in regulations. The units of measurement are set out in the act.

It became necessary to give a power to add to the schedules in the event that new units of measurement are derived as a result of scientific progress. With respect to the power to delete, the capacity in the area of science for determining accuracy seems to be increasing constantly. As a result it is found from time to time that, for example, the last decimal in one of the figures in the schedule is no longer accurate. It was decided that rather than go back to Parliament and ask that the figure .00789 be changed to the figure .00788, they be given this power to delete and replace the definition making the minor correction.

The Chairman: Everything that you have said, Mr. Beseau, seems to me to affirm the principle that this is conferring some form of legislative power upon the Governor in Council. The question to decide then is whether this is the kind of delegation that we should approve.

Mr. Beseau: I would say that is correct, senator.

The Chairman: Would it accomplish it if clause 6 were made subject to clause 4? In other words, that this power could only operate within the limits of clause 4.

Mr. Beseau: I would interpret clause 6 as being subject to clause 4 because this is the power to amend the schedules. Notwithstanding that, clause 4 is the overriding clause, that all units of measurement must be based on the international system.

I understand that where some of these definitions do require amendment is as a result of international conventions or conferences whereby it is agreed that the present definition is somewhat out of date.

The Chairman: We have searched out instances in all the legislation that has come before us where the administrative officials are really being given the power to legislate. In many cases we have taken serious objection to it. In some cases we have applied time limits in which their action can evolve and at whatever stage it is at a certain time is the law and only action of Parliament could change it.

We did that in the bank legislation in relation to the guarantee of deposits up to a certain amount. They were taking a provision in the act that the definition of a deposit would be established by by-law. They seemed to feel that they could not arrive at a satisfactory definition as quickly as required to include it in the bill before us. We informed them we would give them two years and whatever it was at that time would be the end of their exercise of this authority. That is the law and only Parliament can change it.

It appears to me that this is not the same type of situation. Maybe this is an area of legislative action in which we would be justified in approving some delegation.

Senator Flynn: The witness is of the opinion that clause 6 is subject to clause 4. It is implied.

Mr. Beseau: It is already subject to clause 4.

Senator Cook: Is an order in council under clause 6 tabled?

Mr. Beseau: This would be the type of order that would be a regulation within the meaning of the Regulations Act. It would be reviewed by the Department of Justice, enacted and tabled in the house in the same manner as other regulations.

Senator Carter: In schedule III a French foot is defined as 12.789 inches, whereas in schedule II an English foot is defined as 1/3 yard. How are they distinguished? They are not the same animal, but they have the same symbol. Is it taken for granted that in Quebec the French foot and no other is used?

Senator Flynn: No, only under the interpretation of some articles of the Civil Code would the French measure be used. It would be used, for instance, in cases involving boundaries of land. When reading the Civil Code this is the interpretation; otherwise the foot in Quebec is the English foot. When measuring land originally granted under seigniorial tenure you use it. It could only be used in that case.

This is exactly the question.

The Chairman: Clause 5 correlates to Schedule III to which Senator Carter is referring.

Senator Carter: It could only be used with the old grant.

The Chairman: That is right.

Senator Carter: My question concerned having the same symbols. Do you just put it down in exactly the same way?

The Chairman: You want to know whether when writing a foot under Schedule III it is the same as when writing it under one of the other schedules?

Senator Carter: Yes.

Mr. Anderson: I suppose it would be called pieds français.

Senator Carter: That is what I say. If that is what is really meant, I think we should just have the French name for it.

The Chairman: We do.

Mr. Anderson: We do.

The Chairman: On the right-hand side there is the French version.

Senator Carter: But it has no English use at all.

The Chairman: There are both the English and French versions.

Senator Carter: But the word "foot" in English does not mean the same as "pied" in French.

The Chairman: It does not have to. The heading of Schedule III is "Units of Measurement to Describe Certain Land in Quebec", and that is the provision in clause 5 of the bill.

Senator Carter: But that is written in French and not in English at all. I do not see the point of the English part of Schedule III.

The Chairman: Honourable senators, I have referred this proposed amendment to Mr. Hopkins. There is only one problem that seems a little bothersome. The proposed amendment to subsection (2), which continues part of subsection (2) refers to "Canadian units of measurement". The real question is what that encompasses. If I look at Schedule II I see that the heading is "Canadian Units of Measurement". If this is what is made inviolate, that cannot be changed, it means that you cannot change anything in the schedule, because anything in the schedule is part of the Canadian units of measurement. By using that descriptive title, have you not shut the door on yourself, and is that intended, that you cannot disturb any of the individual units of measurement that appear under the heading of "Canadian Units of Measurement"?

Mr. Beseau: I would say that you can change any of the units in there to change the definition of them or the symbol, but in doing so you cannot alter the ratio of any one to the other, so that if as a result of changing one you would be changing the ratio of another unit, you would also be required to amend that second unit to keep the same ratio between the units in there.

The Chairman: I was not addressing myself to that. I was addressing myself to the point that in your paragraph (b), as you carry it through from subsection (2) of clause 6, that is your description. The thing in respect of which the Governor in Council cannot authorize any change is "Canadian Units of Measurement". Is that a generic term? If I go to the schedule I find it is entitled "Canadian Units of Measurement". Is that the thing in respect of which they cannot make any change?

Mr. Beseau: They cannot make a change that would amount to nothing but a straight deletion. If they are going to delete, I would suggest that they will have to delete and replace, otherwise they would be deleting a Canadian unit of measurement and replacing it with nothing.

Senator Hollett: Why does the Governor in Council need that authority?

The Chairman: The explanation we got yesterday was that under this bill there are both standards of measurement, the metric system as well as whatever you call the other, the Imperial or whatever it is, and both are equal-

ly valid. But if Canada at some future date wanted to swing to the metric system only, you would have to come back to Parliament by virtue of this clause.

Senator Hollett: Why?

The Chairman: This clause makes it necessary that you must.

Senator Hollett: No, this clause makes it necessary that you do not have to.

The Chairman: No.

Senator Hollett: I say we should delete clause 6 completely and then we would have no trouble.

The Chairman: This clause says that the Governor in Council cannot propose any amendment to Canadian units of measurement as a result of which these Canadian units of measurement are not authorized for use in trade.

Senator Hollett: That is the suggested amendment.

The Chairman: That is right.

Is there any other discussion on this? Is the amendment acceptable to the committee and is it approved?

Hon. Senators: Agreed.

The Chairman: Shall I report the bill as amended?

Senator Connolly (Ottawa West): I should like to ask one question, which is really a technical one. In the last line of clause 5 they refer to "seigniorial tenure". It is spelt "seigniorial". I was wondering whether that should not be spelt "seigneurial". Maybe the dictionary anglicizes the word, which is a French word.

Senator Flynn: I do not know the translation. I know that it is correct in French, but I do not know the translation.

Senator Connolly (Ottawa West): I think in the Civil Code when they talk about seigneurial tenure they spell it with eur. I certainly would not propose any amendment here.

Senator Flynn: It may not be necessary to have an amendment. It may be sufficient if the departmental officials check on it, and if there is an error it can be corrected.

The Chairman: Have you any comment, Mr. Anderson?

Mr. Anderson: The existing act uses the same spelling in English as the present bill. Of course, it may be perpetuating an error.

Senator Connolly (Ottawa West): It could be. Perhaps you would have a look at it.

The Chairman: Our Law Clerk tells us that for any change in the spelling of a word we do not need to make an amendment.

Senator Flynn: That is what I was suggesting.

The Chairman: This would be a typographical error which would be corrected. What I suggest is that sometime later this morning Mr. Anderson could confirm with Mr. Hopkins whether it is desired to go with the spelling in the bill or whether Senator Connolly's idea is to be accepted.

Senator Connolly (Ottawa West): Check it with the Civil Code.

The Chairman: Perhaps, Mr. Anderson, you would let him know. If you do not let him know it will appear in the bill as reported, as it is spelt in the bill now.

Shall I report the bill with the amendment?

Hon. Senators: Agreed.

The Chairman: That completes our work for this morning. Thank you very much, Mr. Beseau and Mr. Anderson.

Bill reported with amendment.

The committee adjourned.

Queen's Printer for Canada, Ottawa, 1970

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable DANIEL A. LANG, *Acting Chairman*

No. 5

WEDNESDAY, DECEMBER 16, 1970

THURSDAY, DECEMBER 17, 1970

FRIDAY, DECEMBER 18, 1970

Complete Proceedings on the following Bills:

Bill C-177: "An Act respecting cooperative associations";

Bill C-174: "An Act to establish the Tax Review Board and to make certain amendments to other Acts in relation thereto";

Bill C-175: "An Act respecting grain";

Bill C-179: "An Act respecting the Buffalo and Fort Erie Public Bridge Company".

REPORTS OF THE COMMITTEE

(For appendix and list of witnesses—See Minutes of Proceedings)

23140—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Orders of Reference

Extract from the Minutes of the Proceedings of the Senate, Thursday, December 10, 1970:

The Order of the Day being read,

With leave of the Senate,

The Honourable Senator McDonald resumed the debate on the motion of the Honourable Senator Robinson, P.C., seconded by the Honourable Senator Bourque, for the second reading of the Bill C-177, intituled: "An Act respecting cooperative associations".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative.

Extract from the Minutes of the Proceedings of the Senate, December 15th, 1970:

"A Message was brought from the House of Commons by their Clerk with a Bill C-174, intituled: "An Act to establish the Tax Review Board and to make certain amendments to other Acts in relation thereto", to which they desire the concurrence of the Senate.

The Bill was read the first time.

With leave of the Senate,

The Honourable Senator Connolly, P.C., moved, seconded by the Honouralbe Senator Lefrançois, that the Bill be read the second time now.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative."

Extract from the Minutes of the Proceedings of the Senate, December 16th, 1970:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Argue, seconded by the Honourable Senator McNamara, for the second reading of the Bill C-175, intituled: "An Act respecting grain".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative."

Extract from the Minutes of the Proceedings of the Senate, Thursday, December 17, 1970:

A Message was brought from the House of Commons by their Clerk with a Bill C-179, intituled: "An Act respecting the Buffalo and Fort Erie Public Bridge Company", to which they desire the concurrence of the Senate.

The Bill was read the first time.

With leave of the Senate,

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

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

Robert Fortier,

Clerk of the Senate.

Minutes of Proceedings

Wednesday, December 16, 1970

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

Present: The Honourable Senators: Lang (*Acting Chairman*), Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Haig, Hollett, Kinley, Macnaughton and Welch. (11)

Present but not of the Committee: The Honourable Senator Argue.

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

On Motion of the Honourable Senator Blois, the Honourable Senator Lang was elected Acting Chairman.

The Committee proceeded to the consideration of Bill C-177, intituled: "An Act respecting cooperative associations".

The following witnesses were heard in explanation of the Bill:

Department of Consumer and Corporate Affairs:

Hon. Ron Basford, Minister;

Mr. Louis Lesage, Q.C., Director, Corporations Branch;

Mr. Roger Tassé, Assistant Deputy Minister (Corporate Affairs).

Cooperative Union of Canada:

Mr. Joe Dierker, Solicitor, Saskatoon, Sask.;
Mr. W. Breen Melvin, President, Regina, Sask.;
Mr. J. Terry Phalen, Manager, Ottawa, Ont.

On Motion of the Honourable Senator Burchill it was Resolved to report the said Bill without amendment.

At 10:50 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

Thursday, December 17, 1970.
(7)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10.00 a.m. to consider Bill C-174, intituled: "An Act to establish the Tax Review Board and to make certain amendments to other Acts in relation thereto".

Present: The Honourable Senators Aird, Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Flynn, Haig, Hays, Kinley, Lang, Welch. (14)

Present but not of the Committee: The Honourable Senators Argue, Lafond and McNamara.

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

On Motion duly put, the Honourable Senator Lang was elected Acting Chairman.

The following witness was heard:

Mr. G. W. Ainslie, Assistant Deputy Attorney General of Canada.

At 10.55 a.m. on Motion of the Honourable Senator Connolly (*Ottawa West*), it was *resolved* to report the said Bill without amendment.

At 11.00 a.m. the Committee proceeded to the consideration of Bill C-175, intituled: "An Act respecting grain".

The following witnesses from the Department of Agriculture were heard:

The Honourable H. A. Olson;
Mr. C. R. Phillips, Director General, Production and Marketing Branch.

Also present but not heard: Miss E. I. MacDonald, Legislation Section, Department of Justice.

It was *resolved* to print as an Appendix to these proceedings a "Summary Information related to Grain handling in Canada."

Upon Motion, it was *resolved* to report the said Bill without amendment.

At 12.10 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Aline Pritchard,
Clerk of the Committee.

Friday, December 18, 1970
(8)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10:20 a.m.

Present: The Honourable Senators: Lang (*Acting Chairman*), Beaubien, Benidickson, Carter, Connolly (*Ottawa West*), Flynn and Martin. (7).

The following Senators, not members of the Committee, were also present: The Honourable Senators: Bourget, Kinnear Méthot and Smith.

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

On Motion of the Honourable Senator Flynn the Honourable Senator Lang was elected Acting Chairman.

The Committee proceeded to the consideration of Bill C-179, intituled: "An Act respecting the Buffalo and Fort Erie Public Bridge Company".

The following witness was heard in explanation of the Bill:

Mr. B. Pomerlan, Financial Operations Branch, Department of Finance.

On Motion of the Honourable Senator Beaubien it was Resolved to report the said Bill without amendment.

At 10:45 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

Reports of the Committee

Wednesday, December 16, 1970.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-177, intituled: "An Act respecting cooperative associations", has in obedience to the order of reference of December 10, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

D. A. Lang,
Acting Chairman.

Thursday, December 17, 1970.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-174, intituled: "An Act to establish the Tax Review Board and to make certain amendments to other Acts in relation thereto", has in obedience to the order of reference of December 15, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

D. A. Lang,
Acting Chairman.

Thursday, December 17, 1970.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-175, intituled: "An Act respecting grain", has in obedience to the order of reference of December 16, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

D. A Lang,
Acting Chairman.

Friday, December 18, 1970.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-179, intituled: "An Act respecting the Buffalo and Fort Erie Public Bridge Company", has in obedience to the order of reference of December 17, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

D. A. Lang,
Acting Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, December 16, 1970

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-177 respecting cooperative associations, met this day at 9.30 a.m. to give consideration to the bill.

Hon. Daniel A. Lang (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, our witnesses this morning are the Honourable Ronald Basford, Minister of Consumer and Corporate Affairs, Mr. Louis Lesage, Director, Corporations Branch, and Mr. Roger Tassé, Assistant Deputy Minister (Corporate Affairs) of the Department of Consumer and Corporate Affairs.

We will ask the minister to explain the nature and extent of this bill and some of the history which led up to it.

The Honourable Ronald Basford, Minister of Consumer and Corporate Affairs: Mr. Chairman, I am grateful to the committee for meeting this morning. I wish to express my thanks to honourable Senator Robichaud, the sponsor of the bill, for his thorough explanation on second reading. I also thank Senator Phillips for his comments with respect to the cooperative movement and the bill.

Mr. Chairman, I have a somewhat lengthy statement which I could present to the committee. I am really not quite sure if the senators have read Senator Robichaud's statement on second reading and that my statement would be a repeat in different words of what was said on the floor of the Senate.

I do wish to explain, however, the consultation that has taken place with regard to this bill over a number of years following the decision by the Government to introduce a cooperative associations bill. My officials met on a considerable number of occasions with representatives, particularly legal representatives of the Co-operative Union of Canada, and those interested in the cooperative movement throughout Canada regarding the provisions of the bill. It has gone through three or four draftings to ensure that it is the kind of bill suitable for the occasion.

My officials also held three or four meetings with provincial officials and officers of those branches within provincial governments responsible for the cooperative branches within provincial governments to ensure, first, that the provisions of our bill were generally in line with what were regarded as the better written and more modern provincial cooperatives acts, and also in meetings with the provincial officials to gain the benefit of their knowledge and advice in the administration of cooperative legislation.

It is because of the very thorough consultation that went on, both with the cooperative movement and with the provincial officials, that in the other place the bill received the support of the cooperative movement, and, after consultation with their solicitors, is the kind of bill the cooperative unions wanted. Therefore, because the consultative process has been so thorough I commended the bill to the other place, and I commend it to the Senate.

I think that rather than read a long statement I would prefer to answer questions honourable senators have, and have my officials here answer any technical questions. However, if it is your wish, I will make a much longer statement.

The Acting Chairman: Is it your wish, honourable senators, that the minister now respond to questions from the committee?

Hon. Senators: Agreed.

Senator Carter: I was not able to follow all that Senator Robichaud said, and I have not had the opportunity to read his speech. What comes to my mind is what is the main purpose of the bill, since we have cooperative acts in various provinces. What is the relationship between this bill and the provincial acts?

Hon. Mr. Basford: The relationship is none. Until this legislation is passed there will have been no federal cooperative act. Therefore, those in the cooperative movement have had to do two things: either form themselves into a cooperative association under some provincial law, provincial charter and statutes, or, if they were seeking some form of federal charter or federal organization, proceed by way of one of two methods. They could incorporate themselves under the Canada Corporations Act, which is quite inappropriate but was done in years gone by. There are a number of what are really cooperatives, which are incorporated under the Canada Corporations Act, which of course is an act designed for the incorporation of joint stock companies and is quite unsuitable for a cooperative type of organization. However, in times past, because there was no federal cooperatives act, and because some cooperatives wanted to organize on a national or federal basis, they formed themselves under the Canada Corporations Act. Latterly we have not done that, because the Canada Corporations Act is unsuitable for the purpose. The other way they

have had to proceed is by way of special act of Parliament. A number of cooperatives have been organized by special act.

We are introducing a federal cooperatives act which would allow those cooperatives that are carrying on business in more than one province and want to be chartered for federal purposes, within federal purposes, to come to us under their own act, the federal cooperative associations act, and to be chartered. Secondly, the act would allow those cooperatives that are incorporated under the Canada Corporations Act to come under this bill by way of a certificate of continuation, or those that are incorporated by special act of the Canadian Parliament to come under this bill by way of certificate of continuation.

That is really the purpose. It has no relation with provincial laws. What we are trying to do is to provide a vehicle for possibly some 40 cooperatives that are organized on a federal basis, and those that are operating in more than one province and want to avail themselves of the provisions of a federal charter.

Senator Carter: Does this bill apply to any one type of cooperative, say marketing cooperative more than consumer cooperatives, or does it apply to every cooperative?

Hon. Mr. Basford: It applies to cooperatives that would fall within clause 5, which spells out the kinds that could come under it. I would think generally—your question is general and my answer will be—the people who would take advantage of it are generally more the marketing cooperatives, because the consumer cooperatives are usually quite small, organized very locally, most of them, and not operating in more than one province, so they would not come within the bill. That is a very general answer. If there is a consumer co-op operating in more than one province that wanted to avail itself of the bill, of course it could.

Senator Carter: It will not apply to credit unions?

Hon. Mr. Basford: No.

Senator Carter: That comes under another act?

Hon. Mr. Basford: Yes.

Senator Connolly (Ottawa West): It comes under this bill, clause 8.

Senator Welch: Does this bill mean that all the cooperatives in a province must join, or is it simply that if a certain cooperative wishes to come under this law it can, but otherwise they can stay out? Will this be compulsory right across the board?

Hon. Mr. Basford: It certainly would not apply to every cooperative within a province. In effect, it would apply to very few, and it would apply only to those who wanted it to apply and wanted a charter. The people to whom it could apply, if they so wish, are spelled out in clause 5, being:

> Any seven or more persons.....who desire to associate themselves together on a cooperative basis for any of the objects to which the legislative authority of the Parliament of Canada extends.

There is a whole list of people, in paragraphs (a) to (h), who cannot have a federal cooperative arrangement under this bill. The answer is that it would not apply to existing cooperatives unless they wanted it.

Senator Welch: Can they opt out if they wish?

Hon. Mr. Basford: Very much so. The decision is really theirs whether they opt in or not.

The Acting Chairman: They must intend to carry on business in more than one province?

Hon. Mr. Basford: That is right. It will apply to an existing cooperative only if it wants it to apply, only if it wants to avail itself of these provisions, and only if it meets the conditions of the bill: that they are operating in more than one province; that they are operating for purposes to which the legislative authority of Canada applies; that they are not wanting to run a railroad, a credit union, or something like that.

Senator Welch: In just a few words, not in a long story, what would be the advantages of opting in or opting out? What would be the advantages to any group of merchandisers or growers?

Hon. Mr. Basford: I think you are going to have some witnesses from the Co-operative Union. They might spell that out more fully than I. Really, the reason would be that there are a number of cooperatives, as I explained, which have wanted to charter nationally or federally and which have done so, for example, under the Canada Corporations Act, which is really quite an unsuitable vehicle for that purpose. Of course, under our Corporations Act which is designed to govern joint stock companies, you have the number of votes, for example, that you have shares. The principle of the cooperative movement is that a member has one vote regardless of his share holding. The concept or the theory is quite different from that which applies to other joint stock companies. So these cooperative organizations that, wanting to have a federal charter and having no special vehicle to do so, have been forced to incorporate under the Canada Corporations Act, have done so under quite an inappropriate vehicle. They will find it quite advantageous and useful to transfer, if I can put it that way, from being incorporated under the Canada Corporations Act to being chartered under this act, which is specifically designed to deal with cooperative organizations.

Senator Welch: Is there any part in this bill that gives you a floor or a ceiling on prices?

Hon. Mr. Basford: Under this act?

Senator Welch: Yes.

Hon. Mr. Basford: No, except that the definition of "cooperative basis" is one that operates as nearly as possible at cost. If you will look at page 2 of the bill,

senator, under the definition section, you will see that it says under clause 3 (1)(d)(iv):

> (iv) the enterprise is operated as nearly as possible at cost after providing for reasonable reserves...

That is just a part of the definition of "cooperative basis"; it is not a system of price control or price regulation, but it is part of the theory of cooperative organizations.

Senator Burchill: There is no special reason why a provincially incorporated cooperative would transfer to this, is there? That is, if it did not want to operate outside its own province. There are no features that are in this bill that are not in the provincial legislation.

Hon. Mr. Basford: No. There would be no particular reason for them to do that. But there is provided in the legislation provisions which are rather interesting, allowing for transjurisdictional transfers for federal cooperatives to become provincial cooperatives and provincial cooperatives to become federal cooperatives, with the consent of the administrations in both the province to which it is being transferred and the province from which it is being transferred. So that a provincial cooperative, if it fell within the provisions of this act, could transfer and become a federal cooperative with the approval of the provincial administration and with the approval of the federal administration. However, if it were just a cooperative organized and operating within one province there would be no particular reason for that cooperative to wish to come under this legislation, as I see it.

Senator Carter: What is the situation with respect to cooperatives that are not in existence at the present time? Do they have to be incorporated under the provincial act before they can come to be incorporated under the federal act?

Hon. Mr. Basford: No. But they have to fall within section 5, for example, and they have to show that they will be operating or that they intend to be operating in more than one province.

Senator Hollett: Under this legislation what is the tax situation with respect to a cooperative as compared to a company that is comprised of just seven people, for example?

Hon. Mr. Basford: There are no particular tax privileges or concessions provided for under this legislation, Senator. I have tried to make it clear that the question of the taxation of cooperatives, which is a very lively issue and one which I know this committee has devoted considerable attention to, is quite a separate issue and a separate question from whether we should have this legislation or not. Whether the cooperative is organized federally or provincially makes no difference to the incidence of taxation or to the rights or tax concessions it may have.

Similarly, senator, as I am sure you know, whether a company is incorporated under the Canada Corporations Act or under the Ontario Companies Act makes no difference to the level in rates of taxes it pays. The tax is levied irrespective of the form of its incorporation or the situs of its incorporation. Similarly with cooperatives, the tax is levied or not irrespective of where the cooperative is or under which legislation the cooperative is formed. So the question of taxation is a lively issue but it is not one that is dealt with under this act. It will be dealt with when the Government introduces amendments to the Income Tax Act.

Senator Welch: In the past there has been a different rating for taxation for cooperatives.

Hon. Mr. Basford: Yes, there has. I had better be careful because I am not an authority on taxation, and I suspect that the members of this committee know far more about it than I do.

Senator Connolly (Ottawa West): Flattery will get you nowhere, Mr. Minister.

Hon. Mr. Basford: But there are different rates that are established, or there may be a different system of taxation that applies; although I think the Cooperative Union might even dispute that statement. Whether it applies or not however, is not determined by this legislation or by the provincial cooperatives acts.

Senator Welch: It seems to me that I saw some place in the White Paper that they were going to tax cooperatives in the same way as they tax any other corporation. Perhaps I am wrong on that.

Hon. Mr. Basford: There were statements in the White Paper on the tax situation of cooperatives, and statements have been made in this committee's report on the White Paper relative to cooperatives. Therefore, because we are paying such heed to the report of this committee, I would not want to comment on the White Paper.

Senator Welch: We are not too sure of our ground yet.

Senator Argue: I was interested in the minister's statement awhile ago when he said that he suspected that under this legislation there would be greater use of it by marketing cooperatives than by consumer cooperatives. I have no reason to think that that is incorrect, but it seemed to me that there would be a large use of this legislation made by the consumer cooperatives. That is only my opinion. I have no special knowledge. Nevertheless, it seems to me that consumer cooperatives have great need of having the kind of interprovincial or national arrangement that could flow from this bill, and I would be highly surprised if they were not going to make a very large use of this legislation. Perhaps they are not. I was just wondering if I could get some information on that.

Hon. Mr. Basford: Mine was really an off-the-cuff answer. My impression of most of the consumer cooperatives is that they are organized on quite a small basis—on a local basis and even on a municipal basis. Therefore, they would not fall under this act now. But if what you say, senator, is true, that there is a need for them to become bigger and to organize across provincial boundaries, then this act is there for them to take advantage of.

Senator Argue: My own quick opinion would be that the smaller consumer cooperatives will have to get organized on a larger basis or they will go under. There is a great danger of them disappearing. Authorities will tell us later whether I am completely off base or not, but it would seem to me that cooperatives are facing the same kind of situation as any other business organization in the country, namely, the need to enlarge and improve technology and efficiency, and this does come, so we all think, with size. I would think that this is one of the major things that will come from this legislation.

Senator Carter: I think I would apply what Senator Argue has said to wholesale co-ops.

Senator Argue: Yes, they are part of the consumer field.

The Acting Chairman: I wonder if I might interject, Mr. Minister, and say that I was interested to learn from Senator Robichaud's speech on second reading that legislation of this nature had been envisaged as far back as 1910. While I should like to congratulate you and your officials upon bringing forward this very significant piece of legislation, I was wondering why your predecessors may have been so dilatory.

Hon. Mr. Basford: At the risk of annoying the Senate I would say that the bill was passed by the House of Commons in 1907, but was defeated in the Senate. I do not know why it was never brought forward again. I made a speech a week ago last Friday in Vancouver in which I said the Senate was being given a chance to redeem itself, and to correct its past error.

Senator Argue: It took you 60 years to gather enough courage.

Hon. Mr. Basford: Yes, to confront the Senate again.

Senator Connolly (Ottawa West): That was another Senate, though. This is a very progressive and forward-looking Senate.

Hon. Mr. Basford: Then here is an opportunity to indicate that.

Senator Hollett: What is the advantage to a co-op in organizing under this bill rather than under provincial legislation?

Hon. Mr. Basford: If it is carrying on business within a province then there is no advantage at all. If it is incorporated, as some of the federal co-ops now are, under the Canada Corporations Act then there are great advantages to transferring under this act, which is specifically designed to deal with cooperatives. If it is a federal co-op that is organized under a special Act of Parliament then I would think there would be advantages to transferring and coming under this act. Of course, changing the objects and the by-laws of a special act co-op or company is, as you know, senator, very difficult. So, if a co-op is presently organized under one of the two methods of federal organization then there will be great advantages to its being incorporated under this bill, but there would be no particular advantage to a little co-op in the Maritimes in its coming under this act.

Senator Welch: Under section 5(3), which is to be found on page 6 of the bill, it appears that the association must carry on business in two or more provinces. Does that mean that a cooperative that does business in one province only cannot be incorporated under this bill; that to be incorporated under this bill it would have to do business in two provinces?

Hon. Mr. Basford: If it is operating in only one province it would have to organize itself under the provincial cooperatives act.

Senator Connolly (Ottawa West): In other words, the same rule is going to apply to cooperatives as applies to the incorporation of companies. If you apply to the federal authority for incorporation you have to establish that you are going to operate in more than one province, otherwise you cannot have federal incorporation. The same rule will apply to cooperatives.

Hon. Mr. Basford: No, the Canada Corporations Act does not contain that requirement.

Senator Connolly (Ottawa West): But the administration generally questions you a bit about this.

Hon. Mr. Basford: What is clear here is that cooperatives in order to come within this bill must satisfy the minister—that is, the administration—that it carries on or will carry on its undertaking in more than one province. So, if it is operating out of only one province, senator, it could not come under this bill. It would have to go to the provincial authorities for a charter.

The Acting Chairman: I would imagine that this has some constitutional aspect to it. Is that correct?

Hon. Mr. Basford: Yes.

The Acting Chairman: The objection taken by the Senate in 1910 was that it was a matter of property and civil rights, I think.

Hon. Mr. Basford: And I dare say there was some political consideration also.

Senator Connolly (Ottawa West): I do not want to use this opportunity to examine Mr. Lesage for discovery, but I should like to ask him this question: If a company applies for federal letters patent, and if it is known to you that it carries on its undertaking within one province only, would you readily grant the charter ?

Mr. Lesage: As the Canada Corporations Act now stands, if it falls within the ambit of the legislative authority of the Parliament of Canada—and a matter may very well be carried on within one province and fall within the ambit of the federal legislative authority of Canada—we would. But to make a clearer picture I think that the cooperative associations are more like the non-share capital associations—the not-for-profit associations—and as a matter of fact we incorporate those non-

share capital associations when they operate on an interprovincial or on a national basis. I think this example taken from the non-share capital organizations or associations is much closer to cooperative associations than the joint stock companies.

The Acting Chairman: Are there any other questions of the minister? Apparently there are not, Mr. Minister. I want to express to you our appreciation for your coming here this morning to address us and to answer our questions. We will see what the future course of this bill is through the Senate. Perhaps we shall create a precedent.

Hon. Mr. Basford: My expression was to the effect that I hope you will redeem yourselves.

The Acting Chairman: We have with us this morning three representatives of the Co-operative Union of Canada in the persons of Mr. Dierker, the solicitor, Mr. Melvin, the president, and Mr. Phalen, the general secretary, and I will ask those three gentlemen to come forward.

Mr. Melvin and gentlemen, I should like to thank you, on behalf of the committee, for attending this morning's meeting. I know from reading the proceedings of the committee of the other place that you have been following this legislation closely, and I think you are generally favourably disposed towards it. The committee would like to hear from you as to what benefit you will derive from this legislation, and what will be its specific effect upon the cooperative movement in Canada.

Mr. J. J. Dierker, Solicitor, Co-Operative Union of Canada: Thank you, Mr. Chairman, for allowing us to appear before the committee. We have had the opportunity of appearing before the committee of the House of Commons and I should like to repeat one of the statements I made at that time, namely, that the Co-Operative Union of Canada is very appreciative of the opportunity it had to take part in the drafting of this legislation, a fact that was indicated by the honourable Mr. Basford. There has been consultation, and we enjoyed our work with Mr. Tassé and Mr. Lesage.

In dealing with the chairman's question as to the benefit to the co-operative movement from this legislation I shall try to answer briefly the question that was raised, I believe, by Senator Argue, which was: What is the advantage of going federal as distinct from going provincial?

There has been a growth in Canada of the corporate nature of a number of cooperatives. As the cooperatives have grown in size and scope of operation they have found that the provincial garb under which they were operating often just did not suit their methods of operation. This has necessitated the securing of private bills of many legislatures in the various provinces. As the Honourable Mr. Basford has indicated, whenever it is necessary to do anything with a private bill it requires another act of the legislature, which is not only time consuming but fairly costly and really should not be required of a continued type of operation.

Also, with the growth of cooperatives across provincial boundaries the differences in provincial cooperative legislation have led to difficult situations in complying with all provincial requirements. This does not mean that there is no need for provincial legislation, which is certainly still required and will continue to be used by most cooperatives.

One example of the necessity to use federal legislation occurred in 1964. It was then found necessary to approach Mr. Lesage and work with him under the Canada Corporations Act to secure a federal charter establishing a co-operative fertilizer manufacturing plant in western Canada. The provincial cooperative acts are not sufficiently broad in scope to provide for manufacturing. This meant that cooperatives had either to wait until the following session of the Alberta Legislature, in that case, or apply for a letters patent charter under the Canada Corporations Act. It was with some difficulty that we convinced Mr. Lesage that he should give us a charter at that time. His criticism really was justified, though I must say that his co-operation was excellent. We finally obtained a letters patent charter and the co-operative will be going under the federal Canada Cooperative Associations Act as soon as it is able to do so.

In addition there are a number of interprovincial supply cooperatives which have been incorporated under the Canada Corporations Act because, generally speaking, the provincial acts were not wide enough in scope to permit their operation. This is part of the reason, Mr. Chairman, for desiring a federal cooperatives act.

The Acting Chairman: Could a provincially incorporated cooperative operate effectively using extra-provincial licences in other provinces than that of its incorporation?

Mr. Dierker: Providing that the act under which it was incorporated was sufficiently broad to enable it to have the corporate powers to operate as it wished. As I mentioned in the case of manufacturing facilities, the provincial acts are not sufficiently broad to give these powers, At least, there is some real question as to whether they are that broad.

Also, in the registration interprovincially of provincial cooperatives there have been practical administrative difficulties experienced in registering cooperatives back and forth and the necessary requirements for registration imposed on the cooperatives.

Senator Connolly (Ottawa West): Is the practice of using extra-provincial licences resorted to frequently in connection with cooperatives?

Mr. Dierker: When you use the word frequently I would have to say no in relation to the number of cooperatives that actually exist, senator. As you appreciate, there are not that many large cooperatives which are supplying provincial cooperatives.

The Acting Chairman: I notice under clause 23 that the ancillary powers to be granted by this bill are really very extensive. They are probably as extensive as those contained in the Canada Corporations Act, if not more so. Are these broader than those generally found in provincial legislation?

Mr. Dierker: Yes, Mr. Chairman, they are. I think it is a fair comment to say that the bill was drafted in a form whereby it will apply to all types of cooperative operation envisaged in the future without amending the bill. It also provides for a very flexible type of administration.

Senator Argue: Who are members of the Cooperative Union of Canada? All the cooperatives or almost all?

Mr. W. B. Melvin, President, Co-Operative Union of Canada: The Co-operative Union of Canada has in membership about 35 organizations which are either provincial or regional in nature and scope and a few that are also national. Through them their members find an involvement in the co-op movement of Canada.

To be a little more specific, it includes the grain marketing pools, Maritime cooperative services, federated cooperative services in western Canada, three cooperative insurance organizations. It is quite a variety, including some fish marketing organizations, one on the west coast and one in the Maritimes, the United Maritime Fishermen.

It is confined in its membership to the English-speaking sector, as we term it, of the cooperative movement. Le Conseil Canadien de la Coopération is the organization representing the French-speaking sector.

Mr. Dierker: Mr. Chairman, if I might add a comment with respect to Senator Argue's question. In so far as Le Conseil Canadien de la Coopération is concerned, we also worked very closely with this group in the building up of this bill. Unfortunately, Mr. Leger, the president of that organization, could not be here today.

Senator Argue: Is the legislation equally applicable to them, or could they make equal use of it once it is law?

Mr. Dierker: That is right.

Senator Burchill: Does this legislation have anything to do with the national association? It does not refer to that at all, does it?

Mr. Dierker: Senator, I am not sure I understand the question when you say national association.

Senator Burchill: You gentlemen referred to the national association of the various cooperatives.

Mr. Dierker: The Co-operative Union of Canada.

Senator Burchill: Yes, exactly; this legislation does not deal with that, does it?

Mr. Dierker: The Co-operative Union of Canada will become one of the cooperatives under this bill.

Mr. Melvin: It is presently incorporated as a Part II company under the Canada Corporations Act. When this legislation is enacted we would seek continuation, is the term I believe, under this act.

Senator Burchill: Is it now established under the Canada Corporations Act?

Mr. Melvin: Yes. If I may say so, it is an example of the problem we have. We could find no other home, so we went there. We would be very happy to find a home under this legislation if it were enacted.

The Acting Chairman: Your present members would become members of the new cooperative association under this act, I presume?

Mr. Melvin: Yes, I believe continuation is the term; we would continue, but we would be under this act instead of the Canada Corporations Act.

Senator Carter: Does this act not provide for a certificate of continuation?

The Acting Chairman: Yes.

Senator Carter: So you get a certificate from the minister and that automatically puts you under this bill?

Senator Macnaughton: After application.

Mr. Melvin: Yes.

The Acting Chairman: Are there any other questions?

Senator Argue: Without disclosing any trade secrets, could Mr. Melvin give us a brief picture of what he expects the co-op movement will be doing with this legislation? They have been wanting it for a long time and now they are going to get it. Just how useful will it be? Will it help with expansion, will it help co-op's pay their way, pay dividends, etc.? Will it be just a very tiny help?

Mr. Melvin: Earlier you remarked on the fact that cooperatives are having to grow larger in order to be efficient and hold their place and do their job in our society. This is very true. There has been quite a large development in recent years for organizations to amalgamate, or for mergers to take place, exactly for this reason, to do a good job. An illustration might be the fact that the wholesale organization in Western Canada, Federated Cooperatives Limited, now operates throughout the entire western region, the four western provinces. It was originally a provincial organization and contained within provincial boundaries. Under those circumstances provincal law was quite adequate in that day. Now it is not. We have one insurance organization that is operating throughout the country. I am sure it will very seriously consider coming under this legislation at the appropriate time. I feel, and others in our organization share the feeling, that this legislation will make it possible for us to operate more efficiently and to do the job we envisage for the people that belong to our cooperatives.

I would like to make this point if I may, Mr. Chairman. Although the regional organizations that I have mentioned are operating over larger territories, the base on which they stand is still the local cooperative back in the community, whatever the community may be.

Senator Argue: And still will be.

Mr. Melvin: And will continue to be. But they need more effective instruments to serve them than we have had in the past, and I am sure this legislation will help us very much in this regard.

Senator Argue: Perhaps I might bring just a wee bit of information to the committee, which underlines perhaps the need of this being done, and ask again whether it will do the job. The province I come from, Saskatchewan, has been at least one of the leading provinces in the co-op movement. I am a member of all kinds of co-ops, and I have never really stopped to count how many. As I get their annual reports I find more and more of them in what I would say would be very serious financial difficulties. One of the great co-ops in Regina has a turnover of $5 million and is losing money; the big co-op in Saskatoon has a turnover of $10 million and is losing money.

I hope I am wrong, but I am afraid that the investments by way of savings of many co-op members in some of our tiny co-ops throughout Saskatchewan are in danger and, to use a trade name, these little co-ops may be facing bankruptcy. I hope I am wrong, but some of them are not paying out any more dividends; even estates are not always able to claim, as I understand it, the moneys that are invested in these local co-ops. I am just wondering if this just might do the job. I think there is a big job to be done.

Secondly, I wonder if the co-op movement generally is doing any research in depth into perhaps some new and different policies to meet a new and different situation. Mr. Melvin can correct me if he thinks I am wrong, but I think one of the great difficulties facing the co-op movement is that when they go out to finance, by and large they pay going rates of interest—8, 10 or 12 per cent. Many corporations are able to finance through issues of shares, and at least initially are not obliged to have this fixed charge. I wonder if there are any new policies and new undertakings coming up that will really put the co-op movement in a competitive position. Right now I do not think the co-op in a general sense is effectively competing with ordinary business organizations.

Senator Connolly (Ottawa West): Before Mr. Melvin answers that, could I ask Senator Argue a question, because he has supplied information. I am afraid I do not know too much about the structure of the co-operative movement, as he does, but it is true of corporations that they can go and get equity capital, share capital, and normally pay no interest for that. This is the investment of the people who buy the shares. Is there nothing comparable in the co-op movement? Do you not buy a interest in a cooperative and have that as a sort of equity investment?

Senator Argue: That is really for Mr. Melvin. My little experience is that a co-op member puts in $5 or $10, a very nominal fee, and the co-op gets going.

Senator Connolly (Ottawa West): Is that a loan?

Senator Argue: No, it is a share, an investment in one share. The co-op then gets going; it makes some money; on the money it makes it very often declares a dividend: it says, "Hazen Argue bought from the co-op $1,000 worth of stock. We are paying him a five per cent dividend of $50," but they keep my $50 to help the co-op grow. So I pay income tax on the $50, and in the meantime they have got it. That is all right as a financial means when the savings are there, but the savings no longer seem to be there in any real sense; in fact, there are many real losses. So when the co-op wants to expand it has to go out into the money market, or some other place, and borrow money at a fixed rate. Senator Connolly asked me the question. I am just a local farmer on a local co-op and I do not know all about it, but we have the witnesses here. That is my impression.

Senator Connolly (Ottawa West): I imagine the witness would confirm what Senator Argue has said.

Mr. Melvin: I would like to make a general comment, if I could, and then perhaps ask Mr. Dierker if he could be more specific, because he is working continuously with the cooperatives in this area.

The general comment I would like to make is that the cooperative movement and the Co-op Union of Canada recognize exactly the kind of thing Senator Argue is saying. We are in a very different kind of environment and atmosphere than we were when cooperatives were started. The little place in the small community, or on the back street and so on, just does not fit any more. The organizations with which we compete for business and so on are well organized, they are extensive, and we must be as efficient as they are to do our job.

In the past year we have had a number of meetings to examine this very problem, and part of the solution as we see it is developing larger units, not necessarily out at the front line, but larger back-up units that can provide services of many kinds more efficiently than can a small one. I used Federated Cooperatives as an example. A provincial operation was adequate at one time, but it is not now in the kind of country in which we are living. This is progress I feel. However, I think it would be more helpful to you if I asked Mr. Dierker out of his experience from day to day, working in the legal field and so on with cooperatives, to make some comments.

Senator Argue: Before you leave that, would you care to comment on the general statement I made about financing, that co-ops must often borrow money today at what is often a high rate of interest?

Mr. Melvin: This is true.

Senator Argue: As a major means of financing rather than as in the past perhaps when they have been able to obtain it by retaining profits or savings, whichever you would wish to call it.

Mr. Melvin: I think we would hope that historically we have had some role or some part to play in the bringing down of margins so that people might be served at less cost. I suppose in a sense we have helped to bring about our own present problem, to which you refer. It is quite true that the margins are changing and you have to look elsewhere for the financing, and this very often takes us to the general market. Maybe Mr. Dierker could comment, if I may ask him.

Senator Welch: Is this plan going to help the situation any?

Mr. Melvin: I think it will help, because it will facilitate the kind of reorganization we need. This legislation will make to easier to organize our back-up organiztions, our wholesales and other organizations of that kind on an interprovincial basis, which is what we must have, if we are going to be strong enough to do the job we have set out to do.

May I make one other comment, sir?

The Acting Chairman: Please.

Mr. Melvin: It is rather general in nature, I realize; it is not a sort of day-to-day business kind of consideration; but I feel strongly, and I know that others do, that up until the present time, or let us say up until the possible enactment of this legislation, cooperatives have really been in a little bit of a wilderness in Canada. The ordinary joint stock kind of organization is recognized in law; mutual organizations are recognized in law and so are other types of fraternal organizations and so on, particularly in the insurance field with which I am a bit familiar. But the cooperative as such has, federally, not been recognized by having a statute which would give it a home. This for us is quite important. Perhaps it is only psychological, but psychology is pretty important. The point is that it would give us a home.

I work for an organization which is a federally incorporated cooperative company; but it is a company, and we had to use the Canada Corporations Act; with the assistance of the officers of the department we are able to make some provision in the letters patent and in our by-laws that gave us cooperative characteristics. But they were not recognized in law by a general statute. We had to take a statute and try to mould it to the extent that it was possible of suit our purposes.

This kind of legislation would give the cooperative movement a home in Canada federally. We now have provincial homes but we have some other jobs to do that require a federal statute. this is our feeling.

Mr. Dierker: I should like to make one or two comments in reply to the questions raised by Senator Argue. Before doing that perhaps I should advise the honourable senators that Mr. Melvin is also Secretary of CIS Limited, a management company for a number of cooperative insurance companies; and when he talks about his employer that is the company he is speaking about. That is in addition to his office as President of the Co-operative Union of Canada.

Senator Argue, your questions have been primarily directed to us as a result of your experiences in Saskatchewan. I should tell you that there is a task force among the Saskatchewan cooperatives now established with a view to considering a form of centralized retail operation under the Canada Cooperative Associations Act, if it becomes law. Otherwise it will be under some other garment if some other garment can be found. It is hoped that by setting up a formula such as that, and the collectively owning of the shares, assets and the various investments of the cooperative members of western Canada, that some of the economics that you referred to can be achieved.

With regard to the issuing of share capital by cooperatives, this is not unknown. United Cooperatives of Ontario, which is a cooperative which may come under this act, does in fact issue a preference share for financing purposes. Again, it is a type of debt issue, because there is a fixed return on preference shares.

Of course you will be appreciative of the fact, though many of the honourable senators may not be, that it is difficult in a cooperative to issue an equity share because of the very nature of equity shares in a cooperative, whereby voting is restricted and capital gains, so-called, if any, are restricted, if not in fact non-existent, so that, consequently, the cooperative shares really have no attraction to the investor.

United Grain Growers has been experimenting, as you know, senator, with a form of equity share with which they have had some success, and it may be that that pattern will be looked at by other cooperatives. I can tell you that this matter is under very careful consideration at this time for the reasons that you have outlined.

Senator Connolly (Ottawa West): Mr. Chairman, we have before this committee very frequently companies both large and small who play a vital part in the economy of this country. The large corporation, as a company, usually has little difficulty with its financing. It goes to the markets either for equity or for debt securities; it borrows at home; it borrows abroad; it has large ramifications. Its primary motivation is profit. That is the reason for its existence. It is the trustee acts of the various provinces that force it into this position.

As I understand the cooperative, the reason for its existence is that the cooperative is primarily formulated to help people who are not as well fixed as the element in the community that can invest in corporate securities of various kinds. It is to help primarily the poor, perhaps. It is to help the people who otherwise could not achieve certain social and economic objectives unless the cooperative were there.

I think that is the distinction between the philosophies of the two types or organization. Am I right on that so far?

Mr. Melvin: Yes, senator.

Senator Connolly (Ottawa West): Do you see a development in Canada where the cooperative movement is going to be oriented more towards helping to produce profits than helping people to help themselves?

Senator Kinley: Both.

Mr. Melvin: Well, you referred, Senator Connolly, to assisting the poor to help themselves.

Senator Connolly (Ottawa West): I know this does not apply in Saskatchewan, because out there they are all rich.

Senator Argue: No, we just have a lot of ordinary people. That is all. You do not have to be poor to belong to a cooperative.

Mr. Melvin: I must say in all honesty that cooperative organizations find it difficult to assist those who are

second or third generation poor. I am not sure of the proper sociological term, but it is difficult to assist the poor who are second or third generation poor, those for whom poverty has become almost a way of life. They require other assistance. Cooperatives have a role to play here, however, because their methods can be applied.

Senator Connolly (Ottawa West): Agreed.

Mr. Melvin: But to generate the necessary strength to do this job within themselves—I think cooperatives have not that capability. However, we are able to give assistance and to provide a way of self-help to people who have some means. They may be poor, but they have the means of improving their position. They may have ability or have some small monetary means or some bit of possession—land or whatever it may be.

Senator Connolly (Ottawa West): Or it may be something that they produce.

Mr. Melvin: But at any rate there are the tools with which to work. The cooperatives are also serving a good many of the people who are in what you might call the lower-middle income stratum of society. I hope I am addressing myself to your question.

Senator Connolly (Ottawa West): You are doing all right.

Mr. Melvin: But the possibility of doing something for those people who are locked into poverty seems to be beyond our capacity, other than to provide a method.

Senator Connolly (Ottawa West): You are on the fringe of that area, I take it—perhaps the upper fringe.

Mr. Melvin: I would think so. One group which we have been able to assist, and which we continue to assist today, is the native population of various parts of our country, and particularly in northern Saskatchewan and northern Manitoba. The cooperative method generally has been applied to their situation with a good deal of success. Mr. Phalen has had actual experience in that area.

Senator Connolly (Ottawa West): I was thinking primarily of the cooperative movement that was developed in Nova Scotia under the aegis of St. Francis Xavier University. I think that that was designed primarily to help the fishermen and farmers down there who were not organized in any way. They were certainly on the lower rung of the economic ladder, and I gather the movement has not only been successful there, but the idea has been exported. I have found it in various parts of the world to where specialists from there have gone to assist in the establishment of co-operative movements comparable to the one that was established originally by the Cody people.

Mr. Melvin: Yes, the Cody International Institute, which has grown out of that program at St. Francis Xavier University, is renowned as a centre for training of people from abroad.

Senator Connolly (Ottawa West): Did you by any chance appear before the Special Committee of the Senate on Poverty?

Mr. Melvin: Yes, we did, and we presented a brief. I might also add that the Saskatchewan Cooperative Credit Association, which is one of our member organizations also appeared and presented a brief which was considered to be a very thoughtful and helpful document. The chairman of the committee mentioned this.

Senator Argue: That is the credit union end of it.

Mr. Melvin: Yes, it ties the credit unions and the cooperatives together.

Senator Welch: I should like to make one remark regarding the cooperatives in Nova Scotia to clarify what Senator Connolly said. I cannot talk about the fish end of it, but I can talk about the agricultural end of it. In Nova Scotia they have built up a very large agricultural cooperative. It is a very nice thing for the cooperative. It is worth a lot of money. Although it did lose some money this year, it has a great reserve. As far as shippers are concerned, they are not doing as well through the cooperative as they were when they were shipping themselves or through other companies. All I can see the cooperatives doing in the agricultural area of Nova Scotia is diminishing the number of people who used to ship. When a shipper joins a cooperative it means that we lose another of the fellows who gave us that same service. It takes practically all of the money earned to operate the cooperative, especially when they are borrowing money at 8 or 9 per cent. I cannot see where we would be very much worse off if the cooperatives folded tomorrow.

Mr. Melvin: I do not think I am aware of this particular situation, senator.

Mr. Dierker: Perhaps I could make one general comment. I am certainly not awure of the factual situation of which you are speaking. However, there is one thing that you must keep in mind, senator, and that is that at least to this point in time the cooperative system is the one that has been devised whereby the producer himself will become an owner of that facility that you have been talking about. You have indicated that it is a facility of some size, so the shipper will have a portion of ownership in this.

Senator Welch: Yes, you have a portion of the ownership, but you do not get anything in return. I might own a part of the cooperative, but I do not get one blessed thing in return. I do not get any interest. I get absolutely nothing. I put my money in there, and there it is.

Senator Connolly (Ottawa West): You get the service.

Senator Welch: I get the same service I can get around the corner from anybody else.

Senator Macnaughton: You get moral satisfaction.

Senator Burchill: Like Senator Welch, I am interested in cooperatives. Is not good management the answer to

the success of a cooperative as well as it is to the success of a credit union? That has been my experience in our part of the country. Is not that the final answer?

Mr. Melvin: Mr. Chairman, it is certainly a very large part of the final answer.

Mr. J. T. Phalen, General Secretary, Credit Cooperative Union of Canada: Mr. Chairman, a cooperative is people trying to solve problems. We have heard discussions like this around similar tables across the country. The question is: What are the problems and what can we do about them. The senator's point of good management is a key answer.

Senator Welch: I should like to ask one more question. Is this legislation the brain child of the task force that covered Canada during the last two or three years?

The Acting Chairman: Are you referring to the Special Joint Committee on Consumer Credit, senator?

Senator Welch: No, I think they called themselves the task force. They crossed Canada, and they put out a book entitled "Agriculture in the Seventies".

Mr. Phalen: That was the agricultural task force.

The Acting Chairman: I think not, senator. I think the recommendation that this legislation be enacted was contained in the report of the Special Joint Committee on Consumer Credit, which was published about four years ago.

Senator Connolly (Ottawa West): These witnesses will not take the same dim view of the Senate and its committees that the minister jokingly took.

The Acting Chairman: Apparently there are no further questions, gentlemen, so I will thank you for your attendance here this morning. We appreciate it very much. Our interest in your problems is evident from the questions put to you.

I asked Mr. Lesage and Mr. Tassé to remain, and they have very kindly done so. May we turn our attention now to the bill itself. It is a document of 107 pages which you will find on the table in front of you. Are there any questions as to specific sections of the bill? Perhaps I might start off by asking either Mr. Lesage or Mr. Tassé a question. Our witnesses referred to cooperative mutual insurance companies, and I was wondering if those companies fall within section 5(1)(c), which is a prohibitory section of this bill, or do they operate in some other manner that allows them incorporation?

Mr. Roger Tasse, Assistant Deputy Minister, Department of Consumer and Corporate Affairs: They would not have the right to come under this bill. They could come under the Canadian and British Insurance Companies Act if they are organized federally.

The Acting Chairman: They would have to come under the Canadian and British Insurance Companies Act rather than this legislation?

Mr. Tasse: That is true, Mr. Chairman.

The Acting Chairman: Are there any other questions the members of the committee would like to direct to our witnesses?

Senator Kinley: Mr. Chairman, are the directors of the insurance company appointed by the cooperative? I think that when I was in the Commons they were appointed by statute.

The Acting Chairman: I am afraid I cannot answer that question.

Senator Kinley: I think the reason for it was that they wanted them under the blanket of their organization, and that sort of thing. I remember that when I was in the Commons it was an issue. The directors were not appointed by the cooperatives. Is that not true?

The Acting Chairman: I doubt that these witnesses would be familiar with that aspect of the matter.

Senator Kinley: I thought you were dealing with insurance.

The Acting Chairman: No, we were not.

Senator Kinley: They have an insurance company.

The Acting Chairman: Yes; as to the details of that insurance company our witnesses would not be competent.

Senator Kinley: Is it provincial? It used to be federal when I was in the House of Commons.

Senator Macnaughton: Mr. Chairman, we have 138 such clauses in this bill; are we to go through it clause by clause?

The Acting Chairman: Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Acting Chairman: Honourable senators, we have also referred to this committee Bill C-174, to establish the Tax Review Board to which Senator Connolly (Ottawa West) spoke yesterday on second reading. Mr. Ainslie of the Department of Justice is here. The time is now 10.45 a.m. Would you prefer to deal with this bill this morning? The committee is meeting on the Canada Grain Act tomorrow or Friday morning.

Senator Macnaughton: May I suggest that we defer the bill, Mr. Chairman. There is an important conference this morning.

The committee adjourned.

Ottawa, Thursday, December 17, 1970

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-174, an act respecting the Tax Review Board, and Bill C-175, an act respecting Grain, met this day at 10 a.m. to give consideration to the bills.

Hon. Daniel A. Lang (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, this morning we have two bills before us; firstly, the Tax Review Board Act; and secondly, an Act Respecting Grain.

In connection with the first mentioned act we have Mr. G. W. Ainslie here, the Assistant Deputy Attorney General. Without further ado, I would ask Mr. Ainslie briefly to review the provisions of this bill. I think that he is the man who is quite competent to answer any questions that we have as to its technical or legal implications.

Senator Connolly (Ottawa West): You are certainly right on that, Mr. Chairman.

Mr. G. W. Ainslie, Assistant Deputy Attorney General: Mr. Chairman, as Senator Connolly advised the Senate on second reading, the purpose of this bill is to update the provisions of the Income Tax Act, the Estate Tax Act and the Canada Pension Plan in relation to appeals to an administrative tribunal.

As you are undoubtedly aware, the Carter Royal Commission on Taxation had recommended the creation of a tax court. They recommended there should be a tax court with the right of appeal to a panel of three judges. They contemplated the scheme would be that the appeal would be to the Exchequer Court. With the new Federal Court bill we now have a tax court which is the trial division of the new Federal Court, and there will then be an appeal from that court to the Court of Appeal.

Having done that, there then arose the question as to whether or not there should still be kept an administrative tribunal to which a taxpayer, at his option, could go, rather than going directly to a court of law. I believe, as was mentioned in the Senate, this was the original idea that was advocated by the Senate in 1946, and as far as the officials of the Government are concerned we felt that there was much merit in having this scheme, whereby you had a tribunal and a taxpayer, at his option, could decide to go to either the tribunal or to the court.

With the administration of the Tax Appeal Board it had been felt that there was perhaps some difficulty in the fact that the tenure of the members of the board was for a period not exceeding ten years. This provision has now been changed so that the people appointed to the new board will have tenure until seventy.

Senator Beaubien: That is, until 70 years of age?

Mr. Ainslie: Yes. In other words, they will have a security of tenure that they did not have in the Tax Appeal Board.

Senator Connolly (Ottawa West): It will be the same as applies to judges of the Federal Court.

Mr. Ainslie: Yes. There is also provision whereby the members of the new board will be entitled to a pension on the same basis as a judge's pension. Those are the first two significant changes.

Another change that has been made is to make the board responsible to the Attorney General rather than to the Minister of National Revenue. The Carter Royal Commission felt, under the existing scheme, that it was undesirable that the board should in fact and in law report to the minister who was always a party in the proceedings before it.

There is also in the act a provision whereby either the chairman or the assistant chairman must be a person who is versed in the laws of the Province of Quebec. Again, this is a matter of some importance since the board has jurisdiction in respect of appeals under the Estate Tax Act. In a great number of appeals under the Estate Tax Act the issue is often a question of law in relation to property and civil rights, as opposed to the statutory provisions of the Estate Tax Act.

In addition, there are provisions in the bill to indicate that the board is to act in an expeditious and informal manner, so that the parties appealing to the board will have an assurance that they can have their appeal heard in a cheap and inexpensive manner.

The other major provision that I should like to bring to your attention, Mr. Chairman, is the provison whereby the Income Tax Act is to be amended so that if there is an appeal to the board, and if the minister loses the appeal, and if the amount of tax involved. . .

Senator Connolly (Ottawa West): Or if he makes it.

Mr. Ainslie: Yes. If the amount of tax involved does not exceed $2,500, and the minister appeals that decision to the court, then the taxpayer will receive his costs in any event of the cause. There have been stiuations where the amount of money involved was very small but where the interpretation of a particular section of the act affected millions of taxpayers. If the minister is in the position where he feels he must appeal in order to have the law adjudicated upon then the taxpayer will have the assurance that his costs in the Federal Court will be paid in any event of the cause. This is to alleviate the feeling that people sometimes have that if they take their appeal to the board and are successful they might then be faced with the prospect of the minister's appealing to the Exchequer Court which might reverse the board's decision, and if the court reversed the board then the normal rule would be that the taxpayer would have to pay the full costs.

Senator Kinley: Is there anything in the bill with respect to the personnel of the board? Are they all to be lawyers?

Mr. Ainslie: The provision in relation to the board is that the chairman and the assistant chairman must be lawyers. I direct your attention to clause 4(2) which provides:

> No member shall be designated as Chairman or Assistant Chairman unless he is or has been
>
> (a) a judge of a superior court of Canada or of a superior, county or district court of a province, or
>
> (b) a barrister or advocate of not less than ten years' standing at the bar of any of the provinces. . .

That is a provision in relation to only the chairman and the assistant chairman, and it is the same as under the existing act. So, other members who are not necessarily lawyers could be appointed.

Senator Kinley: Chartered accountants, for example, could be appointed as members?

Mr. Ainslie: They are not precluded from being appointed to the board under this bill.

Senator Beaubien: How many members of the present Tax Appeal Board are not members of the legal profession?

Mr. Ainslie: My understanding is—and I stand to be corrected—that all of the members on the present board are, in fact, lawyers. However, I am not certain, and I may be wrong there.

Senator Kinley: The chairman gets $24,000 a year.

Mr. Ainslie: There is provision there for the Governor in Council to fix the salary provided it shall be at least $24,000 a year.

Senator Kinley: I think the Senate ought to take notice of that.

Senator Connolly (Ottawa West): Mr. Chairman, may I ask the witness a question arising out of a point he made a little earlier, and which is not quite clear to me from my reading of the section. The minister is responsible for costs in an appeal which he takes to the Federal Court when the amount of the tax involved is $2,500 or less. Suppose for the sake of argument that the minister finds that the Appeal Division of the Federal Court has not given him the kind of decision he feels is warranted and that he should appeal further. In that event is the taxpayer going to be saddled with the costs that are involved in either the Appeal Division of the Federal Court of Canada, or in the Supreme Court of Canada should the minister go that far?

Mr. Ainslie: Senator Connolly, I wonder if I could answer that question by saying that in my view the word "court" in the new section 101 of the Income Tax Act, which is to be found on page 13 of the bill, is sufficiently broad as to include the court of appeal. In other words, with this section incorporated in the Income Tax Act, I see no difficulty in regard to the court of appeal.

Now, in regard to an appeal to the Supreme Court of Canada—I am sorry for not having with me the new Federal Court Act, but I think I am correct in saying that one would have to obtain leave of that court because the amount in controversy would be $2,500. The practice that has applied, certainly in the United Kingdom and I assume that as a matter of course the court in exercising would only grant leave on conditions, and I would assume that as a matter of course the court in exercising its discretion would allow the appeal provided that the minister undertook to pay the costs.

Senator Connolly (Ottawa West): Yes, but if we say that in the Senate, or if a witness says that before a committee of the Senate, we do not bind the court, because it is a discretionary matter.

Mr. Ainslie: I appreciate that.

Senator Connolly (Ottawa West): However, I think that perhaps it is all right.

Mr. Ainslie: May I say, sir, that there was one appeal in respect to which we had to obtain the leave of the Supreme Court of Canada, and in that case leave was, in fact, granted on the basis that the minister had to pay the solicitor-client costs throughout.

Senator Connolly (Ottawa West): The solicitor-client costs?

Mr. Ainslie: Yes, that was the order. It was a very small amount that was in controversy—it was, in fact, $25.00—but it involved a question of whether a particular plan was a deferred profit-sharing plan or an employee's profit-sharing plan, and it involved 2,000 or 3,000 employees. So, it was a matter of some importance, and the court there did give leave, but it was on the terms of the minister having to pay the costs.

Senator Cook: Who won?

Mr. Ainslie: I am sorry, but I cannot tell you now. I have forgotten the result.

Senator Beaubien: Mr. Ainslie, will the Tax Review Board be in a position to give a ruling? If a taxpayer is contemplating some particular transaction and wants to know the tax implications, can he go to the board and obtain a ruling beforehand?

Mr. Ainslie: No, this board will deal only with appeals from assessments made by the minister. In other words, the procedure will remain the same. The jurisdiction of the board is limited. There will have to be an assessment, and after the assessment an objection, and then the minister will have to refuse to accede to the objection, and then in that case the taxpayer will appeal to the board, but the board will have no jurisdiction to entertain questions of law or to give a ruling at the wish of a taxpayer.

Senator Beaubien: I think that that is terribly important. Many people go to the Department for a ruling, and when they get it they are told that it is not binding.

Senator Connolly (Ottawa West): Many people can go to the Department and not get a ruling.

Senator Beaubien: Yes, they will either not give you a ruling or give you a ruling that is not binding.

Senator Benidickson: It is only recently that you have been able to obtain a ruling from the department.

Senator Beaubien: This board seems to me to be the place to which you should be able to go.

Senator Connolly (Ottawa West): With all due respect to Senator Beaubien's views, Mr. Chairman—and I can understand why he puts them forward—if we try to change the character of the Board to the extent of giving

it power to give rulings before the fact, it would, I think, create a very cumbersome situation. I would prefer to see something in the Income Tax Act to cover Senator Beaubien's point. What he is talking about is something that may seriously affect business decisions.

The Acting Chairman: As I understand it, formal rulings are now made on request to the department, but I understand that they are all of dubious legal significance.

Senator Beaubien: They tell you that. I know of many cases where people have asked for their opinion, and where they have been told: "We think, but..."

Senator Kinley: Mr. Chairman, we know some of these things, but we want to get them on the record. I should like to ask Mr. Ainslie if it is possible to take an appeal against the discretion of the minister on class or kind.

Mr. Ainslie: No, sir, because the jurisdiction of this board is limited to appeals under the Income Tax Act. The discretion as to class or kind is a discretion exercised under the Customs Act.

Senator Kinley: By the minister.

Mr. Ainslie: Yes, sir, but there is no jurisdiction in this board to deal with customs matters; they go to the Tariff Board. I am sorry, but I am not familiar with the exact scope of the jurisdiction of the Tariff Board.

Senator Flynn: Perhaps there would be an appeal from the Tariff Board to the federal court.

Mr. Ainslie: Yes, there is.

Senator Kinley: My interest is that industries are given huge amounts in subsidiaries and a man who needs a machine to build up a viable plant seems to be in trouble getting it. The discrimination is not good.

Senator Connolly (Ottawa West): I think as a matter of practice though that within the customs department a ruling before the fact on class or kind before an importation is a relatively easy ruling to obtain. They will tell you very quickly before you import.

Senator Kinley: Well, I have had experience; I know you have to fight to get what you want.

Senator Connolly (Ottawa West): That is undoubtedly true in every case.

The Acting Chairman: Mr. Ainslie, probably the committee is more familiar with the appeal procedures under the Income Tax Act than those under the Canada Pension Plan Act and the Estate Tax Act. It might be useful if you would refer to the provisions as to how appeals are carried under those two acts.

Senator Cook: Clause 9. (1) provides:

> Where an appeal is made to the Board under any Act, the appeal shall be made in writing but no special form of petition or pleadings shall be required by the Board, unless the Act under which the appeal is made expressly otherwise provides.

What is the effect of that? I would have thought that dispensing with pleadings would make the matter extremely difficult.

Mr. Ainslie: The reason for that provision is twofold. Our experience has been that if the taxpayer has retained a solicitor prior to the filing of the notice of objection, the notice usually clearly sets forth the matters in dispute. It is then a waste of paper to require the solicitor or taxpayer to rewrite it.

Our experience has also been that if a taxpayer does not retain a solicitor for the preparation of the objection he normally does not do so for the preparation of the notice of appeal. Therefore, before the present board there are some notices of appeal that quite frankly really do not disclose the issues. The board is faced with the problem of whether it should act as a court and strike these documents out on the grounds that they have not complied with the rules of adequate pleading, which would defeat the whole purpose of the board and prevent it from being a tribunal of easy access.

Therefore we felt that on balance it would be preferable; there is a risk, but it would be preferable to allow the board to hear an appeal even though the notice of appeal or the document instituting the appeal is not one which would normally be expected from a solicitor.

Senator Connolly (Ottawa West): That has been the law for a long time.

Mr. Ainslie: That is correct, sir. The other point is that in our view no harm can come from this procedure. There is the appeal to the court so that in the long run it would encourage or facilitate individuals appealing to the board without the necessity of retaining a solicitor.

Senator Connolly (Ottawa West): What was your second reason?

Mr. Ainslie: The first one was just to dispense with the necessity of lawyers' offices having to retype the notice of objection. In 90 per cent of the cases the notice of appeal to the board is identical to the allegations of fact and the reasons contained in the notice of objection. There was a tremendous amount of paperwork involved.

Senator Benidickson: When Senator Connolly very ably outlined the procedures under the bill on second reading he intimated that it was the original intention with respect to the existing board that its procedures would be similarly very simple but that over the years formalities have developed. This, of course, makes it very plain that it is not the desire to have these procedures other than simple and inexpensive. Senator Connolly said that even an objection by letter would be adequate to put things in motion.

Mr. Ainslie: Yes, sir.

Senator Cook: That is my point; I am not raising any objection. An appeal is commenced in writing but it might emerge as an entirely different issue. If there are no pleadings the case may open and become an entirely different issue than was originated.

Mr. Ainslie: That is the risk that the Minister of National Revenue will run. However, in our view on balance the risk is very nominal because if the issue should turn out to be something entirely different...

Senator Cook: And of importance.

Mr. Ainslie: Then the taxpayer by failing to disclose adequately in his document the issue is inviting an appeal to the court. Therefore in the long run it would not be to the taxpayer's benefit to cloak or disguise the real matter in dispute.

The other point is that as a matter of practice I find that in most cases the department is well aware of the issue, because after the assessment has been filed the taxpayer is obliged to file a notice of objection with the minister and generally there is correspondence or interviews. Therefore in the majority of cases the real issue of fact or law between the parties is known before the case commences.

Senator Cook: The only one who would suffer hardship would be the poor old judge.

Senator Benidickson: The questions put by Senator Lang were very important and should be dealt with before we are diverted.

Mr. Ainslie: In regard to appeals under the Estate Tax Act, section 23 of the act provides that a person who has filed an objection to an assessment may appeal to the board. It also provides that the provisions fo the Income Tax Act regulating all matters in connection with an appeal under the Income Tax Act are to apply *mutatis mutandis* to the appeal under the Estate Tax Act. So that the procedure under the Estate Tax Act is the same as that under the Income Tax Act.

In regard to the Canada Pension Plan Act, section 37 gives a limited jurisdiction to the board to entertain an appeal in regard to the quantum of self-employed earnings. In other words, the Government wish to be in a position whereby income for the purposes of the Canada Pension Plan Act would be the same as that for the purposes of the Income Tax Act. It was felt that it would be undesirable to have one tribunal saying the income is X dollars and another arriving at a different amount.

For that reason section 37 of the Canada Pension Plan Act provides that:

> Subject to this Part and except as otherwise provided by regulation, the provisions of Divisions F, I and J of Part I of the *Income Tax Act* with respect to assessments,

I will leave something out,

> ... objections to assessments and appeals, ... apply *mutatis mutandis* in relation to any amount paid or payable as or on account of a contribution for a year in respect of self-employed earnings...

Have I answered the question satisfactorily, Mr. Chairman?

The Acting Chairman: Mr. Ainslie, I have an idea that there is an itinerant tribunal under the Canada Pension Plan Act consisting of three judges. I am not sure what appeals they hear.

Mr. Ainslie: The Canada Pension Appeal Board is established under the Canada Pension Plan Act. The jurisdiction of that board, I believe, is limited to the determination of the question of status as employee or self-employed. It also relates to the question of the amount of benefits payable under the act. However, that board does not have jurisdiction in regard to the narrow issue of determining the amount of income of a self-employed person.

The Acting Chairman: Are there any questions on this area?

Senator Connolly (Ottawa West): I think Senator Benidickson had another question.

Senator Benidickson: That was on another matter. Mr. Ainslie, I have not got *Hansard* in front of me, but my recollection of the very able speech Senator Connolly made on second reading is that he indicated that under the terms of this bill certain members of the existing Tax Appeal Board, notwithstanding that they have not filled their ten-year tenure, will be compulsorily retired. He also told us that they would have the right to render judgments. Notwithstanding their retirement, they will have the right to render judgments that have not been rendered. However, he indicated that there was a backlog. I think he only gave us the backlog for the board as a whole, for retiring and non-retiring members of the Tax Appeal Board. With respect to those that are retiring when this bill passes, have you any indication how many of them will likely render judgments following hearings that they undertook before retirement? I believe they retire on full pay.

Mr. Ainslie: The provisions are to be found in clause 18. You will see that subsection (3) provides:

> Each member of the Tax Appeal Board who is seventy years of age or older on the coming into force of this Act shall thereupon cease to hold office.

I think that is the provision you are referring to. I believe the other provision you are referring to is subsection (3) of clause 21, which provides:

> Each member of the Tax Appeal Board...may within six months after the coming into force of this Act and notwithstanding that he is not a member of the Tax Review Board, give decisions in respect of appeals heard by him prior to the coming into force of this Act.

I am unable to say just what would be the number of appeals the members of the board would be unable to give decisions on in six months. I have no information on that. I would assume, though, that the board could deal with the majority of the appeals. Again I must say that I have no information; I have not discussed this matter with the members of the board

Senator Carter: What happens to the cases that are left over? Do they have to start right from scratch again?

Mr. Ainslie: They would not have to start from scratch. The concluding provisions of subsection (3) of clause 21 provides:

> ...and where no decision is given within such six month period in respect of an appeal heard by any such member, the appeal shall be reheard.

Therefore, there would be a necessity for a re-hearing.

Senator Benidickson: You start right from the beginning then?

Mr. Ainslie: I would say that provision is sufficiently broad so that certainly you would not have to start from the beginning, in the sense that you would not have to file a new pleading. Similarly, the word "rehearing" would be broad enough, in my view, that if the parties consented thereto it could be argued on the basis of the transcript or of the evidence that had been taken before the previous member.

Senator Benidickson: We just rely on hope that those who are retired, and are on full pay, will during this six months period render judgments if their health permits.

Senator Connolly (Ottawa West): It might help the committee if I said this. I think I got this document from the Tax Appeal Board Registrar. I did not put it on the record in *Hansard* because I did not think it was appropriate to show how many cases a member of the board had under advisement. It shows the number and the names of the cases, I think, which each of them has under advisement at this time. It is not a big list in any case. I think this is just a ballpark guess, but I would say that perhaps then or fifteen at the outside would probably cover it. Many of these are perhaps not complicated cases, I would think; the decisions just had not been rendered up to the date I got the material. I can supply that to the committee; I can go and get it if it is necessary, or if individual senators would like to see it I would be glad to produce it. I did not think it was the kind of thing I should have put in *Hansard*.

Senator Cook: Very often a decision of the Tax Appeal Board is held up pending a current appeal to the Exchequer Court. There have been cases where they have waited because a similar case was under appeal to the Exchequer Court, after which decision they have rendered their own decision.

Senator Aird: I am not sure whether I missed the point made by Mr. Ainslie. I should like to refer him to clause 9(1), the last phrase of which says:

> ...unless the Act under which the appeal is made expressly otherwise provides.

Inasmuch as this bill seems to be directed to the Income Tax Act, the Canada Pension Plan and the Estate Tax Act, do you have any knowledge whether or not there is an express direction at this time as to the method of filing those appeals? In the event you do not have that knowledge, what is the intention, as it relates to each of these acts, of the respective departments? It seems to me this could very well, if it were so decided by the respective departments, take out this discretion, which seems to be the fundamental purpose of this bill.

The Acting Chairman: A good point.

Mr. Ainslie: I do not think it could depend on the discretion of the department. It would have to be an express provision in an act of Parliament, requiring either a particular form of pleading or that the appeal be instituted in a particular manner.

Senator Aird: That is my first question. Are those in being now?

Mr. Ainslie: Certainly they are not in being. There are provisions in relation to the manner in which the appeal is to be instituted.

Senator Aird: In each of these three acts?

Mr. Ainslie: Yes. I think it is fair to say it is primarily in the Income Tax Act, and the other acts incorporate the provisions *mutatis mutandis*.

The Acting Chairman: If I may interject, I think your point, Senator Aird, is that by amending the Income Tax Act one could defeat the purpose of the simplified form of proceedings established by this clause.

Senator Aird: That is correct.

Mr. Ainslie: I wonder if I could refer the members of the committee to, for instance, section 89 of the Income Tax Act which provides:

> An appeal to the Board shall be instituted by filing with the Registrar of the Tax Appeal Board or by sending by registered mail addressed to him at Ottawa three copies of a notice of appeal in such form as may be determined by the rules.

There you have a provision whereby there is an order to institute the appeal; you certainly have certain conditions precedent that have to be met, such as sending it by registered mail and things of that nature. Have I satisfactorily answered the question?

The Acting Chairman: Yes.

Senator Aird: You have answered my question in part, but the real purpose of this act is to simplify procedures. What I am concerned about is that some amendments to the Income Tax Act, the Canada Pension Plan Act or the Estate Tax Act might in effect from a practical point of view obviate the purpose of this act, if in fact they do otherwise provide.

Mr. Ainslie: Mr. Chairman, my answer to that is, of course, that would be the case if in fact Parliament at a subsequent date was to enact legislation under either the Income Tax Act or the Estate Tax Act. If Parliament was to specify, provided that notice of appeal must contain certain provisions, the way this is drafted those provisions would override the provisions of this bill.

The Acting Chairman: Or by order in council, I would gather, from that section you read in the Income Tax Act, which makes the proceedings as may be set out by regulation. I presume under that proviso, orders in council could make the proceedings very complicated without any necessity for amending the act itself.

Mr. Ainslie: The answer to that, Mr. Chairman, could be found in the new division (i) which is to be brought into force by virtue of the provisions to be found on page 11. You will find there that it provides how the appeal is to be made.

Senator Cook: Parliament may change its mind.

Senator Aird: We would agree that Parliament could change its mind. My first question is, has Parliament changed its mind before this act comes into effect? I am getting a partial answer as it relates to the Income Tax Act, but I have not, as far as I know, gotten an answer as to how it might apply to the Estate Tax Act or the Canada Pension Plan Act.

Mr. Ainslie: The answer is the same. Under both acts the scheme of both the Estate Tax Act and the Canada Pension Plan Act is that the appeal is governed by the provisions in the Income Tax Act. The answer I have given in regard to the Income Tax Act appeals...

Senator Aird: Is applicable across the board?

Mr. Ainslie: If I can direct your attention to section 23 of the Estate Tax Act: the provisions of the Income Tax Act relating all matters in connection with an appeal under section 59 of the Income Tax Act shall *mutatis mutandis* apply, so that the provisions of the Income Tax Act or the governing provisions will find a similar legislative intent in section 37 of the Canada Pension Plan Act.

The Acting Chairman: I think we are still concerned and that it is outstanding.

Senator Flynn: We will have to watch for any amendment which may be brought eventually.

Senator Cook: In one respect subsection (1) differs from subsection (2) because the latter says, "notwithstanding the provisions of the act". This has a different philosophy.

The Acting Chairman: They could potentially have a different philosophy.

Mr. Ainslie: I wonder if I might bring the attention of the committee to subclause (1), clause 11:

> Subject to the approval of the Governor in Council, the Board may make rules not inconsistent with this Act...

I merely wish to bring to your attention that the board under its own rules could not override the provisions of section 9(1) of the act.

Senator Connolly: Did the former law explicitly say that? I think it is always implicit that a regulation should be within the four corners of an act. Because you are enacting new legislation here I think you probably should put everything in it that you can. I wonder whether the Income Tax Act had that specific provision in it with respect to the Tax Appeal Board.

Mr. Ainslie: The provisions are to be found in subsection (1) of section 87 of the Income Tax Act which provides:

> The Board may, subject to the approval of the Governor in Council, make rules not inconsistent with this Act governing the carrying on of the business of the Board and practice and procedure in connection with appeals.

Senator Connolly: Thank you very much. You are just carrying that forward.

Mr. Ainslie: That is true.

The Chairman: Are there any other questions?

Senator Flynn: Mr. Chairman, I would like to come to section 18. I understand that the present members who are now over 70 would retire when this act becomes effective and would continue until the end of their term and receive the same salaries as they are receiving presently, and then they will be pensioned under the Public Service system. I understand that three out of five members will be retired because they are presently over 70. That leaves two members, who by the application of subsection (4) of section 18 will become members of the Appeal Board, but only for the remainder of the term for which they had been appointed or if they reach 70, whichever comes first. These two will be in a rather awkward position compared to those appointed for life. There will be three appointments for life and two will remain there for I don't know how many years. It seems to me that under those circumstances the least that can be done would be to give them the opportunity to retire now and get the same salary as the three who are forced to retire because they have reached the age of 70.

I am not suggesting that the Government should appoint them for life or until they reach 70, but it would appear to be fair to either appoint them as are the others or give them the opportunity to retire with full salary. I feel they will be in an awkward position in comparison with the new appointees.

Senator Benidickson: With due respect, Mr. Chairman, I do not quite agree with that. I do not know what the terms are from the point of view of years remaining in each of these cases, but I would just as soon get their services even if we have to pay the same remuneration as we are now paying to them until they do reach age 70. In addition, it seems to me that since they have a few years to go their experience would be of some value to the new members of the board.

Senator Flynn: I agree with that, but the point is that they could be appointed to the Tax Appeal Board the same as the three others who will be appointed under the act until they reach 70. The problem arises if they do not reach 70 before the end of their term of 10 years. Sup-

pose they had been appointed seven years ago. They are going to be there for only three years with members appointed until they reach 70. I do not see why the Government does not appoint them if they are qualified. Of course, the way to do it would be to strike out subparagraph (b) of clause 18(4).

Mr. Ainslie: I wonder if I might interject for a moment to say that my information in regard to the two members is that their terms will expire in November 1972 and in March 1972. That is my understanding.

Senator Flynn: If they have only two years to go, it is not too interesting.

Senator Beaubien: What age will they have at that time?

Senator Flynn: I know that one is 63 and the other is only 46. If they are qualified, I do not see why the Government does not appoint them to the Board.

The Acting Chairman: We do not know they ages, so it is hard to judge that.

Senator Flynn: I know they are 63 and 46 respectively.

The Acting Chairman: This seems not unlike our own situation in the Senate, where the age was amended. I notice that my new colleagues do not seem to suffer any disability.

Senator Flynn: This is not a problem for the witness but is really a problem for the Minister of Justice. I was wondering whether the Minister of Justice would not agree to appoint the two who are not yet 70, appoint them under subclause (4) until they reach the age of 70 years.

The Acting Chairman: Would it please you, Senator Flynn, if I gave an undertaking to speak to the Minister of Justice on that specific point?

Senator Flynn: Yes.

Senator Cook: What would have happened if this act had not come into force?

Senator Flynn: They would have retired in two years.

Senator Cook: But they would possibly have been re-appointed.

Senator Flynn: They would be with other members who are re-appointed for a term, not only until they reach 70. There is a mixture of lame ducks. It may not be entirely unfair but it puts them in a rather curious position with respect to the other members, the new members who would be appointed. So it could be done, Mr. Chairman, by deleting subparagraph (b) of subclause (4).

Senator Connolly (Ottawa West): Under the act as it now reads, I would think that if the minister, or the powers that be, so decide, both of these people whose terms expire in 1972 could be appointed under the terms of this bill and retired at 70.

Senator Flynn: They could be re-appointed at the end of 1972.

Senator Connolly (Ottawa West): Yes. They could be re-appointed at any time.

Senator Flynn: I do not know. If you read subclause (4).

Senator Connolly (Ottawa West): Perhaps they have to run out their term.

Senator Flynn: I think it would be for the minister to re-appoint them now. The way the act reads, you may wonder whether the Minister can appoint them again, becuase it says that their term will expire'—'that he will cease to be a member on the day on which the term for which he was last appointed to the Tax Appeal Board would, but for this act, have expired." They are already condemned.

Mr. Hopkins: Not forever, I would say.

Senator Flynn: Maybe not, but it sounds like that.

The Acting Chairman: I would be glad to express the concern of the committee on that point.

Senator Beaubien: Suppose the minister was trying to get rid of them.

Senator Flynn: That is what I was trying to find out.

Senator Cook: Does the witness know if there is any expectation that this bill will lead to an increased volume of work for the Board, more appeals?

Mr. Ainslie: It is very difficult to forecast. One of the purposes of putting in this provision in regard to cost was to try to make the Board more accessible. I think the problem is one which is up to the taxpayer's advisers. The trend of the statistics is that there is more litigation under the Income Tax Act, and it fluctuates from year to year at present as to whether the appeal is originally brought into the Board or originally brought into the court. This is something which is entirely in the discussion of the taxpayer and his advisers, so it is very difficult for me to make any forecast as to what the volume of the work would be.

The Acting Chairman: With the new income tax we may be expecting next year, I would think that the volume would be much greater.

Senator Benidickson: I have not read the details of the bill and I have forgotten what we were told with respect to the pension provisions for the members of the Tax Review Board, in comparison with the pension arrangements now existing with respect to the Tax Appeal Board and particularly as to whether both the contributions on the part of members of the Board, whether one is contributory and the other is non-contributory.

Mr. Ainslie: If I may answer that, Mr. Chairman, the present provisions that apply to the existing members will be found in section 96(1) of the Income Tax Act. It

deals with members of the Board who were contributing to the Civil Service Superannuation Act prior to their appointment. It provides:

> Notwithstanding any other statutory law, where a person who is appointed a member was immediately prior to his appointment a contributor under the Civil Service Superannuation Act, he continues while he is a member to be a contributor under the said Superannuation Act.

Subsection (4) provides that the Civil Service Superannuation Act is applicable to a member to whom subsection (1) does not apply as though the Board were listed in Schedule A to the act.

So the existing members are entitled to their pension pursuant to this provision, whereas under the new act the members will them become entitled to a pension...

Senator Flynn: Under the Judges Act.

Mr. Ainslie: Under the Judges Act, and that is to be found...

Senator Flynn: Section 6, paragraphs 2 and 3.

Senator Connolly (Ottawa West): I think it is section 53 of the Judges Act that sets out the details.

Senator Benidickson: Do the judges contribute to the pension?

Mr. Ainslie: No. The judges have a non-contributory scheme.

Senator Carter: What about the two lame ducks that Senator Flynn was talking about? Do they qualify for a pension when their term is up?

Mr. Ainslie: Yes, under the existing act.

Senator Flynn: Yes, but not under the Judges Act.

Mr. Ainslie: No, no.

Senator Carter: They are contributing to the Civil Service Pension Fund.

Senator Flynn: They will contribute for the remainder of their term, too.

Mr. Ainslie: And, Mr. Chairman, can I say that they will not lose any of the rights that they have under the Civil Service Superannuation Act.

Senator Carter: Unless they came from the Civil Service, they will have only ten years' contribution and their pension will be based only on that ten years.

Mr. Ainslie: That is correct.

Senator Benidickson: That was the contract under which they took the job on the Board.

Senator Flynn: Yes. I am not criticizing that, I am just thinking of the position now.

The Acting Chairman: If there are no further questions, I wonder if I might have a motion to report the bill.

It is proposed by Senator Connolly (Ottawa West) and seconded by Senator Beaubien, that we report the bill without amendment.

Mr. Ainslie, I wish to thank you very much, on behalf of the committee, for a most able and competent presentation of the information this morning. It has been most useful to us.

Senator Kinley: I think it is the best explanation we have had yet of a bill.

Senator Connolly (Ottawa West): Mr. Chairman, I hope that Senator Kinley's remarks will go on the record.

The Acting Chairman: That concludes the discussion on this bill.

Honourable senators, in respect of Bill C-175, we have with us the Honourable H. A. Olson, Minister of Agriculture, and Mr. C. R. Phillips, Director General, Production and Marketing Branch, Department of Agriculture.

Mr. Olson will give to us the general background of this piece of legislation and an explanation of it. In doing that, Mr. Minister, I hope you will comment on the new policies that might be embodied in Bill C-175. I might caution you, too, that members of this Standing Senate Committee on Banking, Trade and Commerce are not necessarily agricultural experts. I, for one, am not, and there are several others in the same position. We do, of course, have one or two outstanding experts on the committee with us here this morning, including Senator McNamara, Senator Hays and Senator Argue.

At the moment, Mr. Minister, we would appreciate it if you would make a brief reference to the general background behind the preceding legislation and comment on the philosophy behind it and how it is carried forward into this bill.

The Honourable Horace Andrew Olson, Minister of Agriculture: Thank you very much, Mr. Chairman. Honourable senators, I have a few points that I should like to raise with you this morning respecting Bill C-175, but I will not go into much detail, because this bill has been in the House of Commons since March of 1970.

Senator Connolly (Ottawa West): They are pretty slow over there, Mr. Minister

Hon. Mr. Olson: I prefer not to comment on that, Mr. Chairman.

Senator Connolly (Ottawa West): At least by comparison with the Senate.

Hon. Mr. Olson: There has been a great of discussion with all sectors of the industry respecting the changes in the Canada Grain Act.

Bill C-175 provides, as did its predecessor, Bill C-196 of the last session, what many people in the industry regard as the Magna Carta for the grain producers, particularly in that area administered by the Canadian Wheat Board. It is designed to provide grade standards for Canadian grain. It regulates the handling and storing of grain through the elevator system. It provides protection for the owners of grain stored in Canadian elevators. It

provides for the allocation of available railway cars among shipping points. It provides authority for the Governor in Council to direct the railway to provide railway cars for the delivery of grain.

As I said, Mr. Chairman, this bill was prepared after a great deal of consultation with all sectors of the industry involved in both the production side and the marketing of grain. The Department of Justice obtained for assistance in drafting this bill one of the most qualified lawyers in Canada in the area of grain marketing.

Mr. Chairman, this bill updates the Canada Grain Act which was passed in 1930, and, while there have been some amendments to that bill since 1930, there has not, until this proposal, been a major revision of the act since that time.

The significant changes in the bill are that it sets out the grade standards as a schedule to the act and makes that amendable by Order in Council. The current act has the grade standards in the act itself and they are, therefore, statutory and require an act of Parliament for their amendment. The purpose of this change, as I have said, is to provide machinery for much more rapid response to the needs of the market and of our customers. So the Canadian Wheat Board and the other grain merchandisers, knowing the requirements of their customers and the need for these changes from time to time, can make adjustments in the grades to satisfy those customer demands.

The bill also provides for the use of newer, more modern quality factors such as protein—and any other quality factors, if they become important to our customers—in the establishment of these grain standards.

The bill also provides the authority of the Board of Grain Commissioners, which, by the way, will be called the Canada Grain Commission under the new act. Moreover, that authority is broadened under this bill to give the Commission the authority to exercise a measure of control as the situation warrants over the entire grain elevator system, including facilities such as feed mills and elevators associated with the processing industry. The current act does not give this authority respecting feed mills and elevators associated with processing.

Bill C-175 also provides the legislative base for the block system and complete control over railway cars and grain movement; and it provides the flexibility to place under the authority of one minister, or one agency, the matter of the allocation of available railway cars among shipping points and among elevators.

I should like to emphasize here that this bill provides the legislative authority and base for this allocation of cars, but I should point out that it does not necessarily, and probably would not in most instances, be delegated to the new Canada Grain Commission but probably in many cases to the Canadian Wheat Board.

There has been a significant updating of the provisions to protect the interests of producers and elevator operators. There is provision for appeal of grades; provision for appeal against refusal by the Commission to issue elevator licences; for investigations, for public hearings and for appeals to the Exchequer Court.

That, Mr. Chairman, is a very brief resume of the major changes and the amendments in the authority that we seek from parliament with the passage of this bill.

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

Hon. Mr. Olson: If I may, Mr. Chairman, I will have distributed some mimeographed sheets comprising a summary of the information related to grain handling in Canada. The members of the committee might find this information useful.

Senator Carter: Is it the intention that this should be appended to the record of our proceedings?

The Acting Chairman: Well, I am looking at it for the first time now, but if the committee deems it worthwhile, we could certainly do so. The heading is "The Canadian Government Supervision of the Handling and Movement of Western Grain."

Hon. Mr. Olson: It is really some background information concerning that subject, and it could be added as an appendix if you so desire.

The Acting Chairman: This is probably for the benefit of senators such as Senator Connolly (Ottawa West) and myself.

Senator Benidickson: I would like to see it appended. (see attached Appendix to these proceedings). We had some very able speeches on second reading of the bill. Now, I do not know anything about grain marketing, but as a listener we heard quite a bit about what the various committees were doing, what our export prospects were and things of that kind. But in large part the speeches were, with respect, I thought directed in a broad way to the history of the grain business rather than being particularly directed to this bill. I think that to have on record somewhere a little historical information about the past, in this form, and about the Canadian Government supervision of handling and movement of western grain would be very useful.

The Acting Chairman: Is it the wish of the committee that it should be so appended?

Senator Carter: I so move.

Senator Aird: I second that.

Hon. Senators: Agreed.

The Acting Chairman: I agree with you, Senator Benidickson, particularly for people such as myself who come to this subject with such little knowledge of the historical development of the grain situation.

Senator Argue: This is not the historical development; this is just the situation as of this moment.

The Acting Chairman: That is true, but what I wanted to direct to the attention of this committee is this, that I think it would be of use if the compulsive sections, the operative compulsive sections on, say, grain producers and elevator operators in this act which must be the

backbone of the rest of the legislation—if our attention could be directed to those two areas. I know, for example, from the summary in front of me that a Delivery Permit Book is issued to each grain producer and that all country elevators in western Canada are required to be licenced by the Board of Grain Commissioners. I imagine that those two points are the nub of the act as they undoubtedly were of its predecessor act.

Hon. Mr. Olson: Yes, Mr. Chairman. With respect to the Delivery Permit Book mentioned in the first paragraph, this, of course, is a permit book that is issued to each producer and it is really administered by the Canadian Wheat Board, but the legislative authority for that permit system is not contained in this bill. There are no amendments dealing with that, with the one exception and that is to give effect to a fair distribution of access to the space in the elevator system provided under that section that deals with the allocation of railway boxcars.

I should mention that from time to time throughout the last few years there has been a committee set up within the industry, and, indeed, headed up by the Canadian Wheat Board to do this kind of thing. It has been called a "Transport Co-ordinator" in some cases, or a "Transport Committee" and it has operated rather effectively in my view. But it has really been, and here I am sure Senator McNamara will agree, an agreement to agree on these things without the statutory authority to allocate these boxcars in a tight situation. So, it has now been put in here because we would like the block system, and I could explain that if you like, to work effectively. We think we should have some base of authority in a statute to make that effective, although it has been working, in my opinion, reasonably well over these past few months on the basis of agreement to agree on it.

So far as the country elevators are concerned, it is not only the country elevators that have to be licenced. That is not new. That was in the previous Canada Grain Act. It includes what we describe as primary elevators, transfer elevators and terminal elevators and so on, and generally the provisions in the licencing section are that these elevators shall meet certain standards structurally and so on, so that they can in effect look after the grain properly while it is the elevators, and furthermore so that the Board of Grain Commissioners can in fact carry out the inspection requirements they need to do from time to time. This will involve such things as taking samples, making weigh-overs and doing audits of various kinds in those areas.

Senator Connolly (Ottawa West): Mr. Chairman, if I may interrupt the Minister for a moment. Here again I am like the other lawyers on the committee in that I know practically nothing about the grain trade except what I hear here. From time to time we read in the papers about deliveries of Canadian grain to foreign purchasers, and that the grain is defective in one way or another; sometimes it has foreign substances mixed in with it and sometimes it has deteriorated. This, I think, causes the general public to be quite concerned about the downgrading of the Canadian image in respect of high quality produce, and particularly high quality grain produce. Would the Minister care to say something about this general proposition? I take it that under the provisions of this bill it is within the ambit of the bill for comment on this point.

Hon. Mr. Olson: Yes, Mr. Chairman. The Board of Grain Commissioners have set what they call an "Export Standard Quality" in this respect. In other words, all the grain going into export position must be cleaned or must be processed in any other way required to bring it up to that export standard. I may add that in my view it is a very high standard, probably a higher standard than that adhered to by any other country in the world. The problem we have had from time to time—and I am happy to say that we have not had very many—arises from situations where we have had, for example, some foreign substance in the grain. In one instance we had a claim for some glass in one or two of the holds of the ship. I cannot explain how it got there because I do not know. I rather suspect it would not have been in the grain all the way from the farmer to the export position; I think it must have got in somewhere else along the line. But this was, in my view, either an act of deliberate damage or an accident. In any event, all this grain is cleaned as it goes into the terminals that load for export, and it is not possible for anything like that, in my view, to remain in the grain while it is being cleaned.

Latterly, we have had a problem regarding some insect infestation, and there was a lot of discussion about the so-called rusty beetle in some grain in western Canada. That is not an uncommon thing to see or to find after a number of months in any grain that has a high moisture content. The eggs of these particular insects are very common around the grain producing areas, and whenever the physical condition of that grain is such—and the climatic conditions, I may add—for them to multiply, then, of course, that happens. As I say, it is usually associated with keeping grain which has a higher than normal moisture content over a long period of time without having it aired out or moved from time to time.

I would like to say this, however, that I checked with the Board of Grain Commissioners and with the Canadian Wheat Board and, in spite of some of the press stories that were circulating, we have received no claims from any of our foreign customers because of rusty beetles in grain. Indeed, I would be very surprised if they could get through the inspection and cleaning system at the terminal. That is why I was surprised.

What we did have a claim for—and we have had more than one, not only this year but many times in the past—was for some other types of insects. I could give you the names of them—I think we could dig them up—but they are commonly referred to as mites, but even then there are several types. The eggs of this particular minute insect are also very commonly found in grain, and whenever you get that grain into climatic conditions favourable for them to hatch and to multiply, this happens. Quite often when grain from Canada and other countries is being shipped to countries where the climatic conditions are suitable for an explosion in the population of these insects, that grain is fumigated. It is just done as a matter of standard practice, to try either

to clean out the eggs or to kill the fertility in those eggs so that they cannot multiply. Even that is not a very unusual thing.

In my view, it was unfortunate that there was some evidence of quite a lot of grain—although it is still a very small percentage of the total—that had rusty beetles in it in Canada at the same time as we received some publicity for, I think, about three claims for grain that had these mites. It was not the same insect, but it hit the press at about the same time, and there was an association there that, in my view, was unfortunate.

Senator Carter: Mr. Minister, are you saying that the steps you take to destroy the eggs of the rusty beetle are not effective in destroying these other eggs?

Hon. Mr. Olson: I am not quite sure if exactly the same chemical compound is used for the mites and the rusty beetles. I know that it is a fairly simple process to get rid of either one of them. In some cases it is as simple as airing the grain out. In other cases I think they use malathion—which is harmless to humans if it is used properly—that does in fact kill all of the insects. I am not sure that we have a chemical that we use in Canada that is potent enough to kill the fertility of the eggs here.

Senator Carter: I noticed you said you would have been surprised to receive claims with respect to these beetles, but you did have claims with respect to these other insects.

Hon. Mr. Olson: Yes.

Senator Carter: That is not unusual and you have had instances in previous years?

Hon. Mr. Olson: That is right.

Senator Carter: It led me to think that possibly if you take steps that would make it a surprise to have claims for rusty beetles, these steps, whatever they are, are not effective to destroy the other.

Hon. Mr. Olson: I think that is true, because with a number of handlings—that is, the number of times this grain has to be elevated and actually exposed to the air—into the country elevator, out of the country elevator, into the terminal, through the cleaning facilities, and then again onto the boat—I would be very surprised if any rusty beetles could survive that much handling and airing. But that is why I said I was surprised. It may be possible, but I was surprised that the rusty beetles could survive that much handling.

Senator Argue: In an ordinary year when you might export 300 million bushels of wheat, against how many bushels might there be a claim?

Hon. Mr. Olson: I am not sure. I think there is someone else in the room who has more expertise in that than I have.

The Acting Chairman: Perhaps you could ask Senator McNamara to answer.

Senator McNamara: I want to ask the Minister if he does not agree with me that the recent comments about the rusty beetle and, to a great extent, the mite are closely related to the disasterous 1968 crop, of which.

In all my experience, most of this trouble could be related to the particularly poor harvest we had that year, and I think there has been undue publicity given to it.

A lot of these mites do not originate in Canada, but you find them in many vessels handling other grains and unless they are very carefully cleaned the mites will be left on the shelves, and so on.

I do not consider in our country the rusty beetles and mites are a problem. They have to be watched, and the Department of Agriculture extensively checks for them, but I think this recent publicity was most unfortunate because it was a tempest in a tea pot and we should not have been talking about it with our customers overseas.

Senator Hays: You should have dealt with it in the Mass Media Committee.

Senator Connolly (Ottawa West): That brings up a point I wanted to raise, Mr. Minister. You are taking authority here to control the quality of the grain that is sold both domestically and on the export market.

Hon. Mr. Olson: Yes.

Senator Connolly (Ottawa West): But are you in the hands of the shipping companies and the individual ships, and have you any control there in respect of shipments abroad?

Hon. Mr. Olson: Mr. Chairman, under the present Canada Grain Act we have grades that are set down by statute; and then under the regulations we have certain tolerances to set the quality to meet those grades. When a certificate for grain—which is really a grain ticket or a warehouse receipt—it is issued to anyone—that is what they get when they purchase a cargo or a lot of grain from us—that person or customer has the right to demand that the grain that he receives is up to the standards that we have spelled out in the act and in the regulations with respect to the tolerances.

So I think it would be, if not impossible, very difficult for anyone to try to sell a grade of Canadian grain—that is a Canada grade standard—if he was not prepared to deliver grain that met that standard.

Senator Connolly (Ottawa West): Yes, but it is the further step that I am concerned about. Assuming that the grain is of prime quality when it goes into a ship, have you any control over the conditions existing in that ship which might downgrade that grain?

Hon. Mr. Olson: Yes, Mr. Chairman, we have, although it is not in this act. I will ask Mr. Phillips to explain in a little more detail what we do with respect to that. There is still another act, the Canada Shipping Act, that deals with the condition of the ships.

Mr. Phillips: Mr. Chairman, the Canada Grain Act deals with the quality of grain *per se*, and as explained by Mr. Olson the Destructive Insect Pest Act provides for the checking of the ships that carry the grain for export, and no ship may be released for loading until it has been approved by the inspection staff under that act.

Reference was made to the matter of glass and so on earlier. That is not covered by the Destructive Insect Pest Act, and we had to provide for that under the Shipping Act, as I recall, and the same inspectors that check the ship for infestation are also checking for glass to see that there is not glass in the ship to start with before the grain is put into it. This is a procedure to protect the export of grain.

Senator Carter: Do you exercise the same control over the railway cars?

Mr. Phillips: The railway cars are covered under the Canada Grain Act. If at any time railway cars arrive at an elevator where there is an indication that the grain is infested then the Board of Railway Commissioners orders the fumigation of the railway cars.

Senator Hays: Is it not true, Mr. Minister, that with the exception of the rusty beetle most insects are destroyed by frost. Most of this grain is grown in areas where there is widespread frost in the winter. I have 150,000 bushels of grain stored, and one bin has rusty beetle in it. This is caused by damp grain, as Senator McNamara pointed out. The minute the first frost gets in the rusty beetle burrows right down inside the grain. It eats the centre out of the grain, which ends up as dust, which can be skimmed off. You can then put in these gas bombs and eliminate the rusty beetle. I do not know how it gets into the elevator, because they watch these things very closely.

Hon. Mr. Olson: There is no doubt about that, and I want to concur in what Senator McNamara said that almost all of the problems we had with the rusty beetle were associated with the 1968 harvest. One of the reasons why it became known was that during the past few months we have had very significantly increased orders for lower grade wheat, and they were calling all of this wheat forward from those shipping points that had grain that was stored since the 1968 crop. That is why there was an explosion of it. Even with all of that I am satisfied that the amount of grain that had any infestation at all in it was probably less than three per cent. As a matter of fact I think we suspended less than ten country elevators as a result of finding these rusty beetles. The suspension is that they are not to discharge grain into any conveyance, particularly a railway car, until they have cleaned it up.

Senator Hays: But is is really a very easy thing to handle. There is a rod with little holes in it that you shove down into the grain, and you drop the pellets containing the insecticide into it. I am sure that any farmer who has $10,000 worth of wheat in the bin watches this like a lawyer watches his bank account. He is not going to allow the bug to stay there very long.

Senator Burchill: I am afraid I am an easterner and thus not very familiar with the grain trade. Is all grain sold on a delivered basis? Are you responsible for the transportation, and all that sort of thing?

Hon. Mr. Olson: Almost all of the grain that is sold for export position I believe is sold in the terminal—that is, at tide-water, so that it is in export position.

Senator Burchill: The ships then would not be your responsibility.

Senator McNamara: Mr. Chairman and Mr. Minister, most of it is sold in store. Other sales are made f.o.b., even though they are made by a Canadian agent or an agent of the Canadian Wheat Board. Sometimes in the international trade it is sold c.i.f. destination. In any event, the ship has to be approved by the Department of Agriculture before the wheat is permitted to be loaded.

Senator Burchill: That applies whichever way it is sold?

Senator McNamara: Yes.

Senator Burchill: I am not clear on the distinction between the functions of the Canadian Wheat Board and the Canadian Grain Commission.

Hon. Mr. Olson: To state it very briefly, the Canadian Wheat Board is the sales agent for and on behalf of all the farmers. It also administers the quota system which ideally at least provides equal access to whatever volume of market there is to the producers. The Canadian Grain Commission, or what is known now as the Canadian Board of Grain Commissioners, are really the policing agents in the whole system who see that the grade standards are met and that the conditions at the elevators are attended to, and they look at the auditing of the entire system.

Senator McNamara: Mr. Chairman, may I ask the minister if he agrees with me that the dual system we have in Canada—that is a regulatory system that is completely divorced from the sales agency—has been of great benefit to the country. The buyers know that the sellers have no control over the grades, and it is not possible for them to manipulate them, because that matter is handled by another body. Does the minister agree with me in that?

Hon. Mr. Olson: Yes, I do.

Senator Aird: Mr. Minister, in your opening remarks you talked about the protein content factor, which might be important to our customers. There have been suggestions from time to time that Canada has lagged behind some other exporting countries, such as Australia and the United States, in that we have been slow to adopt this protein grading factor. I wonder if you would care to comment on this suggestion.

Hon. Mr. Olson: Yes, I would, Mr. Chairman, because I think it is important for us to have the kind of flexibility in adjusting grades so that we can, in fact, grade according to quality factors and, in this case particularly, protein, when our customers demand it.

We have had some requests for grain segregated according to protein content now. It is not, perhaps, a majority of the sales that we make, and I think one of the reasons for that is because generally the protein

content of Canadian grain is higher than that of the grain grown in any other country of the world. But, we are moving into a new era in milling and baking quality factors where many of our customers would like to know in advance—that is, in addition to the visual grading of grain—what is in it. It is not necessarily that they would all demand high protein, but they would like to have consistent protein because if they have cargos of wide variations in protein content it does do a great disservice to the milling and baking processes that follow. For example, if they set their grist or their mix thinking or hoping—perhaps judging it on the basis of their experience—that it is, let us say, 14 per cent average protein, then that requires a certain type of process, and the bakers set their formulas and so on to fit that. If they get a cargo which is very much lower or, indeed, very much higher than that, it does foul up the whole system.

Senator Aird: It would seem obvious, then, Mr. Chairman, and Mr. Minister, that the diet of the receiving country has a good deal to do with their requirements. Would you comment, therefore, upon whether or not potential future sales to the People's Republic of China and/or Japan might be affected materially one way or the other, if, in fact, we in a protein content factor measurement on these sales, or are in a position to say what the content will be?

Hon. Mr. Olson: I think it will be very important, and it will become more and more important as we move into what is commonly referred to as continuous flow baking systems, because uniformity of the protein content is very important to them.

These continuous-flow baking systems have been used for only about eight years but I am persuaded that there will be increased demand for uniform protein levels. I repeat, not necessarily high, but uniform levels. Many of our customers, for example China, have not been asking for this segregation. However, the United Kingdom and others have indeed asked for guaranteed protein levels.

Senator Argue: There has been a great demand amongst the producers for a system of protein grading at the local elevator. Certain organizations have come forward based mainly on this demand.

Can the minister indicate whether or not such a system is likely to come into effect, when it will do so and what premiums, if any, might be attached to high protein grades coming off the farm?

Hon. Mr. Olson: To answer the last part of your question first, the payments would be directly related to the difference in value placed on protein levels by our customers. I suggest that will vary from time to time.

I cannot predict when this will come about. We do not have a mechanism or device at the moment that will give us a protein test sufficiently rapidly for an elevator agent to apply to each load delivered by the farmer. Some are coming pretty close, but in the initial stages I think that it is possible, although it would not be perfect, to call grain forward into particular bins in the terminal elevators from those shipping points that have a high average protein. That is between 13 per cent and 14 per cent. The grain would be segregated on that basis.

It will take somewhat longer in my view to have a protein system in place sufficiently effective to relate the tests to individual farmers.

Senator Argue: As I understand it, an American wheat producer does receive the benefit of a premium attached to protein grading. I wonder if this is so and how an American farmer can be paid a bonus for high protein if it is not possible to pay a Canadian farmer?

Hon. Mr. Olson: That is true, although it is not applicable to all American grain. Indeed, it is not applicable to all the American grain in those areas such as Montana and North Dakota which is comparable to the Canadian protein.

My understanding is that some very large elevators in the United States have facilities for making a protein test, but there is some delay. However, if these tests are made in advance of delivering a large quantity of grain then, of course, they can be related. The grain is segregated on that protein basis because of the larger number of bins and larger capacity of the elevator and it can be directly related to the farmer. However, it certainly does not cover 100 per cent of American grain at the present time.

We are also able to do that fairly quickly because we are building a new protein testing laboratory in Calgary which will test the shipments going west to the Vancouver terminal.

In fact, most of the flour mills in western Canada have the ability to make protein tests. We hope that when this comes into operation a sample of each carload shipped will be sent to the laboratory. A reading on the test would be received by the terminal operator by the time the car arrived at the terminal so that the load would be put in a bin containing grain of the same protein level.

Senator Carter: In view of the food shortages in underdeveloped countries and particularly the protein deficiency in their diets, is there a trend towards higher proteins to take care of that problem?

Hon. Mr. Olson: I do not think that that problem will be solved by the differences in the protein in Canadian grain. That is not really the purpose for making our grades according to protein levels. It is more closely related to the milling and baking processes because the protein test gives us and our customers an indication of a number of factors, including the water absorption rate in the mixing of the dough for bread. This changes very significantly according to the protein level in the flour.

However, in so far as it making a significant change to the dietary requirements of the people eating the bread it is not significant.

Senator Carter: I have in mind the situation of a famine, in India for instance. In the past we have shipped a few carloads of wheat or grain, but if it does not provide the necessary nutritional qualities it seems to be almost an exercise in futility.

Hon. Mr. Olson: This grain does provide for certain diet requirements, but I would have to say that it is not a substitute for very high levels of animal proteins such as are found in milk powder, meat, eggs, et cetera.

Senator Carter: I am informed that the grain millet has a protein content much higher than any other grain. Can we produce that kind of grain in Canada and are we doing anything about it?

Hon. Mr. Olson: I am advised that we cannot. However, there are other grains, for example rapeseed, that also contain far more significant levels of the type of protein that is useful to make up these diet deficiencies.

Senator Carter: You referred to the storage of wet grain as one of the main factors in respect to insects. Is there anything in the grain regulations to control the amount of moisture as a factor in accepting or exporting grain?

Hon. Mr. Olson: Yes, there is. A test of the moisture content in grain is a relatively simple process. Every elevator agent in the country has a device which enables him to do this very quickly.

I am not sure of these figures, but I believe that if the grain contains more than 14.5 per cent moisture it is no longer considered to be dry grain. Between 14.5 per cent and 17 per cent is graded as tough and over that as damp. The elevator agent has the right to refuse to take grain that contains moisture levels higher than he himself thinks he can take care of and keep it from going out of condition.

The problem we had in 1968 was that everybody involved in the industry—the Canadian Wheat Board, the Board of Grain Commissioners and everyone else—tried to be as helpful as they could to all of the producers who had very high volumes of this high moisture content on hand, and we took into the system, I suggest, far more high moisture grain that year than we would normally do, because we wanted to give the farmer the benefit of the drying facilities in the terminal elevators. However, I have to say, too, that a lot of that grain that came into the system, which was perhaps below the damp category, stayed in those elevators for a long period of time. While it did not, as we say in the industry, heat because of the high moisture content, it did raise all of these other problems.

Senator Argue: There is one further question on the causes where you have authority over the allocation of boxcars. Once in a while we seem to fail to move the grain into position at a sufficiently rapid rate to meet sales et cetera; at least, there is that feeling around. Is there any authority here to order the railway companies to produce a certain quntity of boxcars for the carriage of grain, or is this authority confined to merely the allocating of the number of boxcars that the railways make available for hauling the grain?

Hon. Mr. Olson: I would hope that the application of these rules and orders would be on a basis of negotiation and working it out with the railways. In the event that we disagreed with the railways, clause 97(a) says:

> The Governor in Council may by order,
>
> (a) where he considers it necessary in the public interest to do so, require a railway company to supply to and place at any point at which the railway company supplies a service, railway cars for the carriage of grain.

Thus if there was a disagreement, the authority is there.

Senator Argue: I think that is important.

Senator Cook: What would be the penalty if they do not? Is there any penalty if the railway company fails to carry out the order in council?

Hon. Mr. Olson: That penalty is not spelled out in the bill. If we need one, I suppose we would have to put it in the regulations under the authority provided to make regulations under this bill.

Senator Cook: Perhaps the persuasive force would be very great.

Hon. Mr. Olson: I would think so, yes.

The Acting Chairman: Mr. Heath, when he was here yesterday, I believe said that the English used only hard wheat, and that if the United Kingdom did enter the Common Market it would likely have little effect on our wheat sales into the United Kingdom. Would you care to comment on that?

Hon. Mr. Olson: I hope that that is the way it turns out. Indeed, I think all of the western farmers do too. But I am apprehensive about the kind of levies that may be placed on that grain entering the United Kingdom. If this should put us in a disadvantaged position vis-à-vis the competitive grains that are produced in Europe or other grains that may also have access to the United Kingdom market, I am very concerned about that. If they are going to subscribe and adhere to the common agriculture policy that is presently in existence in the EEC, then we are apprehensive that there may be some additional levies placed on that grain going into the United Kingdom. I am very grateful for Mr. Heath's comment that they intend to continue to use large quantities of hard grain; that is encouraging; but we are also very conscious of having access to that market without too many charges along the way.

Senator Carter: Looking to the future, with protein content becoming more and more preminent as a sales characteristic, how would you meet the requirements supposing a market demanded a certain protein content, say 10 per cent or 12 per cent? Would you have to grow that or could you dilute the various grains down to an average of that?

Hon. Mr. Olson: We do not have any large quantities of grain growing in Canada that would have a protein content much below 12 per cent; that is about the bottom so far as the hard spring wheats are concerned. We grow a very small quantity of what we call soft white spring wheat that has a protein content lower than 12 per cent. The range we are talking about is between 12 per cent

and something over 15 per cent in some years, but not very much. It is within that range that we are discussing this. We know very shortly after a new harvest comes in what the average protein content is in any particular district; that is, the shipping point. That information is available to us, and I think that if we have the statutory authority to keep this grain segregated along the way according to protein content we would not find it too difficult to call forward grain from those shipping points that had a level of protein in it that was satisfactory to our customers.

Senator Carter: But then you run into the problem of quotas.

Hon. Mr. Olson: There is no doubt about that, but I am of the opinion that maximizing our total sales is good for all the farmers, whether they happen to have the kind of grain that can be supplied to one or another of the particular deals we make.

Senator Carter: There was a problem some months ago over farmers in one province blackmarketing wheat, I suppose is the description.

Hon. Mr. Olson: "Bootlegging" is what they call it.

Senator Carter: I also read in the newspapers that some farmers were reduced to the point where they were paying their education taxes and municipal taxes in wheat. Are these things covered in the bill?

Hon. Mr. Olson: No. The administration of the quota system is contained in the Canadian Wheat Board Act. It is not in this bill.

Senator Carter: You said earlier this was a policing bill, which polices only the quality of the grain.

Hon. Mr. Olson: And the elevators, and that sort of thing.

Senator Carter: The handling of it.

Hon. Mr. Olson: Yes.

Senator Benidickson: The Minister, this has been a busy and even rather a hectic week for most us, because it is the week prior to the Christmas adjournment, and we have not had this bill before us for very long. That is why the day before yesterday, when it was introduced for second reading, I had some apprehension about portions of the speech made by my good friend Senator Argue. In this busy week have you had an opportunity to read his speech?

Hon. Mr. Olson: Yes, I have. I thought it was a good speech.

Senator Benidickson: I refer to page 342 of *Hansard*. I wanted to get your comments. I remind you that he pointed out that in recent months and years, under the leadership of yourself and Mr. Lang, very many things have been done that are helpful in solving the problems of the grain trade. He referred to certain organizations that have undertaken studies within recent periods, that have been helpful, and then he went on to say:

> This has been done with a substantial measure of success in many ways. The main point that I have been critical of in some of these various proposals is that the powers that be...

I assume you are one of those. He then goes on to say:

> ...did not in any sufficient way ask for the opinions of the producers themselves before action was taken. All of a sudden some revolutionary program was announced, and the opinions of general producers were not asked; they did not have a clue that such a program was forthcoming; basically they did not support it, although they went along with it, because of the quota provisions...

You say that this particular bill was introduced in March of this year. This frightens me. What is your answer to Senator Argue, who is a western farmer, and his assertion that the producers themselves have had inadequate invitations to express their views?

Senator Argue: Not on this bill.

Hon. Mr. Olson: Mr. Chairman, I think that in part of his speech he was referring to the LIFT program of last year.

Senator Benidickson: He indicated that he was opposed to the LIFT program.

Hon. Mr. Olson: Those comments were also related to the LIFT program and of course I could make a great argument I think that would persuade you that we had to do that kind of a program in the crop year 1970.

Senator Benidickson: I did not think his remarks were confined to the LIFT program.

Senator Argue: That is the revolutionary program which I was talking about and certainly not this bill—it has taken 40 years.

Senator Bourget: We are not dealing with that today, are we?

Senator Benidickson: We were dealing with the bill. I thought that since it was presented in *Hansard* and it is paragraphed there that it could refer generally to the bill because the speech was on the bill.

Senator Argue: There are a lot of things other than the bill.

Senator Benidickson: He did say that he has made representations indicating that he did not particularly favour the LIFT program. Prior to the portion I have quoted he went on to say that in connection with this attempt to be helpful and improve the situation in the train trade, a task force on agriculture had been appointed.

Hon. Mr. Olson: The task force consisted of a number of eminent agriculturalists headed by D. L. MacFarlane, chairman, and D. R. Campbell, P. Comptois, J. C. Gilson,

and D. H. Thain, members. That is the report to which I think he was referring. They were appointed in 1967, I believe, to give us an analysis and some recommendations for the whole agriculture structure in the 1970s.

Senator Benidickson: What was involved in the reference to a study of grain marketing by Mr. S. C. Hudson? What relationship does that have?

Hon. Mr. Olson: I understand that was done for the Economic Council of Canada.

Senator Benidickson: The Wheat Board itself commissioned a similar study domestically and internationally.

Hon. Mr. Olson: Yes, it was the Wheat Board.

Senator Benidickson: Is that part of the background for the preparation of this bill?

Hon. Mr. Olson: Not really, Mr. Chairman, because the marketing and the techniques of marketing, other than to make sure that the quality is provided for in the grades and so on, is really in another area completely.

Senator Argue: Mr. Chairman, if I might say a word, I did speak about this in my speech. It involves many things other than the bare bill itself, because it opens up the whole question, in my opinion, for a second reading discussion of the grain marketing situation. I think Senator McNamara would agree that a large part of his speech was not on this precise bill but on the general grain situation and the tremendous improvements in markets. This was very much in order and is the kind of thing which should be done. Senator Benidickson has quite rightly said that I objected to the LIFT program. It did come, to a large extent, out of the blue as far as the actual producer was concerned.

A new policy has been announced by the Honourable Otto Lang. I should like to relate a private conversation we had. I said that there should be more consultation with the producers, and he replied that you cannot really have a public opinion survey. I said, "Maybe that is what you should have." Well, I was delighted to find out a couple of weeks later that he had sent out a letter to every grain producer in western Canada, almost 200,000 of them, asking for their opinions. I think that was a wise move. The minister will get all these opinions and I am sure that after looking at them some improvement may result—because the farmers will have been consulted.

Senator Benidickson: I remember you referring to that letter and commending the minister for sending it. Did that letter have application to the bill before us?

Hon. Mr. Olson: Not this bill, but the stabilization program that was announced. Of course, the purpose was to invite some kind of public debate or reaction to these proposals prior to the bill becoming operative, hopefully, for the 1971 season. That legislation will have to come to Parliament early in February. After consideration has been given to all the opinions that have been expressed, the bill will be drafted and presented to Parliament.

Senator Benidickson: I am satisfied. This portion of the speech rather frightened me. It does not particularly relate to this bill and certain agricultural policies are recommendations in general.

Hon. Mr. Olson: Mr. Chairman, I ought to explain with respect to this bill that there were many meetings across the country; indeed, the Standing Committee of the House of Commons on Agriculture spent several weeks hearing witnesses from farm organizations.

Senator Carter: Is this a new bill? Does this update the existing legislation?

Hon. Mr. Olson: When this is passed we will repeal the present Canada Grain Act, and there are one or two acts which will be amended by the passage of this bill. There is section 108 which I believe deals with section 11 of the Prairie Farm Assistance Act, which modernizes or updates some of the provisions. In section 107 under the heading of consequential amendments on page 75 there is an amendment to the Wheat Board Act and the PFA Act. Under section 109 there is a minor consequential amendment to the Crop Insurance Act, and in several other places. Many of these are technical matters where we have, for example, changed the name from the Board of Grain Commissioners to the Canada Grain Commission.

Senator Carter: Does this act include new powers that did not exist in the old legislation?

Hon. Mr. Olson: There is a new provision in section 97 (a) dealing with the allocation of railway cars. There is a new provision under Section 41 of the bill, giving the commission authority to alter the charges from the full storate charges, when any elevator is inoperative due to labour stoppage or for any other reason that the elevator cannot function. That is a new provision, and it brought in some other elevators that were not covered before.

Senator Carter: I notice under clause 74 you have investigations and arbitration, and there is a list running from (a) to (i). Do you have many of that type of complaint to investigate?

Hon. Mr. Olson: Yes, Mr. Chairman, we do. There is a continuous flow of appeals. I am not sure that they would fall into the category of investigations, but of appeals against a grade, for example, by a farmer who is not satisfied with the grade that the local elevator agent may give him. On a continuous basis also, the Board of Grain Commissioners are doing inspections at all of the elevators, to make sure that the kinds of grain that they claim they have there, and the volume, is, in fact, there.

Senator Carter: Is this the final court of appeal for the farmer, or can he go higher, if he does not think that he has got justice?

Hon. Mr. Olson: Yes, he could appeal to the minister, and in any case he could appeal to the Exchequer Court, depending on what he is appealing.

Senator Benidickson: I was interested in the point raised by Senator Cook, on the question of penalty, when we put in statutory form the authority of the Gonervor in Council to direct the railway companies in their allocation of box cars. I have been around here for a great

number of years and I repeat that I know very little about the grain trade, but I have seldom been here in a session when there has not been considerable complaint, from the representatives from the farming areas, about the provision and allocation of box cars for their production. My understanding is that, over the years, the Department of Transport and the Department of Agriculture and other agencies of Government, and the Wheat Board perhaps, have been relying on persuasion and negotiation. Notwithstanding the reliance simply on that, there has been, to my knowledge, in every session, complaints of considerable strength from the producers of grain about this matter of box cars. I wonder if the minister, when he is drafting regulations, would give some consideration to that. I believe that we have been working on persuasion and negotiation for years, and I think Senator McNamara will probably be able to confirm that.

Hon. Mr. Olson: I do not believe that all of the complaints are going to go away simply because we have within the act the authority to direct the railways to put cars at certain places and, indeed, even the number of cars.

The Acting Chairman: There might not be enough cars.

Hon. Mr. Olson: There are two or three things we have to take into account. As the chairman has pointed out, one has to consider the number of cars that are available. Also, when a car is loaded, in fairness to the railway company, they ought to know when that car is going to be unloaded. We have had experience where grain has been left in cars for a long period of time, because there was no place to unload it. This usually happens at the end of the crop year, when the Wheat Board is trying to equalize the quotas as much as they can. Therefore, I do not think all the complaints are going to disappear. A farmer living a hundred miles away from another elevator is usually not very happy if he sees the quota there has gone up to four bushels, for example, while his elevator is still at two. If the Wheat Board could explain to him the reasons why this is so, from time to time, I think he would have a better appreciation of it. These complaints will continue as long as we have production in excess of the immediate market demand.

Senator Benidickson: I have some sympathy for the railways, too, because I had a function to perform at one time in the Department of Transport as parliamentary assistant to the Minister of Transport. We often had to convey the Department of Transport's reports, as received from the railways, with respect to these constant complaints in Parliament.

The Acting Chairman: Honourable senators, if there are no more questions for the minister, I would like to draw your attention away from the general to the more particular. While the minister and Mr. Phillips are here, are there any questions you would care to direct to specific clauses in the bill? I am sure the minister and Mr. Phillips would be glad to stay with us while we go through the bill clause by clause. Alternatively, if there are no more questions, may I have a motion to report the bill?

It is moved and seconded to report the bill without amendment.

Hon. Senators: Agreed.

The Acting Chairman: Mr. Minister, thank you very much for your patience in answering these long and difficult questions. We appreciate very much your having taken the time to be with us. We also thank you, Mr. Phillips, for your assistance.

Hon. Mr. Olson: It has been a pleasure to be here.

The Acting Chairman: Honourable senators, we have a precedent today which I think should be noted for the record. We have with us Mrs. Aline Pritchard, of the Committee's Branch, who is acting today as our clerk. I am advised that this is the first time that a woman has performed this function. I am glad that we have such a beautiful and charming woman as Mrs. Pritchard here this morning, and we acclaim her heartily.

Hon. Senators: Hear, hear.

The committee adjourned.

Friday, December 18, 1970

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-179, an act respecting the Buffalo and Fort Erie Public Bridge Company, met this day at 10.30 a.m. to give consideration to the bill.

Senator Daniel A. Lang (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, we have referred to us Bill C-179, respecting the Buffalo and Fort Erie Public Bridge Company, and our witness is Mr. B. Pomerlan, of the Department of Finance. Mr. Pomerlan, would you describe to the committee the necessity for this bill?

Mr. B. Pomerlan, Financial Operations Branch, Department of Finance: Yes, Mr. Chairman.

Honourable senators, this bill is very brief. It contains just three clauses, two of which are key clauses. One relates to the borrowing power of the bridge authority and the other relates to what we call the reversionary date—that is, the date upon which the property of the bridge authority located in Canada reverts to the Government of Canada.

The need for this bill may be attributed to the fact that the bridge authority is looking at its traffic projections over the next period of time, and it is considering the possibility of widening the bridge in the event that such widening is required to handle the increased traffic which they expect.

The decision has not been taken on (a) whether the bridge is necessary, or (b) if it is necessary when it will

be constructed, but this legislation is intended to be ready in that event.

Senator Connolly (Ottawa West): Do you mean the widening?

Mr. Pomerlan: Yes, the widening of the bridge. What the bridge authority is faced with immediately is what they call the rehabilitation of the bridge—that is, the strengthening of the bridge, replacing the decking on the bridge, installing new lighting systems, and generally putting the bridge in a much better condition than that in which it exists at the moment. This is what they call phase one.

Phase two is the widening of the bridge, if widening is decided upon. Phase one fits in with phase two, but it could be that only phase one will be undertaken, and not phase two.

The existing borrowing authority of the bridge is $4 million, and this is actually sufficient to take care of phase one, but if phase two is necessary then the costs of that will run anywhere from $10 million to $12 million, and this additional borrowing power is necessary.

Senator Connolly (Ottawa West): What did the bridge cost originally?

Mr. Pomerlan: The cost was of the order, I think, of $1 million.

Senator Connolly (Ottawa West): $1 million?

Mr. Pomerlan: Yes, it was a very small amount at the time.

Senator Connolly (Ottawa West): Has it been increased in size since it was originally built?

Mr. Pomerlan: No, it has not. Improvements are made to arrangements and systems to accommodate increases in traffic, but the bridge is essentially safe. It is approximately 40 years old.

The reversionary date under the present legislation is 1992. If the bridge authority decides to proceed with the widening they would have to seek financing by borrowing in the market. The term of such borrowing would likely be of the order of 40 or 50 years. The reversionary date of 20-20 is about 50 years from now. While it is quite true that the language is when the bonds are paid off or 20-20, whichever is later, the 20-20 is more consistent with the likely term of the bonds. In any event it gives the bridge authority an assured life of approximately 50 years, after which time the Canadian property reverts to the Canadian authorities and the American property to the American authorities. At that point in time they would decide how the bridge would be administered.

The Acting Chairman: Did some United States governmental body have to pass equivalent legislation?

Mr. Pomerlan: Yes, that equivalent legislation was in fact passed during the current year.

Senator Connolly (Ottawa West): By the State of New York?

Mr. Pomerlan: By the State of New York; this is parallel legislation to the extent it is required.

Senator Connolly (Ottawa West): How did it come about that the Canadian Government became involved in this when only a state is involved in the United States? Is it simply because it is international?

Mr. Pomerlan: It is an international bridge; that is right.

Senator Connolly (Ottawa West): Can you tell us anything about the operating position of the bridge? Has the authority been making money?

Mr. Pomerlan: Yes, they have been making small surpluses in each year.

Senator Benidickson: But the amount given to the Canadian Government as its share of the surplus has been at a fixed amount for some time.

Mr. Pomerlan: It has been at about $200,000 per year to the Canadian Government.

Senator Benidickson: They have had a net surplus beyond the amounts they have distributed to governments.

Mr. Pomerlan: Yes, but that has been very modest; there is very little left over.

Senator Benidickson: The sponsor pointed out that the toll rates relative to other international bridges are rather low.

Mr. Pomerlan: These rates have been unchanged since 1956, when they were referred to the Board of Transport Commissioners and approved.

Senator Beaubien: Is the bridge administered in the United States?

Mr. Pomerlan: Yes, the bridge authority is incorporated in the United States. However, its powers in Canada derive from the Canadian legislation.

Senator Benidickson: But there are Canadian directors.

Mr. Pomerlan: That is right.

Senator Benidickson: And the chairmanship alternates between a Canadian and an American year by year.

Mr. Pomerlan: That is right; one year there is a Canadian chairman and a U.S. vice-chairman and the following year it reverses.

Senator Benidickson: The sponsor, Senator Kinnear, said last night that we would not be called upon, or there would be no appeal made with respect to the $2,500,000 that might be required for the repairs and renovations at the moment.

Mr. Pomerlan: That is right.

Senator Benidickson: But that there might be an appeal in the case of the larger expenditure of about $12 million when the widening is carried out.

I may be quite wrong in this, but there are two international toll bridges in the area I represent. I have been informed that no federal assistance would be forthcoming with respect to a toll bridge. Indeed, if it is privately operated by a private company charging tolls, on which basis most of them are organized, one of the difficulties that the organizers of this public service has is that we even asked them to put up the money for our customs officers and immigration offices.

Mr. Pomerlan: That is right.

Senator Benidickson: Why would we mention the possibility of an appeal to the Government for assistance with respect to the widening if it has not been done in the past? Would that be a reversal of past policy?

Mr. Pomerlan: I am afraid, senator, I cannot speak on Government policy in these matters.

Senator Benidickson: Do you know of any international toll bridges to which the federal Government has made a contribution?

Mr. Pomerlan: There are some in the eastern part of the country that have been put up between the Department of Public Works and one of the American states. There are several in the east.

Senator Benidickson: Which are subject to tolls?

Mr. Pomerlan: No, they are toll-free.

Senator Benidickson: Well, that was the point. When tools are charged, as is the case here, my understanding is that the bridge authority has to find considerable funds for customs and immigration offices. Theoretically this expenditure is eventually reimbursed by tolls.

However, there is a bridge in Kenora-Rainy River where the tolls are insufficient to carry the debt charges. It has not been a success. It has been a wonderful public advantage to have the bridge, but from the point of view of financing revenues have not been adequate to pay obligations under the debentures. Our departments have consistently refused to make any contribution with respect to the structures that actually house departmental officials.

Mr. Pomerlan: This is a problem with regard to government policy; I cannot speak to it.

Senator Benidickson: My curiosity was aroused last night when there was some hint that we might expect an appeal for assistance when the major undertaking is decided upon, namely the widening of the bridge at considerable expense.

The Acting Chairman: Maybe we will cross that bridge when we get to it, senator.

Senator Connolly (Ottawa West): Perhaps Senator Benidickson feels that we are crossing the bridge now. Once this bill is passed and in force the authority for the financing will be there.

Mr. Pomerlan: That is right.

Senator Benidickson: The authority for the private organization to do the financing.

Mr. Pomerlan: That is right.

Senator Benidickson: But this amendment does not involve any commitment on the part of the Government to share in any future expenses, or change their policy.

Mr. Pomerlan: Not a bit. It is just enabling legislation which, if passed, authorizes the bridge authority to borrow. There is no indication of the source of the funds and no mandate as to where to borrow.

Senator Benidickson: It is proposing policy whereby a non-profit organization, usually sponsored by public-spirited people on one or both sides of the river, raises the financing and gets it going. Then our Government says they will not even pay the costs of the buildings required at the end of the bridge for their immigration and customs officials.

Senator Carter: Does the federal Government pay rent for these buildings?

Mr. Pomerlan: No.

Senator Carter: If the authority started to charge rent, on what basis could they refuse to pay it?

Senator Benidickson: I do not know, but they do. With respect to one of the bridges to which I referred in my area, the one that has been unprofitable, I would say that in initiating it, in the actual fund raising, 98 per cent of the financing, what was required to provide this public advantage—which is just as much an advantage to Canada as it is to the United States—resulted from funds raised on the United States side of the bridge and guaranteed by a relatively small village in the State of Minnesota. The state, seeing the predicament of this village, with deficits for the international bridge, has indicated that it is willing to buy the bridge and put up state funds to relieve the village of this obligation, or relieve the people who put up the money, although in fact it was under the guarantee of the village, because it is realized they cannot carry it. However, they baulk at the State of Minnesota having to finance the cost of Canadian facilities for the Canadian side of the bridge, which are used for government purposes.

Senator Connolly (Ottawa West): And without compensation.

Senator Benidickson: Without compensation.

Senator Connolly (Ottawa West): Is it in the legislation?

Senator Benidickson: Here is a free gift of the bridge, paid for by the citizens of Minnesota, and we get just as much advantage from it as they do. Indeed, I do not know why they put up a bridge to move tourists into Canada, but they did. Then, as I say, we will not even pay rent for our facilities.

Senator Connolly (Ottawa West): Can Senator Benidickson say whether or not the legislation authorizing the

erection of the bridge made these other contributions a condition precedent?

Senator Benidickson: I frankly do not recall whether that was stated in the bill. I sponsored the bill some years ago, but I cannot remember that. I do remember it was made clear that that was government policy.

Senator Connolly (Ottawa West): It is the practice anyway.

Senator Benidickson: It was the practice and the policy has continued.

Senator Connolly (Ottawa West): I think the same situation arises on this bill.

Senator Benidickson: On this bill, because this is standard policy. There may have been some exceptions in the east, but one would still think they were exceptions with respect to non-toll bridges.

Mr. Pomerlan: That is right.

Senator Benidickson: That is a different situation.

Mr. Pomerlan: Yes, I presume it is, because it is not the same as the bridges in this part of the country.

Senator Carter: When you say it is a non-profit organization, are you saying that the tolls are set only to cover operating expenses?

Senator Benidickson: Yes.

Senator Connolly (Ottawa West): There is no profit.

Senator Benidickson: There is no equity.

Senator Connolly (Ottawa West): There is no equity money.

Senator Benidickson: No equity money at all.

Senator Connolly (Ottawa West): Except provided by the public.

Senator Benidickson: Except the people who bought the bonds. The revenues have not been adequate to do that, so the poor little village on the American side is under an obligation to pay the deficit. I would say that on a bridge of that kind we get more benefit than they do, because the incoming traffic from a heavily populated country like the United States benefits our tourist industry to a much greater extent than the reverse, Canadians going across to the United States on that facility.

The Acting Chairman: If I could bring the committee to order and back to the bill itself, are there any other questions of the witness on this bill?

Senator Connolly (Ottawa West): I just want to make this suggestion. I hope Senator Benidickson's proposal can be arranged, and then I would think perhaps the village might make him an honorary citizen!

Senator Carter: Is this the so-called Peace Bridge?

Mr. Pomerlan: That is right.

Senator Carter: This is the Peace Bridge?

Mr. Pomerlan: This is the Peace Bridge, yes.

Senator Carter: Is there anything significant about its construction? Why it should get this particular name? It seems to be a special project.

Mr. Pomerlan: After World War I the citizens on both sides of the border felt that as a gesture of good will this bridge should be built. There was a need for a bridge and they thought it would be nice to have such a bridge as a demonstration of the good will existing between the two countries. This is what gave rise to the bridge, and this is why it was called the Peace Bridge, because it was erected shortly after World War I.

Senator Connolly (Ottawa West): They paid 98 per cent and we paid 2 per cent.

Senator Benidickson: No, not the bridge dealt with in this bill. I know nothing about the financing of this bridge.

Mr. Pomerlan: It was paid out of borrowed funds.

Senator Beaubien: Mr. Chairman, I move that we report the bill without amendment.

Hon. Senators: Agreed.

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

Senator Benidickson: Is there any way of putting into the report something about the present stern policy of the Government on non-profit international bridges? It seems rather harsh when the Government will not pay for their own facilities.

The Acting Chairman: I imagine the transcript of this committee meeting could be passed to the appropriate officials.

Senator Carter: Is the committee not able to make a recommendation to the Government with respect to policy on this?

Senator Benidickson: Future policy with respect to other bridges.

Senator Carter: Yes, future policy.

The Acting Chairman: I certainly would not think it would be within the ambit of reference of this bill.

Senator Connolly: It seems to me from the material that is now on the record that there is an implicit recommendation from the committee that there would be a review.

Senator Benidickson: I thank Senator Connolly for his support on the policy.

The committee adjourned.

APPENDIX

SUMMARY INFORMATION RELATED TO GRAIN HANDLING IN CANADA

Canadian Government Supervision of Handling and Movement of Western Grain

A delivery permit book is issued to each grain producer in Western Canada by the Canadian Wheat Board. this book contains a record of acreage seeded to grain by the producer and of all grain delivered to elevators from his farm during the current crop year. Delivery quotas for the various kinds of grain, and for each delivery point in Western Canada, based on farm acreage, are set by the Canadian Wheat Board.

All country elevators in Western Canada are required to be licensed by the Board of Grain Commissioners. The licensee is required to be bonded by an approved surety company, to carry insurance against fire on all grain stored in licensed premises, to submit reports of grain handlings and stocks, and to audit grain stocks in each elevator at reasonable intervals and submit audit results to the Board. The Board's Assistant Commissioners inspect all country elevators regularly to see that requirements of the Canada Grain Act and the Canada Grain Regulations are being complied with. The Assistant Commissioners also investigate complaints relating to producer transactions with licensed country elevators.

When the producer delivers a load of grain to a licensed country elevator, if he agrees with the grade and dockage offered by the country elevator agent, he receives payment based on the initial payment price for the kind and grade, established by the Canadian Wheat Board. If the producer and the country elevator agent do not agree on the grade and dockage, the producer receives an interim elevator receipt for his grain and they jointly forward a representative sample of the grain to the Board of Grain Commissioners for government grading. This official Board of Grain Commissioners grade then becomes the basis of settlement for the grain delivered.

The Canadian Wheat Board issues shipping orders to companies which operate licensed country elevators. These orders authorize the company to ship carloads of a specified kind and grade of grain to a specified terminal point, such as Vancouver, Thunder Bay or Churchill; to one of the Canadian Government Elevators in Western Canada; or to a flour mill elevator. Rail movement of grain from country points is controlled by the Block System and is administered by the Canadian Wheat Board.

Terminal elevators are licensed by the Board of Grain Commissioners to handle, treat and store grain shipped in carload lots from country points in the prairie provinces. Licenses are required to be bonded, to insure all grain stocks against fire, and to submit regular reports of grain stocks and handlings. The elevator buildings and all grain handling equipment including scales are subject to the Board's inspection and approval. The stocks of grain in all licensed terminal elevators are audited annually by the Board of Grain Commissioners and the quantities on hand are compared with totals of outstanding registered warehouse receipts as shown by the Board's records. After the results of audits have been compiled, the elevator licensees are required to make adjustments covering all overages and shortages.

On arrival at a terminal elevator, grain is officially sampled, weighed and graded by officers of the Board of Grain Commissioners cleaned to tolerances established for commercially clean grain; treated if necessary to remove excess moisture, mineral matter or for other reasons; and binned according to grade. Warehouse receipts are issued and registered by the Board of Grain Commissioners and delivered to the manager of the terminal elevator. The warehouse receipts are then delivered to the Canadian Wheat Board, the owner of the grain. Warehouse receipts are negotiable documents representing a specified quantity and grade of grain and are used by the holder as security to obtain bank financing for grain transactions.

When the grain is sold by the Canadian Wheat Board for domestic use in Canada or for export, and is loaded out of the terminal elevator to railway cars or vessels, it is again sampled and graded by the Board of Grain Commissioners' inspection staff, according to export standard samples and specifications, and weighed under supervision of the Board of Grain Commissioners. When the grain is ordered out for shipment, the Canadian Wheat Board surrenders registered warehouse receipts for the grade and quantity, and the receipts are cancelled by the Board of Grain Commissioners.

The references to buying, pricing and selling of grain apply specifically to the kinds of grain over which the Canadian Wheat Board has full marketing jurisdiction in Western Canada, namely: wheat, oats and barley. Other grains handled through country and terminal elevators such as rye, buckwheat, flaxseed, rapeseed and mustard seed are bought and sold by producer co-operatives, elevator companies, processors and grain exporters. The Board of Grain Commissioners' inspection, weighing and documentation apply uniformly to all kinds of grain and oil seeds.

Elevators located east of Thunder Bay, Ontario, which handle Western grown grain are licensed by the Board of Grain Commissioners as "Eastern" elevators, and are subject to Board requirements for bonding, insurance of grain stocks, and reporting. These are transfer elevators and are situated at ports on the Great Lakes, the St. Lawrence River and at the Atlantic seaboard. Eastern warehouse receipts are issued by the elevator managers to cover all grain received. The receipts are registered with the Board, and are surrendered and cancelled when the grain which they represent has been shipped. As all western grain handled has already passed through terminal elevators at Thunder Bay, it has been officially inspected and does not require further cleaning or drying at eastern elevators. This grain must be binned according to grade and no mixing of grades is permitted during storage or shipment. All western grain loaded out into ocean vessels for export is officially sampled, verified for grade and certified by the Board of Grain Commissioners.

Otherwise, the Board of Grain Commissioners' inspection and weighing services are provided at an eastern elevator only on request of the elevator manager or the owner of grain consigned to or in store in the elevator. All stocks of grain in licensed eastern elevators are audited by the Board and quantities on hand are compared with totals of outstanding eastern warehouse receipts as shown by the Board's records.

The Board of Grain Commissioners establishes in the Canada Grain Regulations maximum tariffs of charges for the various services performed by licensees of country, terminal and eastern elevators, such as elevation, storage, cleaning and drying. Generally, the elevator licensees charge the maximum rate permitted, but may charge less providing they file the schedule of charges with the Board. The Board also sets out in the Regulations allowances for invisible loss and shrinkage on grain received at country and terminal elevators.

Canadian Government Supervision of Handling of Eastern Grain

Licensed eastern elevators, in addition to handling western grown grain, for export or for domestic use, may handle shipments of grain grown in Eastern Canada and grain grown outside Canada (U.S.A.). The handling of this grain by these elevtors is subject to the same requirements as in the case of western grain, that is, bonding, insurance, issuing of warehouse receipts and reporting to the Board. The Board of Grain Commissioners provides services for this eastern grain and grain grown outside of Canada only on a request basis.

There are elevators in the eastern division which handle principally eastern grown grain and are not licensed by the Board of Grain Commissioners. These are country elevators and feed mills. The Board maintains an inspection unit at Chatham, Ontario, which provides official sampling and grading services on request to grain producers and to the grain trade in the surrounding area. Services are also available from Board offices located at Toronto and Montreal.

Board of Grain Commissioners Operating Costs.

The Board of Grain Commissioners' total expenditure budget amounts to some $11,000,000 per annum; about 75 per cent of this amount is recovered through fees for services, charged according to Schedule A of the Canada Grain Regulations.

Additional information relating to expenditure and revenue is contained in the Board's annual report for 1968.

Winnipeg, Manitoba
April 1, 1970

Queen's Printer for Canada, Ottawa, 1970

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 6

WEDNESDAY, JANUARY 27, 1971

First Proceedings on Bill C-3,

intituled:

"An Act respecting investment companies"

(For witness—see Minutes of Proceedings)

23191—1

THE STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, December 15, 1970:

"A Message was brought from the House of Commons by their Clerk with a Bill C-3, intituled: "An Act respecting investment companies", to which they desire the concurrence of the Senate.

The Bill was read the first time.

With leave of the Senate,

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

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, January 27, 1971.
(9)

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

Bill C-3, "An Act respecting Investment Companies".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Blois, Carter, Cook, Desruisseaux, Flynn, Gelinas, Hollett, Isnor, Kinley and Lang.—(13)

Present, but not of the Committee: The Honourable Senators Lafond and Urquhart.—(2)

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

Witness:

Department of Insurance:

Mr. R. Humphrys,
Superintendent of Insurance.

At 11.55 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, January 27, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-3, respecting investment companies, met this day at 9.30 a.m. to give consideration to the bill.

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

The Chairman: This is the first meeting of the committee this year, so I welcome you all. We will have a lot of work. We have before us today Bill C-3, respecting investment companies. If you recall, originally we had Bill S-17 in the session of 1968-69. We rewrote the entire bill with the full support of Mr. Humphrys—perhaps the word "full" is not appropriate, but Mr. Humphrys can explain whether it was full or not.

The bill before us now contains substantially the provisions of Bill S-17 as they were in June of 1969 when that bill left the Senate. Some additions and changes have been made.

Mr. Humphrys is here this morning to explain the bill. I have asked him to refer to the clauses and tell us those which have not been changed in relation to Bill S-17. That will assist our consideration.

We have had inquiries from various organizations who wish to appear, a number of them in relation to the specific provisions dealing with sales finance companies. Following our usual practice we have informed these organizations that if they are expeditious in presenting their material, we will hear them. We have at least one for next Wednesday, and perhaps there will be more. Therefore we may take three or four sittings in consideration of this bill, but I can tell Mr. Humphrys that we are not going to waste any time on it.

Mr. Humphrys, will you come forward?

Mr. R. Humphrys, Superintendent of Insurance: Mr. Chairman and honourable senators, as the Chairman has already mentioned, this bill is substantially the same as Bill S-17 which was before you in the session of 1968-69 and which was given third reading in the Senate in June of 1969. Following that date the bill moved over to the House of Commons, but it was not possible to deal with it in the balance of that session. It was introduced in the fall of 1969 in the House of Commons, but again was not dealt with at that session. It was reintroduced last fall as Bill C-3.

The nature, the scope and the purpose of the measure I believe are well known to you. It was reviewed again briefly at the time of second reading. However, as a brief reminder I might say that the principal purpose of the bill is to establish a system of reporting and supervision for companies that are substantially in the business of acting as financial intermediaries.

These are defined broadly as companies that raise money and debt instruments and use a significant portion of the money so borrowed for investment purposes. The main type of company covered would be those usually known as sales finance companies, but there would be a considerable number of other types of companies covered by the definitions as well.

The main effect of the bill would be to require companies subject to it to submit annual statements to the supervisory authority, which is stated to be the Department of Insurance; it would empower the Superintendent of Insurance and his staff to examine the condition and affairs of companies at their head offices; it would require the Superintendent to report to the minister in any case where he thought that the ability of the company to meet its obligations was inadequately secured; and it empowers the minister to take one or more of a series of steps designed to result in improvement in the financial position of the company, or in extreme cases to stop it from borrowing from the public, or even to enable the minister to initiate winding up proceedings by applying for a receivership order under the Bankruptcy Act.

The bill does not prescribe any particular standards of financial strength, or classes of eligible investments. It does, however, have the overriding requirement that a company subject to the bill is supposed to keep itself in a financial condition to give adequate security for its debts, and also to refrain from making investments and loans where there may be a conflict of interest.

That in brief outline is the nature and purpose of the measure, which are exactly the same as in the measure that was before you nearly two years ago.

The Chairman: Mr. Humphrys, if we put the purpose of the bill in a nutshell, it applies to companies that borrow money on their bonds, debentures, etc., and use that money for financing purposes and other operations—not necessarily operations with which they have any share connection—by loaning the money, by purchasing shares, etc. We proceed from that as a base and there are exceptions. That is the broad base. I do not want to interrupt the way in which you are planning to present this, but I wonder if we could collect some of these ideas. For instance, perhaps we could collect in the record at some stage the exceptions that cut down the application of this bill to the business of investment or investment companies.

Mr. Humphrys: Yes, Mr. Chairman, I will summarize that, and it will fit very well with the comment I am about to make, pointing out the two major areas this bill differs from the one that was before you in 1969.

The first major matter, and the one that ties in with the comments you have just made, Mr. Chairman, is a change in clause 3, which broadens the area of ministerial discretion to exempt companies from the application of the bill. A moment ago I mentioned that the bill would apply to companies that are acting as financial intermediaries; that is, companies that raise money on debt instruments and use some or all of the money so borrowed for investment. If the definition were left at that it would obviously cover a vast number of companies, because nearly every company borrows some amount of money at some time or other, and nearly every company has an investment in securities or investment type instruments at some time or other.

In order to restrict the application of the measure to companies that are, to a significant degree, acting as financial intermediaries, some tests were put in to make sure that it would not apply to companies that were only borrowing a very small amount, or investing only a very small amount.

The first test was, that in order to measure whether a company is significantly in the investment side of the business the bill would not apply to any company if less than 40 per cent of its assets were in investment type instruments. On the other side, it would not apply to a company if its borrowed money, its debts from borrowed money or its guarantees were less than one-third of its capital and surplus. Those are the basic tests to make sure that it applies only to companies that are borrowing a significant amount and investing a significant amount. In order to be covered the company has to borrow at least an amount equal to one-third of its capital and surplus, and have at least 40 per cent of its assets in investment type instruments—bonds, stocks, investment real estate.

The Chairman: You are now referring to subsection (3) of clause 2 on page 3.

Mr. Humphrys: That is the major qualification of the first broad category, of those companies that borrow and invest.

In addition to those tests, a certain number of companies would be excluded. The first exclusion would be companies that are acting as securities dealers, if they are licensed under provincial law. Securities dealers and brokers often borrow money, and often have a considerable inventory of securities of one type and another that they have for sale to their clients. There is a specific exclusion for those companies if they are licensed under some relevant legislation. In most provinces there is a licensing requirement on securities dealers, and there is really a code that applies to them, so it was not thought necessary to cover them by this measure.

Also excluded would be companies that borrow only from banks or from major shareholders. Major shareholders are defined as shareholders who own more than 10 per cent of the equity stock. It was thought that major shareholders would know what they were about in lending to companies in which hhey have such a significant interest, and it was thought not necessary to apply this kind of measure for their protection. The exclusion in relation to companies that borrow only from banks is proposed because most companies borrow from banks from time to time, and it was thought that in the absence of such an exclusion the measure would cover a great many companies that are not really in the business of acting as investment intermediaries.

Senator Isnor: What is the main reason for excluding any companies?

Mr. Humphrys: There are a number of reasons. The first would be exclusion of companies that are borrowing only small amounts, or investing only small amounts, because the intention of the measure is to cover only companies that are significantly acting as investment intermediaries.

That was the purpose of the first tests on the proportion of their assets that would be investment type instruments and the amount of borrowing. The exclusion for securities dealers was based on the consideration that they are not essentially investment intermediaries and that they are supervised in other legislation.

The exclusion in relation to companies that borrow only from major shareholders and banks was proposed because major shareholders would be expected to know the full details of companies in which they have such an important personal interest; and the exclusion of companies that borrow moneys from banks was intended to avoid bringing within the measure a great number of companies that borrow from their banks from time to time perhaps more than the minimum limits prescribed here, but are not really acting as investment intermediaries.

There was a subsidiary consideration that in this country the banks are all strong and can be rasonably expected to look after their own affairs; but this was not the major consideration in that exclusion, because the same point could be made in respect of a number of other important financial institutions.

The Chairman: They are regarded as sophisticated borrowers?

Mr. Humphrys: Sophisticated lenders.

The Chairman: Sophisticated lenders, yes.

Senator Carter: Would it be fair to say that in the original bill what happens is that you had the net so wide that you were picking up companies that did not need the provisions you have in mind to protect investors, and at the same time you were creating an administrative problem because you would have more than you could actually deal with satisfactorily.

Mr. Humphrys: Yes, senator, that is a very accurate comment. In the original bill that was brought before you, the original scope was very wide, but there was quite a broad power for the minister to exclude companies. The Senate—and, in particular, this committee—though that that perhaps was going too far in bringing a

great many companies in and then letting them out. It made a lot of administrative work and created a number of problems for the companies concerned. So this committee, in studying the matter, decided that it would be better to narrow the original scope, to try to focus more accurately on the type of company that should be under such a measure; and consequently a number of amendments were made to try to accomplish that end.

That, in essence, is the effect of the provisions of the bill defining the companies that would be covered.

Since the matter was considered by this committee in 1969, further discussions have taken place. Some representations have been made to the department and other representations were made before the House of Commons committee. It was realized that, even within the narrower range of the definitions adopted in the amending Bill S-17, cases might arise where really there was no good reason in the public interest that the particular company be subject to a measure such as this.

It was thought that to try to define every such case in the terms of the legislation would be practically impossible, in the present state of our knowledge; it would complicate the legislation greatly, without giving us any real feeling that we had dealt with every case. So a change was made that broadened the area of ministerial discretion, whereby companies could be excluded if, having regard for a number of specific circumstances, it appeared that the public interest did not require that such companies be covered.

That broadening of the ministerial discretion is set forth in clause 3 on page 5 of the bill. I think it might be of interest if I just expanded on that particular provision, because it is quite relevant to this important aspect of the bill, as to who is going to be covered by it.

Turning to clause 3 on page 5—and, in particular, to subclause (2)—paragraph (a) permits the minister to grant an exemption if the business of investment carried on by the company, or a significant portion thereof, is of short duration and is incidental to the principal business carried on by it.

This is substantially the same as the ministerial discretion that was in Bill S-17—with a slight change in wording to make it a bit more workable.

Paragraph (b) is substantially the same as in Bill S-17—with some additional wording to clarify the interpretation. That is in favour of companies that become incorporated after the effective date of this measure, primarily for the purpose of carrying on the business of investment. Such companies may be excluded if they are, and intend to remain, companies with less than 40 per cent of their assets in investment type instruments or with borrowed money less than one-third of their capital and surplus.

Paragraph (c) is an important new one. It enables an exemption to be granted if the minister considers that it is not necessary in the public interest that the company be covered, having regard to:

(i) the persons to whom the company is indebted in respect of money borrowed by it,
(ii) the amount of the indebtedness of the company in respect of money borrowed by it,
(iii) the nature of any security given by the company in respect of money borrowed by it, and
(iv) the extent of the integration of the company's activities with the activities of its subsidiaries, if any, and with the activities of any corporation of which it is a subsidiary and any other subsidiaries of that corporation,

To bring this into focus, perhaps I might give a general example. I would not wish any comments that I might make in respect of examples to be interpretated as a determination of policy at the present time, because each case that applies for an exemption will have to be considered on the basis of the particular circumstances.

The Chairman: Will you have covering regulations under this section, or just depend on each individual case?

Mr. Humphrys: It would depend on an examination of the individual case but it is expected that, by the time the measure has been in force for a year or two and we have had a chance to look at all the cases that become covered by the act and that apply for exemptions, that it will be possible to draw rules that are more accurate and more precise than we can now; and that we would be in a position then to report on the classes of cases that had been exempted, so that if the bill comes before Parliament again, this matter could be considered in the light of actual experience, to see whether the terms of the legislation should be changed at that time or whether the discretionary approach should reasonably be continued.

Some examples might be, for example, under (i) the persons to whom the company is indebted in respect of money borrowed by it—I have already referred to the fact that companies that borrow only from banks would be exempted. There might be cases where a company borrows from another sophisticated lender, it might be a private placement, a special arrangement, a consortium of foreign banks or some arrangement whereby one can reasonably take the view that the public interest does not demand that this kind of supervision be applied.

Another example is under paragraph (ii).

The Chairman: But under paragraph (i) it might be a parent company.

Mr. Humphrys: Well, borrowing from a parent company should be exempted anyway, because a parent company would be a major shareholder.

The Chairman: Yes, but there are some complications in that that I will mention to you later.

Senator Desruisseaux: How about street money? What about short-term money that they get from the street on the basis of a note?

Mr. Humphrys: I would not think, senator, that that would justify an exclusion, if you are asking for my opinion right now, because many companies, sales finance companies particularly, borrow short-term on the market, and that is the kind of situation that should be covered by a measure such as this.

The Chairman: If I recall the facts correctly, Atlantic Acceptance did a lot of short-term borrowing.

Mr. Humphrys: Yes, a great deal.

The Chairman: And that is exactly the kind of operation we are interested in.

Senator Cook: Would there be such a thing as a conditional exemption, then, dependent upon a change in circumstances

Mr. Humphrys: No, the exemptions would not be conditional, senator, but the minister would have the right to withdraw the exemption if he thought that the circumstances had changed.

Senator Cook: But how would he know?

Mr. Humphrys: It follows that the administration would keep in touch with cases that had been exempted. They would not be formally required to file returns if granted an exemption, but I think in practical terms the administration would have to keep in touch with such cases to see whether circumstances had changed.

The Chairman: Mr. Humphrys, what concerns me is that if the minister grants an exemption under section 3 he does have the right at a later time to revoke; but where is there any authority in the bill under which he can require the furnishing of any material to him after an exemption has been granted?

Mr. Humphrys: There is nothing in the bill that would require such an exempt company to file information with the department or with another body specifically for this purpose, but all the companies that are subject to this measure, being federally-incorporated companies, are also subject to the Canada Corporations Act, and therefore would be required to file annual statements with the Department of Consumer and Corporate Affairs so that there would be a source of information in that respect. To take a practical view, I would not expect that there would be a serious difficulty in obtaining a reasonable degree of information about companies that had been exempted from the measure. The problem that arises is quite similar to the problem that arises in getting information about the company in the first instance to see whether it is a company that is subject to the measure or not.

But we thought that to give a conditional exemption, that is, to exempt the company from some provisions of the bill but not from others, would be adding to the complication and would leave the public in a position where it would not know really whether a company was subject to the essential control provisions of the act or not. So it seemed better to give an outright exemption or not to give an exemption so that the public would know that, if a company is on the list as a registered company, the measure applies to it; if it is not on that list, the measure does not apply to it. In that way it presents a clearer picture.

Senator Aird: Mr. Chairman, the last point you made is very important. How, in fact, will be public know? Will these companies carry the information on their letterheads? Will it be advertised?

Mr. Humphrys: The bill requires that there be a list of the registered companies published in the *Canada Gazette* each year. The fact that the company is registered would also be on file in the Canada Corporations Act so that if one were making inquiries about a company pursuant to that act one could always obtain information about whether the company was registered under this act or not.

Senator Aird: Do you have any forecast at the present time of the number of companies that you contemplate this will cover?

Mr. Humphrys: So far as we have been able to determine, we believe it will be about 90 companies. How many of those might apply for and be granted an exemption I do not know at this stage.

Senator Hollett: Has the Governor in Council yet delegated or stated what minister or department this will come under?

Mr. Humphrys: It is intended that it be the Minister of Finance and that it be administered by the Department of Insurance, which reports to the Minister of Finance.

Senator Cook: On the same point, you give an exemption under paragraph (i), the persons to whom the company is indebted in respect of money borrowed by it. If, for instance, that were changed materially, should there not be some obligation on the company which enjoys the exemption to report the fact that the condition under which they got the exemption was changed? Would that not simplify the thing for you?

The Chairman: You mean such as any substantial variation or departure?

Senator Cook: Yes, from the current conditions under which the exemption was granted in the first place.

Mr. Humphrys: I think it would be incumbent upon us to try to become and keep informed in relation to such cases. We thought that we could accomplish that without having a statutory requirement resting on such companies to report under the measure. It is a queston that relates to your earlier point, senator, about whether the exemption should be conditional or not. On balance we thought that it would be workable to give an outright exemption, but to try to keep ourselves up to date on the cases in an informal way. I think if we find that that does not work; then a different approach will have to be taken. But I do not really expect that a company that has received an exemption under this would take the attitude that they would not make available to us any information concerning their affairs. If it came to an outright difficulty where we had reason to think we should know, the minister could withdraw his exemption which would have the effect of forcing them to report.

The Chairman: I think your decision to be forthright in the exemption is a wise one, Mr. Humphrys, because otherwise I can see how it might interfere very considerably with financing.

Mr. Humphrys: Yes.

The Chairman: If it were a conditional exemption as against an absolute exemption, I can see where that might pose problems for those people who would be dealing in that field. Is it necessary in your opinion that a corporation that has been granted an exemption should be required to report any material change in its operations?

Mr. Humphrys: Well, Mr. Chairman, it is a difficult point, but I think it is one that is quite important from the point of view of the extent of the supervisory responsibility, and the implications of Government responsibility in relation to a company that may be in question. If a company is reporting officially to the supervisory authority and the supervisory authority has no power to do anything about the situation that is being reported, then I think it is almost worse from the public point of view than if the public knows it is an outright exemption.

If you are going to require these companies to report, then it is a conditional exemption and what the minister is really doing is saying, "I will not exempt you from the requirements of providing information to the Superintendent of Insurance. I will exempt you from my powers to do anything about your company if I think a bad situation has arisen." He would have to first find grounds for withdrawing the exemption. Then he would have to have the Superintendent make his examination, and then would have to take the other action. So we thought the company should be either under the measure or not, because a conditional exemption, in effect, gives the minister the power to amend the act and say, "I will make certain portions of the act apply to this company and "others apply to another company," and I think it could be quite a confusing situation.

The Chairman: But the companies are under the act, if it is necessary for them to get an exemption.

Mr. Humphrys: But once they are exempt, they are not under the act.

The Chairman: All I was saying was not that they are compelled to go through all the reporting here, but I asked you if you thought it was necessary for good administration that exempt companies be required to report material changes. That would give you a starting point.

Mr. Humphrys: We would want to know about material changes, Mr. Chairman. We hesitate to put a statutory requirement on an exempt company. I will say, in relation to the same thing, that I should draw your attention to the fact that the power of the minister to exempt is conditional to this extent, That he cannot exempt a company from the limitations on the transfer of shares to non-residents.

Senator Carter: Would it not depend largely th permanence of the change? There might be a variation for a period of three or four weeks, and by the time you get your report in it would be back to normal again.

Mr. Humphrys: We would not want to have to deal with every such case. The idea of an exemption would be to put the company in a category where we do not have to concern ourselves with its day-to-day operations. If a material change did occur in the scope of its activities or the nature of its investing or borrowing, then, truly, it would be a case that the exemption should be reconsidered. So I think this implies that there would be some continuing contact to review the exemption, if circumstances change. But the imposition of a statutory requirement on the exempt company to report material change is something that we did not propose. I admit that in one way or another we should try to keep informed on such matters.

Senator Cook: If the department was not in such good hands as yours, would it not be a good idea to put the onus on the person who first made the exemption?

Mr. Humphrys: A statutory requirement of that type is subjective with the company, if you say that the company shall report any material change. It would have to be any change that, in the opinion of the company, is material—which, again, leaves it to the company's judgment whether to report or not.

Senator Aird: Yes, but the alternative, Mr. Humphrys, is the only place you are going to get this information from is a filing under the Corporations Act, and you have a sizable time lag factor.

Mr. Humphrys: Yes, senator, but the implication of this is that the onus is not on the administration to bring an exempt company back in. It can be done, but it does not require the administration to withdraw the exemption if certain things happen.

Senator Gelinas: Are these exemptions reviewed every year?

Mr. Humphrys: I think they would be reviewed periodically. It is hard to judge at this stage how many there would be and what the nature of them would be.

The Chairman: This bill does not require an annual review of the exemptions.

Mr. Humphrys: No, it does not, Mr. Chairman.

The Chairman: So here we are doing our best to provide a measure of protection for the public against conditions we know have existed. For the purpose of this bill we are assuming that once a person qualifies and the minister gives him an exemption, he carries on and it is up to the minister to try to find out whether he has been true to the circumstances on which the exemption was given.

Senator Cook: I think we should reserve the point and come back to it after we have heard the evidence of the other people.

The Chairman: Yes, I think we have talked it out, and we can make a note of it.

Senator Desruisseaux: Mr. Chairman, if I could revert to clause 3(2)(c)(ii)—"the amount of the indebtedness of the company in respect of money borrowed by it,"—what would be the present guidelines? I cannot see what they would be.

Mr. Humphrys: I could give two examples there, senator. Under the test in subclause (3) of clause 2 a company is not considered to be an investment company if the outstanding debt, together with guarantees, is less than 25 per cent of the aggregate of the debt and capital and surplus.

We might have a case where a company had guaranteed debts of some of its subsidiaries but had not borrowed any money or had borrowed only a small amount, so the indebtedness for the money borrowed might be quite small although the total of its guarantees plus borrowed money might be more than the 25 per cent base. So we thought that might be a kind of case we would want to look at to see whether the borrowed money was of such significance that the company should be covered or not.

Another case might be where a company buys a parcel of real estate that has a big mortgage on it. When it prepares its balance sheet that mortgage would appear as a debt, but it is not money that was borrowed by the company. So, again, we might want to look at that case in the light of the actual money borrowed by the company, as distinct from its debt.

Those are the kind of cases we would want to look at.

Senator Aird: Mr. Chairman, I would like to go back to the numbers again, and perhaps Mr. Humphrys does not have them available at this time, but it seems to me that it would be very useful for us to have on the record a breakdown, province by province, of the 90 that he forecasts will come under this act, so that we will have an idea as to where this responsibility is ultimately going to lie.

Mr. Humphrys: We have done the best we can so far, senator, to try to identify the companies that might meet the tests. We have not received all the information that we would need from all the companies, so we do not want to commit ourselves too firmly on any predictions, although most of them are centred in the two major provinces of Quebec and Ontario.

Senator Aird: More than half?

Mr. Humphrys: I think so, yes.

The Chairman: In your projection by which you reached 90, have you projected incorporations, looking forward, or is this just existing companies?

Mr. Humphrys: This is just existing companies, so far as we could identify them.

The Chairman: If there are no other questions, will you carry on, Mr. Humphrys?

Mr. Humphrys: That area of discretionary exemption was one of the principal changes in this measure as compared to the bill you studied although, as you can see, it is aimed at the same kind of problem that this committee was working on when you last studied the measure.

The Chairman: I think your Roman numeral (iv) in section 3 is a very important additional basis for exemption; that is, the integration feature of the company's activities. Would you develop that a bit?

Mr. Humphrys: Under the measure as it left the Senate, where a company loaned money to or invested in a subsidiary it was provided that that type of investment would be ignored for the purposes of testing whether a company was an investment company or not, provided that the subsidiary was not itself an investment company.

Some cases have come to us since then where there could be two, three or four layers of subsidiaries and the company may have made an investment in the second or third layer. Rather than try to revise the wording dealing with subsidiaries that has been adopted by this committee, we thought it better to take this approach and permit the minister to look at the extent of the integration in the activities of the particular company with those of its subsidiaries, of its sister companies and of its parent, and to try to judge in that context whether it is really an investment intermediary so far as the public is concerned or whether it is part of the whole operating function of the corporate enterprise.

There may be a variety of cases—perhaps more so than anybody can list at this stage—where a company may serve only the parent, or it may serve all the companies in the group. There may be quite a variety of circumstances.

This permits such companies to be studied and in the light of the integration of its activities with companies in the family, to determine whether this kind of supervision and control is necessary in the public interest.

The Chairman: Even if such an operation were covered and exempt, or the act did not apply under the provisions, this integration might apply in the situation where you have a top company which fully owns a number of subsidiaries that are manufacturing companies, and then it has also a wholly owned subsidiary which it uses as a financing media. The top company may lose money in addition to holding shares in its financing subsidiary, but all the borrowing from the public for the financing of the manufacturing companies may be done by this financing subsidiary. We have dealt with that elsewhere on a percentage relationship of assets. But this integration feature would apply, would it not?

Mr. Humphrys: Yes. Such a case could be studied under this clause.

The Chairman: The committee will remember that we had Massey-Ferguson who were making substantial representations on this point.

Mr. Humphrys: The other important addition to the bill deals with the limitation of the transfer of shares to non-residents in respect of sales finance companies. These new measures are found in clauses 10 to 17, and they carry with them the subsidiary provisions enabling the making of emergency liquidity loans to companies that are subject to that restriction. These emergency loans could be made by the Canada Deposit Insurance Corporation using funds borrowed from the Consolidated Revenue Fund.

The Chairman: That is a curious set-up, Mr. Humphrys. This is to deal with the nationality of the shareholders of the company and requires that the non-nationals cannot hold more than a certain percentage of shares of the company. Is that right?

Mr. Humphrys: Yes, Mr. Chairman. Clauses 10 to 15 impose limitations on the transfer of shares of a sales finance company to non-residents. A sales finance company is defined on page 17 of the bill as:

> —an investment company at least twenty-five per cent of the assets of which, valued in accordance with the regulations, consist of
>
> (i) loans, whether secured or unsecured, made by the company, or
>
> (ii) purchases by the company of conditional sales contracts, accounts receivable, bills of sale, chattel mortgages, bills of exchange, promissory notes or other obligations representing part or all of the sale price of merchandise or services;

Such a company would be subject to these limitations and the limitations are practically identical with similar limitations applicable to life insurance companies, trust companies, mortgage loan companies and banks. That is, they impose a maximum of 25 per cent on the portion of the shares that can be held by non-residents and a maximum of 10 per cent on the shares that can be held by any one non-resident. In relation to those companies, those limitations apply to each class of shares if there are several classes.

Senator Lang: Assume that a company was exempted under this act and it had outstanding options to non-residents involving more than 25 per cent of the stock, and then the exemption was revoked and the option holders exercised their option? What sort of position would the directors find themselves in?

Mr. Humphrys: I would say first that the power of the minister to exempt a company from the application of the act does not extend to enable him to exempt a company from the limitations of transfer of shares between non-residents. That is the first answer to your question.

The second point, which is a difficult one, is that a company is subject to these limitations only if it is a sales finance company that is, only if it remains an investment company and remains as a sales finance company within these definitions. Should it fail to do so, it would drop out of the act completely and would also be freed from these exemptions.

It would be possible to imagine a case of a company that was subject to these restrictions and its financial position changed in such a way that it was no longer an investment company. Then it might be sold to non-residents and might subsequently come back in as an investment company.

Once a company is registered under this act, it remains an investment company regardless of the change in its assets until that registration is allowed to lapse or is withdrawn.

The Chairman: The company can bring the thing to issue. It would not renew its registration?

Mr. Humphrys: The renewal is at the discretion of the minister and not the company.

The Chairman: How does the company let it lapse?

Mr. Humphrys: It could not let it lapse. The minister might let the registration of the company lapse if it is no longer acting as an investment intermediary; but it is discretionary with him whether he allows it to lapse or not.

Senator Beaubien: Mr. Humphrys, what about CIT Finance and such people who are wholly owned in the States?

Mr. Humphrys: Any company that is controlled by a non-resident—that is, where more than 50 per cent of the voting stock was held by a non-resident on October 17, 1969, which was the date that this measure was announced—is exempt from this restriction.

Senator Aird: I should like to ask a question under 10(1)(a). Is it normal to say:

> (i) an individual who is not ordinarily resident in Canada,

I query the word "ordinarily".

Mr. Humphrys: This is the same wording as that used in the Bank Act, the Insurance Companies Act, the Trust Companies Act and the Loan Companies Act in connection with similar measures. We therefore considered it wise to following that wording, which I have not had questioned.

Senator Cook: Is it also used in the Income Tax Act?

Mr. Humphrys: As I say, it has been used in other cases. Maybe Mr. McDonald, the Legal Adviser to the Department of Insurance, would comment in this connection.

Mr. H. B. McDonald, Legal Adviser, Department of Insurance: I would only say that the expression has been used in other statutes and there is a body law to assist in the determination of the meaning of the expression.

Senator Aird: You are satisfied that there is sufficient jurisprudence and a number of rulings on the point to provide a sensible interpretation of the wording "ordinarily resident".

Mr. McDonald: I would think so, senator.

The Chairman: I think that is correct, senator; there is much jurisprudence on the question of establishing whether a person is or is not to be regarded as a resident. He may think he has done all that is necessary to cease being a resident, but the jurisprudence provides that no matter where else he may have residence he still retains residence in Canada.

Senator Aird: In any event I draw to the attention of the Superintendent that from a common sense point of view this seems to be wording that would give rise to a number of questions and therefore should be reconsidered.

The Chairman: Yes, they could avoid it by prescribing a time limit, such as is contained in the Income Tax Act. A person spending so many days in Canada becomes a resident for tax purposes.

Senator Aird: In my opinion a person is either a resident or a non-resident of Canada and the word "ordinarily" has nothing to do with it. That would be a layman's approach.

The Chairman: That is open to various interpretations.

Senator Aird: Yes.

The Chairman: Would you consider a definition that would not present such problems, for instance by time limit?

Senator Beaubien: Or as defined by the Income Tax Act.

Mr. Humphrys: I would suggest, Mr. Chairman and senators, that the provision has been in the federal legislation since 1965. We have had no difficulty with it.

In this connection we are creating a prohibition against the directors' transferring shares to persons of a certain class. The decision rests with the directors and if they act in good faith and on the basis of their knowledge and understanding, this is all that is required of them. Therefore, if they reach the conclusion that a person is not ordinarily resident in Canada and refuse him a transfer of shares, they are acting in accordance with the requirements resting on them.

However, the extent to which this provision might be criticized is that in the context of this type of measure does it leave the way open for a person who is really a non-resident to achieve control of a company where Parliament does not wish him to do so? I doubt that there is enough range of judgment within the measure to arrive at that result. In the first place, it would deal only with individuals, because the residence of a corporation will be known precisely. If an individual is moving back and forth, in and out of Canada and his connection with Canada is such that the board of directors feel that in their judgment he is ordinarily resident in Canada, is close enough to the borderline that there would probably be no objection from the point of view of public policy if he does own more than 10 per cent or 25 per cent of the stock of a company.

The Chairman: Except that you would agree with the principle of drafting the provisions of a bill clearly enough that litigation will not be provoked.

Mr. Humphyrs: I could not quarrel with that principle, definitely not.

The Chairman: Do you not think that the word "ordinarily" in this clause might very well have that effect?

Mr. Humphyrs: It gives a broader range of judgment to the directors, but I do not think it would provoke litigation.

The Chairman: But penalties are imposed on the directors if they permit transfers by a non-resident.

Mr. Humphrys: They are protected from penalty if they act in good faith on the basis of the best of their knowledge and belief. Therefore, if they form a judgment that a person is not ordinarily resident in Canada and refuse transfer of shares, in my opinion he has no recourse against them and no penalties are imposed for improper action. The converse also follows.

The Chairman: That is too broad a statement. Certainly the directors might have an exposure to litigation as between themselves and the affected person. You are speaking from the point of view of prosecution and penalty under the statute; if they act in good faith they would not be subject to it. However, we are considering it from the point of view of the obligations imposed on directors vis-a-vis the person who is refused a transfer because they consider him to be a non-resident. He makes an issue of it and the courts hold that on the basis of the evidence he is ordinarily a resident.

Mr. Humphrys: In that case he could obtain the shares, but I see no serious problem arising from that.

The Chairman: Except the cost; litigation is expensive.

Senator Aird: Perhaps a practical answer would be to ascertain the interpretation as to whether a person is a resident or a non-resident by consulting your department.

Mr. Humphrys: Yes, and he might not attempt to buy the shares, which is essentially the purpose of the measure.

Senator Beaubien: What would be the effect of simply deleting the word "ordinarily"? Ordinarily is a wonderful word invented by the lawyers.

The Chairman: It would then read "a person who is not resident in Canada".

Mr. Humphrys: I cannot answer that without consulting the Department of Justice. I would be very reluctant to see a change in this measure as compared with similar measures containing identical wording.

The Chairman: I do not think the fact that we have not checked this in other legislation is any argument against checking it in this bill.

Senator Hollett: Do you not consider there to be a slight grammatical error in paragraph (c): " "resident" means an individual . . . that is not a non-resident;".

Mr. Humphrys: ". . . an individual, corporation or trust that is not a non-resident;" I do not think so senator.

Senator Hollett: "Resident means an individual that is a non-resident". Would it not be better to have "who" in there somewhere? I am not worrying very much about it, but I would not like your department to come out with grammatical errors. It means an individual who is not a resident or a corporation or trust that . . .

Senator Aird: The word "ordinarily" also appears.

Senator Hollett: Well, no one knows what that means.

Mr. Humphrys: I do not think that would be necessary.

The Chairman: It is a negative manner of defining; however, its meaning is clear.

Mr. Humphrys: Your point is correct, senator, from the point of view of the purity of English. The clauses through to 14 are, as nearly as possible, identical with similar measures in the other legislation.

The Chairman: When you say "other legislation" you mean the amendments we made to the Trust Companies Act?

Mr. Humphrys: The Trust Companies Act, the Loan Companies Act, the Canadian British Insurance Companies Act and the Bank Act, with, of course, whatever changes in wording are necessary to accommodate them to the new type of company covered by this measure. Sales finance companies that were foreign owned at the effective date of this announcement, October 17, 1969, are exempt from this restriction. The exemption holds as long as one non-resident owns more than 50 per cent of the stock. If the situation should change and that condition no longer exists—that is, it is no longer a case that one non-resident owns more than 50 per cent—then they would be subject to this restriction and future transfers of shares would be restricted.

The Chairman: Mr. Humphrys, would you rationalize the policy that makes it necessary to have this kind of restriction on non-resident holding apply to sales finance companies?

Mr. Humphrys: I can only refer back to the announcement of the Minister of Finance. The press release dated October 17, 1969, issued by the Minister of Finance was as follows, in the significant passage respecting your question, Mr. Chairman:

> These companies play an important role in financing retail trade and in financing business and industry through loans for equipment and inventory. The Government considered it important to preserve a significant Canadian controlled element in this type of financial enterprise.

This type of company, in the activity that it plays in the financial fabric in the sale of goods and in retail trade, was of a special defined type. I think sales finance companies are generally known and recognised for their particular type of business; it comes close to a kind of banking activity. The fact is that in Canada a large number of the sales finance companies that are foreign controlled. There are some that are Canadian controlled.

The policy, as I interpret it, was that the Government thought it desirable that a Canadian controlled element be maintained in this financial activity, and consequently they proposed this measure. I do not think it necessarily implies any policy decision respecting other types of companies, whether they should be subject to similar restrictions or not. Steps have been taken class by class from time to time as circumstances seemed to indicate. You will recall that this type of restriction was imposed respecting life insurance companies back in, I think, 1965, and loan companies and trust companies at the same time. Following that, similar restrictions were adopted for banks. Then there were provisions relating to broadcasting companies and other types that are defined as constrained share companies under the Corporations Act.

The Chairman: You would not regard, would you, the modus that might impel you in connection with a broadcasting company to require Canadian ownership to be the same as that requiring Canadian ownership in sales financing companies? Is there a principle that is common to the two?

Mr. Humphrys: I would not think so, Mr. Chairman, but I really think that any proposal in this regard is a matter of government policy and it is hard for me to say more than I have.

The Chairman: I am not going to ask you to.

Mr. Humphrys: The policy decision was evidently that so far as sales finance companies are concerned, the Government thought there should continue to be a Canadian controlled element, although not obviously an exclusive area for Canadian control. As I see it, the significance of these companies is the part they play in the financing of retail trade and business and industry generally through corporate loans and other financing activity. They do play an important part in the financial fabric of the country, and, just as in the case of banks and other major financial institutions, there is a case for seeing to it that there is some Canadian control voice in this activity.

The Chairman: Mr. Humphrys, I was wondering if you have a statement, or if you could prepare one, that would show the number, size and scope of the business operation of non-resident companies operating in Canada in this sales finance field; then sales finance companies operating in Canada that are majority controlled as against, say, 100 per cent; and then the Canadian owned.

Senator Beaubien: Are those figures available, Mr. Humphrys?

Mr. Humphrys: We would not have that type of information yet. We think that if this measure is adopted and the reporting procedure begins, we would then be able to produce that kind of information, at least as respects federally incorporated companies. We could not necessarily get it with respect to provincially incorporated companies.

The Chairman: You mean that if we ask the Bureau of Statistics to tell us the percentage operation of the field we could not get it?

Senator Beaubien: Would General Motors Acceptance and C.I.T. Finance report on the size of their Canadian operation?

Mr. Humphrys: General Motors Acceptance would. C.I.T. is a United States company but they have a Canadian subsidiary.

Senator Beaubien: Which would report.

Mr. Humphrys: It would report to us. We would be able to produce figures for federally incorporated companies. We would be able to produce figures in relation to federally incorporated companies. The difficulty of getting accurate figures is that we would have first to see whether the company falls within the definition of a sales finance company in this measure, which may not be exactly the same as the definition being used for the DBS figures, but I imagine that the DBS could produce a breakdown of the companies that they include in their definition of sales finance companies.

Senator Beaubien: If you got the figures of General Motors Acceptance and C.I.T. Finance I think you would have 99 per cent of what the foreign-owned people are doing.

Mr. Humphrys: I can say that, of the ten largest sales finance companies in Canada, as put forward by the briefs of the Federated Council of Sales Finance Companies, seven of them are federally incorporated. Their total assets were reported by the Federated Council at the end of 1968 as being $3.1 billion. I think that 75 per cent of that would be represented by federally incorporated companies and two of the major companies that are Canadian controlled, the I.A.C. and the Traders Group would account for close to two billion of the $3.1 billion.

The Chairman: So there is a significant Canadian market in this kind of operation?

Mr. Humphrys: At this point of time, there is a significant Canadian controlled element in this particular industry, yes.

The Chairman: And this would check inroads.

Mr. Humphrys: It would prevent the sale of any such company that is now Canadian controlled, it would prevent the sale of control to non-residents. It does not by itself prevent the formation of a new company, owned by non-residents from the outset. So it does not protect the Canadian controlled company from competition from other existing foreign controlled companies or new companies. But it does prevent the sale of existing Canadian controlled companies in this field.

The fact that the Canadian controlled companies have to compete to such a significant extent with foreign controlled companies leads to comments in relation to this lender-of-last-resort provision. It was noted that the number of foreign controlled companies in this field in Canada are subsidiaries of very large foreign companies. They may have access to funds from their parent, or they may be able to put the guarantee of their parent on their paper which they market in the Canadian market. In such cases it gives them a significant advantage in the investment market as compared with Canadian controlled companies that cannot add the extra name to their paper.

It was felt that if a Canadian controlled element of any significant size is to be retained in this industry, not only must one prevent the sale of the company to non-residents but one must try to put the companies in a position where they can compete for the business without significant disadvantage. Part of the competition in this field is the ability to raise money in the market in order to finance the purchase of the sales finance paper and carry on the other activities. Consequently, to attempt to equalize the competition position this facility is proposed to add an extra degree of confidence to the paper of the Canadian conrolled companies.

This measure proposes that a lender-of-last-resort facility be created, whereby loans could be made to Canadian controlled sales finance companies if needed to meet an emergency liquidity problem. Such loans, under this proposal, could be made only for emergency liquidity. They would be limited to six month periods and would be made only if the company concerned had substantially exhausted sources of liquid funds otherwise available to it.

The Chairman: Are you referring to clause 16?

Mr. Humphrys: Yes.

The Chairman: Or the Canada Deposit Insurance Corporation may make loans?

Mr. Humphrys: Yes.

The Chairman: I think that was in connection with sales finance companies that are subject to clauses 11 to 13?

Mr. Humphrys: That is correct, sir. Clauses 11 to 13 deal with companies that have a non-resident share limitation. They are companies with respect to which there is a restriction on the transfer of shares to non-residents. So any such company is in a position where it cannot become controlled by non-residents. This lender-of-last-resort facilities through the CDIC is available only to such companies, so it can be said that it is available only to Canadian controlled sales finance companies.

The Chairman: Do you think that is clear from clause 16?

Mr. Humphrys: Yes, senator, because clause 16 permits these loans to be made only to companies that are subject to clauses 11 to 13, and those are companies for which the transfer of shares is limited, and such companies do not include foreign controlled companies.

The Chairman: What is the source of the money that the Canada Deposit Insurance Corporation may use for liquid purposes?

Mr. Humphrys: The Canada Deposit Insurance Corporation is really used as an agency vehicle for these loans. It will not use the funds that it has accumulated from its deposit insurance activities. Its activity in this regard would be completely separate from its deposit insurance activities. This bill would empower the advance of moneys from the Consolidated Revenue Fund to the CDIC for the purposes of such loans and would require the CDIC to account for such activities, quite separately from these deposit insurance activities.

Senator Aird: Do you have a figure, Mr. Humphrys, as to the assets of the CDIC at the end of 1970 ?

Mr. Humphyrs: I have not it with me, senator. I can easily get it.

Senator Aird: Do you have an approximate idea—or your colleagues?

Mr. Humphrys: I would rather get the figures.

Senator Cook: Were there any claims on it last year?

Senator Beaubien: It is a one-way street only?

Mr. Humphrys: There will be claims on it. In effect, there have been claims, yes. The Commonwealth Trust Company in British Columbia is now under liquidation, which will give rise to a claim against the Deposit Insurance Corporation. Mr. McDonald will get the figure for the assets of the CDIC by telephone.

Senator Cook: Would it be of any great magnitude?

Mr. Humphrys: It is hard to estimate at this stage, but I think the claim will be substantial, yes. I would expect so.

The Chairman: The contributors are financing the failures.

Senator Beaubien: Of competitors, yes.

Mr. Humphrys: The funds from the contributors are paying the depositor's losses. That is the intention of the plan.

Senator Beaubien: The force that is strong has to look after the weak.

The Chairman: That is a good principle.

Senator Aird: The point is that it is an increasing sum of money, and is it being put to use?

The Chairman: This money for this purpose will come from the Consolidated Revenue Fund.

Mr. Humphrys: It is quite separate from any other activity of the corporation and will not be advanced unless there is an application for a loan from the company, in which case the Deposit Insurance Corporation would then seek an advance from the Consolidated Revenue Fund for the purpose.

Senator Lang: Does it say that anywhere in the bill?

Mr. Humphrys: Yes, senator, in clause 29, page 40, it says that out of the Consolidated Revenue Fund the minister may advance funds to the CDIC for the purpose of making loans under section 16.

The Chairman: I was just wondering whether there should be some tie-up between section 16 and section 29. What do you think Mr. Hopkins?

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: There is in section 29 (1)(b).

The Chairman: Well, the significance of that does not fall exactly...

Mr. Humphrys: I think, sir, it should be line 14 of paragraph (a):

> ...the Minister
>
> (a) may, on terms and conditions approved by the Governor in Council, authorize advances to the Canada Deposit Insurance Corporation (in this section and sections 30 and 31 referred to as the "Corporation") of amounts required for the purpose of making loans under section 16;...

The Chairman: But that is not an exclusive thing. Is it not still within the scope of section 16(1) for the Deposit Insurance Corporation to make the loan?

Senator Cook: Or to use its own funds.

The Chairman: It may be that I have missed it, but there is nothing I have seen in the bill that requires the Deposit Insurance Company to maintain this as a separate operation and to use only those funds.

Senator Lang: But section 29 (b) is mandatory, however. It says that the minister "shall".

The Chairman: It is a question of intention.

Mr. Humphrys: The intention is that the corporation shall not use its own funds but shall use only the funds advanced to it under section 29, but subject to reimbursement. The Deposit Insurance Company should not be put in the position where it can incur losses for the funds that it has for the particular purpose.

Mr. Humphrys: It is not intended that the CDIC be empowered to use any of its deposit insurance funds.

The Chairman: Where is the limitation?

Senator Cook: Section 31 says that it has to be kept separate.

The Chairman: Section 30 says that the corporation shall establish in the Bank of Canada a separate account. Under section 31 on page 41 there is a provision that the record shall be kept separate and distinct. But that still could govern within the limits that the Deposit Insurance Company was putting up its own money.

Mr. Humphrys: But section 31 says:

> 31. The assets and liabilities and the receipts and disbursements of the Corporation arising from its operations under this Act, and the records of the Corporation relating thereto, shall be kept separate and distinct from those arising from its operations under the *Canada Deposit Insurance Corporation Act.*

The Chairman: It does not tie it down in section 16 that they have general authority to make loans in certain circumstances. True, there is a source named in section 29 which may provide the money, but it does not take away from the Deposit Insurance Company the right to use its own funds. At least I have not seen it there. Maybe I should read it more carefully.

Mr. Humphrys: We will look at that point, Mr. Chairman.

Mr. Hopkins: It should be looked at, yes.

Senator Cook: As it is, it is just a cross-reference. Section 29 relates to section 16, but section 16 does not relate to section 29.

The Chairman: All right. I think it should be tied in and I would appreciate your looking at it.

Mr. Humphrys: It is certainly intended that any activity of the CDIC in this regard be kept quite separate from its deposit insurance activities, because it is intended to use the CDIC only as an agency vehicle.

The Chairman: I believe we interrupted your presentation, Mr. Humphrys.

Mr. Humphrys: I was almost finished, Mr. Chairman. I dealt with the lender of last resort facility which is linked to the restriction on transfer of shares of sales finance companies to non-residents, and we touched on clauses 29, 30 and 31, which also are linked in with the lender of last resort facility. So that is the outline especially of the new clauses that are in the bill, stemming from the limitation on transfer of shares with respect to sales finance companies.

The Chairman: Except for section 15.

Mr. Humphrys: Section 15 is part of the same piece. It is inserted in order to prevent the restrictions on the transfer of shares being avoided by the sale of all the assets and liabilities of the company to another company so that, effectively, the whole business could be transferred to another company leaving the selling company as an empty shell. The provision states that no sale or disposal of the whole or any part of the undertaking of a sales finance company—that is, a company under this restriction on transfer of shares is of any effect unless it is approved by the minister, if the minister thinks that the sale is likely to result directly or indirectly in the acquisition of the whole or any part of the undertaking of the company by a non-resident.

Now, there is an area of judgment left in there, because cases might arise where the sale is from a federal company to a provincial company and the provincial company, while it may be Canadian-controlled at the time of the sale, might promptly be purchased by a non-resident, if there is no restriction under its jurisdiction. So that one would have to look at the end result of the sale of the undertaking to try to judge whether it is a move intended to get the business and undertaking into the hands of non-residents.

It is not put up as an absolute prohibition—that is, that the minister shall refuse, because there might be cases where a company would wish to sell parts of its undertaking, and in such cases it might be that perhaps the only purchaser or best purchaser is a foreign-controlled company. So that dealing with part of the undertaking I think makes it important to leave a certain amount of flexibility to consider the particular case.

This type of control over the sale or dispoal of the whole or any part of the undertaking is one that is found in other legislation that we administer. This one is not quite as extensive as we have it in other legislation. It is intended here primarily to serve an auxiliary purpose to the limitation of the transfer of shares.

The Chairman: There seem to be a number of problems inherent in the language of section 15, Mr. Humphrys. Maybe you can clarify them for me. This relates to Canadian-controlled companies.

Mr. Humphrys: Yes, sir.

The Chairman: Where it may have some percentage of non-resident shareholders.

Mr. Humphrys: It may have, yes.

The Chairman: But not up to control.

Mr. Humphrys: That is correct, sir.

The Chairman: So it is a Canadian-controlled company. You talk about the "sale or disposal" of the whole or any part of the undertaking of "a sales finance company". The question that arises right away is: What is "the undertaking or part of the undertaking"? What does it include, and what is the creditors' position in relation to this? Are we getting into that old situation of matters of property and civil rights in the province? Are you trenching on rights of creditors by saying that under certain circumstances only with the consent of the minister can a sale be made part of the assets?

I have sent for the Canada Corporations Act because "undertaking" is defined there. I think it is defined as being "the whole or any part of the business". It is in the interpretation section. What does that include? Does this "sale or disposal" include the matter of mortgaging or pledging for the purpose of raising money, or creating a floating charge for the purpose of raising money?

Mr. Humphrys: I do not believe that the sale of the undertaking of the company...

The Chairman: I am going to the word "disposal" as well.

Mr. Humphrys: I do not believe it is synonymous with the sale of assets of the company.

The Chairman: "Undertaking" in the Canada Corporations Act is defined this way, that it "means the business of every kind which the company is authorized to carry on". So if a sales finance company of this character, to which section 15 would apply, wishes to sell a block of its assets, is it subject to section 15 and must you get the consent of the minister?

Mr. Humphrys: One would have to look at the case, but the sale of assets by itself in the normal trading of assets would not, I think, in anybody's interpretation, be the sale of part of the company's undertaking. But where it is the sale of a block of business which includes the sale of assets and all the pertaining rights and privileges,

where it is part of the business the company is carrying on, then it would be the sale and disposal of part of the undertaking of a company.

The Chairman: But you are distinguishing between "assets" and "undertaking"?

Mr. Humphrys: Yes.

The Chairman: And you are distinguishing between "part of the undertaking" and "some of the assets".

Mr. Humphrys: I am distinguishing between the whole of the undertaking or part of the undertaking, and I am distinguishing between the undertaking and the assets.

The Chairman: Have you any connotation on the word "disposal"? Certainly, it is different from "sale" because you use the two words.

Mr. Humphrys: Well, it is a broadening of the concept, to take care of any case where the assets are really separated from the company. There may be cases where it is questionable whether it is a sale. It could be a trade, for example.

The Chairman: What is mortgaging? In a mortgaging you are pledging and you are giving a prior right to the mortgagee in relation to the assets which are charged.

Mr. Humphrys: I would not regard it as being a disposal if you were giving a claim against your assets, but if you are transferring title of the assets I would regard it as being disposal, even if you have a contingent right to recover.

The Chairman: If I use a form of trust deed or indenture in creating a floating charge, have not I got right into the question you are mentioning, that there is inherent in that a transfer to a trustee? It may not become effective as a floating charge and does not interfere with the operation of the company until there is a default, but is there not some kind of disposal there?

I would have thought that instead of saying "the whole or any part of the undertaking" you might say, "the whole or any substantial part of the undertaking". That would cut down the problem a bit, and in a lot of legislation I think they use it. In trust deeds, for example, they use that expression as to what the company, notwithstanding the charge on its assets, may do in the ordinary course of business.

Senator Cook: In default.

The Chairman: Yes.

Mr. Humphrys: Well, in fact, it is unlikely that any refusal of the minister to approve a sale would be directed against anything other than a sale of a substantial part of the undertaking. But putting the word "substantial" in adds to the uncertainty, as to what kind of case shall be brought forward. The chairman has already mentioned that there may be some question about whether a particular transaction is the sale of part of the undertaking. Putting the word "substantial" in there raises another judgment point. If you decide it is a sale of part of the undertaking, is it a substantial part? Again, it is a question of judgment, of what is substantial. So we left the word out, really, to try to make more precise the kind of cases that should be put before the minister to see whether, in his opinion firstly, it is a case that would result in the acquisition of the whole or any part of the undertaking by a non-resident; and, secondly, if he says "Yes", whether he would approve or disapprove of it.

The Chairman: But, Mr. Humphrys, the language used in trust deeds is "to the whole or substantially the whole of the undertaking". I think the reasonable interpretation of that has been that it covers and includes any viable part of the operation.

Mr. Humphrys: I would say "substantially the whole" is a much easier phrase to interpret than "any substantial part".

The Chairman: Then why should not this read in that fashion: "the whole or substantially the whole of the undertaking"?

Mr. Humphrys: Well, we wanted to deal with cases where the proposal might not be "substantially the whole"; it might be half; it might be a quarter, and you might want to say, "We do not think that transaction should go through."

Senator Beaubien: If it was a big undertaking, even a relatively small part might be a very big piece of the business.

Mr. Humphrys: Yes.

The Chairman: I can conceive a sales finance company might have operations in a number of provinces, and it might decide that in the interests of its business operations it wants to get out of the business in a particular province, maybe based on experience or something else. Here, it seems to me on the reading of section 15, it has to come to the minister for his consent.

Mr. Humphrys: That is right; it is intended.

The Chairman: Then we are at the question as to whether it should be intended and whether we should approve.

Mr. Humphrys: Exactly.

The Chairman: This is ordinary business judgment; it is not disposing of a viable part of the business operations.

Senator Cook: It is only questioned if it tends to end up in the hands of non-residents?

Mr. Humphrys: That is correct, sir.

The Chairman: This may be the logical place to solve it; and it may be the only place.

Mr. Humphrys: It is intended to complete the pattern of control of the transfer of shares to non-residents, and really to block the possibility of avoiding that by selling the undertaking, or a substantial part of it.

You could do this piecemeal, of course. You could sell part this week, and part next week, and so on. So, in order to make it effective we thought we should put in the words "the whole or any part", and then if it is a sale of the undertaking in anybody's judgment the matter can be placed before the minister.

In practical terms I do not think it is all that difficult to find out or settle upon when the transaction is a sale of part of the undertaking as distinct from a sale of assets. We have a lot of precedent in our other legislation. For example, the Loan Companies Act provides that the company may sell and dispose of the whole or any part of the business, rights, credits, effects and property of the company, and that no such sale or disposal shall be made until approved by the shareholders and by the minister. This is the sale of the whole or any part of the business, rights, credits, effects, and property. We think that the word "undertaking" is really the same as business, rights, credits, and effects. Part of that would really be a sale of part of the company's business activity—for example, a branch in a particular province, or a defined section of its activity—and not the sale of a particular asset, and not the trading of shares in the market.

The Chairman: Let us stay with the word "disposal". You are talking about sale, but let us talk about disposal, and what is encompassed by disposal. Would you say that if a company of the kind covered by section 15 was going to mortgage its assets, or issue a debenture creating a floating charge, it would have to obtain the consent of the minister?

Mr. Humphrys: I would not so interpret it, Mr. Chairman. I would not think that the pledging of any part of its assets as security for a loan would be interpreted as a disposal of part of the company's undertaking. It might be in one sense, and I would defer to the chairman's knowledge on this. It might be a disposal of part of the company's assets, or a contingent disposal, but I would not interpret it as being a disposal of part of the company's undertaking.

Senator Cook: Following up the chairman's question about the sale of part of the undertaking in a province, I should like to ask you whether a sale to a non-resident company which was doing business before October 17, 1969 would be blocked by that section.

Mr. Humphrys: It could be blocked by the minister if he wished, or he could approve it if he thought it was acceptable in the circumstances.

Senator Aird: I am wondering if my interpretation is correct. You have a percentage or a numerical restriction on the transfer of shares?

Mr. Humphrys: Yes.

Senator Aird: Therefore, this section goes much further in respect of discretion in that it says "any part thereof". This is the net result of what we are talking about. This is a much wider discretion in the hands of the minister.

Mr. Humphrys: It is, senator. It should be recognized, however, that the sale of part of a company's undertaking is not a common transaction. Trading in assets and buying and selling assets, yes, but not the sale of part of the undertaking. It is quite an unsual action for a company to take, so I would not really expect, first, that there would be many problems of this type, or, second, that it would be very hard to determine whether the particular transaction is a sale of the company's undertaking or not. If there is any doubt the, of course, you would have to put it before the minister.

Senator Aird: Did you give consideration to a definition of the word "undertaking" then?

Mr. Humphrys: We thought a lot about it. We looked at the definition in the Corporations Act, and at the wording in the Loan Companies Act and the Trust Companies Act, in which the counterpart of this section talks about the sale of the business, rights, credits, eflects, and property, and we thought that the word "undertaking" standing by itself would really convey the sense intended with sufficient precision to make the section workable.

The Chairman: Mr. Humphrys, how much in the way of assets would you have to be proposing to deal with in order that in your opinion it would come under section 15, and be the whole or any part of the undertaking of the company?

Mr. Humphrys: I do not think I would make a judgment solely on the proportion of assets that are involved in the transaction. I would want to look at the whole transaction to see if it goes further than the mere sale of assets so that it is really a sale of the undertaking—whether there is something that goes with it such as a part of the business activity that gave rise to the assets.

The Chairman: Take my example where a company decides that it does not want to carry on its operations in one particular province of Canada any longer and so, therefore, it negotiates the sale or disposal of the assets that are referable to its operations in that province, and non-resident. The sale may be to a company that is operating legitimately in Canada, but which comes within the non-resident category with a certain percentage of non-resident shareholders. Would you say that in those circumstances those assets being sold or otherwise being disposed of would constitute the whole or any part of the undertaking and that therefore the company would have to apply to the minister?

Mr. Humphrys: Not the assets as such, but I would look at the transaction, and if the transaction was one where the sale represents the receivables, if you like, from that area of operation together with the offices and the business contacts, with the intention and expectation that the purchaser is going to carry on the business, then I would say it is part of the sale of the undertaking.

The Chairman: Even if the intention is to go out of business in that province, for good and sound business reasons?

Mr. Humphrys: Yes, Mr. Chairman, but if the company just closed down its offices and said that it was stopping

business there and that it had a block of receivables which, for one reason or another, it wanted to turn into foreign-owned finance company, or to anybody else, then I would not regard that as a sale of a part of the company's undertaking.

The Chairman: Except that a good lawyer at one end or other of the transaction would insist that there be coupled with the purchase of the receivables in that province an undertaking that the company selling them would not for a certain period of time engage in or resume that business operation.

Mr. Humphrys: It depends on the purpose of the purchase; he may not be interested in carrying on.

The Chairman: I am assuming that he is.

Mr. Humphrys: If he is, it is a sale, not only of the assets but of the business connections and the territory for business development. I would regard it as being part of the undertaking of the company.

The Chairman: If this were a case of one company intending to discontinue operations in a certain province and another company buying its assets, the first company would give an undertaking in writing not to carry on in competition because the second company makes the purchase in order to continue the business.

Mr. Hopkins: That is more than merely the sale of assets.

Senator Beaubien: It would be part of the undertaking.

Mr. Humphyrs: I would so interpret it in that case.

The Chairman: The next question is should this cover any part, or should it be a substantial part?

Senator Aird: Particularly in the event of a new percentage factor on the shares.

Mr. Humphrys: I do not know what a substantial part is. I might have an opinion, but the opinion of others could be different. If our only requirement is to focus on the question, 'is it part of the undertaking", then we know we have to put it before the Minister. However, if we also have to decide if it is a substantial part of the undertaking, there is an additional uncertainty.

I agree that by leaving the word out we may bring more cases before the Minister than otherwise but we would be more definite as to whether a case must be presented to him. I would submit that sale of part of the undertaking of a company is not a common or frequent transaction. Therefore we are not dealing with a great flow of cases which will create a massive problem of interpretation or judgment. In the event of an extra case or two arising, I do not think it would be a serious problem for the company concerned on the administration.

The Chairman: I insist on staying with the word disposal; you stay with the word sale. Let us consider the word disposal and the position of creditors in relation to disposal of assets and the creditors' rights to deal with them.

Are you suggesting that a creditor in these circumstances under clause 15, if he were seizing assets, would have obtain the consent of the minister for their disposal?

Mr. Humphrys: It is unlikely that a creditor would be seizing the whole business. However, if it were a case where the company was disposing of part of its undertaking it would have to go to the minister. If it is a creditor, whoever the recipient may be, the case would have to be presented for consideration.

The Chairman: Would the creation of a debenture issue have to be considered by the minister?

Mr. Humphrys: I would not so interpret it. The pledging of assets as security for a loan would not be disposal of part of the undertaking. It might be in legal parlance a contingent disposal of part of the assets. However, it is rare for a company to do more than just pledge some of the assets as security.

The Chairman: No, Mr. Humphrys; if I obtain security, I have security on the assets of the company. I may specify certain assets, but you are creating a floating charge on the assets of the company. The business can be carried on in the ordinary manner until there is a default, when the floating charge seizes everything.

Mr. Humphrys: But is not the essential transaction a pledge on some or all of the assets of the company as security for the borrowing, rather than the concept of pledging the undertaking? The creditor is really not interested in carrying on the business; he wants security for his loan.

The Chairman: I do not think so, because in the same document the company is given the right to make disposals notwithstanding the security that is held by the trustee. There are conditions in connection with those disposals and there are certain monetary limits. If these limits are exceeded the consent of the trustee and the security holders must be obtained and the proceeds paid to the trustee to reduce the amount of the obligation.

Mr. Humphrys: Yes, I recognize there are often restrictions on even change of the type of undertaking.

The Chairman: That is right.

Mr. Humphrys: But I was proposing that it is not in its essential characteristic a pledge of the undertaking of the company as security for the creditors. It is a pledge of the assets with certain conditions, that the company will not change its type of undertaking or dispose of part of its undertaking except pursuant to the conditions laid down.

Senator Cook: Is there a similar section in other legislation?

Mr. Humphrys: The Loan Companies Act provides that the company may sell and dispose of the whole or any part of the business rights, credits, effects and property

of the company and that no such disposal takes effect until it has been submitted to and approved by the Minister.

The Chairman: There it requires the approval of the shareholders, as I would expect in such a transaction.

Mr. Humphrys: This type of clause has been contained in the Loan Companies Act, the Insurance Companies Act and the Trust Companies Act for many years. It is very easy to identify the cases where it constitutes the sale of the business, rights or property rather than the sale of the assets.

The Chairman: Mr. Humphrys, sometimes 50 years after a statute has been passed, there are instances where the courts have declared such an act to be unconstitutional. We have to rationalize this, which is not achieved by saying it is in another act.

Mr. Humphrys: I was not addressing myself to constitutionality but to the administrative problems created by these cases. We have not found it difficult to distinguish between the sale of assets and the sale of the business, rights or property or even part of the business, rights or property.

The Chairman: What have you to say about the possibility of conflict?

Mr. Humphrys: Constitutional conflict?

The Chairman: Yes, part of this will affect creditors' positions.

Mr. Humphrys: I regard this type of clause as being a modification of the corporate power of a company, rather than a distinction between...

The Chairman: Now, Mr. Humphrys; not really.

Mr. Humphrys: Rather than legislating on a private contract.

The Chairman: Do you mean that this flows essentially out of the right of the federal authority to incorporate a company and give it authority to create by-laws, the management of its operations and so on?

Mr. Humphrys: To give it corporate power or to place limits on its corporate power.

The Chairman: Then it must go to the Minister if it wishes to make a disposal of its assets?

Mr. Humphrys: I would think that it would be within the scope of the incorporating authority to impose such conditions on the exercise of a company's corporate power.

Senator Aird: Is the constitutional question a real reason for the change of the language in the other acts which I believe provide for business, assets and property to the word "undertaking" proposed in this bill?

Mr. Humphrys: No, we thought that the word "undertaking" swept in the other words in a really more significant manner.

The Chairman: We have had full discussion of this clause and will place it on our list for consideration. We will not come to any conclusions without informing you of our thinking and giving you full opportunity to reply if you wish to add to your comments later. I think there is a question that we have to work through there. What the result will be I am not prepared to say; that is for the committee. That about takes us through the limitation of non-resident shareholding and the methods of dealing with it. Is that not right?

Mr. Humphrys: Yes, Mr. Chairman.

The Chairman: I was wondering if you would deal in a particular way with clause 9, which is entitled "Prohibited loans and investments".

Mr. Humphrys: The purpose of clause 9 is to prohibit a company from making loans and investments where there may be a conflict of interest. The wording of the clause has not been changed from that in the bill that was previously before you, with the exception of the addition of one subsection, which is intended to prevent an investment company from guaranteeing the obligations of another company where it is prohibited from investing in that company.

The Chairman: Which subsection is that?

Mr. Humphrys: That is subsection (3) on page 12. In other respects the clause stands as it did earlier.

The Chairman: Just so as to have it on the record for your consideration, we had evidence when we were dealing with Bill S-17 on how various companies operate. Some of them have really a holding company at the top, they have a series of manufacturing companies which are their tools for carrying on business, and then they have a financing subsidiary. This is the proposition I want to put to you. It appears to me that clause 9 prohibits the making of investments by way of loans, shares, etc. by an investment company in any other company in which a substantial shareholder of the investment company has a 10 per cent interest.

Mr. Humphrys: That is correct.

The Chairman: This means that if a company had a Canadian financing subsidiary, and also had a number of Canadian manufacturing subsidiaries, if the purpose of that financing subsidiary was to finance the manufacturing subsidiaries, it would no longer be possible for the financing subsidiary to continue financing the manufacturing subsidiaries after the bill comes into force, because any such financing would involve loans from an investment company—that is from the financing subsidiary—to other companies in which the parent company of the investment company had more than a 10 per cent interest. There must be some way out from under that.

Mr. Humphrys: I would refer you to subsection (11) on page 15. This type of case came before the committee when you were considering the bill. This particular instance was, I think, Canadian Pacific Securities. Canadian Pacific Securities is the financing subsidiary of the group and raises money by the sale of securities to

the public, and the funds are used to invest in other companies in the Canadian Pacific group. This particular case was before the committee, and subsection (11) was put in with the idea of dealing with that kind of case. It was first thought that such case should not be exempted, because the public is lending money to the financing company, and if that money is going to be put into a number of other companies in the group, then essentially it is acting as a financial intermediary so that it should be under the bill.

Subsection (11) was put in to take care of this case which the chairman has described, and provides that if the parent guarantees the obligations of the subsidiary, then the subsidiary can make loans to the parent or to any of the sister companies in the group. The only stipulation is that the parent must be either an investment company under this bill or must agree to provide information to the department concerning its financial position.

The Chairman: The parent company may not be an investment company.

Mr. Humphrys: Then it must file statements. If it is a foreign company, this provision can be withdrawn by a condition in the company's certificate. If the company is raising money in the Canadian market and using the money to finance other related companies, this is the very kind of activity that has given rise to all kinds of difficulty in other cases. It is really making investments where there is not an arms-length relationship. Subsection (11) was put in to say that there would not be a prohibition against lending to the sister companies if the parent company guaranteed the obligations, and if the parent company provided such information as is required of an investment company. If the parent company is not under Canadian jurisdiction, if it is a foreign company pure and simple, then it might not be in the interests of the Canadian investor to have this money going into a whole lot of subsidiaries which themselves are controlled outside Canada, in which case the investing in those sister companies might be prohibited.

The Chairman: What I intended to suggest was that I thought you should put in the integration provision that you have in claude 3, subsection (2) (c) (iv), where the minister may grant exemption, if he studies the entire activities and integration and determines if they are in the public interest. That is in clause 3. Why is it not in clause 9?

Mr. Humphrys: It is not in clause 9 because we considered the provisions of subsection (11) went as far as we should go in removing the prohibition against investments in those cases where there is not an arms-length relationship. If an exemption is granted under the exemption category, then they are exempt from this restriction in clause 9 also. It does not have to be in both places. If the company is going to be exempted because the extent of the integration of its activities with companies within its family is such that this bill need not apply, then clause 9 would not apply. If it is a case where we think the bill should apply to it, notwithstanding that its activities are to some extent integrated with its related companies, then I think clause 9 should apply also, unless it falls within the category of subsection (11).

The Chairman: Mr. Humphrys, are you saying that under clause 3, which is the power of the minister to grant exemption in the circumstances contained there, he can consider and grant an exemption, whereupon clause 9 has no application?

Mr. Humphrys: Yes, Mr. Chairman.

The Chairman: Is that clear?

Mr. Humphrys: If the company is exempt from the bill, it is exempt from clause 9.

The Chairman: Clause 9 prohibits certain investments to be made by an investing company. The minister's exemption to an investment company is within the confines of clause 3, so then you say that even though it is an investment company, since it has the exemption there is no prohibition. You mentioned arms-length transactions, but even in clause 3, when you are dealing with this integration subsection one of the factors the minister may look at if he is going to exempt is:

> the extent of the integration of the company's activities with the activities of its subsidiaries, if any, and with the activities of any corporation of which it is a subsidiary and any other subsidiaries of that corporation.

You are there dealing with situations that are not within the category of arms-length transactions.

Mr. Humphrys: Yes, Mr. Chairman.

The Chairman: I thought you had mentioned arm's length, the limitation in clause 9.

Mr. Humphrys: Yes. The effect of clause 9 will be that where a company is subject to the act and does not have any exemption, then clause 9 will prevent it from making investments and loans that are within arm's length. Unless...

The Chairman: That are not within arm's length. Is that what you said?

Mr. Humphrys: I said it will prevent it from making investment and loans that are within arm's length. In other words, it will prevent it from making investments and loans where there may be a conflict of interest.

The Chairman: To a subsidiary.

Mr. Humphrys: And within its own judgment. Unless it falls within the category of subclause (11), which was put in to recognize that where you have a borrowing subsidiary in the group, then if the parent guarantees the obligations of the subsidiary, it is much the same as if the parent borrowed directly. If the parent borrowed directly, there is no prohibition against its lending or investing in subsidiaries. The prohibition here does not prevent downstream lending or investing, but it does prevent lateral lending or investment and upstream lending or

investment. The reason is that many of the problems that have arisen in recent years have been just exactly that, where the money has been raised from the borrower and fed into associated companies where the people making the investment decision were influenced by other interests and not by the interest of the corporation that did the borrowing.

The Chairman: Are there any other questions on this point?

Mr. Humphrys: Mr. Chairman, I have a few other points of less important changes, which I would like to mention.

The Chairman: Yes, but keep on record somewhere there that I would like you to deal with how you propose to finance the administration. We discussed that at length when we considered the bill before but some aspects of it seemed to develop in the hearings in the committee in the other place.

Mr. Humphrys: There are a few items to which I would like to draw your attention. Some of them are quite minor. I will quote the clause and subclause and give a word or two of explanation, so that it will be on the record. If anyone wishes to look up the particular point, it will be easy to do. On page 1, clause 2(1)(b)(ii)(D) and (E), those were changed slightly to clarify the wording. Subparagraph (D) deals with the definition of real estate forming part of the invested assets and makes it clear that it only deals with real estate other than real estate for the company's own occupancy. Subparagraph (E) makes more precise the reference to investment in sales finance paper and other related types of assets.

On page 2, clause 2(1)(g) there is a slight rewording of the exclusion in favour of loan companies. The change is intended to make it clear that small loans companies will be subject to this act. It is a technical point.

The Chairman: I thought they were.

Mr. Humphrys: It was so intended, but the earlier wording raised some doubt, because the Loan Companies Act does apply in some respect to small loans companies.

On page 3, clause 2(3)(c), the word "solely" is struck out of line 44. This refers to the exemption in favour of securities dealers. The previous bill said that a company that is engaged "solely" in the business of an underwriter of, or broker or dealer in, securities is exempt. Questions arose about the restriction of the word "solely" so it was struck out. The general feeling was that it would be easy to identify really the nature of the business even if they engaged to a minor extent in other activities.

On page 5, in clause 3—we already dealt with that. That deals with the ministerial discretion.

On page 9, clause 5(8)(a)—this deals with the requirement on an investment company to give notice concerning its borrowing or to file a copy of the prospectus. Certain cases may arise, so it was represented, where a borrowing takes place very quickly and the requirement to give notice beforehand might inhibit the transaction. So the wording was changed to accept the notice within a week following the transaction.

On page 12, clause 9(3)—I already touched upon that. That is a new subclause that prevents an investment company from guaranteeing the obligations of a company if it is prevented from investing in that company.

On page 16, clause 10—I am referring to clauses 10 to 17—we have discussed this. They are the clauses which deal with the limitation on the transfer of shares to non-residents and the making of emergency loans by the CDIC.

On page 34, clause 23(6)—this deals with the right of appeal from a ministerial decision. The wording is changed to remove the previous wording which gave the court the power to prescribe a remedy. This wording enables the court to rescind a decision of the minister on the grounds that the basis for it was improper at law but it does not empower the court to put itself in the position of the minister and say what the company should or should not do.

The Chairman: Mr. Humphrys, is the Federal Court Act now become law?

Mr. Hopkins: I do not think it has been proclaimed yet.

Mr. Humphrys: Yes, not yet, but it does contain provisions that will change these words from exchequer court to the new title.

Mr. Hopkins: It has not been proclaimed yet. It is on the statute books and has received Royal Assent.

The Chairman: Any bill that receives Royal Assent is law, but if it has not been proclaimed, then it is not in force. I suppose it is a kind of suspended animation.

Mr. Humphrys: Mr. Chairman, that act does contain provisions that will effect the change of name of the court; so it is not necessary to make amendments in this bill.

The Chairman: I should not like to refer to the words "Exchequer Court", if we had the new name "Federal Court" and the act was operative. At any rate, we have that bill and we will look at it.

Mr. Humphrys: I am informed that if the proclamation of the Federal Court Act occurs before the coming-into-force of this act, then these words can be changed in the printing of this bill.

The Chairman: On the basis that it is a printing error or something like that?

Mr. Humphrys: I think there is a relative clause in the Federal Court Act.

The Chairman: Is there anything else?

Mr. Humphrys: On page 37, clause 27, subclause (1), there is a change requiring the Superintendent's report to the minister to be tabled in Parliament, and there is also a clause requiring the CDIC to prepare a report on its activities which will be included with the report of the Superintendent.

Clause 28 on the same page deals with the assessment against the companies to cover the administrative expense.

The Chairman: I should like to deal with that in detail at our next meeting.

Mr. Humphrys: The change brings these assessments into force beginning in the fiscal year 1972-73 so that any expense involved in the fiscal year 1971-72 will not be assessed against the companies concerned. The reason for that change is that with the broadening of ministerial discretion to exempt companies, we think much of the activity in the first year might be studying applications for exemption, and it would not be appropriate to levy the expense of that activity against the companies that remain in the act after that initial activity is completed.

There is also a change on page 38 which has the effect of levying expenses on the basis of a fiscal year rather than a claendar year. That is a technical point.

On page 40, clauses 29, 30 and 31 are related to the financing of loans made by CDIC under the emergency lender of last resort provision.

On page 41 in clause 32 there is a slight change in the wording. It says that the Governor in Council may make regulations to ensure the carrying out of the provisions of this act. The previous wording referred to the proper carrying out of the provisions. The word "proper" was cut out.

The Chairman: I question the word "ensure" in that clause. What is the connotation of it? I gather the wording was changed.

Mr. Humphrys: The wording was changed, yes. Bill S-17 said that the Governor in Council could make such regulations "not inconsistent with the provisions of this Act as he considers appropriate to insure the proper carrying out of such provisions." It now reads that the Governor in Council may "make regulations to ensure the carrying out of the provisions of this Act."

First of all, the reference to regulations "not inconsistent with the provisions" was cut out because it was thought that the Governor in Council does not have power to make regulations that are inconsistent anyway. Secondly, the reference to the opinion of the Governor in Council was cut out so that his power to make regulations and their validity would be a matter of law rather than his views.

Senator Cook: Do you not think it should be "make regulations necessary for the carrying out of the provisions", instead of "to ensure the carrying out of the provisions"?

The Chairman: The word "ensure" seems to imply that the regulations are going to guarantee something. We are concerned that the regulations do not empower them to legislate.

Senator Cook: It is only necessary for the carrying-out of the act.

The Chairman: We will think that over as well.

Mr. Humphrys: The only remaining point is on page 43, clause 37, where there were changes made in the penalty clauses, first to give the alternative of a fine to imprisonment in each case—that alternative existed in the Criminal Code, but it is now being spelled out here; and, second, to remove the possibility of imprisonment in the case of negligence in the preparation or approval of an account, document statement or return.

That, Mr. Chairman, is the list of the changes other than very minor changes of wording here and there which would have no effect on the principle.

The Chairman: Thank you very much, Mr. Humphrys. There are some questions I should like to ask with respect to the financing of the administration when we meet next Wednesday morning.

The committee adjourned.

Queen's Printer for Canada, Ottawa, 1971

Clause 23 on the same page deals with the assessment against the companies to cover the administrative expenses.

The Chairman: I should like to deal with that in detail at our next meeting.

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On page 40, clauses 29, 30 and 31 are related to the financing of loans made by CIDC under the emergency lender of last resort provision.

On page 41 in clause 32 there is a slight change in the wording. It says that the Governor in Council may make regulations to ensure the carrying out of the provisions of this Act. The previous wording referred to the proper carrying out of the provisions. The word "proper" was cut out.

The Chairman: I question the word "ensure" in that clause. What is the connotation of it? I rather the word-ing was changed.

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First of all, the reference to regulations "not inconsistent with the provisions" was cut out because it was thought that the Governor in Council does not have power to make regulations that are inconsistent anyway. Secondly, the reference to the opinion of the Governor in Council was cut out so that this power to make regulations and their validity would be a matter of law rather than his views.

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The Chairman: The word "ensure" seems to imply that the regulations are going to guarantee something. We are concerned that the regulations do not empower them to legislate.

Senator Cook: It is only necessary for the carrying-out of the act.

The Chairman: We will think that over as well.

Mr. Humphrys: The only remaining point is on page 42, clause 37, where there were changes made in the penalty clause. First to give the alternative also fine to imprisonment in each case that alternative existed in the Criminal Code, but it is now being spelled out here, and, secondly, to remove the possibility of imprisonment in the case of negligence in the preparation or approval of an accounting or statement of revenue.

That Mr. Chairman is the list of the changes other than very minor changes of wording here and there which would have no effect on the principle.

The Chairman: Thank you very much, Mr. Humphrys. There are some questions I should like to ask with respect to the financing of the administration when we meet next Wednesday morning.

The committee adjourned.

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 7

WEDNESDAY, FEBRUARY 3, 1971

Second Proceedings on Bill C-3,

intituled:

"An Act respecting investment companies"

(For list of Witnesses—See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, December 15, 1970:

"A Message was brought from the House of Commons by their Clerk with a Bill C-3, intituled: "An Act respecting investment companies", to which they desire the concurrence of the Senate.

The Bill was read the first time.

With leave of the Senate,
The Honourable Senator Lang moved, seconded by the Honourable Senator Paterson, that the Bill be read the second time now.

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, February 3, 1971.
(10)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to *further* consider:

Bill C-3, "An Act respecting Investment Companies".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Benidickson, Blois, Carter, Connolly (*Ottawa West*), Desruisseaux, Flynn, Gélinas, Hollett, Isnor, Kinley and Macnaughton. (13)

Present, but not of the Committee: The Honourable Senator Sullivan. (1)

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

Witnesses:

John Labatt Limited:

Mr. Dean C. Kitts,
Corporate Counsel and Assistant Secretary.
Mr. C. F. Brown,
Vice-President and Treasurer.

Department of Insurance:

Mr. R. Humphrys, Superintendent.

Canadian Institute of Public Real Estate Companies:

Mr. Maurice W. Wright, Q.C., Counsel.
Mr. Charles Hay, President.

At 11.15 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade And Commerce

Evidence

Ottawa, February 2, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-3, respecting investment companies, met this day at 9.30 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, we have two briefs this morning, one from John Labatt Limited and the other from the Canadian Institute of Public Real Estate Companies. Mr. Humphrys, of course, is sitting in at our invitation, and we may have questions to ask him afterwards.

We will hear first from John Labatt Limited, who are represented here this morning by Mr. Dean Kitts, counsel and assistant secretary, and Mr. C. F. Brown, vice-president and treasurer.

Gentlemen, the floor is yours. If your brief is not too long, perhaps the best way to get started would be to read it.

Mr. Dean C. Kitts, Corporate Counsel and Assistant Secretary, John Labatt Limited: Honourable senators, first I would like to thank you for the opportunity to speak to you with respect to Bill C-3. As the chairman has noted, the brief is rather short; it deals with a technical point, and if I may I think I would like to read it into the record. I did not monitor very well the progress of this brief, so that the submission was put together rather hastily, with the result that this is the first time you have seen it. Ideally we would have preferred to have the brief in your hands in good time before appearing here and presenting it so that you could have read it. For that reason I would like to read it into the record. The haste with which the brief was put together also explains to a certain extent the fact that although normally it would be presented by Mr. Hardy, our president, or Mr. Carson, our executive vice-president, who signed the brief, they have, I am afraid, prior commitments for today and are unable to attend.

I would now like to present the brief and read it into the record. This is the submission of John Labatt Limited to the Standing Committee on Banking, Trade and Commerce.

John Labatt Limited (hereinafter called "Labatt" or the "Company") is a federally incorporated public company engaged through subsidiary companies in the manufacture, distribution and sale of foods, beverages and a wide range of industrial products. Its shares are listed for trading on the Toronto, Montreal, Winnipeg and Vancouver stock exchanges and are held by over fifteen thousand persons, the vast majority of whom, according to the books of the company, are resident in Canada.

A reorganization of Labatt's operations for administrative purposes in 1964 resulted in the transfer of manufacturing operations previously conducted by the company to indirect or "second level" subsidiaries, that is, to subsidiaries the shares of which are held by a direct or "first level" subsidiary of the company. For example, the brewing operations of Labatt are now completely conducted by provincially based brewing companies which are for all intents and purposes wholly-owned by Labatt Breweries of Canada Limited (hereinafter called "Labatt Breweries"). Labatt Breweries, in turn, is a wholly-owned "first level" subsidiary of the company. This type of organizational structure is essentially duplicated in the more recently established consumer foods and industrial products side of Labatt's business, with many operations being conducted by wholly-owned subsidiaries of the Ogilvie Flour Mills Company, Limited (hereinafter called "Ogilvie"). Ogilvie too is virtually wholly-owned by the company.

A very high proportion of companies within the Labatt group are closely held if not wholly-owned. Reference in this regard is made to the audited consolidated balance sheet of the company and its subsidiaries for the fiscal year ended April 30, 1970 (Exhibit A) where the minority interest is shown to represent only 7.2% of the aggregate of such minority interest and paid-up capital and surplus.

Labatt through its subsidiaries operates ten breweries in seven provinces. It also operates the largest flour milling business in Canada, is the leading domestic supplier of pasta products and is the producer of an outstanding line of confectionery goods. It is also engaged in the manufacture and sale of wines, soups, jams, pickles, milk products, animal and poultry feeds, poultry and meat products, wheat starch and gluten products and organic chemicals and recently entered the food service industry in both Canada and the United States.

The growth of the Labatt organization over recent years is indicated by the increase in gross sales from $123,492,000 in the 1966 fiscal year to $388,783,000 in the 1970 fiscal year, and by the increase in net earnings from $5,616,000 to $17,626,000 over the same period. The Labatt organization now employs some 10,300 persons as compared to 2,800 in 1966.

The Chairman: Of course during that period the acquisition of many of these other operations went on; is that not right?

Mr. Kitts: That is right. As a matter of fact, I understand that that 10,300 persons is roughly 12,000 currently, that is, roughly 1,700 more than I have indicated here.

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This growth has been facilitated to some extent by the company borrowing funds, from time to time, from the public under its trust deed securing debentures and in accordance with the relevant provisions of federal and provincial companies and securities legislation.

Section 2(1) (b) of Bill C-3 (an Act respecting investment companies, hereinafter called the "Act") defines the expression "business of investment", in part, as follows:

> (b) "business of investment" with respect to a corporation means the borrowing of money by the corporation on the security of its bonds, debentures, notes or other evidences of indebtedness and the use of some or all of the proceeds of such borrowing for
>
> (i) the making of loans whether secured or unsecured, or
>
> (ii) the purchase of
>
> (A) bonds, debentures, notes or other evidences of indebtedness of individuals or corporations,
>
> (B) shares of corporations
>
> ... or for the purpose of replacing or retiring earlier borrowings some or all of the proceeds of which have been so used;

It should be noted that the only assets resulting to a company carrying on the business envisaged in the extracted portion of this definition are evidence of indebtedness and shares. For convenience of future reference such assets will hereinafter be called "intangible assets" as contrasted with assets of another type normally encountered in carrying on a commercial or industrial business such as inventories, accounts receivable, lands, building, equipment and the like hereinafter called "tangible assets".

Section 2(1) (g) of Bill C-3 defines "investment company", in part, as follows:

> (g) "investment company" means a company ... (ii) that carries on the business of investment.

Such borrowing by Labatt and the use of some or all of the proceeds in the operations of its subsidiaries (usually by way of unsecured advances) would constitute carrying on the "business of investment", and in the absence of some saving provision, labels the company an "investment company" for the purposes of Bill C-3.

The Superintendent of Insurance is given sweeping regulatory powers under Bill C-3. The evidence given before the Standing Committee on Finance, Trade and Economic Affairs by Mr. Humphrys, the present Superintendent of Insurance, must therefore be indicative of the philosophy which will be involved in the application and enforcement of the Act.

It would appear from Mr. Humphry's evidence that the Act is intended to provide means for regulating the activities of companies such as sales finance companies which like banks, mortgage loan companies, trust companies and other financial institutions borrow money from the public for investment in commercial paper and other indebtedness the underlying value over which they exercise no real control. He referred to them as "financial intermediaries". The following excerpts from his evidence will illustrate the point:

(At Volume 1, page 8):

> An investment company is defined in substance as a company that carries on the business of investment. Thus the proposed Act would apply to companies that act as financial intermediaries in much the same way as do a number of other financial institutions such as mortgage loan companies, banks, trust companies and, in a different way, insurance companies. (*Emphasis added*)

Senator Benidickson: What do you mean by "emphasis added"?

Mr. Kitts: That is in relation to the underlining in the brief, sir. The excerpt continues:

(At Volume 1, page 16):

> **Mr. Humphrys:** There were two points, Mr. Chairman. The series of events that precipitated action were the financial failures that took place a few years ago. There were three or four of them that are well known, Atlantic Acceptance and Prudential Finance, and this brought sharply to the fore that there was a gap in the supervisory structure relating to financial institutions, both at the federal and provincial level. Then in examining this problem, the gap, it quickly becomes apparent that there is a fairly elaborate structure of govermental supervision for financial intermediaries of all other types that is banks, insurance companies, trust companies, mortgage loan companies—all companies that accept or solicit funds from the public and use the funds for investment purposes, whether on long-term or short-term liabilities, as the case may be.
>
> This particular group of companies of which sales finance companies are one class, act much in the same way—they solicit funds from the public in one fashion or another for investment purposes. But there was no regular source of information and no means of supervising these companies or controlling their actions if they got themselves into financial positions where they could not pay their obligations, and they were still able to solicit funds from the public. The consequence was that some members of the public lost heavily. It was really not a very logical position to have close supervision on all the rest of the field but leave a gap for this particular type of company.
>
> (*Emphasis added*)

(At Volume 1, page 23):

> What we were seeking by this measure was to try to draw it in such a way that it would catch companies that were essentially acting as investment intermediaries rather than as trading and manufacturing industrial companies. This is not always a sharp division. It is a question of degree.
>
> (*Emphasis added*)

(At Volume 1, page 25):

> **Mr. Walker:** Would you repeat for me once again, then, the main object or the main purpose of this piece of legislation?

Mr. Humphrys: The main purpose is to establish a system of reporting and supervision for companies that act in a substantial way as financial intermediaries—attracting funds, soliciting funds from the public and using some or all those funds for investment purposes, as distinct from industrial, commercial, manufacturing purposes—thus completing the general pattern of supervision of financial institutions that exists under federal legislation.

(*Emphasis added*)

In keeping with the philosophy enunciated by Mr. Humphrys "trading and manufacturing industrial companies" should be excluded from the application of the Act. We agree with him on this point. In our view "trading and manufacturing industrial companies" are already sufficiently well regulated through securities, companies, consumer protection and combines legislation, and in some cases by legislation specifically directed to the undertakings with which they are involved. In any event, we doubt that the expertise and experience of the Department of Insurance is such as to enable it to supervise in a meaningful way the operations of a "trading and manufacturing industrial company". Section 2(3)(a) of Bill C-3, reading, in part, as follows, seems designed to bring about this exclusion in that it deems companies not more than 40 per cent of the assets of which are "intangible assets" (for example most manufacturing companies not to be investment companies:

> (3) Notwithstanding subparagraph (i) of paragraph (g) of subsection (1), the following companies unless incorporated after the coming into force of this Act primarily for the purpose of carrying on the business of investment, shall be deemed not to be investment companies for the purposes of this Act:
>
> (a) a company not more than forty per cent of the assets of which, valued in accordance with the regulations, at any time during its current and last completed fiscal year consisted of loans or purchases described in subparagraphs (i) and (ii) of paragraph (b) of subsection (1);

The test then of a "manufacturing industrial company" would appear to be whether or not 60 per cent or more of its assets are "tangible assets"—as we have defined them—such as lands, buildings, equipment inventories and the like.

Section 2(4) of Bill C-3, reading as follows, goes one step further in providing that assets of a company represented by evidence of indebtedness and shares of a closely held "first level" subsidiary shall not be considered "intangible assets" of the company for the purposes of Section 2(3)(a) provided, however, not more than 40 per cent of the assets of such subsidiary are "intangible assets":

> (4) For the purposes of paragraph (a) of subsection (3), any assets of a company that consist of loans to, shares of or bonds, debentures, notes or other evidences of indebtedness of any subsidiary of such company shall be deemed not to be assets that consist of loans or purchases described in subparagraphs (i) and (ii) of paragraph (b) of subsection (1) if
>
> (a) at least seventy-five per cent of the equity shares of such subsidiary are owned by the company; and
>
> (b) not more than forty per cent of the assets of such subsidiary, valued in accordance with the regulations, at any time during its current and its last completed fiscal year consisted of loans or purchases described in subparagraphs (i) and (ii) of paragraph (b) of subsection (1).

Thus, it is permissible in determining the status of a company under the act to look not only to its assets but also to the assets of its subsidiaries. Why one may not go beyond "first level" subsidiaries in making the examination is not easy to understand.

While the reorganization of Labatt in 1964 resulted in considerably more than 40 per cent of the assets of the company being represented by shares and evidence of indebtedness of closely-held subsidiaries, the "tangible assets" of the Labatt group of companies greatly exceeded 60 per cent of the total assets of the group. Reference in this regard is made to the attached audited unconsolidated balance sheet of the company—the corporate balance sheet—as at April 30, 1970, Exhibit B, where shares and indebtedness of closely held subsidiaries are shown to constitute 75 per cent of total assets and to the attached audited consolidated balance sheet of the Company and its subsidiaries as at April 30, 1970, Exhibit A, where consolidated "tangible assets" are shown to represent 85 per cent of total consolidated assets. Moreover, a recent appraisal value of the fixed assets of Labatt and its subsidiaries exceeded the net book value thereof by approximately 180 per cent.

The framers of Bill C-3 must have had in mind exempting companies and closely held groups of companies from the application of the Act if a substantial part of their combined assets (60 per cent or more) are "tangible assets" such as lands, buildings, equipment, inventories and the like used in "industrial, commercial and manufacturing" operations for otherwise unintelligible situations such as the following would exist:

> If Labatt's operations were conducted by Labatt itself as they primarily were prior to 1964, rather than by subsidiaries as they are now Labatt would be deemed not to be an "investment company" pursuant to Section 2(3)(a).
>
> If Labatt's operations were conducted through "first level" closely held subsidiaries such as Labatt Breweries and Ogilvie, Labatt would still be deemed not to be an "investment company" pursuant to Section 2(3)(a) as supplemented by Section 2(4).
>
> Since Labatt's operations are now conducted by closely held "first", "second", "third" and even "fourth" level subsidiaries the saving provisions of Section 2(3)(a) and Section 2(4) are not available and Labatt would, by definition, be an "investment company".

There would appear to be little or no logic in, nor any useful purpose served by making Bill C-3 work in this way. What difference does it make for the purposes of the Bill that a company's manufacturing operations rather than being carried on by a closely held "first level" subsidiary are carried on by a closely held subsidiary of such "first level" subsidiary, that is by a "second

level" subsidiary or for that matter by a "third" or "fourth" level subsidiary.

On the basis of the foregoing, Labatt is clearly an "industrial, commercial or manufacturing" company, and for this reason Bill C-3 should not apply to Labatt but it does and to this extent the Company is opposed to the Bill.

Section 2(4) of Bill C-3 is clearly deficient in scope and the reason therefor is apparent upon close examination of the subsection. Subparagraph (a) of the subsection stipulates that the voting shares of the subsidiary must be "owned" by the company in question; in other words, the subsidiary must be a "first level" or directly held subsidiary. The equity shares of a "second level" subsidiary would, of course, not be "owned" by the company in question but would be "owned" by its directly held "first level" subsidiary. Quite apart from the problem with subparagraph (a) of Section 2(4) subparagraph (b) thereof simply ignores the fact that manufacturing operations might be carried on in an organization such as Labatts' by subsidiaries the voting share of which although not being "owned" in the legalistic sense of the word by the company in question are clearly controlled by such company.

If Section 2(4) is really meant to place a closely held group of companies 60 per cent or more of the consolidated assets of which are "tangible assets" in the same position under Section 2(3) (a) as a single company with the same proportion of "tangible assets" the fact that it does not do so is a problem in the drafting of Bill C-3 which must be overcome.

Rewording Section 2(4) along the following lines would appear to offer one solution to the problem:

> (4) For the purposes of paragraph (a) of subsection (3), any assets of a company that consist of loans to, shares of or bonds, debentures, notes or other evidences of indebtedness of any subsidiary of such company shall be deemed not to be assets that consist of loans or purchases described in subparagraphs (i) and (ii) of paragraph (b) of subsection (1) if upon a consolidation of the financial statements of such company and its subsidiaries prepared in accordance with the regulations
>
> (a) the minority interest in subsidiaries at any time during the current and last completed fiscal year of such company does not exceed twenty-five per cent of the aggregate of such minority interest and the paid-up capital and surplus of such company and its subsidiaries; and
>
> (b) not more than forty per cent of the consolidated assets of such company and its subsidiaries at any time during such company's current and last completed fiscal year consists of loans or purchases described in subparagraphs (i) and (ii) of paragraph (b) of subparagraph (1)."

This provision overcomes the anomaly of companies such as Labatt which are in every sense "industrial, commercial or manufacturing" companies being classified as "investment companies" merely because of their choice of a decentralized organization for administering their operations.

Other solutions to the problem might be found in modifying present Section 2(4) so that it would clearly extend by its terms to subsidiaries beyond the "first level" or by narrowing the definition "business of investment" to embrace only the business of "financial intermediaries" of the type referred to by Mr. Humphrys.

The Chairman: If Mr. Brown has nothing to add at this time, we have then reached the stage at which you may ask your questions, honourable senators.

Senator Benidickson: Mr. Chairman, for quite a few months, when this committee was dealing with the White Paper on Taxation, we became used to the term "closely-held companies". I assume that the phrase, as used here, is not at all similar in meaning. Is that correct? Labatts is a public company on the stock exchange, and, although it may have the controlling power over subsidiaries at different levels, nevertheless it is by no means a controlled company in the sense in which we used that phrase in previous meetings on taxation. The expression "closely-held" in this case is not the same thing at all.

Mr. Kitts: No. What we were trying to do, sir, in using that term was simply to indicate that in a great many instances Labatt companies, or the companies within the Labatt group, are in fact wholly-owned. There are some exceptions. In a number of companies, for example, there are small minorities, and one cannot technically call them wholly-owned subsidiaries, but what we are trying to put forward is the fact that, generally, these companies are extremely closely-held. They are virtually wholly-owned.

Senator Benidickson: Did you make these representations to the committee of the House of Commons?

Mr. Kitts: No, we did not, sir, as I believe I indicated.

Senator Benidickson: So you are coming to us in the first instance.

Mr. Kitts: Yes.

The Chairman: Would it be fair to say, Mr. Kitts, that all these operating companies are either wholly-owned subsidiaries of John Labatt or are owned in excess of 75 per cent?

Mr. Kitts: With very minor exceptions, Mr. Chairman, yes. One is Laura Secord, which is 64 per cent owned. Another is Parkdale Wines. There is a minority interest in there of 40 per cent, which is owned by a wine company in England.

The Chairman: If, for a moment, we may just visualize this set-up, you have John Labatt at the top?

Mr. Kitts: Yes, that is right.

The Chairman: Would you call it the holding company of the entire group?

Mr. Kitts: Yes.

The Chairman: Then we move down to what you call the first level which, I take it, is a wholly-owned subsidiary of John Labatt?

Mr. Kitts: Yes. In the case of Labatt Breweries of Canada it is a wholly-owned subsidiary. In the case of Ogilvie, it is virtually wholly-owned; there is a very small minority.

The Chairman: How many of these subsidiaries are subsidiaries of John Labatt, Limited, the top company, as against being a subsidiary of a subsidiary?

Mr. C. F. Brown, Vice-President and Treasurer, John Labatt Limited: There is a fair split on that one. For example, Labatt Breweries of Canada is owned by John Labatt, and so is Ogilvie, but Ogilive owns, for example, Catelli. Labatt Breweries of Canada owns all the provincially operated brewing companies, which are so orgaized for public purposes. There are many companies at the so-called second level. It is a mixed bag.

The Chairman: In the financing, is all the financing generated in John Labatt, or is some of it generated in the first-tier subsidiaries?

Mr. Brown: At the time we acquired certain companies, they did have their own financing. Since the acquisition of the companies, our policy is to do all the financing in John Labatt.

Senator Connolly (Ottawa West): The shares that you buy on the Exchanges are shares of John Labatt?

Mr. Brown: Yes.

Senator Connolly (Ottawa West): Not of Ogilvie?

Senator Benidickson: Ogilvie is still listed?

Mr. Brown: It was recently delisted; the Preferred is still listed.

Senator Connolly (Ottawa West): None of the subsidiaries is listed?

Mr. Brown: Laura Secord is.

The Chairman: They have told us that is 65 per cent owned by John Labatt.

Mr. Brown: 64 per cent.

The Chairman: And the Parkdale Wines about 40 per cent.

Mr. Brown: Yes.

Mr. Kitts: No, Mr. Chairman, we have 60 per cent of Parkdale and the minority interest is 40 per cent.

The Chairman: Yes, the minority interest is 40 per cent. You say that since all these acquisitions all the financing has been done in the top-level company. Then that money is advanced by way of unsecured loans to the various operating companies, is that right?

Mr. Kitts: That is right.

The Chairman: Which may be first-tier or second-tier companies?

Mr. Kitts: Yes.

The Chairman: And I take it that in the ordinary way you take notes or some pieces of paper to evidence this?

Mr. Brown: That is right. These subsidiary companies have their own bank lines of credit. When we talk financing, I assume you are referring to our debentures and the long-term stuff.

The Chairman: Well, I do not know whether we need to get into what are the policy decisons which dictate that John Labatt will lend money to Ogilvie or to Catelli. That is a policy decis.on at the level of John Labatt. I take it that Ogilvie or Catelli may do some of their own.

Mr. Brown: Many of these first- and second-level companies operate completely independently of John Labatt and they do not require financing from John Labatt. Cases in point would be Ogilvie, Laura Secord and Catelli.

The Chairman: When you say "independently," you do not mean all the implications of that word?

Mr. Brown: No, I do not.

Senator Carter: Does that mean that they generate loans of their own from the public?

The Chairman: No, there is no indication of that. I think the suggestion was that they have their own lines of bank credit. Is that correct?

Mr. Brown: Yes, and they generate funds themselves too, of course.

The Chairman: Through their operations.

Mr. Brown: Yes.

Senator Beaubien: On page 8 the Labatt brief is suggesting that we amend section 2(4) of Bill C-3. Should we not ask Mr. Humphrys what he thinks of the amendments?

The Chairman: I was just wondering whether, instead of doing this piecemeal we should not finish with these witnesses.

Senator Benedickson: I quite agree but I think another question might be appropriate at this point. Have you submitted these amendments or have you had discussions with the Department of Insurance on the proposed amendments?

Mr. Kitts: No, we have not, sir, again because of the haste with which it was done.

Senator Benidickson: This is new ground in coming to us in so far as this proposal is concerned?

Mr. Kitts: Yes.

The Chairman: Senator Benidickson, I was just wondering this. In the bill which is before us if you look at page 4—and would you look at this as well, Mr. Kitts?—the marginal note is "When corporation a subsidiary", and I notice in subsection (5) it says:

> For the purposes of this Act, a corporation is a subsidiary of another corporation only if,

—and then, in paragraph (b):

... it is a subsidiary of a subsidiary of that other corporation.

Had you considered the implications of that?

Mr. Kitts: Yes, we had, Mr. Chairman.

The Chairman: And notwithstanding what the implications might be, you came to us?

Mr. Kitts: Yes, we came to you.

The Chairman: You think this does not help you?

Mr. Kitts: No, we do not think it does.

The Chairman: Why?

Mr. Kitts: We do not think it does, sir, because paragraph (a) of subsection (4), immediately above it, stipulates that in order for this section to be operative the shares of the subsidiary in question must be owned by the company in question. To take an example to illustrate it, the shares of Labatt's Ontario Breweries Limited are not owned by John Labatt Limited but rather by Labatt Breweries of Canada. So I suspect that perhaps the draftsman of the bill felt that this might have been the salvation for Labatt, but I am afraid, in our view, it does not accomplish that purpose.

The Chairman: Let us take names. Your brewing operations are carried on in provincially-owned companies?

Mr. Kitts: Provincially-based companies.

The Chairman: Do you mean provincially incorporated?

Mr. Kitts: No, generally they are federally incorporated.

The Chairman: In the case of your brewing operations, they are in companies that are subsidiary to John Labatt (Canada) Limited?

Mr. Kitts: Labatt Breweries of Canada.

The Chairman: Labatt Breweries of Canada?

Mr. Kitts: Yes. Their shares are accordingly owned by that company rather than by Labatt. If we are applying this test to Labatt—and this is the nub of our problem—subsection (4), while I believe it is intended, in keeping with the philosophy enunciated by Mr. Humphrys, to exclude closely-held groups of companies involved in manufacturing operations, this provision unfortunately stops at first-level subsidiaries.

The Chairman: Let us see. The question then is as to whether the Labatt Brewery Company, which is owned by Labatt of Canada, is a subsidiary of John Labatt by virtue of this paragraph (b). If it were, as a matter of interpretation, a subsidiary, for the purposes of this act, of John Labatt, then would your problem be solved?

Mr. Kitts: I do not believe so, Mr. Chairman. I think there is one key word in subsection (4)(a) that presents a problem to us, and that is the word "owned". In interpreting this provision, with that word in there, rather than "owned or controlled" or "owned by the company or by a subsidiary thereof", they have stipulated, if we are to consider the assets of, let us say, Labatt ...

Senator Benidickson: What page are you on?

The Chairman: On page 4, subsection (4), the one immediately above the one I was dealing with.

Mr. Kitts: This provision stipulates that if the assets of Labatt (Ontario) are to be considered in investigating the status of John Labatt Limited under the act, then the shares of that subsidiary must be owned by John Labatt Limited, and they simply are not.

The Chairman: Maybe this is a case where we put in two contradictory statements. It may be that we frustrate the meaning that was intended to be given by (b) by what we have put in (a) in subparagraph (4). That may well be, and if that is so—mind you, I am only trying to present something now and we will get Mr. Humphrys' view in due course—it may be that if "company" were broadened in its meaning to include any subsidiary that qualifies under subparagraph (5), that would be enough to remove your objections, Mr. Kitts?

Mr. Kitts: I believe so. If in implementing that thought the provision was such that we could examine the assets of subsidiaries beyond the first level in determining the status of John Labatt Limited, and if that definition of "subsidiary" in subparagraph (5) could be imported into this, then I think we could accomplish our objective.

The Chairman: It is a neat point. The first thing we have to decide, in my opinion, is whether it was intended to give relief in such cases. Certainly I know when this bill was before us the first time—when we rewrote it—we had in mind the Massey-Ferguson operation. They appeared here and they used all these subsidiary companies as tools to carry on their business and the Massey-Harris Company rides at the top.

Senator Benidickson: And I suppose you also have Argus in there somewhere.

The Chairman: Oh yes. We certainly had that kind of co-operative setup in mind when we rewrote the bill. Now whether the kind of setup you put forward should be treated in this fashion is something we will have to decide after we have heard from Mr. Humphrys. Is there anything more you would like to add at this time, or is your whole problem the fact that you have a top company and you have subsidiaries of that company and then you have subsidiaries of those subsidiaries? Is that your problem? Is that what creates your problem?

Mr. Kitts: That is what creates our problem.

The Chairman: And you say the substantial character of all the operations is manufacturing and commercial and the financing is for the purpose of promoting those operations?

Mr. Kitts: That is right.

Senator Connolly (Ottawa West): Mr. Chairman, I wonder if there is any relief for the company arising out of the discretionary powers of the Minister in clause 3?

The Chairman: Yes, on page 5 you will find the exemptions.

Senator Connolly (Ottawa West): I have not read the detail of that section, but there is power in the Minister to grant an exemption.

The Chairman: It would come under (iv), I would think. The question is whether it is intended that they should have to apply for exemption or whether they should definitely be outside the scope of the act. Paragraph (iv) is worded sufficiently broadly to entitle them to ask and to entitle the Minister to grant exemption.

Senator Connolly (Ottawa West): But I think the witness is looking for statutory exemption rather than discretionary exemption.

Mr. Kitts: That is right.

Senator Connolly (Ottawa West): It might well be that discretionary exemption would in fact be satisfactory in practice if not in theory.

Senator Beaubien: But, Mr. Chairman, an exemption by the Minister would not be satisfactory. If you had to get an exemption and then you wanted to do some financing and the conditions change and the Minister would not grant the exemption, you would have to rearrange the whole setup of the company unless you could be assured of having such an exemption.

The Chairman: As I read the exemption clause on page 5, once the Minister exercises his discretion and you get an exemption, then I would think it is applicable until such time as he revokes it.

Senator Beaubien: But if an underwriter is going to sell $10 million worth of bonds, he does not want to have the safety of his investment at the discretion of the Minister who may revoke.

The Chairman: Well, if necessary, you could deal with that by saying, and I think it logically follows, that everything you do while you are enjoying the exemption is not affected by the subsequent revocation. I should be inclined, if I enjoyed an exemption, not to go and ask the Minister anything about it; I would go ahead and carry out whatever I was attempting to do, because I have no obligation to report to the Minister from time to time here, as I understand it. If I get an exemption, that is it. The Minister can take whatever way he likes and he can make whatever inquiries he wishes to make, but I do not think there is any compulsion on the company that enjoys an exemption to file anything. I think I asked Mr. Humphrys that the other day and I think he agreed.

Senator Benidickson: It is rather unusual for a Minister to be retroactive in whatever he does.

The Chairman: If there is any doubt about it, we could say for greater certainty that anything that is done while an exemption is in existence is not affected by subsequent revocation.

Senator Gélinas: Mr. Chairman, I thought that the suggestion was made at the last meeting that exemptions should be reviewed every year.

The Chairman: I don't think that suggestion was made by me.

Senator Gélinas: It was by me.

The Chairman: By you, yes. My answer deals with that in part, then; why raise an issue in relation to something you enjoy?

Senator Macnaughton: Mr. Chairman, if you were lending money on a long-term basis, I am not so sure that you would want to rely on the Minister's discretion for an exemption.

The Chairman: I would feel happier if there was a definite declaration in the statute, that is that anything done up until the exemption is revoked is valid and is not affected by the revocation.

Senator Connolly (Ottawa West): But that might make it impossible—and here I am not arguing for the Minister, he can do that for himself—but it might make it impossible for the Minister inasmuch as if the company enjoyed the exemption and then proceeded to do something that was clearly within the ambit of the act, once that came to the attention of the Minister I should think he would probably then say "No, the exemption cannot apply in this case," but he would not know until after the event. In this way you might frustrate the purpose of the act.

The Chairman: But the exemption to my way of thinking does not mean anything if it is in terms where the Minister is not prepared to exercise the discretion or can interfere at any time and affect anything that is going on. There has to be something definite. Otherwise, as Senator Macnaughton says, in any substantial borrowing, a lawyer who was familiar with this sort of transaction would look at what the statute says and what the transaction is and he would make his own assessment as to whether that would disqualify the person attempting to get the financing from his exemption. If you came to that conclusion you would say, "I want the approval of the minister on this that it does not disturb the exemption." Immediately you are interfering with financing.

Senator Beaubien: Why would Mr. Kitts be appearing before us asking for an amendment unless he is afraid that the legislation as it stands does not cover the company?

The Chairman: Mr. Kitts has pointed out why in his considered view the present wording of subsections 4 and 5 on page 4 does not provide the protection—namely, if a subsidiary of a subsidiary, being set by statute, be a subsidiary of a number one company. That seems clear; but when we come to the qualifications in subparagraph (4), where the top company must own 75 per cent of the shares of such subsidiaries, this is a stumbling block. It might well be that we will have to consider some rewriting in the paragraph dealing with the 75 per cent.

I am not giving any opinion at this stage because we are merely discussing the point. But if it is the intent that this kind of operation should not be subject to the bill, then we will have to consider a little rewording.

However, we were on another point, that of revocation and its effect on an exemption and how serious it might be in connection with financing. They are two different questions. Are there any other questions?

Senator Connolly: I notice that in the brief it refers to industrial, commercial and manufacturing operations. I am wondering whether that language is used anywhere in the act.

Mr. Kitts: Not that I am aware of.

Senator Connolly: I think it arose from the evidence given by Mr. Humphrys in another place.

Mr. Kitts: That is so.

Senator Isnor: Mr. Kitts, if you are granted this exemption, would that not tear your main balance sheet to pieces? You could not present a balance sheet as you have today.

Mr. Kitts: No, I do not think that would apply.

Mr. Brown: What was the question?

The Chairman: If the Company were granted the exemption it is seeking, then, in the words of Senator Isnor, would it tear your balance sheet to pieces; would it affect our balance sheet?

Mr. Brown: No.

Senator Isnor: Consolidated companies are included in your ma n balance sheet.

Mr. Brown: Yes, and there is no exemption in regard to that.

The Chairman: The exemption applies only to whether you are subject to the reporting of this bill. It does not affect the makeup of your balance sheet.

Senator Isnor: That is the question I am asking: will it?

Mr. Brown: No, sir, it will not.

The Chairman: Is there anything else that you would like to add, Mr. Kitts?

Mr. Kitts: No.

The Chairman: Mr. Humphrys, would you like to deal with these points now or at the conclusion of the hearing, or on another day? Perhaps you might want to reflect on what has been said.

Mr. Humphrys, Superintendent of Insurance: I will meet the pleasure of the committee. As for the suggested amendments we saw the context of them only this morning, so I would not want to express a complete analysis on them in a few moments. However, if it is the wish of the committee that I should respond to any questions at this moment, I would be happy to do so.

The Chairman: Perhaps we might address to you any question that we now have and you can reserve your position on the quality of any amendment. We will be sitting again next week as there are more representations to be made. Mr. Humphrys, would you care to come up here? Have honourable senators any questions to ask of Mr. Humphrys?

Senator Connolly: The essential point is whether Mr. Kitts' submission is the right one and whether or not the company will be called upon to comply with the provisions of the act as the act is now written.

The Chairman: Senator Connolly, your question is whether, under the provisions of the bill as it now stands, and having regard for the outline and the manner in which Labatt operates, Labatt would enjoy a statutory exemption?

Senator Connolly: Yes.

Mr. Humphrys: Mr. Chairman, I think that we would not. I believe the interpretation of the application of the act as put forward in the brief is accurate. I should first like to say that I am a little disturbed by the implication contained in some of the questions, that coverage under the provisions of the act would somehow be a threat to the safety of creditors. It was suggested at one point that the company was engaged in borrowing and that were the provisions applicable to the company, that this would somehow be to the disadvantage of creditors.

The purpose of the measure is to try to establish a system that will safeguard the position of creditors. Therefore I cannot see that coverage under the act could ever be a disadvantage to the company's creditors.

The Chairman: Mr. Humphrys, I did not take that conclusion from the line of questioning. The suggestion of Senator Macnaughton—and I join him in that conclusion—was that when in the Minister's exercise of discretion, he says that one has an exemption, and then one borrows or undertakes financing, the people offering the money might say, "We want to know that when this transaction is completed the discretionary exemption will not be revoked."

Senator Macnaughton: During the period of the loan.

The Chairman: Yes.

Senator Macnaughton: Particularly when one considers American federal finances.

Mr. Humphrys: If there is a ministeral discretion to grant an exemption or to revoke it, then I do not think that is compatible with a provision which binds him not to use that discretion. Secondly, if Parliament decides to grant it, it can be done only on the assumption that it will be exercised in a reasonable way; and that if an exemption is granted and subsequently revoked, the revocation will be linked very strongly with the public interest and that there will be real reason for the exemption to be revoked and that the supervisory provisions contained in this measure will be brought to bear on the matter.

I would hope, and have done so all along, that this measure would be regarded as a protection to creditors, rather than a disadvantage to them. I can see that a company itself may feel happier in some circumstances outside of the measure, because I suppose no one really likes more Government reporting or any more statutory provisions applicable to it. However, I would have hoped that the measures in this bill would not have been judged as disadvantageous to lenders.

There are no provisions in the measure that restrict the kind of investments or the volume of borrowing with relation to capital or surplus, or any of these matters. The only restriction is really one of borrowing, investments and loans where there may be a conflict of interests.

The Chairman: Well, Mr. Humphrys, I think there is; it depends on what you mean when you refer to restriction. If I have to register under this bill and furnish certain statements and materials which you examine and report

to the minister, you may conclude that the company is carrying too heavy a load of debt and so report.

You may in certain circumstances move in and take over the operation, or stop it from proceeding into greater liabilities. Now, certainly when I report you are concerned as to how I borrow and the extent and quality of the assets I obtain for the money I borrow from the public. Therefore, inherently there are limitations of that kind; I think those are the teeth that you need in the bill.

Mr. Humphrys: Yes, Mr. Chairman; I accept your comments and I agree with them. I really meant to state that there were no statutory limitations on the kind of borrowing or the nature of the use of the borrowed funds.

It is true, as the chairman points out, that there are provisions in the act that allow action to be taken if it is deemed that there is a threat to the safety of the borrowers and that, of course, is the basis of the measure.

I do not believe that it is unreasonable to hold that if a company were granted an exemption under the act any subsequent revocation of that exemption would be retroactive and would attempt to interfere in any way with actions the company had taken while it was exempt from the measure. To do otherwise would involve exactly the same principle that faces legislatures from time to time, retroactive legislation. While retroactive legislation is not impossible, it is almost universally accepted as not being desirable. There was certainly not any thought in connection with this measure that an exemption would be other than a complete exemption. If it were subsequently revoked the measure would apply only from the date that the revocation was made.

Senator Beaubien: Mr. Humphrys, if the capital setup of this company were changed it would clearly not come under the act. Therefore does it make sense that simply because it happens to have elected to set up its capital structure in such way that it would come under the act when if the parent company held all the shares of all the subsidiaries there would be no question that it would come under the act?

The Chairman: Oh, senator; you know that there may be excellent reasons why Labatt felt in the acquisition of these subsidiaries that they had to maintain the existing setup.

Senator Beaubien: I am just saying that another company, of exactly the same type, all the shares being held by the parent company would not come under the act. However, because it has a certain kind of capital setup another company must apply to the minister for his discretion as to whether they are going to come under the act. Surely that is not right?

Mr. Humphrys: Mr. Chairman, this points up exactly a class of problems that faced us when the bill was being prepared and faced this committee when it studied the measure two years ago. It also faced the subcommittee in considering amendments to it.

The whole difficulty is that there are not clear-cut classes of cases. You can think of a whole range of cases. A company might be engaged in direct manufacturing in a particular line and for one reason or another change its corporate structure and acquire a number of operating subsidiaries. An illustration is Massey-Ferguson, which you have studied.

It was generally accepted that that is not an investment type operation, let us say a change in corporate organization. However, suppose a holding company buys shares in this company, that company and another company. At what point does it change from essentially an investment operation, where it raises money and buys shares in a number of different corporations, to an operating organization? I do not believe anyone can answer positively.

Now, we have had an illustration this morning in this brief of a tremendously complex industrial organization with a great range of activities. If this group started out as a brewing company and then bought interests in other types of operation, does that classify them as a milling, wine-making or food-manufacturing operation? Is the test whether they have control of the subsidiary, or a major investment? Where is the point reached at which they become an industrial rather than an investment organization?

This is the difficulty and this was the reason I think that appealed to the committee two years ago and was in our minds. It was thought that one could apply a statutory exemption with a reasonable test for one layer of subsidiary. However, there are many different types of cases that one can think of and even find. We felt that it was really a practical impossibility to write a series of statutory rules that would meet every kind of case and corporate organization that might be conceived.

This was why the statutory exemption went one layer on the subsidiary only and when the bill was studied more recently it was proposed that some broadening of the discretionary exemption should be granted to take care of a case involving a very close integration of the operations of the borrowing company with the subsidiaries.

Senator Beaubien: The point is that this bill does provide that if 40 per cent of the assets of the subsidiary are intangible, and if you look at the consolidated balance sheet of Labatt there is no question that 85 per cent of the assets are the tangible kind. There you have the yardstick to judge. The only concern is the wording, "owns the shares." If it is deemed that the parent company owning all the shares of the second company should be deemed to hold all the shares of the third and fourth companies you do not have any problem.

The Chairman: In subclause (5) on page 4 we do declare for the purposes of this bill that a corporation is a subsidiary of another corporation only if it is controlled by that other corporation, et cetera.

Then we say "it is a subsidary of a subsidiary of that other corporation". We therefore recognize in the definition of a subsidiary that for the purposes of this bill it includes a subsidiary of a subsidiary. If we go back to subsection (4) we take away any benefit of that by putting in the limitation "at least 75 per cent of the equity shares of such subsidiary." What subsidiary do they mean there? Do they mean the subsidiary according to the statutory definition we have written? It negatives the whole thing when it says it must be owned by the company. Obviously the shares of a subsidary of a subsidiary are not and cannot be owned by the top company,

so we have negatived in subsection (5) the substantial effectiveness of subsection (4).

Mr. Humphrys: The purpose of the definition in subsection (5) was first to provide for the filing of statements of subsidiaries in addition to the statement of the parent company, should that be desired, and was to deal with the question of consolidated statements, which is dealt with in a subsequent subsection having to do with the filing of information, and it was also in relation to possible interpretation of clause 10. When subsection (4) was drafted and amended by this committee, it was deliberately written in the way it is found in this bill, and intended to apply only to a first layer subsidiary, so that I do not feel subsections (4) and (5) are in conflict. Subsection (5) was for a different purpose, and the wording in subsection (4) was intended...

The Chairman: Well, it is there, and you can have whatever application in law you can give it.

Mr. Humphrys: It was intended to exempt investments in a first layer subsidiary only. I well recall that when the point was discussed here, it was pointed out that if one tried to go down through a whole chain of subsidiaries one could easily accomplish the purpose of having all the assets, or effectively all the assets, in investment type instruments, and still get complete exemption, because by multiplying down you can raise the proportion of assets in investment type to any desired degree. Even with the one layer subsidiary you could have a situation where 64 per cent of the consolidated assets could be investment type assets and the whole enterprise would be exempt. If you put another subsidiary below that you can raise it to 75 per cent, and two more down you can raise it to about 90 per cent. That is why it was found when this working was last studied that this kind of thing should stop at one layer, and then if it was a more complex corporate organization the only thing to do was to look at it as an individual case and see what judgment could be made in the particular circumstances.

Senator Connolly (Ottawa West): On that last point, if you look at the individual case, bearing in mind what has been put into this submission, would you say that in this case the company would qualify for exemption?

Mr. Humphrys: I think it would be wrong for me to answer that question in the present state of our information about the company concerned and about the policy to be developed in the light of discretionary exemption.

The Chairman: I think you can only point out what are the provisions; you cannot go beyond that. We seem to have thrashed this thing back and forth. Mr. Humphrys understands the position of John Labatt; he understands the viewpoints that have been expressed here; and I was wondering if, therefore—because, of course, we are going to see you again and again on this—you would reflect on it, and at a later stage we could have a full and complete consideration of this point.

Senator Gélinas: Have you had other representations made directly to you which would be somewhat similar to this problem?

Mr. Humphrys: I think the representations made by the Weston company before the House of Commons committee were on a quite similar point. They were concerned about the activities of the parent company and loans to second and third layer subsidiaries, and whether that kind of investment activity would bring their company within this measure. They also suggested the possibility of amendments that had to do with consolidation. I would be happy to review the proposed amendments made in the Labatt brief and give you more considered comments at a subsequent meeting.

The Chairman: I was wondering if, while you are doing that, you would keep in mind, certainly the suggestions by way of amendments that are in the Labatt brief, and also the suggestions that have been thrown up here in the discussion, which may involve a different way of dealing with the situation. I am sure you will do that.

Mr. Humphrys: I would be glad to do so, Mr. Chairman.

The Chairman: Thank you, very much, Mr. Kitts and Mr. Brown.

Honourable senators, we now have another brief, which is from the Canadian Institute of Public Real Estate Companies. We have here Mr. Maurice W. Wright, counsel, and Mr. Charles Hay, the president.

Mr. Maurice W. Wright, Q.C., Counsel, Canadian Institute of Public Real Estate Companies: Mr. Chairman, honourable senators, my name is Maurice Wright, and I appear as counsel of the Canadian Institute of Public Real Estate Companies. I have with me a gentleman who may be known to you in different capacities. I refer to Mr. Charles Hay.

To some of you he may be known as the former president and chief executive officer of Gulf Oil (Canada) Limited. To others he may be known as the president of Hockey Canada. For our immediate purposes, I would ask you to recognize him as the president of the Canadian Institute of Public Real Estate Companies.

The Chairman: You might have added on a nice personal note that he is the father of a great hockey player.

Senator Hollett: Would it be wiser, Mr. Chairman, to talk about hockey, rather than this subject?

Mr. Wright: Although the brief bears the name of my partner, Mr. Soloway, you will be aware of the fact that there was some problem about knowing who would be here this morning.

The Chairman: Yes, I was aware of that.

Mr. Wright: I claim pride of authorship, and therefore must accept the responsibility of any criticism this brief may invite.

The Chairman: If we have any we will make it.

Mr. Wright: I am sure.

The Chairman: You just go ahead.

Mr. Wright: Mr. Chairman and honourable senators, the Canadian Institute of Public Real Estate Companies appreciates being given this opportunity to appear before your committee. We are extremely concerned about Bill C-3. We oppose the proposed legislation to the extent that it seeks to bring real estate companies under its legislative umbrella.

We have already appeared in opposition to the Bill before the Standing Committee of the House of Commons on Finance, Trade and Economic Affairs. We are attaching hereto a copy of the Submission which we presented on that occasion because it sets out with deliberateness our considered position.

Stated very briefly, we fail completely to understand the legislative wisdom which applies identical regulatory standards to real estate companies as it does to sales finance companies. Bill C-3 intends to catch within its legislative net real estate companies by reason of the fact that "some or all of the proceeds" of monies borrowed by a real estate company is used for the purchase of real property as part of the company's operations.

May I invite your attention to the bill itself. The phrase "business of investment" is defined in clause 2(1), and I would like to exterpolate from the definition:

> (b) "business of investment" with respect to a corporation means the borrowing of money by the corporation on the security of its bonds, debentures, notes or other evidences of indebtedness and the use of some or all of the proceeds of such borrowing for
>
> ....
>
> (ii) the purchase of
>
> ...
>
> (D) real property other than real property reasonably required for occupation or anticipated occupation by the corporation...

and so on. In that way, if a company has used the proceedings of its borrowing for the purpose of the purchase of real estate, it is by statutory definition involved in the business of investment.

The major portion of Bill C-3 devotes itself to the regulation of sales finance companies. Presumably this portion of the proposed legislation seeks to protect the public against future debacles similar to those which occurred in the case of Atlantic Acceptance and Prudential Finance. We endorse the object of Bill C-3 in attempting to protect an unsuspecting public who might choose to lend money to a company whose principal objective is dealing in commercial paper and in what is generally described as a finance operation. We do not understand, however, why a real estate company should be subject to similar regulation any more than a mining company or a retail grocery business.

A real estate company must borrow in order to survive and to operate. It is simply not possible for a real estate company to finance its operations out of equity capital. Almost all real estate companies obtain their borrowing from the same sources, mainly, through a combination of borrowing from the chartered banks, from trust companies, from life insurance companies, mortgage companies, pension funds and similar sources. In all cases the type of person who lends money to a real estate company is what might be described as a "sophisticated lender".

I am not sure that it is the happiest choice of language, but that is the one I am committeed to.

The type of lender who lends to real estate companies simply does not need the protection of the Superintendent of Insurance or any of the legislative safeguards which would be provided for under the proposed Investment Companies Act. Throughout the evidence given by Mr. Humphrys, the Superintendent of Insurance, to the Commons Standing Committee on Finance, Trade and Economic Affairs, he consistently referred to the companies over which he seeks regulation as "financial intermediaries" or "investment intermediaries." Indeed, each and every specific illustration which he gave related to a sales finance company.

I say that because I have gone through the evidence carefully and it is all documented in the brief which accompanies this document.

We state to you categorically that a real estate company is neither a financial intermediary nor an investment intermediary. We made this point to the Commons Committee and apparently they were impressed by this argument. Unfortunately, when Bill C-3 was reported out to the House of Commons it did not take care of the situation in our respectful view, in a meaningful sense. The committee obviously tried to steer a middle course by introducing an amendment to Section 3, subsection 2, of the bill. The amendment provides that the minister would have the right to grant exemption from the application of the act by taking into account the following factors:

> (i) the persons to whom the company is indebted
>
> (ii) the amount of the indebtedness
>
> (iii) the nature of any security given by the Company, and
>
> (iv) the extent of the integration of the company's activities in the activities of its subsidiaries, if any.

Mr. Chairman, may I take a minute to elaborate on that. I would invite your attention to section 3 of Bill C-3. Section 3(2) did not read, when we appeared before the Commons committee, in the way that it does now. It has been amended by adding to section 3(2)(c) certain provisions. It is provided that the minister may grant exemption, and it is based upon the four factors which are set out in section 3(2)(c). Now, that is an amendment.

The points that we made before the Commons committee all directed themselves to the points which are sought to be covered in the amendment. In other words, why should the superintendent seek to protect people like trust companies? Banks constitute no problem, because they are just not involved in this. But do life insurance companies really need the protection of the superintendent, or mortgage companies, or trust companies, or pension funds?

There are people who, rightly or wrongly, I have described or dubbed here as being "sophisticated lenders".

As to the amount of the indebtedness, the nature of any security given by the company in respect of money they intend to borrow, the extent of the integration of the company's activities, we dealt with that in depth.

Certainly, the first three points which formed the main point of our brief to the Commons committee, were in that direction and there was considerable discussion. But when it was reported to the House of Commons it had what I suggest to you is this middle course type of amendment, giving the minister power to grant exemptions based upon these four criteria.

There is a very interesting aspect to this. The first part of section 3(2) reads:

> The Minister may grant exemption from the application of the provisions of this Act, other than the provisions set out in sections 10 to 15....

There is a specific mention of sections 10 to 15. Sections 10 to 15 deal wholly and exclusively with sales finance companies. In other words, there is a dual recognition; it is a give and take situation that is set out in section 3(2). The minister may grant exemptions, but there will be no exemptions at all where anything covered by sections 10 to 15 is concerned, namely, where sales finance companies are concerned—but he will consider giving exemptions where these other factors are involved.

I submit to you that the whole point of this legislation is directed to sales finance companies in the legislation that is before you, but the net is simply too broad, it is too wide, it seeks to catch up into its net people who have no business being there.

I would like to continue now with the brief.

The committee obviously realized that because of the above factors the operations of a real estate company are so different from those of sales finance companies that there might well be justification to exempt real estate companies. Our disagreement with the amendment is that it will probably not serve any useful purpose for the following reasons:

> (a) When the subject becomes caught in government controls, the controls do not become easily relaxed. It is simply not in the nature of the civil servant to relax controls.
>
> (b) Though the amendment gives the Minister the right to determine whether he will grant exemption from the Act, it will still be a civil servant who will make the decision, probably the Superintendent of Insurance.

Senator Beaubien: Wait until Mr. Humphrys sees this.

Mr. Wright: Honourable senators, I hasten at once to add here that there is nothing personal intended so far as Mr. Humphrys is concerned. I am talking about the theory, the principle of the legislation, and nothing more. Nothing personal is involved.

Our principal irritation with the legislation is that it serves absolutely no useful purpose whatever where real estate companies are concerned. It purports to give protection to those who have no need for the protection and whose abilities for determining the financial standing of a company are probably superior to those of the public servant.

If real estate companies should be placed ander the jurisdiction of Bill C-3, then it will mean that no person will be able to make any loan to any real estate company unless and until clearance has been obtained from the Superintendent of Insurance so that either a certificate of registry has been issued to the company under section 18 or the company has been exempted from the act.

Section 20 of Bill C-3 provides that, and I quote in part:

> An investment company... shall not borrow money on the security of its bonds, debentures, notes or other evidences of indebtedness before the issue of a certificate of registry to it.

Thus, legal counsel acting for a mortagage company, trust company or life insurance company which is lending money to a real estate company, would be imprudent if any mortgage moneys were ever paid to a real estate company without clearance first having been obtained from the Superintendent of Insurance. Indeed, legal counsel would be quite justified in insisting upon obtaining clearance each and every time an advance were to be made by his client under a mortgage.

May I just interrupt my presentation of the brief to say that I would hope for the support here of those members of the committee who are lawyers and who have personal knowledge of the duties which devolve upon the solicitor for a lender. He has to certify title to the lender, and he knows that under section 18, on page 27 of Bill C-3, the minister may, upon application made to him by an investment company, issue a certificate of registry to the company for such term not exceeding one year if he considers it appropriate, and son on, and then at page 29 of Bill C-3 he knows that section 20 provides a prohibition on borrowing by saying that an investment company to which subsection (1) of sction 19 applies shall not borrow money on the security of its bonds, debentures, notes or other evidences of indebtedness before the issue of a certificate of registry to it.

Now, Mr. Chairman and honourable senators, if I were acting for a life insurance company as solicitor for the mortgagee, the lender, and, for example the lender was putting out a mortgage of $2 million payable in several advances of, for instance, $500,000 each, I would consider myself derelict in my duty to my client, the mortgage lender, if I did not, before each and every advance was paid, check with the Superintendent of Insurance to make sure that the certificate of exemption was still extant, still in existence.

Senator Macnaughton: If you were acting for an American lender, you would be in an even tougher position.

Mr. Wright: Indeed I would. I know I would. Furthermore, many of these real estate companies, particularly in times of tight money situations—and this is not to derogate from their financial strength—when they need a mortgage advance, need it immediately, because they do not want the money lying around for an unnecessary length of time. So when they need the money they want it right away.

In those circumstances, if I were the solicitor for the lender, I would have to go to the Superintendent of Insurance to get this evidence, and with the greatest personal respect to the public servant, I must say that the sense of urgency might not necessarily be as compelling with him as it is to the borrower and the lender in the private sector. I submit that there is a built-in area of irritation which could very easily develop, and in saying that I do not think I exaggerate th eseriousness of the situation.

Now, all of this for what purpose? To protect the life insurance company, trust company, mortgage company or pension fund? We submit that regulation by government ought not to be sought, and ought not to be granted, unless such regulation will advance some public interest. It has yet to be pointed out why public interest will be advanced by placing real estate companies under the type of regulation which is involved in Bill C-3.

Any legislative step which may have the effect of hindering or even slowing down the use of moneys for the purpose of real estate companies is contrary to the public interest. Real estate companies use their borrowings for the purpose of financing the construction and development of residential and commercial building projects. Real estate companies are not financial intermediaries. A real estate company is simply not involved in dealing with commercial paper, and we submit that the inclusion of real estate companies under Bill C-3 will serve no useful purpose.

Mr. Chairman, honourable senators, I am putting it to you quite frankly that the best that can be said for this legislation insofar as real estate companies are concerned is that it will not do them any harm. I think that is the best that can be said for this legislation. I submit that is not sufficient justification for imposing regulations. Under the Interpretations Act all legislation is deemed to be remedial, and I just cannot see the remedial effect of this legislation.

We do not understand why a real estate company ought to be in any different position. Really, without getting too technical about it in terms of the tax language, real estate to a real estate company is really the inventory of that company. Why a company, merely by reason of the fact that it invests in real estate, should be deemed to be in the business of investment, I do not understand.

The whole thrust of what we are saying is that the basic objective of the legislation is to protect the public, and almost all of Bill C-3 directs itself to protecting the public that might be victimized as a result of borrowings from certain types of companies. Real estate companies are just not in that category. We do not see what purpose is going to be served by including real estate companies. It does not make us feel any happier.

The submission which was made in the other place shows the names of the companies that are members of the Canadian Institute of Real Estate Companies. A number of these are federal companies; many of them are provincial companies. But the fees which are going to be paid by the companies in order to finance the operations of Bill C-3 will be based upon the assets of the companies, and we are going to be paying money. We figure that our members are going to be paying to subsidize an operation that is not going to serve any useful purpose at all.

The Chairman: Mr. Hay, do you wish to add anything?

Mr. Charles Hay, President, Canadian Institute of Public Real Estate Companies: No, I have nothing to add on that, sir.

The Chairman: Mr. Wright, if you reduce this to the basics, a real estate company, if it borrows money on the security of its debentures, et cetera, and subsequently uses the money to buy real estate, then it is caught under this bill. You have been talking about life companies, loan companies and trust companies. So far as life companies are concerned, as part of the investigation there is an examination of their real estate transactions by the superintendent. Now if the basic purpose of this bill is to protect the public or the public interest, then it might be that if the borrowings were only from life companies, trust companies or loan companies, the public interest might not be as seriously concerned as it would be if the range or the market for borrowing is extensive and cuts into all different types of money markets such as pension funds or companies that make a practice of making mortgage loans in this field. If we are talking about life companies as you have been, maybe there is enough protection in that the other end of the transaction, as part of the real estate transactions of the life company, would be examined by the superintendent. But if you are speaking generally, is there not an area where a real estate company borrows money, buys real estate, and then projects a plan for the development of a subdivision or the construction of a series of apartment buildings or supermarkets, and if there is a public interest that is broader than that of life companies et cetera, is there not some element of protection required in that area? Let us suppose that the judgment in the acquisition of this property is too rosy hued and the plans for the development of a supermarket or apartment building may have an extra glow to them, is it not then advisable in such cases to have somewhere a measure of protection—if the real estate company can go anywhere where there is money available and borrow it?

Mr. Wright: I really do not think so, sir. I proceed on the theor ythat all your past bespeaks your future—I do not know who said that originally—and I think back to personal experience and the experiences of others. I am being subjective about it. I cannot think of cases where real estate companies borrow from the public in the sense of the type of situation which created the problems experienced in Toronto a few years ago. A real estate company might buy property and give a mortgage back to the prior owner as part of the purchase price. Even there the vendor would actually be lending money to the real estate company because he would be taking back an evidence of indebtedness, a mortgage, and he would have to go to the superintendent of insurance.

The Chairman: Only if he is incorporated.

Mr. Wright: If the real estate company is incorporated—and I am only directing my remarks to corporations—I fail to see where the public gets involved; they are private dealings throughout. I have the greatest difficulty in understanding how the superintendent of insurance will be able to give any measure of protection to any of the people involved in real estate operations.

The Chairman: Well, Mr. Wright, that is a question we can get some information on from Mr. Humphrys later as to what is his view as to there being a public interest to be served. We can pitch it back and forth and we may have our own views on it, but what we are really concerned about is what lay behind the extension of the provisions of this bill to include real estate companies. I think perhaps the best way of getting that will be from Mr. Humphrys. What I am wondering is this; whether within the scope of the bill there is not the opportunity to operate without being subject to the provisions of the bill. If you had a corporate vehicle for each venture, you might very well come into the category of the statutory exemptions.

Mr. Wright: Yes. There is another area I might just mention, Mr. Chairman. There was some discussion on this before the committee of the other place, and that

was the attempt to give some protection to the so-called unsuspecting public by setting out a formula in the legislation that if a real estate company borrowed money from the public in excess of x per cent of its total borrowings, then the act may apply to a situation of that kind. In other words, to try to provide for a formula which would have some practical significance rather than tar them all with the same brush.

The Chairman: I think the committee understands what your problem is. I certainly do. You want a statutory exemption and you give reasons in your brief as to why you think you are entitled to it, and the chief reason is that there is no public interest exposed in the operations and relationships of real estate companies which require the protection which this bill proposes to give. Is that a fair statement?

Mr. Wright: That is right. If I might clarify that without being too technical about it, I am not suggesting that there should be a statutory exemption *per se,* but rather that the definition of an investment company should be so stated as to apply only to a particular type of company such as a sales finance company which the legislation appears to have been primarily designed to regulate.

The Chairman: We have noted that. Are there any further questions?

We thank you, Mr. Wright, for your presentation. We will weigh it. Thank you also, Mr. Hay.

Now, Mr. Humphrys, we give you a choice. We shall be sitting again next week and if you feel you would like to organize your thinking and deal with the matter then, we are prepared to meet your wishes.

Mr. Humphrys: I think it might be better if I waited until next week.

The Chairman: In those circumstances the committee will adjourn. At the next hearing we will hear from the sales finance companies and also from CEMP Investments, after which Mr. Humphrys will be in the hot seat.

The committee adjourned.

Queen's Printer for Canada, Ottawa, 1971

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 8

WEDNESDAY, FEBRUARY 10, 1971

Third Proceedings on Bill C-3,

intituled:

"An Act respecting investment companies"

(For list of Witnesses—See Minutes of Proceedings)

23195—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis–(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, December 15, 1970:

"A Message was brought from the House of Commons by their Clerk with a Bill C-3, intituled: "An Act respecting investment companies", to which they desire the concurrence of the Senate.

The Bill was read the first time.

With leave of the Senate,

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

After debate, and–

The question being but on the motion, it was–

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being but on the motion, it was–

Resolved in the Affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, February 10, 1971
(12)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10.00 a.m. to *further* consider:

Bill C-3, "An Act respecting investment companies".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Everett, Flynn, Hollett, Isnor, Kinley, Macnaughton and Willis. (15)

Present but not of the Committee: The Honourable Senators Lafond and Lefrançois. (2)

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

The Chairman explained to the Committee that the witnesses were unable to attend due to the unavailability of accommodation in Ottawa because of the Conference taking place this week, and he further explained at length the areas of Bill C-3 where possible amendments might be made.

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

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade And Commerce

Evidence

Ottawa, Wednesday, February 10, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-3, an act respecting investment companies, met this day at 10 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, we were supposed to continue our discussion of Bill C-3 this morning. Representations were to have been made by the Federated Council of Sales Finance Companies and by CEMP Investments Ltd. Representatives of these organizations encountered a practical difficulty in obtaining accommodation in Ottawa, because apparently it is being monopolized by the events which are taking place here. I am sure you have read about this in the newspapers so I do not need to identify them any further. I took the liberty of informing these men that we cannot tell them they must come if there is no room for them at the inn. I told them they may appear next Wednesday if the Senate is sitting; if not they would have a final opportunity to appear on the following Wednesday.

I have discussed the matter with Mr. Humphrys in view of the fact that some really serious points have been developed during the course of our hearings. One of these is that contained in the Labatt brief dealing with what we refer to as second tier subsidiaries—that is with respect to operations of commercial, industrial and manufacturing companies where their corporate setup is such that they operate through first tier subsidiaries and also in some instances have subsidiaries of those subsidiaries. The wording of the bill as it is before us indicates that notwithstanding their commercial manufacturing industrial operations, which is the substance of their business, they might be classified as an investment company by reason of these second tier subsidiaries.

During the interval I have discussed this with some members of the committee and our law clerk. I have also discussed the matter with Mr. Humphrys.

We also had the real estate companies, who presented a brief which required serious consideration. In addition, this morning I received a memorandum from Molson, who are in the same position as Labatt in their operations. They are therefore affected in the same way by this question of second tier subsidiaries.

This appears to me to be a serious question, especially since the aim or thrust of this bill is in connection with certain types of investment, so as to protect the public. However, it was never the intention of the bill that it should extend and make an operation which is commercial, industrial and manufacturing a statutory investment operation.

Mr. Humphrys, our law clerk and I discussed this question in conference this morning. We considered clauses of the bill which might be given consideration for possible change. In collaboration we worked out certain changes which in due course would be presented to the committee. I believe the preferable way of dealing with this would be the way we followed with you previously.

This will mean given Mr. Humphrys a memorandum of our ideas at this stage before the committee becomes firm on how it should proceed. In this way we would get his reaction and perhaps a re-draft in a form acceptable to him, but which will recognize the points we make. I suggested to Mr. Humphrys that I would furnish him with an unofficial memorandum of our views at this time for his comment.

I think it is safe to say that there will have to be some changes in the bill. For instance, Kemp Investments, which is a large operation constructing big, prestige office buildings, etcetera, will probably touch in their brief on the points raised by the real estate companies.

Senator Connolly: Are they the people who are coming next week?

The Chairman: Yes, CEMP Investments and the Federated Coundil of Sales Finance Companies. In discussion with their counsel yesterday I inquired whether their concern in the bill is because of the non-resident shareholding limitation. He told me that is not the case but they will be referring to certain other aspects. I was about to inform him that the non-resident provisions being a question of policy it might very well be that we would not be influenced by representations.

In these circumstances I am not sure that any general discussion in the committee or sporadic questioning of Mr. Humphrys would produce much more information. My suggestion, therefore, is that we might adjourn and, whenever our next meeting takes place, make it the conclusion of the hearings and arrive at whatever decisions have to be made. Is that agreeable to the committee?

Hon. Senators: Agreed.

Senator Connolly: Are we to see the memorandum from Molson?

The Chairman: Yes, I will send it around to each member of the committee if you wish.

Senator Connolly: I wonder whether you have told us this morning what is in it? I know you have not gone into the detail of the sections, but perhaps that is not necessary.

The Chairman: No; it affects points such as the real estate investment and those raised by Labatt, which also concern Molson. It would also identify the sections dealing with the advance of funds by the Canada Deposit Insurance Association and tie that in to the disbursement of these funds, indicating that they can only be disbursed out of moneys advanced and not out of their own funds. They also mention the provision covering the power to make regulations. We think that wording is faulty and that a preferred wording might be necessary for the carrying out of the provisions of the bill.

Then there is a re-wording of the clause 15. Our form of re-wording may not fit in with the scheme of the bill as Mr. Humphrys has it in his mind. We are not wedded to the exact wording, but we are, I think, reasonably wedded to the aim of the bill. That is, it appeared in the form in which clause 15 is drawn that even an expropriation in the circumstances provided in clause 15 could be negatived if they did not have the minister's consent.

Then the question was: what is an undertaking? What is the undertaking of the company? This is clause 15.

The thought we had was that instead of saying:

> No sale or disposal of the whole or any part of the undertaking of a sales finance company . . . is of any effect unless and until it has been approved by the minister,

if the result would be that whatever was sold or disposed of would pass to a non-resident, we thought it should be approached from a different point of view so that it might generally have a more intelligent application, because the question is: what does "disposal" mean? If you dispose of any part of your undertaking, the Canada Corporations Act says that the undertaking is the business that the company is authorized to do; in other words, whatever the objectives of the corporation are, that is the undertaking. They may not be carrying them all out, of course.

Then there are provisions in the ancillary powers in the Canada Corporations Act under which a very broad additional authority is given to any federal company. The wording of one clause of the ancillary powers is that a company as ancillary to its incorporation under the Canada Corporations Act may sell or dispose of the undertaking of the company, or any part thereof as the company may think fit. We do not want to disturb those authorities more than is necessary to accomplish the purpose the bill has in mind in attempting to give the minister a restraining authority where a company that has non-resident shareholders is attempting to dispose of part of its undertaking, and the sale or disposal would be to a non-resident.

I will read the sort of thing we had come up with in draft form. I do not see any value in debating it now, but if the committee would like to have a copy of this in outline we will send a copy to each member.

Senator Beaubien: I think that would be an advantage.

The Chairman: This is the wording we came up with:

> A sales finance company to or in respect of which sections 11 and 13 apply . . .

These are the limitation of shares held by non-residents . . .

> shall not sell or otherwise dispose absolutely . . .

This is to cover the question of mortgaging etc.

> of the whole or any substantial part.

We have put in "substantial part" instead of the picking and shedding of bits and pieces of its business.

Senator Connolly (Ottawa West): Perhaps even simple assignments of certain paper.

The Chairman: Yes.

> . . . any substantial part of its undertaking, and the sale or disposal is of no effect, unless and until it has been approved by the Minister, if, in the opinion of the Minister, it would be likely to result directly or indirectly in the acquisition of the whole or any substantial part of the undertaking by a non-resident.

Senator Connolly (Ottawa West): It makes it easier in the administration for the Superintendent to have it that way, I should think.

The Chairman: Oh yes. It is language in respect of which there must be jurisprudence, because "the whole or any substantial part" is the language found in, I would say, practically every trust deed that has been drawn where the question is: how far can the company go in the disposal of assets that are subject to a deed of trust and mortgage and what steps must you take? Usually in the trust deed the substantial part is put in dollar terms; that is, that you may without getting consent from a trustee dispose of assets which have no further value in use for the company. Then there is provision where the money has to go to the trustee, but if you have spent more money on capital assets you can draft the money back from the trustee into the operations of the company.

We have been trying to harness all that. I think we have moved along a distance and I am sure we will come up with something that makes good sense.

If there are no other general questions, is it agreeable that if the Senate is sitting next week we meet on Wednesday, which will be the concluding meeting, and if it is not sitting next week we will meet the following week, and that will be the concluding meeting? Is that agreeable?

Hon. Senators: Agreed.

Senator Connolly (Ottawa West): Could I just ask one thing, Mr. Chairman? I know we do our best with these bills, and we go into them in depth. Obviously on this one we have. However, do we know whether any of these questions that you propose to consider at our next meeting were in fact considered in the other place?

The Chairman: All I know so far is that Labatts, who appeared before us last week, said they had made no representations to the Commons committee.

Senator Connolly (Ottawa West): It may not have been brought before the other committee. I did not read the evidence.

The Chairman: Actually I do not think it hit them to that extent until they started to make a particular study of it.

The committee adjourned.

Queen's Printer for Canada, Ottawa, 1971

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 9

WEDNESDAY, FEBRUARY 10, 1971

Complete Proceedings on Bill S-10,

intituled:

"An Act respecting La Société des Artisans"

REPORT OF THE COMMITTEE

(For list of Witnesses—See Minutes of Proceedings)

23439—1

THE STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, February 2, 1971:

"Pursuant to the Order of the Day, the Honourable Senator Lefrançois moved, seconded by the Honourable Senator Boucher, that the Bill S-10, intituled: "An Act respecting La Société des Artisans", be read the second time.

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

23439—1½

Minutes of Proceedings

Wednesday, February 10, 1971.
(11)

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

Bill S-10, "An Act respecting La Société des Artisans".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Everett, Flynn, Hollett, Isnor, Kinley, Macnaughton and Willis. (15)

Present but not of the Committee: The Honourable Senators Lafond and Lefrançois.(2)

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

WITNESSES:

Department of Insurance:

Mr. R. Humphrys, Superintendent.

La Société des Artisans:

Mr. Luc Parent, Q.C., Legal Advisor.

Mr. René Paré, Q.C., President.

Upon motion of the Honourable Senator Beaubien it was *Resolved* to report the said Bill without amendment.

At 10.00 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, February 10, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-10, intituled: "An Act respecting La Société des Artisans", has in obedience to the order of reference of February 2, 1971, examined the said bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Minutes of Proceedings

The Standing Senate Committee on Banking Trade and Commerce

Evidence

Ottawa, Wednesday, February 10, 1971

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-10, an act respecting La Société des Artisans, met this day at 9.30 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, I see a quorum and, therefore, call the meeting to order.

We have before us for consideration Bill S-10, respecting La Société des Artisans, and appearing this morning are Mr. Luc Parent, Legal Adviser, and Mr. René Paré, President of La Société des Artisans.

Following our usual practice, we will hear from Mr. Humphrys first, following which the applicants may judge whether they want to supplement what Mr. Humphrys says.

Senator Desruisseaux: Mr. Parent, you may speak in French or English, as well as Mr. Paré, when your turn comes.

Mr. R. Paré, Q.C., President, La Société des Artisans: As you wish.

Senator Macnaughton: You may speak in French.

The Chairman: Well, Mr. Humphrys, are you ready to give us your views on Bill S-10?

Mr. R. Humphrys, Superintendent of Insurance: Mr. Chairman, honourable senators, the purpose of this bill, as was explained on the motion for its second reading, is to change the status of this organization from that of a fraternal benefit society under our general insurance legislation to that of a mutual life insurance company.

La Société des Artisans is quite an old organization in Canada. It was incorporated in 1876 under the laws of Quebec and later changed to federal status in 1917 when there was a federal corporation formed which took over by agreement the assets and liabilities and membership of the provincial organization.

According to its original formation as a fraternal benefit society, the emphasis was perhaps more on the concept of fraternalism with local lodges and the social and welfare aspects that went with a lodge movement; but it did have insurance as an additional function of the organization to provide for the protection and welfare of the members of the society.

As the years have gone on the insurance aspect of the organization has become more important, and the society has now become really quite a large financial organization, quite a large insurance organization. The latest estimate that we have, which covers the year 1969, shows that the total assets amounted to $75 million. The society is in good financial position. It has a surplus of assets over liabilities of something in the order of $5 million. The premium income amounts to something in the order of $20 million. So that you can see that it is quite a large insurance organization now.

The concept of a fraternal benefit society under the general insurance law is really based on organizations that are primarily fraternal organizations, and it emphasizes the fraternal aspect with insurance being secondary. In a case such as this where the insurance has grown to such a very large extent, it is more appropriate from our point of view that the organization be treated as a mutual life insurance company. Consequently we favour and support the change that is being asked for here. The actual application of the law will not be very different, but there are some differences in the pattern of supervision applicable to insurance companies that do not apply to fraternal benefit societies. On the other hand there are some restrictions on fraternal benefit societies that do not apply to insurance companies.

Perhaps the most significant thing from the point of view of the insurance customer of the fraternal society as compared with an insurance company is that the fraternal benefit society issues the so-called open insurance contract. The by-laws of the organization are part of the contract, and as a consequence the contract can be changed; there can be assessments levied, and there can be other changes. I would hasten to add that there have been no such assessments by fraternal societies for many years in Canada, and although the possibility exists, the fact is that they have maintained themselves in a satisfactory financial condition and they have not had to levy any special assessments of this type on their membership.

That, Mr. Chairman, is a word by way of background. As far as the bill itself is concerned, it does two things; it states that the organization will now be a mutual life insurance company and it provides that all the contracts that have been issued in the past will now be treated as firm contracts, and any right that did exist to levy assessments against them will be removed. It also spells out special provisions relating to the form of government, that is corporate government, that the Society wishes to maintain. As a mutual life insurance company under the general law, each participating policyholder has a vote

and is entitled to attend the annual meeting, and at the annual meeting he elects the directors, and the directors govern the organization.

This organization which has grown up as a fraternal benefit society with a lodge system and a representative form of government, or a delegate form of government, if you will, wishes to become a life insurance company but also wishes to retain the same pattern of corporate government that it had before—that is, a delegate system. They want to retain their local jurisdictions and have those local jurisdictions elect delegates to a regional meeting and then have the regional meeting elect delegates to the general meeting of the organization which would be the counterpart of the annual policyholders' meeting in a life insurance company.

So the real reason that this bill is before you, as distinct from proceeding by way of letters patent as was authorized a year ago, is that this form of corporate government is quite different from that prescribed in the general act for life insurance companies generally, and our legal advisor and the company's legal advisors also considered that there was not enough authority under the letters patent procedure to make changes of this kind which are really contrary to the provisions of the general act. So that the main part of the bill spells out this delegate form of voting.

There is also a slight change in the name, and the other provisions are to insure that there is no break in the continuity of corporate existence. The objects of the Society are spelled out in clause 6. They are just the same as the objects of the life insurance companies that have been incorporated over the years without the additional provisions of paragraph (b) of clause 6 which reads:

(b) to encourage social and educational activities.

So this will continue to be an interest and a function of this organization by way of a continuation of its past interest and activities among its membership.

I should like to add that there is one precedent of this type dating from some 20 years back when another fraternal benefit society having its main operation in the Province of Quebec was changed to a mutual life insurance company. That was done in the late 1940's by the Alliance Nationale. In that case the change was quite similar, except that the Alliance changed over completely to a mutual life insurance company with one vote per policyholder, whereas La Société Des Artisans wishes to retain something quite close to its present form of government.

Senator Beaubien: Mr. Humphrys, as Superintendent of Insurance, are you perfectly satisfied to recommend this bill without any reservation?

Mr. Humphrys: Yes, senator.

The Chairman: There are differences as against the usual government provisions in a bill. I notice that the general meeting is held every four years, so the moment the president and directors are elected, they are in for four years.

Mr. Humphrys: Yes, Mr. Chairman.

The Chairman: There may be virtues in that.

Senator Isnor: What are they?

The Chairman: You do not have to run as often.

Senator Kinley: They can kick the president out, if they want to and make him retire?

The Chairman: But he is elected for four years.

Senator Kinley: He is elected for four years. Does that mean you cannot touch him for four years?

The Chairman: Unless he misbehaves.

Senator Macnaughton: The executive committee is elected from the Board of Directors, is that right?

Mr. Humphrys: Yes.

Mr. Luc Parent, Q.C., Legal Adviser, La Société des Artisans: But the president is elected at the general meeting, Mr. Chairman.

Senator Everett: Do the policyholders then have no representation on the board?

Mr. Humphrys: The board will be made up of policyholders; there are no shareholders in this organization. What it consists of is a series of steps leading to the election of the Board of Directors, so that the members meet first in a local jurisdiction and elect delegates to a regional meeting. Then the delegates at the regional meeting elect some of their members to go and form the general meeting of the company, and from the delegates there are elected the directors, so I think it is accurate to say that the policyholders, the individual members, have their will recognizd through this series of steps leading to the general meeting at which the delegates elect the Board of Directors who will govern the organization in the intervening period between the general meetings. But, of course, special general meetings can be called in these periods if that is desired.

Senator Everett: I am thinking of differentiating as between policyholders who are members of the fraternal society and those policyholders who by virtue of changing this to a mutual life company are not members of the society.

Mr. Paré: They have to be members of the Society.

Mr. Humphrys: All policyholders both past and future will be members of the organization and will have the same rights. Persons who become policyholders after a change such as this is made will have exactly the same rights as those who were policyholders before the change and therefore will be members of this company.

Senator Everett: Why then is the change necessary?

Mr. Humphrys: At present the organization is designated under our laws and under its act of incorporation as a fraternal benefit society. As such there are certain restrictions on its operations that do not apply to life

insurance companies. But it has now reached a point of development and volume of insurance that for supervisory purposes and for the purpose of regulation under the Insurance Act we think it is desirable that it be a company, and we from our point of view have no objection to their retaining the kind of internal form of government that they have had in the past and that the membership appears to want to retain under the new regime.

Senator Everett: Can you tell us what are the restrictions they presently operate under?

Mr. Humphrys: There are certain provisions in the insurance act that require a greater degree of separation of accounts between different groups of membership, different types of business, than applies in the case of insurance companies. There are more restrictions on the extent to which premiums can be used in the financing of the operations and the expenses of the company. There is more formality involved in the government of fraternal benefit societies than in the case of insurance companies, primarily because the laws contemplated small organizations for fraternal societies, with insurance being only a side issue, and it is rather more limited than in the case of life insurance companies. So, there has to be more formality in the segregation of funds and the segregation of accounts, and more formality in the size and amounts of policies that can be issued, and limitations on the extent to which re-insurance arrangements can be made with other corporations, because one has to think always of fraternal membership.

Senator Everett: Would you stop there, Mr. Humphrys?

Mr. Humphrys: Yes.

Senator Everett: On re-insurance, you said there are some restrictions because one has to bear in mind—what?

Mr. Humphrys: —the concept of membership. For example, it is common among insurance companies to exchange re-insurance. That is, if you have some big policies, you re-insure the excess with other companies and may take some re-insurance from them on a reciprocal basis; whereas a fraternal society cannot do that because its powers are limited to insuring its members only. So they cannot participate in this exchange of re-insurance.

Senator Everett: So at the present time it does not re-insure?

Mr. Humphrys: It seeds re-insurance to others, but it does not accept it.

Senator Everett: To what level does it re-insure now?

Mr. Paré: It varies, depending on the individual case. We go as high as $60,000; the rest is re-insured.

Senator Everett: By virtue of this they will be allowed to exchange re-insurance?

Mr. Humphrys: They could do some of this.

Senator Everett: Would they propose to go into the re-insurance business?

Mr. Humphrys: I would think not so, except in an incidental way. I do not put it forward as a major intention of the organization. There is another aspect, that in becoming a major insurance organization, in competing for business for membership, selling policies in the market, a fraternal society can be at a disadvantage because of the open contract. As a company they can issue a closed contract where the policyholder knows exactly what he has, and if an organization becomes really a major insurance organization, the fraternal concept can be a competitive disadvantage in the market place.

The Chairman: Senator Everett, on the question you raised originally, it is covered in section 3(2) and also in section 7(1).

Senator Everett: Yes, thank you, Mr. Chairman.

Just to go on, does the company intend to change the nature of its business, that is, the type and amount of policies it is going to issue?

Mr. Humphrys: I would not expect any sharp change in its method of operation or policy, senator. I think the change is really in recognition of the development of the organization and that it really fits more appropriately as a company than as a fraternal society.

Senator Everett: Has the company filed financial statements with the committee?

Mr. Humphrys: I do not think so. We get financial statements, of course, and have for years, from the society, and it has been subject to our supervision.

Senator Everett: Do you get interim statements?

Mr. Humphrys: No, not as a matter of law. We get the annual statement, and we have the power to call for additional information. We know the organization well and examine it regularly, so we do not feel it necessary to get interim statements.

Senator Macnaughton: It is not the custom to file statements with this committee, is it?

Mr. Humphrys: No.

Senator Macnaughton: It is confidential information.

The Chairman: That is the privilege of the people who are applying.

Senator Everett: In fact, Mr. Chairman, with respect, I do not think it is confidential; it is published by the Superintendent every year.

Mr. Humphrys: The financial statements are published in our annual reports.

Senator Connolly (Ottawa West): There are some 350,000 members in this organization and they have a very democratic way of operating—with areas and smaller jurisdictions. How many directors are there?

Mr. Paré: We have 19 and the president, which makes 20.

Senator Connolly (Ottawa West): How many areas are there?

Mr. Paré: We have 18 regional jurisdictions.

Senator Connolly (Ottawa West): Just as a matter of interest, do you get a pretty good attendance at local as well as annual meetings?

Mr. Paré: Yes. We have 350,000 members. We cannot say that all these members come to these local sessions and the regional ones, but I consider we do pretty well. I would say that, in total, we have something like 10,000 to 15,000 members who are very active in the society, either in the local jurisdiction or the regional ones, so that we do the best we can to have the members take an interest in the society.

Senator Connolly (Ottawa West): I think this is very unusual, because normally in the case of an insurance company a small attendance is regarded as the general rule.

Senator Flynn: Even with a mutual company?

Senator Connolly (Ottawa West): Yes.

Senator Macnaughton: That is the reason for the four-year term, is it not? It is really a procedural matter. You cannot go through that expense and confusion every year.

Mr. Paré: Yes. We have now, as a fraternal society, the election taking place every four years, with the same system, as the Superintendent has said, and we want to keep it as a mutual company.

Senator Carter: What happens when a director dies or resigns during the four-year period?

Mr. Paré: He is replaced by the board of directors after consultation with the regional jurisdiction he represents, because every member of the board of directors represents one of the regional jurisdictions.

Senator Hollett: When does a member become of age to vote?

Mr. Paré: At 21.

Senator Hollett: It is not stated in this bill, is it?

Mr. Parent: It varies from place to place. We do business also in the United States and in some places it might be 18 years of age.

Senator Hollett: That is what I was wondering.

Senator Flynn: The French text is clear, because it says "majeur" which means that under our law it would be 21.

Senator Hollett: Which section is that?

Senator Flynn: Section 7(2). In French it says "majeur," which really means "majority".

Senator Hollett: It says it in French, but it does not say it in English.

Mr. Humphrys: It says:

Any member who is of age...

Senator Hollett: I want to know what you mean by "of age".

The Chairman: It is a matter of interpretation, and that would be interpreted as being 21.

Senator Hollett: Can a person become a member before he becomes of age?

The Chairman: I would expect so, yes.

Senator Flynn: I should like to put some questions to Mr. Parent and Mr. Paré in French.

I should like to know how local and regional jurisdictions are determined. Are there any regulations at present?

Mr. Paré: It is determined by regulation, the decisions being made by the general assembly, which rules on requests from members in a given region that it be organized into a special region.

Senator Flynn: Are you referring to section 11, Mr. Paré? This general assembly would be a meeting in which all members have a right to take part?

Mr. Paré: No, they are delegated.

Senator Flynn: The general assembly consists only...

Mr. Paré: Only of delegates. At this general assembly, there are about seventy-five people.

Senator Flynn: Seventy-five people?

Mr. Paré: Yes. You see, the members of a local section elect delegates to the regional body, and the regional body elects delegates...

Senator Flynn: To the general assembly?

Mr. Paré: ...to the general assembly.

Senator Flynn: After all, it is the general assembly that holds the same powers as, say, the shareholders of a company or the members of an ordinary mutual insurance company.

Mr. Paré: Yes, that is so. The general assembly is the highest authority.

Senator Connolly (Ottawa West): From what Senator Flynn has just said, I was wondering whether the company might not find itself restricted somewhat as a result of section 8 which says that a member, even though he is a delegate or a substitute, shall not vote by proxy. There is no proxy voting at the meetings. If attendance at the meetings fell, would the company not be inhibited in its administration and operation without proxy votes? I am wondering why they cannot have proxy votes. Perhaps they do not want them.

Mr. Parent: There is a law which provides that when a member cannot attend a meeting he is represented by

another person who is called in French a "suppléant", an alternative.

Mr. Paré: When the regional jurisdiction elects delegates to the general meeting, it elects at the same time one or two alternate delegates.

Senator Desruisseaux: Mr. Paré, the main aim of the whole organiaztion is to arrange matters so as to increase your members' stake in the company, is it not?

Mr. Paré: It is a democratic organization.

Senator Desruisseaux: Now, if you had to change it, it would be very difficult, would it not?

Mr. Paré: You could say it would be impossible. I am convinced that if a refusal were met with here, then because of the growth of democracy within the Société des Artisans, our members would prefer to continue to operate under the present charter.

Senator Desruisseaux: You are writing insurance at present?

Mr. Paré: Yes, we are first and foremost an insurance company.

Senator Desruisseaux: You are changing the name, but without making any practical changes in the powers—isn't that so? Everything else remains almost the same, except the name?

Mr. Paré: But you see, as Mr. Humphrys said just now, there are certain restrictions that affect fraternal societies, which is our present status. So if that were taken away, we would no longer be a fraternal society. For example, as Mr. Hmphrys said, we cannot take re-insurance.

There are certain forms of, say, group insurance, that we are unable to write at present. That would disappear with the present system, because we come under the sections that give the mutal and capital stock companies their powers. We would have all the powers those companies now have. This is the principal difference that has led us—it is not just the name change—that has led us to request the changes; we want to have all the powers, without any restrictions, like the capital stock and mutual companies.

Senator Flynn: The mutual life insurance companies, that is?

Mr. Paré: That is so.

Senator Flynn: Now, as stated in your explanatory notes, the system represents . . .

Mr. Paré: Yes. The difference with respect to a mutual company is that we keep the democratic system.

Senator Desruisseaux: You also operate outside Quebec?

Mr. Paré: We operate chiefly in Quebec, Ontario and New Brunswick, as well as in the five New England states.

Senator Burchill: How often does the board of directors meet?

Mr. Paré: The board of directors meets every three months, and we can have special meetings if necessary.

Senator Connolly (Ottawa West): How many members do you have in the United States?

Mr. Paré: In the United States, we have 50,000 members, mostly Franco-Americans.

Senator Everett: How do you presently finance the social and educational activities of the organization?

Mr. Paré: We have a system which is rather original. Every insurance company pays commissions to agents, and we take a small portion of those commissions and give it to the local jurisdiction. It is sufficient to operate this system.

Senator Everett: Do you propose to do that same thing with the new company?

Mr. Paré: Yes, we propose to keep that.

Senator Everett: Thank you.

The Chairman: Are there any other questions?

Senator Connolly (Ottawa West): You must have some good parties.

Mr. Paré: They do work seriously. At times they may have a good party, but I think we can say seriously that they work very well.

Senator Macnaughton: How many times does the executive meet?

Mr. Paré: It meets twice a month.

The Chairman: Mr. Paré, do you wish to add anything to the discussion before we pass this bill?

Mr. Paré: No. I think everything necessary has been said.

Senator Beaubien: I move that we report the bill.

The Chairman: Is it agreed?

Hon. Senators: Agreed.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 10

WEDNESDAY, FEBRUARY 24, 1971

Fourth Proceedings on Bill C-3,

intituled:

"An Act respecting investment companies"

(For list of Witnesses—See Minutes of Proceedings)

23441—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, December 15, 1970:

"A Message was brought from the House of Commons by their Clerk with a Bill C-3, intituled: "An Act respecting investment companies", to which they desire the concurrence of the Senate.

The Bill was read the first time.

With leave of the Senate,
The Honourable Senator Lang moved, seconded by the Honourable Senator Paterson, that the Bill be read the second time now.

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

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Minutes of Proceedings

Wednesday, February 24, 1971

(12)

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

Bill C-3, "An Act respecting investment companies".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Hollett, Isnor, Kinley, Macnaughton and Martin—(14).

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

WITNESSES:

Federated Council of Sales Finance Companies:

J. B. Gregorovich, Ford Motor Credit Company of Canada Limited. Chairman, Legal and Legislative Committee.

W. P. McKeown, Canadian General Electric Credit Limited. Member, Legal and Legislative Committee.

R. A. Roberts, General Motors Acceptance Corporation of Canada, Ltd. Member, Legal and Legislative Committee.

C. H. Bray, Executive Vice-President.

Department of Insurance:

R. Humphrys, Superintendent.

CEMP Investments Ltd.:

Philip F. Vineberg, Q.C., Secretary and Director.

Rupert B. Carleton, Vice-President and General Counsel.

At 11.10 a.m. the Committee adjourned until Wednesday, March 3, at 9.30 a.m.

ATTEST:

Frank A. Jackson
Clerk of the Committee

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, February 24, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-3, respecting investment companies, met this day at 9.30 a.m., to give further consideration to the bill.

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

The Chairman: Gentlemen, I call the meeting to order.

We have two briefs to deal with this morning; the first is from the Federated Council of Sales Finance Companies, and the second from CEMP Investments Limited.

We are under a little pressure this morning, honourable senators, because Senator Aird has arranged for his committee to sit at 11 o'clock, and the appropriate arrangements have already been made with witnesses in this regard and he wishes to be able to borrow some of the talent we have in this committee for that meeting. Therefore I thought we would try to deal as much as we can with the matters before us, such as hearing the submissions and dealing with whatever amendments we think should be made until 11 o'clock and then we would adjourn so that the other committee might have a quorum. Is it agreed, honourable senators?

Hon. Senators: Agreed.

Senator Aird: I am very grateful, Mr. Chairman, for your consideration and I should like to have that observation placed on the record. Thank you very much.

The Chairman: I have already referred to the Federated Council of Sales Finance Companies, and from that organization we have as witnesses Mr. J. B. Gregorovich, Mr. W. P. McKeown, Mr. R. A. Roberts and Mr. C. H. Bray. I believe Mr. Gregorovich is going to make the main presentation.

Mr. J. B. Gregorovich, Chairman, Legal and Legislative Committee, Federated Council of Sales Finance Companies: Mr. Chairman and honourable senators, we have presented a brief to you which I believe arrived rather late last night because of the transportation difficulties. Therefore, I shall read the introductory statement on the major problems initially and when that has been done we will be very happy to answer any questions you may have or to elaborate on the points raised.

The several points that we have attempted to make clear in the following pages are all important to the members of the Federated Council of Sales Finance Companies. However, from the array of important items, some are obviously more important than others and it is to a few of these that we address ourselves now.

Clause 9 of the bill is the subject of paragraph 7 on page 4 following. The prohibition of "sideways" lending is of such importance to the financing subsidiaries of automobile manufacturers that it is necessary to provide a description of the situation.

Many of us would envision a new car dealer as being the head of a substantial, successful business who, as a person, fulfils a responsible role as a community leader. This recollection is appropriate to a new car dealer in the late 1930's and in the decade or so following the war. The situation today is not the same as it was.

The first-and second-generation auto dealership, having enjoyed real success in the earlier stages, has become exceedingly valuable by reason of re-invested earnings in land, buildings and equipment, as well as in going concern value in earning-power based on a long-lived reputation for service to a large and growing list of customers. The problem arises when the dealership is not going to be bequeathed to a member of the family and needs to be sold. The value of the dealership is such as to eliminate many worthwhile persons from the market of potential and desirable buyers.

Within the last few years, profitability of dealerships has been on a sharp decline as auto sales have been soft. While the current economic situation tends to relieve the first problem marginally, it creates another in the form of other dealerships in financial distress and threatening to close.

The two circumstances—one a longer term development, the other more topical—have been solved, apparently satisfactorily, by automobile manufacturers taking a substantial equity position in such dealerships in partnership with a businessman. In this way, the outlet for the manufacturer's goods is maintained and the availability of products and service to customers is maintained. We submit that the presence of dealerships in which the manufacturers have an interest has been of value to all concerned. The communities, customers of the dealership, and the participating businessmen have been helped, as well as the manufacturers.

Under section 9, the required non-equity financing of the dealership could not be provided by the finance subsidiary of the same manufacturer which has an interest in the dealership.

An automobile dealership requires both equity and non-equity financing to provide the funds necessary to successfully finance the premises, equipment, parts and automobiles to carry on the business of sale and service of automobiles. Normally, the bulk of the financing is non-equity financing. Assuming that the equity invested in the dealership is $100,000, the non-equity financing required would be: $100,000 as capital financing of building, equipment and working capital; $500,000 as inventory financing; $1,000,000 as retail financing; $7,510,000 for lease financing.

In the case of an otherwise well-qualified businessman who has exhausted all other sources of capital and still

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lacks the equity required to undertake the dealership, the manufacturer may provide a substantial or major part of the equity investment. For example, of $100,000 equity needed, the applicant may be required to invest $20,000 and the manufacturer will invest the remaining $80,000. The equity will be investment in shares, common and preferred, in the corporation doing business as an automobile sales and service dealer. The businessman manages the dealership and will, as his financial standing improves, purchase the shares of the manufacturer until he attains complete ownership.

It has been normal for the non-equity financing to come from a finance company which is related to the manufacturer. The non-equity financing by the finance company will be on the same terms and conditions as investment in any dealership it finances.

To assist in estimating the size of the problem created by section 9, the Federated Council submits the following data compiled from the records of:

> General Motors Acceptance Corporation of Canada Limited, Ford Motor Credit Company of Canada Limited, Chrysler Credit Canada Ltd.

As at December 31, 1970, 179 Canadian auto dealerships of these companies had manufacturer equity participation. The credit extended these by the finance company subsidiaries of the manufacturers totalled $83.7 million composed of $5.5 million in capital loans, $21.3 million in lease financing, and $56.9 million in inventory financing.

If I may interject at this point, the last sentence refers to the financing extended to auto dealerships with manufacturer equity participation. Of the 179 that do have manufacturer equity participation credit is extended by finance subsidiaries to 102, so that 102 of the 179 dealerships receive financing from the three factory subsidiaries noted above.

The Chairman: That will be the finance subsidiaries of the manufacturer?

Mr. Gregorovich: Yes, Mr. Chairman.

Under section 9, not only will the combination of equity and non-equity financing services be prohibited, but subsection (2) would require that all such holdings be disposed of—to whom, at what price, and at what subsequent loss to dealers, communities and manufacturers, no one can predict.

In view of the severity of the consequences on existing and future dealerships, these companies will probably seek exemption under subsection (5). The grounds for granting an exemption are now very narrow. We respectfully submit that the grounds for exemption should be broadened so as to give the minister a reasonable area of discretion. Further, we are interested in the comments of the members of the committee as to the likelihood of such exemptions being granted if applied for.

Senator Isnor: What do you mean by that—that we should express our views, and that the minister would grant them?

Mr. Gregorovich: We would ask that you express your views as to whether in these circumstances you would expect that the minister would exercise his discretion. It is not a direction, but what we are asking is for an interpretation of the prohibition of section 9 as being one which would not exclude this type of financing which has been normally carried on over quite a number of years and which has, as we suggest, advantages.

The Chairman: Senator Isnor, in subsection (5), which Mr. Gregorovich has been talking about, the authority is given to the minister to make an order, and what they are in effect saying is, "We would like, on the basis of our operations, to have these operations covered in these situations"—in other words, if the minister would exercise his discretion on certain sets of facts.

Senator Hollett: Of course, ministers change, Mr. Chairman.

The Chairman: Yes, they have a way of doing that, do they not?

Senator Beaubien: Not often enoughem

The Chairman: Nor completely enough.

Mr. Gregorovich: We would hope that this would be guidance not only to the Minister of Finance today but for the future as well, since this would be the background.

If I may interject, the minister's discretion to permit this could also be exercised under section 3(2), and it might well be that that might be a more appropriate section to apply under. In seeking the advice of this committee our hope would be that the views would apply to an application under either section.

The Chairman: Honourable senators, the restriction in subsection (5) that the witness is talking about is one that I would doubt the companies concerned could meet, because the language is that the minister can make an order of exemption

> if he is satisfied that the decision of the investment company to make or hold any investment so exempted has not been and is not likely to be influenced in any significant way by that person or group and does not involve in any significant way the interests of that person or group, apart from their interests as a shareholder of the investment company.

The Chairman: It is pretty hard to say, in the relationship of a manufacturer who has subscribed for the substantial part of the capital of the dealership, that the investor, being the manufacturer, is not likely to be influenced in a significant way in the matter of decisions; and therefore I think the witness has quite properly said that there is great opportunity for the exercise of discretion by the minister under section 3, and, as I understand it, you are presenting that as your second point.

Mr. Gregorovich, is the language of section 3, on page 5 of the bill, broad enough, in the different reasons that I enumerated, that you can rest a case for ministerial discretion, or do you think that any enlargement of language is necessary?

Mr. Gregorovich: We believe that the language of subsection (2) (c) and subsection (4) suggests that a factor which may be considered is the extent of the integration of the company's activities with the activities of its subsidiaries,

and having regard for the purposes of this act it is not necessary in the public interest that this act apply.

The Chairman: I am trying to get this in a nutshell. What you are saying is that under subsection (5), which is part of section 9, you could not hope for the exercise of discretion, having regard for the limitations that operate on the minister in making such an order, but you feel that under section 3 on page 5 of the bill, where the minister may exempt from the application of the act any particular investment, there is enough elbow room in the present language to deal with your situation if there is the will to deal with it. However, we cannot very well write the will into the bill.

Mr. Gregorovich: No, Mr. Chairman.

The Chairman: Then within the scope of the present bill you are covered if you can persuade the minister to act.

Mr. Gregorovich: We believe we would be. However, we have asked in the brief, and we are asking, that members of the committee concur in our view that the type of lending to which we are referring is not the type of lending which was intended to be prevented by section 9 which we believe has specific reference to certain types of companies—what I would call fraudulent transactions in certain companies. I would not call them finance companies because the type of lending that they did was not sales finance. The sales finance lending that they did, in fact, caused no losses. It was the other types of lending to other types of activity that caused the losses.

We believe that the intention of section 9 is to prevent that type of fraudulent loss; but we suggest it was not intended that it meant the continuance of what is a very worthwhile form of lending carried on by subsidiaries.

The Chairman: Mr. Gregorovich, you have two escape clauses, one under section 3 and one under subsection (5) of section 9. It would not appear that subsection (5) of section 9 might be of much help to you?

Mr. Gregorovich: That is true.

The Chairman: But you think that subsection (3), in the reasons that the minister has to find for acting, may be of much help to you?

Mr. Gregorovich: Yes, Mr. Chairman.

The Chairman: What do you want us to do?

Mr. Gregorovich: We have requested the comments of the members of the committee. As I have said, as a guide for ministerial action and to the intent of the act, we seek concurrence in our view that ministerial discretion would be expected to be exercised in the type of application that we would make.

The Chairman: You understand, Mr. Gregorovich, that while the members of the committee may express views in committee, they either approve of the bill in its present form or make amendments if necessary.

I would suggest that if Mr. Humphrys is ready to express a view at this time in relation to section 3—I do not wish to anticipate him—and on the approach that might be followed in relation to section 3, he might like to make a statement now?

Mr. Humphrys: Yes, Mr. Chairman; if it is the wish of the committee I would be glad to make a comment on the particular point that is under discussion.

I would suggest, Mr. Chairman, that the terms of section 3, where the minister would be granted some discretion to exempt companies under certain conditions, would not likely permit an exemption of a company of the type that is described by Mr. Gregorovich.

The point that he referred to, the extent of the integration of the company's activities and the activities of its subsidiaries, if any, with the activities of the corporation of which it is a subsidiary and any other subsidiaries of that corporation, was intended to permit examination and special consideration of the case where a sales finance company dealt only with other companies in the family; but this case, if I understand the presentation correctly, is one where some part of the activities of the sales finance company, but a minor part, is involved with sister companies, but the main part of the business of the sales finance company is buying conditional sales contracts from any of the others that are independent corporations and not subsidiaries of either the sales finance company or its parent.

So my own reaction would be that this is not the kind of case where the operations of the company are so deeply integrated with other companies in the family that it should be exempted from the act completely. So I would not have thought that section 3 would really be a likely channel to solve this particular problem.

The Chairman: Mr. Humphrys, you see where that viewpoint puts the case?

Mr. Humphrys: Yes, I do.

The Chairman: It puts the case, in relation to where you have subsidiaries and not the main part of the business with independent dealers, that these manufacturers may no longer assist these dealers.

Mr. Humphrys: I think it puts the case back into section 9 . . .

The Chairman: Yes.

Mr. Humphrys: . . . and the question of the minister's discretion under section 9. As you have pointed out, Mr. Chairman, the discretion proposed under clause 9 would permit the minister to exempt that particular investment, or investments of a particular class, if two conditions obtain; one being if the minister is satisfied that the decision to make a holding investment is not significantly influenced by the substantial shareholder; and the second, that the interests of the substantial shareholder are not significantly affected by the investment.

When this particular situation was drawn to our attention some time ago we thought that it might well be that it would fit within those categories. As we understood it, the financing of the automobile dealership by the acceptance company was carried out really in the same pattern as applied to all other automobile dealerships. There was no special consideration given to a particular company where the parent of the acceptance company had an equity inter-

est. If that is the case and the equity interest of the parent company is really an incidental transaction designed to ease the transfer of ownership of the dealership or to make it possible to establish the new dealership, then the equity interest taken by the parent company is not really as an investment as such; it is rather an incidental transaction to establish the dealership and, hopefully, to place it in the hands of an independent businessman who will run it.

We thought that those two points would permit us to give really fair consideration to an application for exemption under that clause.

The next point, also in clause 9, is that an investment or loan is not prohibited if it is ancillary to the main business of the acceptance company.

The Chairman: Would you illustrate that?

Mr. Humphrys: In some cases the financing of a dealership by the acceptance company may involve a loan for capital purposes, expansion of the building or addition of new facilities. In such case the transaction would be incidental, auxiliary or ancillary to the main business of the acceptance company, which is financing the sale of cars. A capital loan to permit a dealer to expand his facilities could well be considered as ancillary to the main business.

There is a further consideration that we think merits study. A good portion of the financing of a dealership by the acceptance company is in the form of what is commonly known as wholesale financing. It is a loan to enable the dealership to obtain its inventory of automobiles from the manufacturer. They are passed to him, sold by the dealer to invididuals and a new conditional sales contract then is created. If that transaction of wholesale financing takes place in the form of a conditional sale from the manufacturer to the dealer which is sold by the manufacturer to the acceptance company, it may well be that that is not an investment or loan falling within the prescription of prohibition under clause 9. Therefore we have to examine all these aspects.

We also felt in studying this that an important consideration in deciding the problem of an application for exemption would be the volume of this kind of business in relation to the other activities of an acceptance company.

The Chairman: Even in the example you gave a moment ago, if the wholesale end of this business in relation to all the other business operations of the finance company and the manufacturer was relatively small in the ratio, would you consider that to be a factor under which the minister would feel he should refuse an exemption?

Mr. Humphrys: We would look at the importance of the particular transaction under study in relation to the total business of the acceptance company.

The Chairman: Have you any figures with regard to the relationship of the wholesale end to the leasing?

Mr. Humphrys: No, I have not, Mr. Chairman.

Senator Connolly: Mr. Chairman, did you say relationship to the leasing?

The Chairman: Leasing is one aspect of the business, which has to be financed somehow.

Senator Connolly: I see.

Mr. Humphrys: Financing of dealerships falls into three main categories: loans for capital development; wholesale financing; and lease financing. I hope you will correct me if I am wrong in saying that the lease financing, as I understand it, would be advancing money in order to permit the dealer to acquire a stock of cars for leasing purposes.

Mr. Gregorovich: Yes.

Mr. Humphrys: So that, Mr. Chairman, is the extent of our study of this particular point. However, I must say that when it was presented to us some months ago it was not drawn to our attention that there was as much as $70 million to $80 million involved. I am not absolutely sure whether that $80 million includes all the wholesale financing carried out by these three companies in relation to dealerships where the manufacturer has equity interest.

The Chairman: Did I understand you to say that in your view the effect of subclause (5) of clause 9 is that if the manufacturer who invests in the equity and is a shareholder behaves only as a shareholder and it does not appear from anything he has done that he is using his shareholder position to influence the direction of the operations of the dealer, that that would be the kind of significant action on the part of the investor that would make the minister refuse to give an exemption under subclause (5)?

Mr. Humphrys: It would not be so much his participation in the managership of the dealer company. If we felt that the manufacturer, the parent, was using his special relationship to the two companies to influence the acceptance company to make a loan merely because the manufacturer had an equity interest, we would suggest that there was a conflict of interest which would raise this question.

Our point of concern is that there are always cases where a transaction such as this can be justified and seems to be good. Our fear is that in an attempt to accommodate the kind of transaction that Mr. Gregorovich has described we may weaken the application of clause 9 to the point that it would not have the effect I think all of us, including the present witnesses, wish. So we felt that we could at least give a fair study under clause 9 to an application for exemption of these transactions.

Obviously, I am not in a position to say how the minister would decide, but I have attempted to explain our approach to the application of this clause and the concepts that would be taken into account in considering an application yor exemption. I am quite free to say that we would not be searching for a way to destroy a pattern of operation that seems to be beneficial and has been useful in the past. Neither will we want to be in the position of having a particular transaction act as a precedent to force us into setting clause 9 aside in circumstances where it should not be.

The Chairman: Mr. Humphrys, would you now deal with this. The effect may well be that a manufacturer of cars with a finance company in which it has a substantial investment, and also having a share interest in a dealership, provides a set up that would come right under clause 9.

Mr. Humphrys: Yes.

The Chairman: That would mean, in those circumstances, unless you could show that in the writing of business as between the finance company and the dealer there was no pressure from the manufacturer exerted because of their share interest, the finance company would have to rid themselves of any of the loans etc., any of the aper they may have taken from the dealer.

Mr. Humphrys: I think I made a note of that, and I would like to correct it. We do not think that anything that was done prior to the coming into force of this act would have to be unallowed, so I think the comment in the brief suggesting that all the loans on the books would have to be disposed of is not our interpretation.

The Chairman: Under subsection (2):

> No investment company shall knowingly hold an investment made after the coming into force of this Act.

So with respect to what they already have on the books, they work themselves out.

Mr. Humphrys: There is no problem.

The Chairman: There are two avenues open for the dealership in that kind of set-up: either they get an exemption from the minister to carry on as they have done, or they cannot buy any more of the dealership paper. Is that right?

Mr. Humphrys: That is correct, Mr. Chairman. That is my interpretation. I think I have said and I can say about the present form of subsection (5) of clause 9. It has been suggested in the brief that the minister's discretion be broadened in order to permit him to consider this case more precisely. It is difficult to find an approach that would broaden the minister's discretion without really converting clause 9 into one of completely ministerial judgment, and we did not think that was a proper thing to do, either from the point of view of asking Parliament to give that broader discretion or from the point of view of the problem of dealing with a large number.

The Chairman: The finding that the minister would have to make under clause 9(5) and in relation to the facts to which he must address himself, is pretty clearly put in subsection (5)?

Mr. Humphrys: Yes.

The Chairman: The only thing that is not put there is how he will jump.

Mr. Humphrys: That is right.

The Chairman: That will be a matter of his assessment of the facts.

Mr. Humphrys: The only possible alternate course we have been able to conceive in thinking about this is that, starting from the premise that the equity interest of the manufacturer in the dealership is an incidental or temporary kind of transaction, intended to promote the dealership and get it into private hands, in that case it might be possible to create another area of ministerial discretion where he is satisfied that the interest of the substantial shareholder in another corporation is incidental and temporary.

The Chairman: Suppose what was done was that the shares were put in trust, or an agreement was made in relation to the voting of the shares, so that the voting would not be related necessarily to any business decisions of the finance company or the manufacturer.

Mr. Humphrys: I think that would be a circumstance that could well be taken into account. A more direct and more simple method of avoiding the whole problem from the point of view of the manufacturer would be to have the acceptance company advance the equity investment itself, and then the dealership is a subsidiary of the acceptance company.

The Chairman: That is right.

Mr. Humphrys: There is no prohibition there. I do not know what problems that would throw up for the companies concerned, but it would certainly be a fairly simple method technically of solving this problem, because as I understand this presentation—the equity financing is quite a minor part of the whole financing package. Even within that the voting of these equity shares, as you say, could be regulated by subsidiary agreements. That would be the most direct method.

The Chairman: Thank you very much, Mr. Humphrys.

Now, Mr. Gregorovich, I think we have got the amplification of the possible effect of the clause, how it may be applied and what the circumstances are. Have you any language that you want to suggest to us to deal with this?

Mr. Gregorovich: Mr. Chairman, I have to advise that we do not have any language we can submit at this point, but we would be pleased to do so at a later date.

The Chairman: "A later date" will have some limitations. You could not expect that "a later date" might be longer than another week.

Mr. Gregorovich: We appreciate that, Mr. Chairman, but we are not prepared to submit alternative language for this.

Senator Connolly (Ottawa West): At all? You mean you are not prepared at all?

Mr. Gregorovich: No, I am sorry. At this point.

Senator Connolly (Ottawa West): Today?

Mr. Gregorovich: Yes, today.

The Chairman: We have covered the main thrust of your brief, have we not?

Mr. Gregorovich: Yes, Mr. Chairman. There is another clause, clause 5, on which I would like to complete my presentation.

The objectives of clause 5(8) are commendable in the case of long-term borrowings. However, we believe that the requirements in the clause for filing information with the Superintendent within seven days of borrowing are both costly and unnecessary for short-term borrowings, as

many companies are borrowing daily and would therefore be required to report to the Superintendent every business day of the year. It would seem that the objective of the act to protect investors would be served if the offering memorandum of the borrowing company was filed with the Superintendent within seven days of the initial borrowing, and thereafter, on a monthly basis, a statement was filed setting out the nature and purpose of the borrowing in such form and detail as may be required by him. The Superintendent could be given direction to require filing on a more frequent basis if he was not satisfied with the company's financial position.

The Chairman: Is there any other point?

Mr. Gregorovich: At this point, Mr. Chairman, I would wish to conclude by saying that we of the Federated Council believe that, should the powers provided for in the bill be used, the expertise resident in the companies in the industry will be of value to the Superintendent; and we now afford our assistance to him and to his officers.

I would want to conclude with our thanks to you, Mr. Chairman, and to the committee, for permitting us to present the brief and to speak on it.

The Chairman: Honourable senators, we have another brief this morning. It is from Cemp Investments Limited. With us we have Mr. Philip F. Vineberg, Q.C., who is known to all honourable senators from his previous appearances here in other matters.

Mr. Philip F. Vineberg, Q.C., Counsel, Cemp Investments Limited: Mr. Chairman and honourable senators, I am very grateful to you for the opportunity of being allowed to make a representation. With me is Mr. Rupert B. Carleton, Vice-President of Cemp Investments Limited. We have not done very well in our homework, as it is only this morning that I am submitting the brief to you. I am in doubt as to whether you would like the brief to be read, or whether we should simply comment on it.

The Chairman: Having heard you before, I would prefer that you comment.

Mr. Vineberg: In that case, I will not read the brief but I will tell you what prompts us to submit it. It might at first be thought that we had no business here, and I should say frankly at the outset that Cemp Investments Limited is neither a company either contemplated under the Investment Companies Act nor a company which is likely, under ordinary circumstances, to be under the Investment Companies Act.

We are a company which does not go to the general public, in the ordinary sense of the term, but we have investments in a large number of other companies, some of which may be covered by the act. In our examination of the act, we have found that it appears to be much broader than would appear to be the case on the surface, and that there are some circumstances where companies of the order of Cemp Investments Limited, which are ordinary investment companies with a pool of resources already there, which would find they would come under the Investment Companies Act.

Let me give one or two illustrations. Before doing so, I should say that we made our views known to Mr. Humphrys, the Superintendent of Insurance, who was very cordial and receptive. I think Mr. Humphrys confirmed that a company of the type of Cemp Investments Limited is not intended to be within the umbrella of the act. The types of recommendations that are advanced are reflected in the exemption clause. We acknowledge that the exemption clause is a great improvement on section 3(1)(c), taking out the number of companies that may be eliminated from the application of the act. But, by the same token, we feel that it is much more effective, much more appropriate, if this is to be done by statute—by specific provision.

After all, the minister is obliged to exercise his exemption having regard to the purposes of this act.

I was very interested in the colloquy this morning when one of the potential parties which might be subject to an exemption was asked for an expression of opinion as to whether or not exemption would be granted, and the rather natural reaction was: "Who knows?" The act is supposed to tell you, and yet it is difficult to find, within the spirit of the act, exactly what is meant by the intention or purposes of the act.

So, as I say, the exemption would burden the department with a great deal of work. Many companies would have to be analyzed. There would be long line-ups in front of the minister's or the superintendent's office. We feel that the burdening of the department with all this work will reduce its efficiency in dealing with the kinds of abuses intended to be covered by the legislation. So, the act itself should pinpoint the problem, instead of trying to cover all cases. As Mr. Humphrys said in an earlier meeting, all companies borrow, all companies invest, or nearly all—so, instead of being burdened with nearly all, we would suggest a cut down. There are specific ways in which we suggest that.

One of the illustrations is drawn from the experience in a company in which we have a 50 per cent interest. It is a company which put up the Toronto Dominion Centre in Toronto. In it Cemp has 50 per cent and the bank has the remaining 50 per cent. That is a company which did not seek funds from the general public. I might add that its 100 per cent equity is owned by Canadian interests. It has received its financing from large banking institutions in New York, or in the United States generally. There are very large issues by well established banking institutions.

Senator Connolly (Ottawa West): Debt financing.

Senator Benidickson: With a guarantee from the Bank of Canada.

Mr. Vineberg: Yes. The act provides, in the definition part, that one can ignore borrowings from Canadian banks—on the assumption, presumably, that Canadian banks can protect themselves. I would respectfully submit that the New York banks can protect themselves just as well, that they are bigger, better organized or just as well organized; and that simply because we have returned to external financing that is no reason for projecting the shadow of the investment company regulation on an operation of this type. Generally speaking, it would be desirable to exclude not only banks—and there is good reason why they would be excluded—but those types of institutions which are normally excluded in the drafting of security laws, so that

possibly trust companies, investment dealers, and other types of creditors, might be excluded.

As an alternative, and using a guide which is sometimes resorted to in securities law, we suggest they should possibly be excluded on a quantum basis, so that a creditor who has advanced $100,000 or more should not be regarded as a poor widow who requires the type of protection intended by this law. That is to say, the large investor will be guided by his own advisers, he will have his own lawyers and accountants; he will make his own investigation. We feel the attention of the minister should be directed to the unprotected.

The Chairman: The poor widows were not the ones most seriously affected by Atlantic Acceptance.

Mr. Vineberg: Admittedly.

Senator Beaubien: Or the pension fund of the U.S. Steel Corporation.

Mr. Vineberg: The question is, if these laws which are made by organizations in the United States and elsewhere were not able to do something about the situation, can the Minister of Finance, or the Superintendent of Insurance?

Is there not a desire to protect in those areas where it is necessary for the Government to intervene in the interests of the investor—and the poor widow is a typical illustration? I quite acknowledge, of course, that there are many institutions where there can be large losses, but I do not think that it is necessary to apply the legislation in this case. Mr. Humphrys was talking this morning about a "conflict of interest". There is a conflict of approach, and a justifiable conflict of approach. The Superintendent of Insurance is cautious—he should be, he must be; he must be prudent.

If I may put it this way. We represent companies that want to accelerate, but we are interested in economic growth. We are ready in all cases to take risks. We cannot anticipate the failure to take that risk at the same time as the brakes are applied to the economic development that we see. We feel that the restriction to be imposed by a ministerial surveillance should be reserved for those cases where it is necessary; and that reasonable freedom should be afforded in those cases where it is not likely to affect anyone.

I might say that I would anticipate that the minister would, in any event, grant an exemption, but I think it would be more desirable if the exemption were granted as a matter of statutory right. As I say, we are not dealing only with our own situation. We have advanced some recommendations here that have nothing to do with Cemp. We advanced those as a corporate citizen. For example, there are many small family companies that are thinly incorporated.

Senator Benidickson: What do you mean by "thinly incorporated"?

Mr. Vineberg: They have a very small amount of paid-up capital. Very often they are incorporated to hold a family investment of portfolio securities. By definition they cannot have very much paid-up capital, being thinly incorporated, and they cannot, at least in the beginning, have very much in the way of surplus. Such a company very often borrows from a member of the family of a shareholder; very often borrows from the father, where the children alone have the shares.

It has been estimated that 90 companies would be covered by this, but when the law is introduced, we think—and I am speaking not so much for Cemp but rather as someone who has had some legal experience in this connection— we think that literally hundreds or thousands of companies would be covered by this that were never intended to be covered. Possibly it would be desirable, in dealing with the exemptions that are available in the case of loans from substantial shareholders, to have this include the family of substantial shareholders; and the members of the family might be defined somewhat as they are defined in the Income Tax Act dealing with personal corporations.

You will find an explanation of that on pages 6 and 7 of the brief.

When clause 2 (3) makes a reference to section 9 (3)(*b*) we presume that that is a clerical error and that the matter is really dealing with section 9 (4)(*b*). It says that it is quite all right if a substantial shareholder lends the money, but it is not all right if a member of the family of a substantial shareholder lends the money, if he is not himself a substantial shareholder.

Senator Benidickson: Do you mean the family as a group or a member of the group?

Mr. Vineberg: A member of the group who is not himself a shareholder: two brothers, two young people or two trusts own the shares of a company, the father lends them $50,000 and they buy shares on the market. Such a company is an investment company under this clause, because the loan that comes from the father is not a loan from the substantial shareholder. We think it was never intended and it would save a lot of bother for a lot of people if the statute was amended to include loans from the immediate members of the family—the father, the spouse, the children—in relationship to substantial shareholders.

The Chairman: In looking at that kind of set-up it is quite obvious that it is a family enterprise or undertaking and that they do not all enter into it on the same basis. Some of them put their money in and some take a share interest, and there are purposes to be served by doing so.

Mr. Vineberg: Yes, one of the reasons why the father very often does not take a share interest in this is because of the rules on personal corporations. So he is ready to lend his money to the company, but he does not want to be a shareholder. All of a sudden these companies which are not intended to be embraced will come within the ambit, and I think both the parties concerned and the department will be harrassed by the need of processing them through the Investment Companies Act, when it is clearly not intended.

Senator Benidickson: And they will probably be exempted in the end, in any event, as a matter of discretion.

Mr. Vineberg: Oh, yes, I presume so, but it would take a long time.

The Chairman: The point is that the exemption would be what could only be called a discretionary exemption; it

would not be a statutory exemption. There is a big difference.

Mr. Vineberg: It also troubles me that many of them would break the law in ignorance of the fact that the law could possibly apply to them and unless their legal advisers were to study the matter carefully it would not even occur to them. I would suggest that it did not even occur to the department when they gave you the estimate of 90 companies that might be subject to this legislation. So it would be disturbing to contemplate a law which through ignorance rather than through intention would be defied in practice by so many companies not intended to be covered.

We also suggest, and perhaps you will concede that we have no selfish interest in the matter, that there might be some kind of a *de minimis* clause in this to eliminate companies whose borrowings are no more than, say, $50,000. That is to say, very small companies where there is just a certain amount of borrowing—maybe not from a substantial shareholder but borrowing of a very private nature where no great amount of money is involved one way or another. To require again that they submit to the act might be unfair.

The Chairman: In view of the value of money today, Mr. Vineberg, when you refer to $50,000 do you really think that is a reasonable figure?

Mr. Vineberg: I was trying to be extremely modest. Perhaps $100,000 would be more appropriate. Perhaps the amount could be $100,000, if it comes from one or two people, which would be different from the situation of $100,000 coming from 100 different people giving $1,000 each. There might be limits on both the number of creditors and the aggregate amount. A combination of the two might be of interest. So long as they were not borrowing from three different sources or borrowing more than $100,000, there might perhaps be an exemption so as again not to bother with the small companies which operate and which are not intended to be covered by this act.

The Chairman: It would seem that this bill springs from the experience with Atlantic Acceptance Corporation and Prudential Trust, where the public was hurt by the machinations of those who were operating the company after having obtained public money.

Senator Connolly (Ottawa West): Those in the industry.

The Chairman: When you look at real estate companies who borrow money, the interest of the public is more likely to be affected seriously as the operations continue rather than as arising out of the initial impact of the borrowing and construction. Maybe that is the purpose of having the registering and reporting of investment companies—so that you can see from year to year how they are handling the public moneys which they have secured by way of investment.

Mr. Vineberg: I question, Mr. Chairman, whether that is the appropriate way to do it. First of all, so far as equity in the real estate companies is concerned, it is not often marketed. There are very few companies of that type that have gone public, although somewhat more recently they have increased. But they are covered by securities legislation, and I think that that is the proper way to have them covered. The securities commission should deal with the distribution of these shares to the public.

So far as financing is concerned, it is unheard of, I would think, to finance real estate by borrowing from the general public in an unsecured way. It is only done either by institutional mortgages or else by securities in the form of bonds and debentures, which are equally governed by security regulations.

It seems to me that this is the proper place and that it is the appropriate medium for the regulation of the distribution of securities of real estate companies, whether in equity or credited form. After all, the Superintendent of Insurance, by examination of a lot of financial statements which give figures based on historic cost, is not going to be in the position to police this matter very well. He is imposing burdens upon himself—or at least he is accepting burdens which Parliament will be imposing upon him, which are not likely to be discharged satisfactorily.

This should be handled as part of securities law, and if securities law is inadequate, it should be expanded, and I think it is being dealt with that way. But what I understand this measure to deal with is the situation where there is a great deal of borrowing equivalent to near-banking. That is, that some individual will deposit or advance sums of money to various financial companies who are intermediaries to use that money for investment elsewhere.

And there is understandable regulation as to how they may invest it and permission for the minister to look at it. I do not think that the real estate company is typically the kind of company subject to appropriate legislation in this manner. It should be more closely regulated than it is regulated by security legislation.

Senator Connolly (Ottawa West): Is Cemp subject to the securities legislation in the provinces?

Mr. Vineberg: Well, we are a private company. We do not issue any securities. In that sense we are not subject to securities legislation. However, we do have an interest in certain real estate companies, and there we are subject to securities legislation. That is, the subsidiary companies are subject to the various provincial securities legislation.

I do not want to trespass on matters already covered by this committee, but we heartily endorse the observations already submitted in the other briefs, and I refer to the Labatt brief dealing with consolidation. We feel that great improvement could be achieved if the formulae embodied in section 2—the ratio to liability and assets and so forth—could be dealt with on a consolidated basis.

After all, there are many important companies that are purely holding companies in their structure but their purpose is to operate manufacturing subsidiaries. If you look at the holding company itself, the test or the criteria would not be appropriate. Now, as the Labatt brief pointed out, the Act takes cognizance of this, but the draughtsman, understandably, gets tired after one tier of subsidiaries; it is awfully hard to calculate how there should be additional tiers. I think the recommendation that it should all be done on a consolidated basis as per the Canada Corporations Act would be the easiest way of dealing with it, and not limit it.

Senator Connolly (Ottawa West): Are you familiar with the submission made by Molson's on the same point?

Mr. Vineberg: I have not seen that.

The Chairman: Well, there is nothing new in Molson's submission as against Labatt. It is the same point.

Mr. Vineberg: You are speaking now of their submissions.

The Chairman: Oh, yes.

Mr. Vineberg: You are not speaking of their products.

The Chairman: Oh, no. I would not do that here.

Mr. Vineberg: In any event, I do not want to repeat what is already before the committee, but it seems to us that a great deal of useful simplification could be achieved by a consolidation test. There may be arguments as to whether it should be a 70 per cent subsidiary or a 50 per cent subsidiary with provision for minority interests but the application of consolidation would greatly reduce the difficulties in the determination of those companies which are exempted.

The Chairman: Mr. Vineberg, I can tell you that on that point the committee is fully aware that there has been a real problem in relation to Labatt's and Molson's and many companies of that kind where you have second and third tier companies. I can also say that Mr. Humphrys is very much concerned, and the Chairman and Mr. Humphrys have gone to the extent of attempting to put something on paper which would deal with the Labatt and Molson situation, but which would avoid what might be pitfalls arising out of the kind of language that might be used. We think we have something, and in due course we will submit it to the committee, and we would appreciate your judgment on it at that time, and if you think it is alright, why, tell us.

Mr. Vineberg: Thank you very much. We will certainly try to be helpful in any way we can. We too, and companies in which we have an interest, know of many situations of third, fourth and even fifth tier subsidiaries that arise through accident or through historic reasons.

The second part of our brief, Mr. Chairman, after we deal with the very cardinal question as to who is covered and who is not, relates to the detailed technical provisions of the Act, and here we are bold enough to suggest for your consideration the possibility of some clarification here and there of a technical nature. We have said to you that we do not believe that we are covered, and we also believe that if we were to be initially covered we would be likely to obtain an exemption. But nonetheless we feel in reading the Act on these points that we are duty-bound to express our views on them. Some of them are of a technical nature; for example, in clause 3(2) there is provision for the revocation of an exemption. The question could be raised as to whether it could ever be reinstituted, and it is a lawyer's delight to debate that point. There is the intimation of the contrary in clause 3(3) by saying that hereafter it is an investment company. Does that mean that the Minister ceases to have the right to exercise the exemption, if he has already exercised it once and then revoked it? Or does it mean, as is more logically likely to have been intended, that he can exempt, revoke the exemption and then should the circumstances later warrant certain changes that he would then reinstitute the exemptions? I think he would be desirous of reinstituting the exemption, but the language perhaps would not permit it, or would be debatable as to whether it would permit it. I think it might be better to have that point clarified.

Then we talk about standards of reporting under clauses 5 and 9 and suggest that it might be matched against the Canada Corporations Act. We also make a comment on something in respect of which you have already had submissions.

Senator Connolly (Ottawa West): You are simply complaining of clauses 5 and 9 with reference to timing?

Mr. Vineberg: To timing. When Parliament considered how long it takes certain accountants to get these things ready, they settled very recently on the time element in the Canada Corporations Act, and here the same accountants are being told they have to get it ready earlier. We think the time limit for one is the same as the time limit for the other, because the Canada Corporations Act report is equally for the protection of the third-party public.

On loans to officers of the company, we quite understand the outright prohibitions, but again if you look at section 15(2) of the Canada Corporations Act, there are some exceptions, and we wonder if there should not be similar exceptions in this instance. Let us suppose a company is following a policy of granting a loan to employees who may also be shareholders of the company in order to buy a home or loans in order to buy shares in the company, is it fair that because a person is an officer of the company, he cannot participate along with the other employees? He is disqualified.

Senator Connolly (Ottawa West): Which section are you dealing with now?

Mr. Vineberg: Well, we are pinpointing clause 9 in relationship to section 15 of the Companies Act. Clause 9 says:

> **9.**(1) No investment company shall knowingly make an investment
>
> (*a*) by way of a loan to
>
> (i) . . . or officer of the company . . .

That is on page 11 of the bill, clause 9.(1) (*a*)—so that the company cannot make a loan to an officer of the company. We quite understand that that should be so, but let us suppose a situation where the company has a policy of helping employees buy homes—many companies do—or, for incentive purposes, helping an employee buy shares, and they apply that to all their employees. Now some of the employees are officers, and in this situation a man who is being promoted to be an officer will be disqualified from participating in the home-purchase plan or fringe benefits of that kind.

Senator Connolly (Ottawa West): It would not be likely to be serious for the home purchaser but it might be serious for the stock purchaser.

Mr. Vineberg: Well, there are many hierarchies of officers. There is a second assistant secretary who is perhaps

just one stage ahead of somebody else and perhaps not earning very much more. The point we are making is that the Canada Corporations Act reflects thinking on this score which has had an historic past, and Parliament has said "Yes, but we must make an exception for these siituations; they are logical exceptions." We think that the Investment Companies Act should make the same exceptions. You will find in the Canada Corporations Act, "no loans to shareholders," but there are exceptions—if you have a policy of loans to buy homes and loans in the ordinary course of business. Now we did not repeat in our brief that third point which is perhaps a more contentious one. Maybe a lending company ought not to lend to an officer, so we did not repeat that because we thought it might be debatable. But the absence of the home and the shares we think is an oversight, and if thought were given to it, it would be probable that Parliament would agree that the same kind of exception that is available generally under the Companies Act should equally be available to investment companies.

Senator Connolly (Ottawa West): Would you be satisfied to have it legislated by way of reference to section 15 of the Canada Corporations Act?

Mr. Vineberg: Yes, except that I would draw the attention of the committee to the fact that we are not raising the debatable point as to whether a lending company which is in the business of making loans should make loans to officers of the company. We could see reasons why in that case they ought not to make such loans generally to officers, although it might be argued that an officer of Company A which is in the lending business could be rather hard put if he were expected to go to company B for a loan for personal purposes, because it means he has to go to a competitor. As I say, that is a debatable point, but we were not entering into that because we were dealing more with technical problems.

Then we make the suggestion that there ought to be some statement in clause 18 (2)(*b*) of the purpose of the imposition of conditions and limitations imposed by the Minister. This is on pages 27 and 28. He may impose any conditions or limitations relating to the carrying on of the business. We do not think that he would consider this at the moment, but supposing at some time he says, "You must only invest in province A or city B" or, "You must not invest in district C"? Those are the types of conditions or limitations that surely Parliament would not have intended to impose. We think what is intended here is something to do with the qualitative type of the investment: "You must only invest in companies that have had a regular dividend record for five years."

Senator Connolly (Ottawa West): Do you think, Mr. Vineberg, that the minister or the Superintendent would get down to that kind of detail? That is really exercising control over the company.

Mr. Vineberg: I would rather if the act said, "Impose any conditions or limitations for the protection of the creditors relating to the carrying on of the business." Have it qualified in some way as to the purpose.

Senator Benidickson: Obvious intervention, curiosity and action.

Mr. Vineberg: Yes.

The Chairman: I do not think the desire is to have the Superintendent of Insurance be the official selector of investments, or the settler of investment policy.

Senator Connolly (Ottawa West): It is stretching it rather far, I would think, Mr. Chairman—and I will raise the point directly with Mr. Vineberg, since he is here—to think, to use your illustration, that the minister or Superintendent would go to that extent.

Mr. Vineberg: Yes.

Senator Connolly (Ottawa West): Even if the language seems to include that. What I think we have is a free economy and a free society, and with that interpretation of the section at the top of page 28—which is section 18(2)(*b*)—you are really saying that the Superintendent and the minister can dictate the type of investments that a company shall make.

The Chairman: If you look at paragraph (*b*), on page 28, I am not sure it goes that far. It says: "impose any conditions or limitations relating to the carrying on of the business . . ."

I can see the intention. It might, when a company is applying for registration, look at the nature of the operation and the manner in which they have been carrying on the business, and the experience of the Superintendent, et cetera, may be such that he thinks there is danger in the direction, unless you put some conditions and limitations as to how they will operate.

Senator Connolly (Ottawa West): I was just using Mr. Vineberg's illustration.

The Chairman: Yes, but the language is general, and it might be advisable—and I am not saying that we should—to put some limitation, so that you are not getting them directly in all cases into the area of investment policy.

Mr. Vineberg: That is what we had in mind, some guide or clue. I am not going through all of the detailed ones because I think mostly they are self-explanatory.

We also submit that the administrative discretion is so broad that perhaps some consideration might be given to judicial review—not so much because we believe that there will be frequent occasion for judicial review but, rather, that ministerial discretion may be exercised more carefully if there would be the right of resort to judicial review.

The Chairman: You mean, what I would call "one-shot" judicial review?

Mr. Vineberg: Yes.

The Chairman: And no appeals beyond that.

Mr. Vineberg: Well, I do not know that we have thought that through. We realize that by the time you got to court the issue would be over in most situations. We were not thinking so much of that, but rather that it would be helpful if the minister's authority were subject to review in the courts.

Senator Benidickson: By whom?

Mr. Vineberg: By the courts.

Senator Benidickson: Which one?

Mr. Vineberg: So that we believe it would have an impact and it would be a form of guide in the future if the court said, "Well, the minister did not really understand the law. It means thus "and so, rather than this or that."

Senator Connolly (Ottawa West): Would you be in the usual difficulty you are in when appealing from discretionary decisions?

The Chairman: Yes, you would be.

Senator Macnaughton: You make that point in your last paragraph on page 10.

Mr. Vineberg: Yes.

Senator Macnaughton: It is quite clear:

> We would also submit that consideration should be given to provide for judicial review of the exercise of discretion which is provided to the Minister and the Superintendent.

If the minister has given reasons, you can examine them to see whether those reasons amount to an exercise of discretion at all, or whether he has been arbitrary.

Senator Connolly (Ottawa West): But if there are no reasons, the appeal would be a very difficult thing to argue.

The Chairman: I wonder how you argue it if he just makes a decision.

Mr. Vineberg: It depends on the degree of discretion given in the act. You could say, "Subject to the decision . . ."—you could have some right of recourse, as under section 138A, for example, of the Income Tax Act. It is a limited right of recourse, but it is some right of recourse.

Senator Connolly (Ottawa West): I think you yourself would be in great difficulty if you were appealing a decision of the minister if no reasons were given, to take the example of the Chairman, and it was discretionary. How do we know—and perhaps he has good reasons for doing it but they are not given and he has statutory authority to use his discretion.

Mr. Vineberg: That is the situation now, because there is no right of recourse. You can always go to court, but if you went to court you would be met exactly with the line of argument that you mention. But it seems that if the law said that the decision of the minister would be subject to judicial review under certain circumstances, then you would have the right to go to court.

The Chairman: It seems to me, Senator Connolly, that what Mr. Vineberg is saying might have particular reference to section 3.

Mr. Vineberg: Yes, on exemptions.

The Chairman: Section 3, on page 5, is where the minister may give an exemption, and in paragraph (*c*):

> having regard to any one or more of the following factors, namely: . . .

Therefore, in giving an exemption he would have to fit or justify his exemption under one of these headings or reasons. Therefore, you are not faced with the situation where the minister does not give reasons. It would appear that under section 3 he is going to have to give reasons.

Mr. Vineberg: Yes, and that would afford an opportunity for some jurisprudence to evolve to make the law clearer in the future.

Mr. Humphrys: Mr. Chairman, I would just like to add this and draw your attention to the fact that there is a provision in the bill for review by the court of ministerial decisions in the really important issues. That is, where there is a report made by the Superintendent that the ability of the company to meet its obligations is not adequately secured, the minister can hear the company, and if he agrees with the Superintendent he has the choice of a number of decisions, but any of his decisions—if he makes any such decisions—are reviewable by the courts.

Senator Connolly (Ottawa West): What section is that, Mr. Humphrys?

Mr. Humphrys: That is on page 34 of the bill.

The Chairman: But we were not talking in that area at the moment, Mr. Humphrys. We were talking in the area of discretion such as under section 3.

Mr. Vineberg: We would like to apply that principle to the entire act, wherever the minister may exercise discretion—not that we anticipate that there would be many cases in court, but rather that it would be a desirable thing to have that protection.

The Chairman: Are there any other items there, Mr. Vineberg?

Mr. Vineberg: Section 18, for example, is an area where ministerial discretion might be granted.

The Chairman: Yes.

Senator Connolly (Ottawa West): Section 23(6) is pretty broad.

Mr. Vineberg: Yes, but that is limited to section 22 which is a very extreme case. I think it is one of those that Mr. Humphrys was speaking of.

Senator Macnaughton: I presume you have not the time, Mr. Vineberg, but I did want to ask you to explain your last paragraph on page 2:

> The economy is not stimulated by needless or unjustifiable curtailments on the freedom of growth-oriented companies to borrow.

If there is time I should like you also to explain page 4, which refers to Canadian companies being at a disadvantage.

Mr. Vineberg: This is a matter about which we have been concerned in several connections. As I say, a company like Cemp is not currently under the Investment Companies Act; but a company of this type, if it might be interested in the acquisition of an important Canadian company would always have to go into borrowing of substantial financing,

and that need for quick financing might make it temporarily an investment company under the bill. Admittedly it is not precluded from borrowing because it will be entitled to be dealt with in a subsequent period, but the cloud that is created by the Investment Companies Act, whether or not a certificate of exemption is going to be granted, whether or not creditors feel it will be renewed, whether or not security will be affected, whether or not a company would like to be under the Investment Companies Act. All of this discourages a delicate quick decision that has to be made as to (*a*) should we buy this company or (*b*) should we borrow the money to buy this company, because one always has to borrow money to buy companies; so that restriction of borrowing is a very serious matter. A great deal of economic growth is based on credit. Foreign companies, American companies, do not have to go through these restrictions. They can make a lightning decision, they can borrow money, they have certain tax exemptions in comparison with Canadian companies, and if the borrowing can be done quickly by a competitor and one has to consider all the ramifications of the Investment Companies Act, one is still busy with one's analysis when one finds that somebody else has bought the company, or one is discouraged from buying the company. While this may not be a crucial factor, it breaks that growth, and I do not think there should be this restraint unless it is necessary in areas where there is a crying need for it.

Senator Macnaughton: You mean this restraint on Canadian companies as distinct from American companies for example?

Senator Conolly (Ottawa West): A company like Cemp, from what I understand of it, knows all about borrowing, American borrowing, because they have been doing it.

Mr. Vineberg: That is right. American companies can borrow on the Canadian market without the Investment Companies Act restrictions.

The Chairman: If the suggestion that you made at the outset, that American banks be added to the banks mentioned in this bill, were followed, the problem that you are talking about would not arise because it would be an exempt transaction.

Mr. Vineberg: That is right. Not just banks, but institutions of a certain type.

Senator Macnaughton: That would again restrict economic development, slowing it up all the time.

The Chairman: No, it would not.

Mr. Vineberg: If you enlarge the area of borrowing it would not throw a company under this bill. You are not putting a brake on economic development. A Canadian company can always stay away from the bill by borrowing from a Canadian bank; but if the matter is of sufficient magnitude, Canadian banks may not be in a position to finance it.

Senator Connolly (Ottawa West): Was there any element of borrowing from American sources in the two bankruptcies that give rise to this bill?

Mr. Vineberg: There was a great deal with Atlantic Acceptance of borrowing from world sources.

Senator Connolly (Ottawa West): I do not think Canada or the industry benefited by those bankruptcies, particularly insofar as access to American funds was concerned.

Mr. Vineberg: I agree.

Senator Cook: If a company borrowed from both Canadian and American banks they would not be exempt, but where it borrowed from Canadian banks only it would be exempt.

Mr. Vineberg: I agree that a situation of that kind was very harmful to Canada's reputation and harmful to Canadian economy. The real problem is how to correct it. It is admitted in the bill that if there is borrowing from Canadian banks, then that is not covered because the banks may be protected through other sources. That is already admitted. Canadian banks perhaps lost very heavily over Atlantic Acceptance just as much as did American banks. It is not suggested on that account that all companies should be policed in any particular way, but each in its own place.

Senator Cook: It is not the banks that we are worried about. It is the general public that we are insuring, not the banks.

Senator Connolly (Ottawa West): I think too that the institutional lenders are a matter of concern, particularly foreign investors, because if they feel that the loss of control over companies of this kind in Canada is valid then there is a feeling of security about lending.

The Chairman: That is the purpose of the securities legislation.

Senator Connolly (Ottawa West): Yes, it is the purpose of the securities legislation; but here I gather we are trying to add to the protection provided by the securities legislation.

The Chairman: We have to ask ourselves the question: is it necessary?

Senator Connolly (Ottawa West): Yes, of course.

The Chairman: Thank you very much, Mr. Vineberg. At the last meeting it was intended that we would close out and deal with the bill today. However, I think there have been some things said today about which Mr. Humphrys might wish to comment and about which I would like to ask him some questions. I feel that we should adjourn. I believe we should do so in view of my commitment to Senator Aird and his committee that we would adjourn at 11 a.m. to permit him to have a quorum, because we are in difficult circumstances today. A number of senators have not been able to get to Ottawa.

Senator Connolly (Ottawa West): Some Ottawa senators had difficulty in getting to the Senate.

The Chairman: I left Toronto by train yesterday evening at 5:10 and I got into the Chateau Laurier this morning at 5 o'clock.

Senator Cook: We can repeat that experience from Montreal to Ottawa.

Senator Connolly (Ottawa West): Mr. Chairman, let me congratulate you for appearing here this morning.

The Chairman: I told the operator to ring the telephone very hard. Mr. Humphrys, would you be available next Wednesday for the purpose of questioning and also to discuss amendments which we seem to have agreed upon although the exact wording may still be a matter of settlement. We have agreed to them in principle. Would this be satisfactory to you?

Mr. Humphrys: Yes, Mr. Chairman.

The Chairman: Then it is understood that we deal with the hearing of Mr. Humphrys on all that has been said today, and also with the proposed amendments. We shall close out our consideration of the bill next week.

Mr. Vineberg: Do you wish Mr. Carleton and I to be present next Wednesday?

The Chairman: If you feel, in going over the range of subject matter that we shall deal with Mr. Humphrys that there might be something on which you wish to comment, I would say, yes, by all means.

Mr. Vineberg: I am thinking only that you may wish us to comment further on some of the points raised dealing with matter on which Mr. Humphrys has not yet had an opportunity of commenting. In the event you desire further comments from us, we would certainly be glad to be available.

The Chairman: I will communicate with you before next Wednesday as to the direction the questioning may take; then you can decide.

Mr. Vineberg: Mr. Chairman, the reason I am lighthearted about this is that I will be at the Seigniory Club attending a Canadian Bar meeting anyway.

The Chairman: Thank you very much.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 11

WEDNESDAY, MARCH 3, 1971

Fifth and Final Proceedings on Bill C-3,

intituled:

"An Act respecting investment companies"

REPORT OF THE COMMITTEE

(For name of witness—see Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, December 15, 1970:

"A Message was brought from the House of Commons by their Clerk with a Bill C-3, intituled: "An Act respecting investment companies", to which they desire the concurrence of the Senate.

The Bill was read the first time.

With leave of the Senate,
The Honourable Senator Lang moved, seconded by the Honourable Senator Paterson, that the Bill be read the second time now.

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, March 3, 1971
(13)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to *further* consider:

Bill C-3, "An Act respecting investment companies".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Blois, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Everett, Flynn, Gélinas, Hays, Hollett, Kinley, Macnaughton, Walker and Welch—(17).

Present, but not of the Committee: The Honourable Senators Lafond, Sullivan and Urquhart—(3).

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

WITNESS:

Department of Insurance:

Mr. R. Humphrys, Superintendent.

After discussion and upon motion amendments were made to pages 1, 2, 3, 4, 10, 14, 26 and 41 of the said Bill.

NOTE: The full text of the amendments appears by reference to the Report of Committee immediately following these MINUTES.

Upon motion it was Resolved to report the said Bill as amended.

At 11:40 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, March 3, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-3, intituled: "An Act respecting investment companies", has in obedience to the order of reference of December 15, 1970, examined the said Bill and now reports the same with the following amendments:

1. *Pages 1 and 2:* Strike out lines 11 to 31, inclusive, on page 1 and lines 1 to 12, inclusive, on page 2 and substitute therefor the following:

"(b) "business of investment" with respect to a corporation means the borrowing of money by the corporation on the security of its bonds, debentures, notes or other evidences of indebtedness and the use of some or all of the proceeds of such borrowing for

(i) the making of loans whether secured or unsecured,

(ii) the purchase of

(A) bonds, debentures, notes or other evidences of indebtedness of individuals or corporations,

(B) shares of corporations,

(C) bonds, debentures, notes or other evidences of indebtedness of or guaranteed by a government or a municipality, or

(D) conditional sales of contracts, accounts receivable, bills of sale, chattel mortgages, bills of exchange or other obligations representing part or all of the sale price of merchandise or services, or

(iii) the purchase or improvement of real property other than real property reasonably required for occupation or anticipated occupation by the corporation, or any corporation referred to in subsection (4), in the transaction of its business,

or for the purpose of replacing or retiring earlier borrowings some or all of the proceeds of which have been so used;".

2. *Page 3:* Strike out lines 11 to 13, inclusive and substitute therefor the following:

"ness and has subsequently made loans, purchases or improvements as described in subparagraphs (i) to (iii) of paragraph (b) of subsection".

3. *Page 3:* Strike out lines 29 to 33, inclusive, and substitute therefor the following:

"time during its last completed fiscal year and the elapsed portion of its current fiscal year consisted of loans, purchases or improvements described in subparagraphs (i) to (iii) of paragraph (b) of subsection (1), whether made with the proceeds of a borrowing or otherwise;".

4. *Page 3:* Strike out lines 38 and 39 and substitute therefor the following:

"its last completed fiscal year and the elapsed portion of its current fiscal year exceed twenty-five per cent of the".

5. *Pages 3 and 4:* Strike out lines 49 to 51, inclusive, on page 3 and lines 1 to 8, inclusive, on page 4 and substitute therefor the following:

"(d a company that was not at any time during its last completed fiscal year and the elapsed portion of its current fiscal year indebted in respect of money borrowed by it other than to a person who was at that time

(i) a substantial shareholder of the company within the meaning of paragraph (b) of subsection (4) of section 9; or

(ii) the spouse, child, father, mother, brother or sister of a substantial shareholder of the company within the meaning of paragraph (b) of subsection (4) of section 9; and".

6. *Page 4:* Strike out lines 21 to 31, inclusive, and substitute therefor the following:

"(a) at least seventy-five per cent of the equity shares of such subsidiary are owned or are deemed to be owned by the company; and

(b) either

(i) not more than forty per cent of the assets of such subsidiary, or

(ii) not more than forty per cent of the consolidated assets of such subsidiary and of all its subsidiaries, if any, at least seventy-five per cent of the equity shares of which are owned or are deemed to be owned by the company,

at any time during the last completed fiscal year of such subsidiary and the elapsed portion of its current fiscal year consisted of loans, purchases or improvements described in subparagraphs (i) to (iii) of paragraph (b) of subsection (1), whether made with the proceeds of a borrowing or otherwise.".

7. *Page 4:* Renumber subclause (5) as subclause (6) and insert the following as new subclause (5):

"(5) For the purposes of subsection (4),

(a) any valuation or consolidation of assets shall be made in accordance with the regulations; and

(b) where a company owns or pursuant to this subsection is deemed to own equity shares of a corpora-

23443—2

tion, the company shall be deemed to own a proportion of the equity shares of any other corporation that are owned by the first mentioned corporation which proportion shall equal the proportion of the equity shares of the first mentioned corporation that are owned or that pursuant to this subsection are deemed to be owned by the company.".

8. *Page 10:* Immediately after line 41 insert the following as new subclause (6):

"6) Any auditor who has acted in good faith and due care is not subject to any liability that might otherwise result from a report made under subsection (5).".

9. *Page 14:* Strike out lines 11 to 18, inclusive, and substitute therefor the following:

"(a) the decision of the investment company to make or hold any investment so exempted has not been and is not likely to be influenced in any significant way by that person or group and does not involve in any significant way the interests of that person or group, apart from their interests as a shareholder of the investment company; or

(b) any investment so exempted would be in a corporation in which the significant interest of the substantial shareholder is temporary and incidental to the principal business carried on by the substantial shareholder.".

10. *Page 26:* Strike out clause 15 and substitute therefor the following:

"15. A sales finance company to or in respect of which sections 11 to 13 apply shall not sell or otherwise dispose absolutely of the whole or any substantial part of its undertaking, and the sale or disposal is of no effect, unless and until it has been approved by the Minister, if, in the opinion of the Minister, it would be likely to result directly or indirectly in the acquisition of the whole or any substantial part of the undertaking by a non-resident.".

11. *Page 26:* Strike out line 18 and substitute therefor the following:

"may, out of amounts advanced to the Corporation pursuant to section 29, make short term loans to the sales".

12. *Page 41:* Strike out clause 32 and substitute therefor the following:

"32. The Governor in Council may make regulations necessary for the carrying out of the provisions of this Act.".

Respectfully submitted.

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, March 3, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-3, respecting investment companies, met this day at 9.30 a.m. to give further consideration to the bill.

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

The Chairman: I call the meeting to order. Honourable senators, we have before us this morning the continuation of our consideration of Bill C-3. We are at the stage of considering what, if any, amendments shall be made. We have two other bills on the order paper which, after concluding our consideration of Bill C-3, we will proceed to deal with. I think they are fairly straightforward and may not take very long.

I have a suggestion to make in connection with what I call the proposals put forward by Labatt and Molson dealing with second and third tier subsidiary companies. I have been co-operating for a while now with Mr. Humphrys on language that would accomplish that purpose and yet would not open the door to a situation that would give Mr. Humphrys some concern. We have now arrived at language which we think deals with that situation, and I will have Mr. Humphrys indicate his agreement.

Our first consideration concerns page 4 of the bill, subsection (4), where we have this question of subsidiary companies. The committee will recall the situation that developed with Labatt in the acquisition of properties or operations which represented a diversification; for instance, when the company acquired the Ogilvy Company and then it developed that the Ogilvy Company had subsidiaries. We immediately had the situation where Labatt was at the top and we had the first tier of subsidiary, namely, the Ogilvy Company. Underneath that we had the various subsidiaries of Ogilvy which were wholly owned by Ogilvy.

If the section to which I have referred remains, notwithstanding the fact that Labatt is a strictly commercial and industrial operation, when we get down to the second and third tiers of subsidiaries it would develop into the category of an investment company and would be subject to the reporting procedures embodied in the act. This is what we seek to change.

The other change is one to clarify the situation as to when the decision is made that a particular company is not an investment company for purposes of this act.

This becomes very important when we have an underwriter about to do some financing for an investment company. Under the bill as it is drawn, whatever the determination might be at the time the underwriter came into the picture, one would still have to look in the bill at what the situation would be at the end of the current fiscal year of the company, and there might be a reverse effect. We have therefore changed the wording.

I have not sufficient copies of this to hand around, but I could read it and then have Mr. Humphrys give his explanation.

Senator Connolly (Ottawa West): Mr. Chairman, if you wish everyone to have it, I am sure the messenger could have sufficient copies run off downstairs.

The Chairman: I think we can deal with it this way. Will you please turn to pge 4, subsection (4)? The proposal is to repeal subsection (4), add new subsections (4) and (5) and renumber present subsection (5) to subsection (6). The new subsection (4), as far down as paragraph (a), is changed only slightly, reading as follows:

> (4) For the purposes of paragraph (a) of subsection (3) any assets of a company that consist of loans to, shares of or bonds, debentures, notes or other evidences of indebtedness of any subsidiary of such company shall be deemed not to be assets that consist of loans or purchases described in subparagraphs (i) and (ii) of paragraph (b) of subsection (1) if
>
> (a) at least 75% of the equity shares of such subsidiary are owned...

Now the new words:

> ...or are deemed to be owned by the company, and
>
> (b) either
>
> (i) not more than 40% of the assets of such subsidiary, or
>
> (ii) not more than 40% of the consolidated assets of such subsidiary and of all its subsidiaries, if any, at least 75% of the equity shares of which are owned or are deemed to be owned by the company, at any time during the last completed fiscal year of such subsidiary and the elapsed portion of its current fiscal year consisted of loans, purchases or improvements described in subparagraphs (i), (ii) and (iii) of paragraph (b) of subsection (1).

We have accomplished two things there. We have moved down into the second and third tier subsidiaries, and also provided a terminal date. Were an underwriter to move in, there would be a date at which time a deter-

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mination would be made as to whether the company was an investment company or entitled to exemption. The phrase "the elapsed portion of its current fiscal year" is intended to deal with that situation.

Since we have used the expression "shall be deemed not to be assets", in subsection (4), provision has to be made for that. Therefore, in subsection (5) we say:

(5) For the purposes of subsection (4),

(a) any valuation or consolidation of assets shall be made in accordance with the regulations; and

(b) where a company owns or pursuant to this subsection is deemed to own equity shares of another corporation, that company shall be deemed to own a proportion of the equity shares of any other corporation that are owned by the first mentioned corporation, which proportion shall equal the proportion of the equity shares of the first mentioned corporation that are owned or that pursuant to this subsection are deemed to be owned by the company.

It is simply that a company which has a percentage of ownership in the first company down, then its percentage of ownership in the second subsidiary shall be a percentage in relation to its holding in the first tier.

Senator Gélinas: Have there been any consultations with the interested parties regarding these suggested amendments?

The Chairman: Yes; there were conversations. I hesitated because you used the word "consultations". There were conversations, and we heard no further objection. The conversations were with respect to this proposed language.

Senator Macnaughton: This would cover the case of Labatt, Molson and the Investment Dealers.

The Chairman: Yes, it covers the situations of that kind and it does not permit the open door situations that might be somewhat akin to some of the sad experiences in these areas during the last number of years.

Senator Connolly (Ottawa West): When this bill was before us two years ago, among others a brief was presented by Canadian Pacific Investments. They found themselves between a parent company and second and third tier subsidiaries. There may have been others. I take it that this amendment would not disaffect the submissions they made?

The Chairman: We dealt with that situation in the bill as we originally wrote it. It is to recognize situations similar to the financing situation in CPR, where somewhere down the line of subsidiaries there is a financing company which borrows and provides the money to the other companies in the chain. We have not disturbed that; is that not right, Mr. Humphrys?

Mr. R. Humphrys, Superintendent of Insurance: That is correct, Mr. Chairman.

The Chairman: The additions cover situations of the character of Labatt, Molson and others. Have you anything to add, other than that this language is agreeable to you, Mr. Humphrys?

Mr. Humphrys: No, Mr. Chairman. Perhaps I might comment that there was a brief submitted to the House of Commons committee in this connection and we gave consideration to the representations. One of the reasons for expanding the area of discretionary exemption was to permit special consideration to be given to cases involving a substantial integration of the operations of the company with those of its subsidiaries. The proposed amendment, which has been read to you by the chairman, we consider to be within the area that would justify an exemption from the application of the act in any event, so we would be satisfied with this statutory provision.

The Chairman: Were you following as I read this? I think the language of the proposed subsections as I have it is in agreement with yours. Did you detect any differences?

Mr. Humphrys: No; I think it is identical, Mr. Chairman. I should say, however, that there is one point where this wording links into a possible change in another section. It might perhaps be better if the formal motion to make this amendment awaited the discussion of the other point. This refers to the introduction of the word "improvements", which depends upon the acceptance of another change.

The Chairman: Yes; I should say that we have introduced one word in this new draft of subsection (4) on page 4, "improvements". We have said "loans, purchases or improvements".

In determining what is an investment company under subsection (1), the definition is the kind of company that borrows money on the security of its bonds, debentures, et cetera, and proceeds to use the borrowed moneys for making loans with or without security, or the purchase of bonds, debentures, et cetera; the shares of corporations, then in (D) of subparagraph (ii):

(D) real property other than real property reasonably required for occupation or anticipated occupation by the corporation, or any corporation referred to in subsection (4), in the transaction of its business,...

I raised a question with Mr. Humphrys with respect to using the borrowed money to purchase undeveloped real estate. Money borrowed for the purposes of financing improvements would not be covered by this section. I asked him if that was his intention. I am not sure that he accepted my interpretation of it 100 per cent. However, I think he was disturbed sufficiently by it that he has suggested that we put in, in addition to real property, the words "and improvements"; is that correct?

Mr. Humphrys: Yes, Mr. Chairman.

The Chairman: That is why we have the use of the word in this amendment. We not only say "loans and

purchases", but "or improvements". It is therefore proposed that we add the word "improvements" in (D) of subparagrah (ii). I think the committee should decide whether it wishes to do that now, before we leave the word "improvements" in the amendment of a later section. Are there any questions with respect to that aspect?

Senator Connolly (Ottawa West): Not after the way you have explained it.

The Chairman: I was not advocating; I was just explaining.

Senator Connolly (Ottawa West): I did not say advocating; I said explaining.

Senator Macnaughton: Do you want a motion on that?

The Chairman: Have you anything to add, Mr. Humphrys?

Mr. Humphrys: No, Mr. Chairman.

The Chairman: Then could we have a motion?

Senator Macnaughton: I so move.

The Chairman: Mr. Humphrys, you would like to add after "real estate"...

Mr. Humphrys: It would require a reversal of two paragraphs, but the effect is exactly as you have described, Mr. Chairman.

The Chairman: What you are proposing will do what?

Mr. Humphrys: It will take out the present paragraph (b) and replace it with a reversal of order of paragraphs (D) and (E). It requires a consequential change in subsection (2). The effect is exactly as you have described it.

The Chairman: Instead of having piecemeal amendments of the clause, where you bring back three-quarters of what you had before the preferred way for drafting is to repeal the whole clause and re-write it. In the re-writing we have retained in subparagraph (ii) substantial parts of paragraph (B). We end up with (i), (ii), (iii) in order to deal with the question of improvements. When we come to improvements we say "the purchase or improvement of real property". That is the substantial change.

Mr. Humphrys: That is the only substantial change. There is a consequential change in subsection (2).

The Chairman: Is that a sufficient explanation, or are there any questions? First of all, I am satisfied that what is proposed makes only the changes that are necessary to add "improvements" in connection with real estate, and to make a consequential change in subsection (2) of clause 2, and for no other purpose. What I contemplate doing, subject to what the committee may say, is that after we have gone through this bill and made all the amendments we think should be made, we could then present it to the assistant law clerk, and ask him to read it and indicate whether he agrees with what we have done before we finalize it and report the bill. I think that is the proper procedure for us to follow, although I am satisfied with what we have been told by Mr. Humphrys who, with his advisers in the Department of Justice, has been over it.

Is it the wish of the committee that we strike out lines 11 to 31 on page 1 of the bill, and lines 1 to 12 on page 2, and make the substitution. We repeat everything in what we have stricken out, but we add provisions in relation to improvements, and we also add a consequential amendment in subsection (2). Is that agreeable?

Hon. Senators: Agreed.

The Chairman: Now we are in a position in which we can deal with the new subsections (4) and (5), which I read to you, and the converting of the present subsection (5) on page 4 into subsection (6). I read it to you, Mr. Humphrys has given his explanation, and the intent is to permit second and third tier subsidiaries to qualify under this subsection in cases such as we have had presented by Labatt and Molson, and I know there are others. Is that agreed?

Hon. Senators: Agreed.

The Chairman: We then go back to page 3. If you look at subsection (3), paragraphs (a), (b) and (d), you see that we have to deal with the same kind of situation so as to facilitate any matter of underwriting to have a definite time when the determination is made; that is, if there is an underwriting proposed durng the fiscal year of the company and a determination is made at that time as to whether the company qualifies as an investment company or is exempt, that decision is final and is a decision upon which the underwriters can proceed. If it is an investment company it must be registered, and if it is not an investment company the underwriter is protected. That involves changing the language in paragraphs (a), (b) and (d). Paragraph (a) says:

> a company not more than forty per cent of the assets of which, valued in accordance with the regulations, at any time.

I think what we propose to add right there is the language we have already put in subsections (4) and (5), namely:

> ...at any time during its last completed fiscal year and the elapsed portion of its current fiscal year.

In other words, we are going to strike out lines 28, 29 and 30. In line 30 we add:

> ...consisted of loans, purchases or improvements described in subparagraphs (i) to (iii) of paragraph (b) of subsection (1), whether made with the proceeds of a borrowing or otherwise.

That is what we propose to add.

In other words, we strike out in paragraph (a) all the words following the words in line 28 "at any time" and substitute the language I have just read. The sole purpose of it is to crystallize the time when effective determination can be made, that either it is an investment company or it is not, and then pick up the word "improvement" which we put in a few minutes ago into clause 2 in

connection with real estate. We have added those words. May I repeat it so that you are sure. We stop at the words "at any time" and then the rest of the paragraph reads as follows:

> ...during its last completed fiscal year and the elapsed portion of its current fiscal year consisted of loans, purchases or improvements described in subparagraphs (i) to (iii) of paragraph (b) of subsection (1), whether made with the proceeds of a borrowing or otherwise.

Is that agreeable? I have explained the purpose of it.

Hon. Senators: Agreed.

The Chairman: In paragraph (b), we strike out lines 38 and 39 and substitute:

> ...its last completed fiscal year and the elapsed portion of its current fiscal year exceed twenty-five per cent of the.

Then the subsection carries on. The sole design, as I have said before, is in order to have a point in time during the year in which the determination can be made whether this is or is not an investment company for the purposes of any proposed underwriting.

Senator Connolly (Ottawa West): The words are "the elapsed portion of the fiscal year"?

The Chairman: Yes, "and the elapsed portion of its current fiscal year." That means that, if you are proposing an underwriting in an acceptance company, half way through the year the underwriter, for his purpose, will want to know whether this is or is not an investment company right at this moment. If it is, it must be registered. He wants that determination to be final, conclusive and binding. Whereas, in the way the language is in the bill at the present time, there is still another test, which would be at the end of the current fiscal year.

Senator Connolly (Ottawa West): You say "and/or"?

Mr. Humphrys: It is the total period, the last completed fiscal year, plus the elapsed portion.

Senator Flynn: Suppose there were an investment company during the last fiscal year and it had ceased to be an investment company, according to the statement, for the elapsed period of the current fiscal year, what would be the position?

Mr. Humphrys: If it has ceased to be, at the present moment, then it would have to apply for an exemption, because if it had become an invesment company in the previous fiscal year, it would be obligated to apply for a certificate, within 60 days of the close of that fiscal year; and if within that 60 day period the circumstances changed and it said "Now, we are no longer an investment company", then it would have to say "We want an exemption" and if the circumstances had been temporary they would get an exemption and that would close it.

In the applications, the main consideration would always be given on the basis of the financial statement at the end of the fiscal year and we would always be looking at the previous fiscal year.

Senator Flynn: Would it not be better to say "or"?

Senator Connolly (Ottawa West): I think you need the accumulated period.

Mr. Humphrys: We think we need it. We thought it would put us into an absurd position if the company was not an investment company in the previous fiscal year, but we looked at it now and it is; yet we could not do anything about it until the rest of the year had elapsed.

Senator Flynn: You could safely say "or".

The Chairman: You would achieve an entirely different meaning from what Mr. Humphrys is looking for. What Mr. Humphrys is saying is that, if you had been an investment company in your last fiscal year and then you move into the next year and your operations are such that you are not then in investment company, you have to remove yourself from that investment classification by some step or other, and the step, as I take it, would be to go to the administrator, or to the minister, for an exemption.

Senator Flynn: That is right.

Mr. Humphrys: I am not sure that it really makes any difference.

Senator Flynn: As far as the company that was an investment company in the previous year is concerned, it would be covered for the following year unless it was given an exemption.

The Chairman: That is right.

Senator Flynn: Then if it did become an investment company, it has to be registered.

The Chairman: That is right.

Senator Flynn: That is why I say "or" and not "and".

Mr. Humphrys: I think the effect is exactly the same.

The Chairman: I would think the effect is the same.

Senator Flynn: If the legal brains are satisfied, I am.

The Chairman: I do not know whether Mr. Humphrys would object to the "and/or".

Mr. Humphrys: I think it would cause heart attacks in the Department of Justice if you put "and/or".

Senator Connolly (Ottawa West): It seems very poor draftsmanship to use "and/or".

Senator Flynn: I did not say "and/or". I would say "or". It is one or the other. It does not need to be the two.

Senator Connolly (Ottawa West): I do not think it makes much difference.

Senator Carter: What would be the mechanism if a company had a statutory exemption in the previous year

and in the elapsed portion of the current year, and then became an investment company after that? Who checks up on that? What is the mechanism? Are they obliged by law to report this, or do they wait until someone checks up and catches them? What is the mechanics of that?

Mr. Humphrys: If it is a ministerial exemption, then the company remains exempt regardless of what it does or what happens to it, until that exemption is withdrawn. But if it is a statutory exemption, the statutory exemption applies to the company only so long as it remains in the situation defined by the statute. Once it departs from that situation, it will become subject to the act; and the act would require it to apply for a certificate of registry within 60 days of the close of the fiscal year within which it moved out of the exempt category. So the statutory obligation is on the company to apply.

The Chairman: Senator Flynn, what we are dealing with in this subsection (3) is really a statutory exemption; and if you look at it in that light, it seems that the "and" is the proper word there.

Senator Flynn: If you are satisfied that it covers the point I wanted to make, I am satisfied.

The Chairman: Is that amendment agreed to?

Hon. Senators: Agreed.

The Chairman: We move now to the amendment in paragraph (b) which I have just read, and that is that we strike out lines 38 and 39 on page 3 and substitute the following:

> ...its last completed fiscal year and the elapsed portion of its current fiscal year exceed 25 per cent of the...

That is inserted in paragraph (b) in those two lines, in the language which I have read.

We come now to paragraph (d) which raises the very same question so, to be consistent, we must make the same amendment. But it raises a number of other questions in the proposal which Mr. Humphrys now has.

In that connection, may I recall to you that we had Mr. Vineberg before us last week not only as a witness representing Cemp Investments, but also, as he said, as a good citizen presenting a viewpoint on various sections of the bill. When we came to this particular section which, on the next page, declares as part of this subsection (d) that if the lender to this investment company is a bank, or substantial shareholders of the company, within the meaning of paragraph (b) of subsection (3) of section 9, then those borrowings, to use colloquial language, do not count for the purpose of determining whether the company is or is not an investment company.

Mr. Vineberg made these suggestions and he indicated how the financing of CEMP has been done in a number of situations, like the Toronto Dominion Tower building in Toronto, where I think the borrowing was from a consortium of non-resident or non-Canadian banks. He had suggested that the bank lenders should not be limited to Canadian banks. Then he made a further suggestion having regard to many of the companies that are created nowadays and where the real interest is internal. For instance, you may have an investment company set up by the father of a family for his children and they are the owners of the equity, the father has no share position, but he may loan money to the company. Mr. Vineberg felt that, instead of limiting and excluding the lenders, where they are substantial shareholders of the company, which is an investment company, we should also exclude a member of the family of such substantial shareholders, even if he is not a shareholder.

With that in mind, Mr. Humphrys has prepared certain proposed changes. He does not go along with the suggestion that we enlarge the area so far as banks are concerned. We can discuss that with him in a minute or two, but he does go along with the other suggestion, that is, in addition to subparagraph (ii) of paragraph (d) of subclause (3) on page 4, where we have the words:

> (ii) substantial shareholders of the company within the meaning of paragraph (b) of subsection (3) of section 9;

he then goes on and says:

> (iii) the spouse, child, parent, brother or sister of a substantial shareholder of the company within the meaning of paragraph (b) of subsection (4) of section 9;

So he is recognizing the merit of expanding this provision to deal with that kind of situation in relation to substantial shareholders. He has not accepted the suggestion with relation to enlarging those who shall be included in the word "bank".

If you have any questions, now is the time to raise the issue with Mr. Humphrys as to why he feels that the lending by banks—in respect to which the company would not, because of that borrowing, become an investment company—should be limited to Canada.

Perhaps I can start the questioning off myself, Mr. Humphrys. Why is it that you have not accepted this proposal?

Mr. Humphrys: Mr. Chairman, honourable senators, the purpose of putting a reference to chartered banks in this paragraph and creating the situation that, if a company borrowed only from chartered banks it would not be considered to be an investment company, was in recognition of the fact that nearly every company borrows from its bankers from time to time for one purpose or another. In order to avoid a massive job that would result from including so many companies and then exempting them because it turned out that the borrowing was really only for their ordinary operating functions or manufacturing functions, it was thought appropriate to propose this arrangement whereby borrowing from banks would not bring a company within the scope of that act.

It was recognized that this had the overtone of perhaps leaving out of the scope of the act some companies that are really investment companies on the basis of moneys that they borrow from banks, but it was thought better to accept that possibility than to sweep in a great many companies in order only to exempt them.

It was thought that this approach could be accepted because it was recognized that the banks in this country are strong and well estalished and that there was no great risk in really leaving the banks to make their own judgements in this connection.

However, the provision was not put in there primarily from the concept that the banks are sophisticated lenders and, therefore, nobody needs to worry about them. We did not think that would be a logical position, because there are many other financial institutions that are also sophisticated lenders. But when one attempts to classify them or to describe a category, it becomes very difficult. On the other hand, the Canadian chartered banks are a class quite easy to describe and do fit quite well into this whole financial transaction. But when you go beyond that you get a tremendous range of financial institutions.

Insurance companies may be big or small; they may be sophisticated or they may be really only moderately skillful in investment. Trust companies also may be big and may have highly sophisticated investment divisions; but trust companies may also be quite small, having only limited facilities. Moreover, if you go abroad, the very problem of defining what is a bank becomes difficult, because in other countries the financial institutions may be set up in a way that is different from the way they are organized in Canada. So that it is difficult to describe even banks under foreign jurisdictions.

If you think about American banks, then why not German banks, Swiss banks, British banks or banks in other countries?

So we thought it better to deal with this problem through the mechanism of giving the minister power to look at a particular situation on the basis of finding out to whom the investment company is indebted for moneys borrowed by it. So you could look at it in a particular case and see where the money came from and, if it was a case such as Mr. Vineberg described, where it is a company put together to finance a big office building and they get a loan from a consortium of banks in one country or another, then you might very well look at it and say that that is the kind of case where the public interest does not demand that company be subject to this act so that it could be exempted. But we felt, really, that we were not in a position to put forward a category of sophisticated investors with enough confidence and enough clarity of definition to make it appropriate for this kind of measure.

So I recognize the point Mr. Vineberg makes, but we think we should be able to deal with it by looking at the particular cases rather than trying to define the categories of sophisticated investors.

Senator Macnaughton: What would happen to a subsidiary investment company owned by a bank? You would knock them out.

Mr. Humphys: Not as such, senator, no. There is nothing in this act that would let a company out merely on the ground of who owns the shares. But if that company borrowed money only from its parent, then it would fall within the category of an exemption because it borrows only from a substantial shareholder.

Senator Macnaughton: Are you not giving a sweet little monopoly to the banks?

The Chairman: You mean to Canadian banks? Well, I suppose that is one way of looking at it. The other way of looking at it is that you are providing some measure of protection for these who lend money in Canada—non-residents who lend money in Canada. Whether that is advisable or not is a question of policy, and, on balance, it strikes me as not being unreasonable.

Of course, the Canadian banks are subject to their own inspection provisions in the Bank Act, where they are examined very closely.

Senator Flynn: The same thing holds for a trust company. It seems to me that the point raised by Senator Macnaughton is valid. The banks would be in a better position to continue to finance investment companies. Investment companies would not have to register if they borrowed from a bank, although they would have to register if they borrowed from a trust company.

The Chairman: You are right in raising that point, Senator Flynn. I should have added a point that Mr. Vineberg raised last week. He thought this area should be enlarged by including in this category of lenders not only the banks but what he called institutional lenders, which would be life companies, trust companies and loan companies.

Senator Macnaughton: And possibly subsidiary investment companies. Mr Vineberg made the point that we should not limit the economic opportunities to expand business in Canada by getting too exclusive. In other words, by giving complete monopoly to the banks in this section. If this country is going to expand, it needs reasonable control, but not exclusive control in the hands of a few.

The Chairman: Well, Senator Macnaughton, with respect to exclusive monopoly being given to the banks, first of all banks do not have an exclusive monopoly. Anybody can apply for a bank charter.

Senator Macnaughton: That is quite true. Anybody can apply; whether he will get the charter or not is another question.

The Chairman: All of those who applied at the last revision of the Bank Act got their charter, but there is only one of them that went anywhere. This, I think, indicates it is a difficult field in which to operate.

Senator Flynn: It seems to me that if the argument given by Mr. Humphrys for exempting the borrowing from banks is a valid one, it is only from an administrative point of view, and it seems to me to be unfair to give this advantage to the chartered banks since it gives them what I might call a monopoly or an advantage over other lending institutions.

The Chairman: Well, senator, let us put it in its proper perspective. There is nothing in this bill that limits or restricts the lending function of banks or institutional lenders. All it says here is that if a bank is a lender to an

investment company, or to a company that you are trying to decide as to whether it is or is not an investment company, you do not look at the bank borrowings.

Senator Flynn: You do not have to register as an investment company.

The Chairman: That is right.

Senator Flynn: But if you borrow from another institution, you have to. Therefore to avoid the burden of registering you will be inclined to borrow from the bank rather than from another lending institution.

The Chairman: But you must remember there are some statutory exemptions in this bill on the relationship of assets and ownership of shares.

Senator Flynn: But that is a very narrow point.

The Chairman: So these investment companies may still, even with their institutional borrowing, fit into the statutory exemptions. That is correct, is it not, Mr. Humphrys?

Mr. Humphrys: Yes.

Senator Flynn: You may be able to get an exemption, and I am aware of that, but you will have to go through the process of obtaining the exemption.

The Chairman: Not the statutory exemption. The statutory exemption is something you are entitled to as of right and you can make that determination yourself.

Senator Flynn: That was the point raised by Mr. Humphrys. He said that you might as well exempt the bank because in most cases the borrowings are made for the ordinary day-to-day operation of the company and therefore they would qualify it for exemption. But he also said that he realized that by putting this exemption there he would also be exempting investment companies from registration. I can very well imagine the case of a company which always has $1 million margin in the bank to make mortgage loans and so on and so forth.

The Chairman: Well, then the question would appear to be—do we take out Canadian banks or do we enlarge the area?

Senator Flynn: Well, if you do not enlarge it, I think we should take it out.

The Chairman: As to institutional lenders, and by that I think we mean life companies, trust companies and loan companies, what comment have you to make, Mr. Humphrys, about the inclusion of such institutions in this particular subsection in addition to banks?

Mr. Humphrys: Mr. Chairman, if the subsection were expanded that far, I think it would so narrow the application of the bill that there would be hardly anybody left in it. Senator Flynn's analysis is quite accurate that the purpose of this reference to the chartered banks is primarily an administrative one, and not really intending in principle to exempt companies that were investment companies, but rather accepting that possibility as something that went along with the desire to avoid having to grant exemptions for a great number of companies or having to study a great number of companies that really only do financing from their banks. I should like to make one point in case there is any misunderstanding of it. As we conceive this and the way it is set up, if a company borrowed only from the bank, then, as this is set up, it would be exempt. But if it borrowed anything from outside the bank, then the whole borrowings are taken into account including the bank loans. We do not measure only the borrowings outside. We measure whether the company is in or not, and if it is in then we measure all the borrowings.

The Chairman: You mean if it borrowed a dollar then the total borrowings would have to be counted in the determination as to whether it was or was not an investment company?

Senator Flynn: You are suggesting that an exemption will apply only if you borrow exclusively.

The Chairman: That is right.

Senator Flynn: Otherwise, if you borrow, say, $10,000 from a trust company and $1 million from the bank, then the total borrowings come within the formula here. I do not know if that reinforces my argument or not.

Mr. Humphrys: For the purpose of the measure I believe it would be preferable to strike out the reference to banks than to expand it to include the whole range of financial institutions.

The Chairman: Well, if you analyse that for a moment, the kind of bank borrowings which you mentioned and which you said or suggested should provide this exemption or exclusion—the ordinary borrowings by a company from its bank would be in connection with the day-to-day operations of the company, and that kind of a company using the borrowed moneys for that purpose would not read on this definition section of the business of investment in any event. So that for the purpose of ordinary bank borrowings it does not matter whether this exclusion is in there or not.

Senator Flynn: Well, then, why not take it out?

The Chairman: Well, I have great respect for Mr. Humphrys and I do not like to emasculate his child without good cause. What would you say, Mr. Humphrys, as to taking that provision out?

Mr. Humphrys: Well, Mr. Chairman, I think that the statutory exclusions have been considerably expanded since the bill was originally introduced. That provision relating to chartered banks was a provision in the measure as it was introduced and you will probably recall that at that time the scope was considerably wider than it is now. For example, a company which had 25 per cent of its assets in investment-type assets would come under the measure. Now that was changed to 40 per cent and then there was this whole series of statutory exemptions put in by the committee. So I think that the kind of

problem that concerned us when we proposed that exemption for companies that borrowed exclusively from banks is perhaps less urgent or less important than it was in the original concept of the measure.

The Chairman: On balance then you suggest that we leave it. Is that right?

Mr. Humphrys: I would still leave it, but I recognize the point that Senator Flynn makes. We have not felt through this measure that being subject to the act is going to be such a burden to a company as to create a special field of business for the banks on the part of companies that are desperately trying to avoid this measure. But if the senators thought that that would be the case, I would say that it was not the intention in putting forward this measure to create a specially preferred field of business for banks as compared with other financial institutions.

Senator Connolly (Ottawa West): What about the protective element for the public? By having this in, it gives the public a little more protection, does it not?

Mr. Humphrys: No, I would say that by striking it out you are giving more protection. On that particular point it gives the banks more protection.

Senator Macnaughton: But you can also kill expansion with so much protection. How would you describe a merchant bank?

Mr. Humphrys: Well, I suppose it is a matter of anybody's own feeling about it. I would think that a merchant bank is one whose prime function is financing the development of industry as compared to its day-to-day operations.

I recall that in Mr. Vineberg's comments he was making the point that he feared this measure would be hampering to companies. We have not approached it from that point of view. We did not contemplate that the kind of supervision exercised here would be such as to limit or hamper the normal activities of the company but, rather, that it would work in such a way that it could be useful to the companies and it would be useful to all well managed companies by having some way of controlling the companies that get into really bad difficulties that damage everybody. But it was certainly not our intention, as administrators, to sit at the board table of every one of these companies or to ask them to clear every possible move with us. I think fears of that type just would not prove to be so.

Senator Macnaughton: I think it is fair to say that no one has any fear as long as you are there, Mr. Humphrys, but who can tell in 25 years?

Mr. Humphrys: I can only say, Mr. Chairman, that our department has been in business a long time, there have been various Superintendents in charge, and I think throughout the history of the department the companies that have worked with it and that have been supervised by it have not felt that the application of the supervision has been hampering or restrictive. I think they rather feel that over the years, the way it has been run, they have gained a good deal from it as well as being subject to the supervision of it.

The Chairman: We are down to the question as to whether we leave in or take out the provision in relation to Canadian banks. Then there is the secondary question, as to whether we expand by adding institutional lenders in this category. Mr. Humphrys' answer to the second point is that we do considerable emasculation of the bill by adding institutional lenders.

On the banks, the only situation that would be covered by striking out the reference to banks would be that if a company which was really an investment company borrowed money from the banks, not for day-to-day commercial or industrial operations but for investment purposes, and then went out and used that money in various directions...

Senator Flynn: I think that is fair. They are like any other investment company.

The Chairman: Yes.

Mr. Humphrys: In that connection, if a bank had a subsidiary company which was a mortgage loan company within the meaning of the Loan Companies Act, it would be subject to all the degree of supervision applicable to any other loan company, whether it got its money from the bank or any other source.

Senator Macnaughton: And if it was an investment company, the same thing?

Mr. Humphrys: Well, as the bill now is, an investment company would not be subject, but if this was struck out it would be in the same position.

Senator Flynn: It creates inequalities.

Senator Macnaughton: Must the borrowing be only from Canadian banks?

The Chairman: That is right.

Mr. Humphrys: Yes, the way the bill is set up.

The Chairman: If they have a dollar of debt from any other borrowing, then all their borrowings must be brought into the calculation of the formula.

Senator Desruisseaux: Will we be creating a preferential situation for co-operatives?

Mr. Humphrys: I do not think so, senator.

Senator Desruisseaux: If four or five investment companies formed a co-operative to do their work, what would happen then?

Mr. Humphrys: Only in the situation if you had four or five co-operatives which formed an investment company, each having more than 10 per cent of the stock, and the investment company got its money only from the co-operatives, then it would not be under this bill because it would be borrowing only from substantial shareholders. But that would not be a course that is available exclusively to co-operatives. It would be available to any

group of corporations or individuals who put together a company on that basis.

The Chairman: Is the committee ready to decide?

Senator Hollett: I have one question, Mr. Chairman. At the top of the page it states:

> (ii) substantial shareholders of the company within the meaning of paragraph (b) of subsection (3) section 9;

I have looked at subsection (3) of section 9, and I cannot find any paragraph (b).

Mr. Humphrys: It should be "paragraph (b) of subsection (4)", senator. There was a new subsection put in there, and this subsection was not corrected.

Senator Hollett: It should be subsection (4), should it?

Mr. Humphrys: Yes.

The Chairman: What is the view of the committee? Shall we leave the provision in in relation to banks?

Senator Flynn: I would move that we delete it.

The Chairman: Deleting it would mean striking out subparagraph (i) on page 4. Otherwise the section would remain in its present form, plus the amendment in relation to substantial shareholder and members of family.

Senator Connolly (Ottawa West): I know we have been thrashing it back and forth, but is Mr. Humphrys satisfied that the deletion of the words in question still makes this bill effective?

Mr. Humphrys: Yes, Mr. Chairman. The deletion of those words would not reduce the effectiveness of the measure.

The Chairman: As a matter of fact, it might bring into your administration situations in relation to investment companies that it might be advisable to have in—the situation you mentioned, where the money is borrowed from the bank and those borrowings are used for investment purposes, and that may not be very wisely used.

Mr. Humphrys: It would bring more companies under the bill rather than the other. It would probably bring a lot more companies in for examination to see whether they are under the bill, and probably would require more study of exemptions, but it is hard to measure that. I do not think the number would be as great as under the original concept.

Senator Macnaughton: It would give you a great deal more experience, which is all to the benefit of the public.

Mr. Humphrys: Yes.

The Chairman: Are you ready for the question? Shall we strike out subparagraph (i), which deals with companies to which the Bank Act applies?

Hon. Senators: Agreed.

The Chairman: Those who support the deletion?

Senator Carter: I am not quite sure if Mr. Humphrys is agreeable to this.

The Chairman: Yes.

Senator Connolly (Ottawa West): Yes, he is.

The Chairman: Agreed?

Hon. Senators: Agreed.

Then, what we have done is, in paragraph (d), on page 4, we have struck out subparagraph (i), which reads:

> (i) companies to which the *Bank Act* applies;

Then there is the other aspect where we enlarge. Subparagraph (ii) then becomes subparagraph (i), and we enlarge the area of borrowing that is not to be included in the determination of whether it is an investment company, to include the language I have read, which become subparagraph (iii):

> The spouse, child, parent, brother or sister of a substantial shareholder of the company...

Senator Flynn: Does "parent" mean father and mother?

The Chairman: Yes. We say:

> the spouse, child, parent...

Senator Flynn: In French "parent" includes the whole family. In English "parent" would mean only the father and mother? "Parent" in French includes everybody in the family.

The Chairman: But if we say "father and mother", we are getting down to specifics.

Senator Flynn: First degree?

The Chairman: Yes. In the French translation we have "father and mother". We might as well put it in the English. In this amendment, of which I take it the honourable senator approves, we are striking Roman numeral I on page 4.

Senator Desruisseaux: Sub-paragraph (i) does not affect what we do here. It does not exclude a company to which the Bank Act applies.

Senator Flynn: A company that borrows from a bank may be an investment company.

The Chairman: It is the borrowing and the person who borrows who may not be an investment company.

We have struck out sub-paragraph (i) on page 5 of subsection (d), and (ii) becomes (i). That remains as is, except that we change subsection (3) to subsection (r). Then we have sub-paragraph (ii) which refers to the word "parent". I do not think there is any difficulty in interpreting the word "parent" in English. In the French translation we have used the words "father and mother"; so there would be no need to change the word "parent" in the English text.

Senator Flynn: I merely wanted to be sure that it meant only that.

The Chairman: Sub-paragraph (ii) which we are adding would then read:

> spouse, child, parent or sister of a substantial shareholder of the company within the meaning of paragraph (b) of subsection (4) of subsection 9 and

Does the committee agree to that addition?

Hon. Senators: Agreed.

Senator Connolly (Ottawa West): Instead of using the word "parent", in order that the English and the French versions should be completely in harmony, perhaps we might use the words "father and mother".

The Chairman: In English the words "father and mother" mean parents.

Senator Flynn: The only argument in favour of Senator Connolly's suggestion is if somebody wanted to interpret the word "parent" in French.

Senator Carter: Would not the word "parent" in English mean also foster parents?

The Chairman: Do not let us spend too much time on this item. If we wish to use specific language, let us use "father and mother".

Senator Connolly (Ottawa West): We get into the problem of who is the father and who is the parent.

The Chairman: We will use the words "father and mother". Of course, if foster parents can be described as parents in law, then they are parents; but ordinarily that is not so. Is it agreed that instead of the word "parent" we use the words "father, mother, brother or sister"? Does that meet all the viewpoints that have been raised? Very well, that is agreed.

Now, Mr. Humphrys, we move on. The next provision to be dealt with, and in connection with which we had questions raised is in section 9. I draw the committee's attention to page 10 of the bill, subparagraph (5) down towards the bottom of the page. It deals with the duty of auditors and the obligation that is imposed on them:

> It is the duty of an auditor of an investment company to report in writing to the chief executive officer and the directors of the company any transactions or conditions affecting the wellbeing of the company that in his opinion are not satisfactory and require rectification; and the auditor shall, at the time any report under this subsection is transmitted to the chief executive officer and the directors of the company, furnish a copy thereof to the Minister.

We have had a submission from the Canadian Institute of Chartered Accountants calling attention to that section. They are concerned about this provision because it broadens the auditor's responsibility to a degree which could subject him to all manner of legal action.

They say:

> We would prefer to see the section withdrawn; but failing this we believe that as a minimum an auditor who follows the course of action contemplated by subsection (5) should be able to do so without incurring liability if he is acting in good faith.

They attached a draft which I have submitted to Mr. Humphrys for his consideration. I understand he has no objection to this. I further understand that the auditors have been in touch with him also.

The suggestion is that we add another subparagraph (6), which would read as follows:

> Any auditor who has acted in good faith and with due care is not subject to any liability that might otherwise result from a report made under subsection (5).

Senator Beaubien: How could an auditor be responsible under subsection (5) if he acted in good faith? It is pretty hard to imagine any circumstance where, having written to the minister, one could claim damages.

The Chairman: He may have acted in good faith and even with due care, but his judgment and his assessment of the transaction...

Senator Beaubien: Judgment cannot hurt a company unless the minister concurs.

The Chairman: But the minister, as a result of this report, may take some action which would adversely affect the company.

Senator Beaubien: The minister might?

The Chairman: He could. What has spurred it is the fact that the auditor's report in the long run might turn out to be a bad assessment—not a deliberately bad assessment, but a bad assessment—of the situation.

Senator Macnaughton: A situation in the United States is developing where auditors can be sued almost on sight, even if they have acted in the best of faith, or anything else. This provision from their professional point of view is therefore very important. As members know, even if one is a director today one can be sued if one has not given the ultimate in good care and studied a question.

The Chairman: You know, it is becoming almost as bad in Canada now to be a director.

Senator Beaubien: The trouble is we have far too many lawyers. I do not see how the auditor, if he is doing what he is told to do in subsection (5), can be sued by the company. If the minister takes action, surely it is his decision.

Senator Flynn: Maybe it sounded superfluous because of the reasons given by Senator Connolly to support it. It says "in his opinion". Of course, it presupposes that he has done what the law requires him to do, and he should not be liable for it. If he gives his opinion that such a transaction should be drawn to the attention of the directors, very well; if it is his opinion that it should not, he should not be liable.

Senator Connolly (Ottawa West): Directors are inclined to be in this respect dependent upon the viewpoint of the auditor. If this section does not water down the responsibility of the auditor and tend to make him careless in his work, I would think that it is a proper addition and clarifies the contents of subsection (5).

Senator Carter: Does the fact that the auditor is required to send the report to the minister create trouble? Why not have the chief executive officer do that? Why impose the responsibility on the auditor? He has discharged his duty when he has reported it to the company officials.

Senator Flynn: It is because the minister wishes to have an independent report; the auditor as such has to be neutral.

Senator Connolly (Ottawa West): The auditor is actually appointed by the shareholders. The chief administrative officer, or the officers of the company do not appoint him. He is appointed to arbitrate, presumably, in the case of dispute between the shareholders and the executive.

Senator Carter: As long as the minister receives the report of the auditor, why should it make any difference whether he gets it from the auditor or from the chief executive officer?

Senator Beaubien: If the chief executive officer is doing something he should not do, he may not send the report. That is why we want an independent man to send it.

Senator Connolly (Ottawa West): I think the auditor would prefer to see this provision, because it confirms his position as a representative of the shareholders, rather than of the executive.

Senator Gelinas: If Mr. Humphrys is satisfied, I would move that subsection (6) be added.

Mr. Humphrys: I have no objection.

The Chairman: Are you satisfied with the wording?

Mr. Humphrys: Yes.

Senator Macnaughton: It is an important trend to establish.

The Chairman: This trend is found also in other directions. It has been duly moved and approved that subsection (6) be added to section 6 of the bill on page 10 and that it shall read as follows:

> Any auditor who has acted in good faith and with due care is not subject to any liability that might otherwise result from a report made under subsection (5).

Senator Hollett: Who is going to decide that?

The Chairman: The court may ultimately have to decide it.

Senator Hollett: But is there a danger that the company may, without taking action, dismiss the auditor?

Senator Connolly (Ottawa West): The shareholders are the only people who control the auditor; they appoint him.

The Chairman: The directors cannot dismiss the auditor; this can only be done by the shareholders.

Senator Connolly (Ottawa West): He is there for their protection.

The Chairman: Yes; I think it is a measure of reflection. It may avoid a lot of rash litigation. This is carried.

Mr. Humphrys, we move now to section 9, at the bottom of page 11 and proceeding to page 12. The Federated Council of Sales Finance Companies appeared. They had a problem arising from the fact of the manner in which this business, the financing of cars, is carried on. There are the manufacturers, acceptance or investment companies and the dealers. In connection with dealers, the going trend as I understand it has been that there are many tied dealers. That means that the manufacturing company may provide a substantial part of the capital for the dealer, then the acceptance company, which is an investment company which buys the paper of the dealer, may also be owned substantially or entirely by the manufacturing company.

In those circumstances under section 9 as it now reads, the loans that might be made between the manufacturing company and the investment company or the investment company and the dealer would be prohibited. That is correct, is it not, Mr. Humphrys?

Mr. Humphrys: Yes, Mr. Chairman.

The Chairman: An effort to relieve that situation somewhat is contained in subsection (5) on page 14. The opportunity for exemption is provided in this language:

> (5) Where any person or group of persons is a substantial shareholder of an investment company...

In this case let us say an acceptance company.

> ...and, as a consequence thereof and of the application of this section, certain investments are prohibited for the investment company, the Minister may, by order, on application by the investment company, exempt from such prohibition any particular investment or investments of any particular class if he is satisfied that the decision of the investment company to make or hold any investment so exempted has not been and is not likely to be influenced in any significant way by that person or group and does not involve in any significant way the interests of that person or group, apart from their interests as a shareholder of the investment company.

The representations which were made to us were to the effect that in the circumstances of the method of operation in this car business it could not be stated that the decision of the investment company to make or hold any investment or exemption has not been and is not likely to be influenced in any significant way by the fact that they have an investment. Representations have also been made to Mr. Humphrys.

We have had discussions with Mr. Humphrys, resulting in his production of a draft of a proposed paragraph (b) to be added to subsection (5), making the first part paragraph (a). I will give you that in a moment, but the effective part would be this:

> Any investment so exempted would be in a corporation in which the significant interest of the substantial shareholder is temporary and incidental to the principal business carried on by the substantial shareholder.

Senator Flynn: Do you intend a restriction of the exemption?

The Chairman: No, this is a restriction of the prohibition. It is an expansion of the exempting power. First of all in this clause you have a prohibition in those relationships.

Senator Connolly (Ottawa West): Could we use an illustration? Let us use names, simply for the sake of argument. Everyone knows of the company called General Motors Acceptance Corporation, which presumably is owned by General Motors. The business of General Motors is manufacturing automobiles, presumably. What you are discussing here are cases where General Motors finance dealerships and take an equity position, or even a debt position, in the financing of the set-up of the dealer. Is that the position?

The Chairman: Yes.

Senator Connolly (Ottawa West): That is literally what you are talking about?

The Chairman: That is right. We have stated that. Mr. Gregorovich, you were here representing the Federated Council of Sales Finance Companies last time. Have we correctly stated the position?

Mr. J. B. Gregorovich, Chairman, Legal and Legislative Committee, Federated Council of Sales Finance Companies: Yes, the position is correctly stated. In the case the honourable senator mentioned, the finance company would provide the finance for the automobile dealer.

The Chairman: Is the language of the amendment I read satisfactory to relieve the prohibition so far as the operations you have described are concerned?

Mr. Gregorovich: Yes, Mr. Chairman, we are satisfied they would provide the minister with a discretion that would relieve the situation.

The Chairman: All we are doing is providing a basis for the exercise of discretion by the minister. We are not compelling him to grant the exemption in the exercise of his discretion; we are only providing guidelines that he may use, if he determines that the interest of a substantial shareholder is temporary and incidental to the principal business—and I think in the circumstances as you related them to us last time it might well be said that it is incidental to the principal business. It may be necessary to finance the dealer, but that is incidental to the main purpose, which is to sell cars and finance the paper.

Senator Connolly (Ottawa West): And make cars.

The Chairman: Yes.

Mr. Humphrys, we have been doing all the talking but this bill has your sponsorship. What have you to say about this?

Mr. Humphrys: As the case was put before this committee and to us, the equity position taken by the manufacturer in a dealership was, as we understood it, incidental to the main business of the manufacturer, which was making and selling cars. It was a temporary position, in the sense that the manufacturer did not contemplate that as a permanent way of distributing his product. We recognize that the word "temporary" is not a very precise word, and we can conceive of cases where the equity position in a dealership might last quite a while. It might happen that the dealer did not do as well as he thought he would and he could not buy out the manufacturer as quickly as he should, or he might die and another man might have to be put in. The concept is that it is not permanent; at least, it is not intended as a permanent way of financing. Within that concept we think the way should be open to consider the case and grant an exemption if it is a legitimate method of operating.

The Chairman: Is it agreed?

Hon. Senators: Agreed.

Senator Flynn: I may be touching on another point, but I was wondering about this power of exemption in subsection (5), whether it would apply to the obligation described in subsection (2) for an investment company to divest itself of any investment after the coming into force of the act which is contrary to the provisions of clause 1. It may not be easy to divest itself of an investment, especially if it is a term investment. You might lose money, and it does not seem to me the power of exemption as described in subsection (5) would apply to a specific case like that.

Mr. Humphrys: I think that point is dealt with in subsection (7).

Senator Flynn: I see.

The Chairman: Are you satisfied?

Senator Flynn: Yes.

The Chairman: This is the way subsection (5) would read, for the purposes of the record. We would strike out lines 11 to 18 on page 14 and substitute the following in paragraphs (a) and (b):

> (a) the decision of the investment company to make or hold any investment so exempted has been and is not likely to be influenced in any significant way by that person or group and does not involve in any significant way the interests of that person or group, apart from their interests as a shareholder of the investment company.

That is pretty much the language in the clause at the present time. Then we say "or" and add paragraph (b), which is the new part, which reads:

> any investment so exempted would be a corporation in which the significant interest of the substantial shareholder is temporary and incidental to the principal business carried on by the substantial shareholder.

Is the committee agreed that we so amend subsection (5)?

Hon. Senators: Agreed.

The Chairman: We have passed over a question raised by Mr. Vineberg last week concerning page 5, in clause 3, where guidelines are given as to the basis on which the minister may exercise his discretion and grant exemption. Mr. Vineberg raised the question whether there should or should not be provision for a judicial review of the exercise of that discretion, because in another context in the bill there is provision for judicial review where, because of the kind of operations a company is carrying on, the Superintendent moves in and may, under direction of the minister, take certain steps in relation to the continued operation of that company etc. There is provision in the bill for judicial review there.

This question of judicial review in relation to this kind of discretion is a different sort of thing. First of all, if for any of the reasons stated, or, to put it more broadly, if for any reason at all, the minister finally decides under clause 3 that he can grant an exemption—and he may read some of the guidelines very broadly in order to do that—where will there be any demand for review? Certainly not from the person who gets his exemption; he will be very happy. The situation whether or not there should be judicial review would, I take it, only arise if the minister says, "No".

Senator Flynn: Revoking.

The Chairman: No. If he says "No, I will not grant an exemption".

Senator Flynn: If he revokes the exemption.

The Chairman: Yes. If he says, "No", what is the position now? I think the position now under the law, if I might suggest it, is that if the minister has exercised his discretion—in other words in coming to a decision has acted reasonably—then the courts will not review it. If he has not acted reasonably the courts, on the basis of the legal decisions there are, will conclude that he has not exercised his discretion, and they will tell him to go back and try it again. That is the famous Pioneer Laundry case.

Senator Flynn: I think the new federal court would have the jurisdiction to deal with a case like that.

The Chairman: Yes. You remember the Pioneer Laundry case where the deputy minister of national revenue for taxation was concerned.

Senator Flynn: It could be dealt with in the federal court.

The Chairman: My own feeling in the matter is that I think there is protection in section 3, having regard to the general law, for any person who is dissatisfied with the exercise or so-called exercise of discretion and that it would be cumbersome. It might defeat the purposes of the act even, to contemplate a specific provision in this bill providing for judicial review. I would not want to have to draft it, I would want somebody else to draft it.

Senator Connolly (Ottawa West): I think that Mr. Vineberg agreed last week, with that reasoning, that you have just stated.

The Chairman: Yes. I mentioned it. He raised this. So I thought we should indicate that we have had a good look at it. I have expressed my view and I think that is your view, too, Mr. Humphrys?

Mr. Humphrys: Yes, Mr. Chairman.

The Chairman: This is for the committee to decide. Shall we leave it the way it is, under the state of the law as it is? Is that agreeable?

Hon. Senators: Agreed.

The Chairman: Now we move on. Under section 15 of the bill, you remember, on the first time round, we had quite a discussion with Mr. Humphrys. Section 15 on page 26 deals with a power which is given to the minister in connection with finance companies that have not resident shareholders, that is, finance companies that are under Canadian control, of course. We had quite some discussion, first of all, whether such a provision giving the minister the right, that he must consent to a sale or disposal of the whole or any part of the undertaking, or in these circumstances you cannot make a sale or disposal without his consent.

We have wrestled with this for some time, Mr. Humphrys and myself, and we have finally come up with this wording.

There was some concern about "any part of the undertaking" and I think the feeling we had was that rather than that language, it should be "a substantial part". We were concerned about the word "disposal", as to how broad the word "disposal" was, and we finally thought that if we delimited it by saying "disposing absolutely" we would cover that situation which we were comtemplating—that is, if you were going to borrow, going to have an underwriting and charge the assets, that is a kind of disposal, and I do not think that was the kind intended. So we put in the word "absolutely" there. As changed, this is the way it would read. Instead of having this in the form of really a prohibition, "no sale of disposal shall take place", we would say:

> A sales finance company to or in respect of which sections 11 to 13 apply...

Those are what I call the non-resident sections.

> shall not sell or otherwise dispose absolutely of the whole or any substantial part of its undertaking, and the sale or disposal is of no effect unless or until it has been approved by the minister if, in the opinion of the minister, it would be likely to result directly

or indirectly in the acquisition of the whole or any substantial part of the undertaking by a non-resident.

We preserve the principal purpose of the section but I think it is a more satisfactory form and it is clearer now. I believe I am not misquoting Mr. Humphrys to say that this changed form of section 15 would be acceptable to him.

Mr. Humphrys: I would like to say, Mr. Chairman, that that is correct, that it would be acceptable. I must say that I still prefer the original form because I think the introduction of the word "substantial" raises another form of uncertainty. But, as you have said, Mr. Chairman, if the revised word appeals to the committee I do not think we would object to it.

Senator Connolly: I wonder if there could be an answer on this point. Suppose, for the sake of argument, there are several offices of the federal sales finance companies and one of them decides that it is not profitable to keep that office open as it is not doing enough business and it proposes to transfer its paper to another sales finance company with an office in that community, in that case the transferee is foregoing? I take it that in that case that would be ruled to be a transaction in the ordinary course of business, if they sought directions from the Superintendent, and that it would not be a case to be covered?

Mr. Humphrys: We would have to look at the particular case, Senator Connolly. If it was the sale of a branch of the company with all the business connections of the whole territorial business, we would look at it as a sale of part of the company's undertaking. If it were a sale of only receivables arising from a particular area, without any discussion about the sale of the business or business connections, then it would probably be a sale of assets. It would take a bit of judgment in each particular case.

Senator Connolly (Ottawa West): I do not go quite so far as the segregation. I simply talk about the disposal of paper and the closing of the office.

Mr. Humphrys: I think that would probably not be a sale of part of the undertaking, it would simply be disposing of some of the assets.

Senator Connolly (Ottawa West): Thank you.

The Chairman: Is this amendment agreed to, to section 15?

Hon. Senators: Agreed.

The Chairman: We turn now to section 16 of the bill, which is on page 26. If you remember, we wanted to be sure in regard to the Canadian Deposit Insurance Corporation. There is provision there where that deposit insurance company may make loans to a sales finance company. We wanted to be sure that they did not use their money, which they had collected from the various banks who have to contribute to this deposit insurance fund, for purposes of making these loans. While it appears subsequently in the statute that this money is to be provided specifically out of the Consolidated Revenue Fund, we felt that there should be a tie-in between the authority for making loans and the reference to the Consolidated Revenue Fund. Therefore, we suggest that subclause (1) of clause 16 of Bill C-3 be amended by striking out line 18 on page 26 and substituting the following:

> 'may, out of amounts advanced to the Corporation pursuant to section 29, make short term loans to the sales'

That is, to the sales finance company.

Now, this removes any doubt there might be that the Deposit Insurance Corporation might be using moneys other than moneys specifically advanced out of the Consolidated Revenue Fund. Mr. Humphrys approves of that.

Senator Connolly (Ottawa West): Mr. Chairman, I am afraid I did not quite follow you there. Does this mean that the only moneys available to correct the situation in which the Deposit Insurance Corporation has to intervene must be moneys contributed by way of premiums paid by the company that is in difficulty which brings the Deposit Insurance Corporation in?

The Chairman: This means that the revenue of the Deposit Insurance Corporation which it gathers under the authority in that statute shall not be used for purposes of this act to make loans to sales finance companies. On page 40 clause 29 (1) reads as follows:

> Subject to subsection (2), out of the Consolidated Revenue Fund, the Minister
>
> (a) may, on terms and conditions approved by the Governor in Council, authorize advances to the Canada Deposit Insurance Corporation (in this section and section 30 and 31 referred to as the "Corporation") of amounts required for the purpose of making loans under section 16;

All we are saying in clause 16 is that the moneys that you use for purposes of those loans can only be the moneys that are so advanced out of the Consolidated Revenue Fund. In other words, we are tying in both of these clauses which deal with this money that goes to the Canada Deposit Insurance Corporation.

Mr. Humphrys, this carries your approval?

Mr. Humphrys: Yes, sir.

The Chairman: Are there any questions? Is it approved?

Hon. Senators: Carried.

Senator Connolly (Ottawa West): Perhaps I should not be asking a question on this now that the committee has approved it, but this does not in any way limit the kind of back-up that was contemplated when the act was written, when these sections were inserted in the act to support the position of the Canadian sales finance company that might be in difficulty?

Mr. Humphrys: No, Senator Connolly. The concept in the bill was that the Canada Deposit Insurance Corporation would act as an agency for the purpose of making

loans to sales finance companies that are under Canadian control, if the loans are necessary for liquidity purposes. The insertion of the words just referred to only served to confirm in specific language the intention that the CDIC would act as an agency and would not use its deposit insurance funds for this purpose, because its deposit insurance operations are quite separate from this kind of thing.

Senator Connolly (Ottawa West): Yes, I can see that.

The Chairman: If you will remember, on the first round when we were dealing with this bill, we got into some discussions about the language that is used in the provision for regulations, and the wording of clause 32 on page 41 of the bill is as follows:

> 32. The Governor in Council may make regulations to ensure the carrying out of the provisions of this Act.

The committee at that time had a view that the word "ensure" was an unfortunate word to use in that connection. What does it mean? Does it mean guarantee?

Senator Flynn: It is not a new expression.

The Chairman: No. Well, in some connotations it is, yes, but not here.

At any rate, we have come up with a suggested rewording of clause 32 of which Mr. Humphrys approves. We suggest that Bill C-3 be amended by striking out clause 32 on page 41 and substituting the following:

> The Governor in Council may make regulations necessary for the carrying out of the provisions of this Act.

So we are not writing in any assurance or any guarantee or anything else. Of course you know what we are still on the hunt for all the time: we do not want under the guise of regulations something approaching legislation—in other words, substantially altering or adding to the provisions of the bill. So we have this as "necessary for the carrying out of the provisions of this Act." And that certainly keeps it away from so legislating.

Senator Flynn: "Necessary"? If the section is badly worded, it would be necessary to adopt regulations to ensure the carrying out of this act.

The Chairman: Well, however badly worded or however well worded the section may be, senator...

Senator Flynn: I think it means the same thing, Mr. Chairman, with all due respect.

The Chairman: It cannot mean the same thing as "ensure".

Senator Connolly (Ottawa West): Would the word "required" be any better?

The Chairman: The word "necessary" is one word that is used at times in this connotation.

Senator Connolly (Ottawa West): I think we should stick with words that have been used because they have been before the courts.

The Chairman: Mr. Humphrys is prepared to accept this change. He feels it is not going to embarrass him.

Senator Macnaughton: The burden is on Mr. Humphrys to show the necessity. Under "ensure" he interprets.

The Chairman: Well, if Mr. Humphrys is ready to become an interpreter...

Senator Macnaughton: No, I was arguing that I think the word "necessary" is a much better word. It is a much fairer word than the word "ensure". The word "ensure" implies compulsion.

Mr. Humphrys: I think that is probably a fair comment, Mr. Chairman.

Senator Flynn: In my opinion it gives full discretion to the Governor in Council to adopt any kind of regulation under this act, and amend it, add to it and subtract from it. I think we have always been very critical in the Senate and in this committee of giving the Governor in Council such wide powers of regulation. Usually we say that the Governor in Council may make regulations to do this, that and the other thing, having to do with certain provisions of the act.

The Chairman: You are overlooking something, Senator Flynn. The authority the Governor in Council has is to make regulations necessary for the carrying out of the provisions of the act. He cannot add to the provisions of the act. He can just provide machinery for the effective operation of the act.

Senator Connolly (Ottawa West): He has to act within the provisions of the act.

The Chairman: That is right.

Senator Connolly (Ottawa West): He cannot go beyond that.

The Chairman: If the act is badly drawn, he has to get an amendment. He cannot amend it by regulation.

Senator Flynn: I think if you had a wording such as this, "the Governor in Council may make regulations to ensure the proper administration of the provisions of this act", there would then be some limitation upon him. But simply having it as, "necessary for the carrying out of the provisions of the act", would not be good enough. It may be the intention that the Governor in Council find in the wording...

The Chairman: With all due respect, Senator Flynn, I do not see it that way. First of all, I shudder at the word "ensure".

Senator Flynn: If you would say "the administration of the provisions of this act" you would know where you were going.

Senator Connolly (Ottawa West): I do not often disagree with Senator Flynn, but I do now.

Senator Flynn: You do occasionally.

The Chairman: Well, Senator Flynn, we have to bow in the direction of Mr. Humphrys because he is going to be working on these regulations and I am not at all sure that he would like to have that language "for the purposes of the administration of the Act".

Senator Flynn: Well, if you do not accept my suggestion, I will not be offended, but I wanted to be on record about it. I think that this wording gives too wide powers to the Governor in Council.

The Chairman: Well, Mr. Humphrys has said that the wording is satisfactory to him and that the word "necessary" may be more apt than the word "ensure".

Senator Flynn: Of course Mr. Humphrys is bound to take this attitude because he does not want to have his hands tied. In any event I think this wording which we find too often in our legislation is too wide and the provision to make powers under the regulations should be defined and should be more precise and should not go as far as to suggest that the Governor in Council may add to or subtract from them.

The Chairman: Do not the words "for carrying out the provisions of this Act" mean for the purposes of administering the Act?

Senator Flynn: Well if you say, "the intention was to do this and therefore in order to clarify certain sections I have to adopt the regulations", then it is up to the concerned party to go to Court and contest the decision of the Governor in Council and that could be quite a task. Anyway, having registered my objection, I will leave it at that.

The Chairman: Then, what is the view of the committee, that we should strike out present section 32 and insert the one which I have read, that is:

> The Governor in Council may make regulations necessary for the carrying out of the provisions of this Act.

Hon. Senators: Agreed.

The Chairman: Now, Mr. Humphrys, were there any other provisions or questions that were raised with which we have not dealt even to the extent of considering them and deciding not to do anything?

Senator Flynn: Before you put that question to Mr. Humphrys, may I put a question which flows from an amendment made earlier to section 2, subsection (3)(d). You remember we deleted the exemptions concerning borrowing from the bank and we added another subsection which exempted borrowing from the spouse, father, mother and so on and so forth. Is this logical when you consider the prohibition to make loans in section 9 where this prohibition is limited only to the spouse or children? Why do we have a certain group mentioned in this first section I mentioned and a rather restricted group in a section which is to me more important for the control because it would mean a loan could be made to the brother of a substantial shareholder or the father and mother of a substantial shareholder. I was wondering whether we should not extend the prohibition to the same extent as we have granted the exemption?

The Chairman: What we have said in section 2 is that where the lender to a company is a member of the family as we have enumerated it, that borrowing shall not count in determination as to whether or not the company is an investment company. Now in section 9 we are approaching it from the point of view of the investment company itself and there is a prohibition against the investment company knowingly making an investment by way of a loan to a director or officer of the company or a spouse or child of such director or officer.

Senator Flynn: I was wondering whether we should not go as far as including the father and mother.

The Chairman: Well, the word "spouse" does include husband or wife.

Senator Flynn: Well, does it mean that they can borrow from a brother?

The Chairman: I shall ask Mr. Humphrys to deal with this.

Mr. Humphrys: Looking at section 9 first, Mr. Chairman and honourable senators, there is a prohibition against investments or loans where there is an implication of a conflict of interest. And in considering the problem that it poses to companies in their lending activities, it is a question as to how far you should expect them to know about family relationships. We started from the concept that everybody in the company should know who the directors and officers are, and the immediate household, if you like, of the directors and officers, being the spouse and children create a unit where it is very easy to manipulate the loans from one member to another. Therefore we thought it reasonable to propose a prohibition in those terms. But to go further and expect the loan officers of the company to know who the brothers of the directors and officers are or who their parents are and spreading out the family was creating, perhaps, a situation that was more than reasonable to ask for in a statutory prohibition. So that the proposal is limited to the members of the immediate family.

Now, coming to this other question that we considered this morning, Mr. Vineberg suggested that there were a very large number of companies made up on the basis of this close family connection, and he thought that if there was not a statutory recognition of this and a statutory exemption we might be faced with a flood of applications for exemption. Now we have no information which would let us know as to whether there are many companies of this type or not, but Mr. Vineberg expressed views about it and I feel that he must have good reason for doing so. So the question then was how far we should go, and you can start with a very limited group such as now appears in section 9, a substantial shareholder, his spouse and children. But one of the particular cases referred to was that of parents staking the children, so it seemed reasonable to put the parents in. But then where do you go from there? What is the situation with the brothers and sisters? You could go on and say what

about brothers-in-law or sisters-in-law or sons-in-law or daughters-in-law or uncles and aunts. So we did not feel we should propose a tighter prohibition in section 9.

The Chairman: There is one other point I want Mr. Humphrys to comment on. Mr. Vineberg raised the question the last day about the time provided for doing things and he referred in one case to section 5 of the bill, and particularly to subparagraph (8) on page 9. I should like Mr. Humphrys to explain that because some people may read that as providing a limitation to the effect that you must file your prospectus either at the time you borrow the money or within seven days. Now, this is not Mr. Humphrys' interpretation at all, and I think his interpretation is sound. Would you just explain it, Mr. Humphrys.

Mr. Humphrys: Yes, Mr. Chairman.

Where a company is borrowing under circumstances that do not require a prospectus, the section says that the company shall file with us, either before the borrowing or within seven days after, a statement of the nature and purpose of the borrowing in such detail as may be required by the Superintendent. So if a case arose where a company was going to the market pretty regularly in a pattern, every week or even every day, what we would ask for would be a general statement of their policy in this regard, at the outset, and that would be sufficient to cover the whole pattern of borrowing. We would not expect a statement to be filed every time they borrowed money. If it were a special situation that was not part of the continuing pattern, then we would ask for information, but we did not contemplate that companies would have to file with us every time they borrowed.

Senator Connolly (Ottawa West): In other words, a long-term borrowing or issue of debentures, or something like that, might require special attention, but short-term borrowings, on a day-to-day basis, would not?

Mr. Humphrys: All we would want is a general statewhat they were doing in their borrowing policy.

The Chairman: There is no limitation on the use of the word "prior to the borrowing" so they can start back at any period of time where they have formulated their policy in relation to that, and if it is a transaction where they do not have to file a prospectus, then they can file a statement with Mr. Humphrys. Then they have complied with the provisions of the act, and it has not interfered with their convenience or anything else in the carrying out of their business.

There is one other item I would like you to make a comment on. Mr. Vineberg raised it. On page 28 he was concerned in section 18(2)(b) with the provision where:

> The Minister may, at any time and in respect of any certificate of registry, . . .
>
> (b) impose any conditions or limitations relating to the carrying on of the business of investment that he considers appropriate,

He was concerned that this might go so far as to enable you to lay down the rules and regulations in relation to investment. Would you develop that?

Mr. Humphrys: We would not interpret this as going so far. The purpose of asking for a provision such as this is in consistency with the other acts we administer where this kind of power is given to the minister. We consider that it is a very desirable tool in any supervisory legislation of this type, because it gives a way of requiring certain steps to be taken if they seem to be necessary in the particular circumstances, without having to invoke the almost overwhelming penalties or provisions in the subsequent parts of the statute.

From time to time we encounter cases where it is required to lay down a condition in relation to a particular company's operation, and this provides a way of doing it without really going to the extent contemplated in the subsequent sections. It is discretionary with the minister, but we have this kind of provision in our other acts and have administered it for a great many years.

I do not think, properly interpreted, it can be considered as permitting the minister really to legislate for companies, in general, through this device. It is a tool available to him to deal with special circumstances and, in our experience, is used very rarely. But I think it is an important tool to have as an intermediate stage in supervising companies.

The Chairman: And, Mr. Humphrys, the person who may be affected by any such direction that the minister would give has the right, under this very same section of the bill, and is entitled to the opportunity to discuss this matter and what the minister proposes to do before it is done.

Mr. Humphrys: Yes, Mr. Chairman.

The Chairman: This appears to cover all the things that were raised in the course of our consideration of the bill. I think we have fairly examined all the questions raised by those who made representations, and we may have introduced a few more of our own.

Now I put the question: Shall I report the bill, with the amendments which we have made?

Hon. Senators: Agreed.

The Chairman: I was going to suggest this as a method of procedure, that we will re-draft the bill, incorporating all these amendments, and then check it with Mr. Humphrys to make sure that we are in line with our understanding, and also have the benefit of the views of our assistant law clerk. That would mean that we would not be in a position actually to present the report until, say, next Tuesday evening. I would think that would be in order. We have made extensive amendments and, therefore, we want to be sure that they are properly reflected.

Senator Connolly (Ottawa West): The wording is very important here.

The Chairman: Is that agreed?

Hon. Senators: Agreed.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 12

WEDNESDAY, MARCH 3, 1971

Complete Proceedings on Bills C-184 and C-191,
intituled respectively:
"An Act to amend the Export Development Act"
and
"An Act to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act"

REPORTS OF THE COMMITTEE

(For list of Witnesses—See Minutes of Proceedings)

23498—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29).
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Orders of Reference

Extract from the Minutes of the Proceedings of the Senate, February 25, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Robichaud, P.C., seconded by the Honourable Senator Hays, P.C., for the second reading of the Bill C-184, intituled: "An Act to amend the Export Development Act".

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

The Bill was then read the second time.

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

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

Extract from the Minutes of the Proceedings of the Senate, February 24, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Argue, seconded by the Honourable Senator Molgat, for the second reading of the Bill C-191, intituled : "An Act to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act".

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, March 3, 1971.
(14)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 11:40 a.m. to consider:

Bill C-184, "An Act to amend the Export Development Act"

and

Bill C-191, "An Act to amend the Farm Improvement Loans, the Small Businesses Loans and the Fisheries Improvement Loans Acts".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Blois, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Everett, Flynn, Gelinas, Hays, Hollett, Kinley, Macnaughton, Walker and Welch—(17).

Present, but not of the Committee: The Honourable Senators Lafond, Sullivan and Urquhart—(3).

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

WITNESS: (Bill C-184)

Export Development Corporation:
Mr. H. T. Aitken, President.

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

The Committee then proceeded to the consideration of Bill C-191.

WITNESS: (Bill C-191)

Department of Finance:
Mr. F. C. Passy, Chief,
Guaranteed Loans Administration.

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

At 12:25 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Reports of the Committee

Wednesday, March 3, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-184, intituled: "An Act to amend the Export Development Act", has in obedience to the order of reference of February 25, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Wednesday, March 3, 1971.

The Standing Senate Committee on Banking Trade and Commerce to which was referred Bill C-191, intituled: "An Act to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act", has in obedience to the order of reference of February 24, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Minutes of Proceedings

Wednesday, March 3, 1971.

(24)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 11:40 a.m. to consider:

Bill C-184, "An Act to amend the Export Development Act"

and

Bill C-181, "An Act to amend the Farm Improvement Loans, the Small Businesses Loans and the Fisheries Improvement Loans Acts".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Blois, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Everett, Flynn, Gelinas, Hays, Hollett, Kinley, Macnaughton, Walker and Welch—(17).

Present, but not of the Committee: The Honourable Senators Lafond, Sullivan and Urquhart—(3).

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

WITNESS: (Bill C-184)

Export Development Corporation:

Mr. W. T. Aitken, President.

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

The Committee then proceeded to the consideration of Bill C-181.

WITNESS: (Bill C-181)

Department of Finance:

Mr. J. M. Fraser, Chief,
Capital Assistance Division.

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

At 12:20 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Peter A. Hayden,
Clerk of the Committee.

Reports of the Committee

Wednesday, March 3, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-184, intituled: "An Act to amend the Export Development Act", has in obedience to the order of reference of February 25, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Wednesday, March 3, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-181, intituled: "An Act to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act", has in obedience to the order of reference of February 24, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, March 3, 1971.

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce, to which were referred Bill C-184, an act to amend the Export Development Act, and Bill C-191, to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act, met this day at 11.40 a.m. to give consideration to the bills.

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

The Chairman: Honourable senators, we have for consideration Bill C-184, to amend the Export Development Act. Mr. Aitken, the President of the Export Development Corporation, is present. He has appeared before us on other occasions and we have always been very happy with him and the way he presents things, so the stage is yours at this moment to tell us what this bill does.

Mr. H. T. Aitken, President, Export Development Corporation: Mr. Chairman and honourable senators, I would like, if I may, to take three or four minutes just to give you the brief background and history and the present position of the corporation.

The Export Credits Insurance Corporation, which was the predecessor corporation of the Export Development Corporation, was established in 1945, and we had only one facility, we provided export credits insurance; that is, we insured the foreign accounts receivable. We insured both consumer goods sold on short term credit, up to 180 days, and capital equipment sold on medium-term credit, up to five years.

Then in 1960 the Government decided that we should provide long-term financing facilities. So, for the past 10 years we have been financing on long-term capital projects abroad, substantial capital projects where Canadian exporters of capital equipment can supply the equipment on a competitive price, delivery, servicing basis, but where they could not make the sale unless long-term financing were made available. The Export Credits Insurance Corporation provided financing from 1960 on.

In 1968 and 1969 it was decided that the entire act should be reviewed, and inasmuch as the Export Credits Insurance Act had been amended some 15 times in its 25 years of existence, it was felt that we should have a new act. Also, to reflect the fact that the name Export Credits Insurance Corporation did not clearly describe our entire facility, it was decided to change our name, and we are now called the Export Development Corporation, which is more indicative of the operations and facilities we are providing to Canadian exporters.

At the time of drafting the legislation for the Export Development Act it was decided that we should add a third facility, regarding Canadian investors establishing, say, a branch plant in another country, in a developing country, by means of which the Export Development Corporation should be authorized to insure that investment in the developing country against the risk of expropriation or confiscation, against the risk of war or revolution in that country which might destroy the assets, or against the inability to transfer profits or repatriate capital.

So now the Export Development Corporation does three things: it provides export credits insurance for consumer goods and capital equipment; it provides long-term financing for major projects abroad, for exports of Canadian capital equipment, and it provides foreign investment insurance. That is what the present Export Development Act authorizes.

The present bill seeks approval to increase our capital, increase our ceiling of liabilities, make certain changes with respect to the operation of foreign investment insurance, add an additional director from outside the Public Service, and certain other consequential amendments.

With regard to the director outside the Public Service, the Export Credit Insurance Corporation had eight directors, all of whom were in the Public Service. The Export Development Corporation has 12 directors, eight of whom are from the Public Service and four from outside.

We have been so happy with the contribution of outside directors to our deliberations that the present bill proposes that instead of having eight from the Public Service and four from outside, we will have seven from the Public Service and five from outside.

The capital of EDC today is $50 million, made up of $25 million capital stock and $25 million donated capital surplus. The bill asks that our capital be increased to $100 million, made up of $75 million capital stock and $25 million donated capital surplus.

The present ceiling in the act for insurance is set at a certain number of times the capital. Were that figure to remain in the act our ceiling would become $1 million, which is not required under today's circumstances.

So we are removing the multiple, leaving the ceiling as it was. When the Export Development Act was introduced a year and a half ago the ceiling which had been established under the previous Export Credit Insurance Act was increased by 150 per cent. So the proposed ceiling for export credit insurance at the corporation's risk is in this bill established at $500 million.

Under long-term export financing the present ceiling for the corporation to lend on its own account is $600 million. We are seeking an increase in that figure by $250 million up to $850 million. The Government has authority to instruct us to lend. It gives us the money and we are the medium through which financing is provided. At present the ceiling under the Export Development Act is $200 million. It is proposed to increase that figure by $250 million to $450 million. So instead of having at present $800 million for long-term financing, we will have $1.3 billion.

The Chairman: On that point, when the Government directs you, within certain liabilities, do they provide the money at that time or do you have to find it within the limits authorized by the statute?

Mr. Aitken: They provide the money, but under the ceiling of the statute. With regard to foreign investment insurance, the present act requires that there be an undertaking of the host country that should EDC have to pay a claim to a Canadian investor, EDC would be recognized by the host country without having all the rights and authorities of the previous investor, and that in addition EDC would get no less favourable treatment than any other investor. This is a statutory requirement. We have found that this inhibited our operations.

We have in process some 25 negotiations with host countries to try to develop this type of agreement, with singular lack of success, except in two cases. We have been able to convince Barbados and St. Lucia that they should give us such undertakings.

The present bill proposes that that requirement be eliminated; but it is substituted by another requirement that the Minister of Trade and Commerce must be satisfied that the laws, legislation and economic and political climate of the host country is such that the provision of insurance for the investment would be reasonable.

The Chairman: Concerning protection of investment in foreign countries, how practical do you think that is? Is your liability to the person who suffers?

Mr. Aitken: Oour liability is to the investor.

The Chairman: Is it a direct liability, that you undertake to reimburse without any dependence on how successful you might be in that country to recoup yourself?

Mr. Aitken: We do not protect the exporter against any commercial risk. If his business goes bankrupt, that is his baby.

The Chairman: But this insurance for investment is political?

Mr. Aitken: That is correct.

The Chairman: And if there were any form of revolution, you might lose that money?

Mr. Aitken: Yes.

The Chairman: And if there were any change in the climate that might lead to socialism and a failure to recognize obligations, you would be stuck?

Mr. Aitken: Correct. The United States has provided this type of insurance for the past 20 years. They have a ceiling of $7 billion. We are seeking $150 million. They have taken in something like $75 million in premiums, and they have paid out, according to the latest official figures that I saw, something like $600,000 in claims. They have two or three claims at the moment. The famous, say, Peruvian case was not an insured investment.

The Chairman: What has been your experience, in the operation of the act with relation to all these different coverages that you provide?

Mr. Aitken: Over the past 25 years we have insured $3.5 billion, of which roughly two-thirds was at the corporation's risk and one-third at the risk of the Government. The Government has the same authority under the insurance operation as they have under long-term financing, in that in certain circumstances they can tell us to insure where our board turns it down.

Under the Government's program we have never had a claim. Under the corporation's business, where our board authorizes insurance, we have paid out claims in the amount of something like $16 million and we have recovered slightly more than $12 million. So there is roughly $4 million outstanding, of which we have written off as irrecoverable $1.5 million. If we consider our premium income, less our net loss, less our operating expenses, we are in the black somewhere between $4 million and $5 million, which is a very modest sum in relation to our current liabilities which are in excess of $200 million. That is the insurance operation.

In the long-term financing we have been lending for 10 years. We have signed contracts totalling $562 million. We have had six requests for extensions, for roll-overs, in five countries. We have been able to come to an arrangement with the borrower who is in difficulty, and I am very happy to tell you that as at December 31, 1970 there was not a single loan that we made—and we made 84 loans in 28 countries—that was in default.

Senator Connolly (Ottawa West): Do you lend at market rates?

Mr. Aitken: Yes. The instructions from our board are that we have to lend at the cost of money to us plus one-half of one per cent. We try to get what the market will bear, because there are certain cases where in order to help Canadian exporters compete with those from the UK, France, Italy or Germany, where the interest rate provided may be more fabourable than the going market rate...

Senator Connolly (Ottawa West): You subsidize?

Mr. Aitken: We do not subsidize. We try to meet them. We try to help Canadian exporters be competitive. All the business that we did up to about two years ago was at 6 per cent. That was then the competitive rate. It was

a non-subsidized rate. The money was costing the board 5½ to 5¼ per cent; but when the rates went up astronomically over the past couple of years we agreed to provide finance in certain cases where clearly we would lose money. By the way, we do not publish the rates at which we lend. However, we signed a financing agreement within the last few months in which the interest rate to us is 9 per cent.

The Chairman: Is your insurance of investments a recent innovation?

Mr. Aitken: Yes.

The Chairman: Have you had any claims, or losses?

Mr. Aitken: No, we have issued only one policy.

The Chairman: Is it confidential?

Mr. Aitken: No, because any insurance we issue under that section of the act is by authority of order in council, except for a delegated authority by which the board can do it if the amount involved is less than $1 million. In this particular case it was for a hotel development in St. Lucia, where the Canadian interest is in the order of $2.4 million. We are providing cover for 85 per cent of that. The policies are issued on a co-insurance basis; the investor carries 15 per cent of the risk and we carry 85 per cent. Senator Paul Martin was down there a couple of weeks ago and told me it was a first class investment, a first class place to stay.

Senator Connolly (Ottawa West): He should know.

Senator Aird: Mr. Aitken, can you tell me how you came to decide upon the proposed limits? Is this based on your forecast of a program over a period of years, or will you be back in two years saying the limits are inadequate?

Mr. Aitken: It is based on past experience and future prospects. The present hope is that the ceilings we are seeking will carry us forward until the end of 1974. We have had forecasts made of the demands for insurance and financing.

Senator Aird: One of the reasons for the question is that in hearings before the Standing Senate Committee on Foreign Affairs we had International Nickel discussing their prospects for a new development in New Caledonia. They were asked if they had communicated with the Export Development Corporation and the answer was no. The reasons were not developed, but it would seem that this is the kind of situation in which your corporation should be interested. Do you pursue this kind of business, seek it out?

Mr. Aitken: We are responsive. When we started we had a ceiling of $50 million. It was an experimental situation. Over the past 18 months we have had 200 inquiries, totalling about $300 million. Mr. Culham, who is the head of our Foreign Investment Insurance program, has spent some time with the other countries who provide foreign investment insurance and it appears that maybe 30 per cent or 40 per cent of the inquiries result in active investment. So, on a $300 million basis if we get 30 per cent we would have done $90 million worth of business. We are seeking a ceiling of $150 million.

However, the cabinet decided when approving the legislation that we should do two things: (a) we should insure only to developing countries, that we would not insure, for example, an investment in Germany, but we would insure a Canadian company in Latin America, the Middle East, the Far East or Africa; (b) we should not provide insurance for any investment in excess of $5 million.

Senator Aird: What is your criterion for a developing country?

Mr. Aitken: We use the list of the Development Assistance Committee of the OECD.

Senator Carter: What proportion of the loans have gone to developing countries?

Mr. Aitken: With regard to foreign investment insurance, we have issued only one policy so far. With regard to long term financing, I would say that 90 per cent of all our financing has gone to the developing countries.

We made one loan quite recently, which will be of interest to the senators. We put up $13.5 million to finance a steel mill into the United Kingdom. Isn't that something; coals to Newcastle. This is a patented, Canadian-developed process known as a mini mill which apparently is capable, by using scrap steel, of producing a type of product which is a by-product or an end product of a big mill. This project, which will use Canadian equipment and know-how exported from Canada to the United Kingdom, involved a credit from EDC to the borrower in the UK, which has to be repaid on a 10-year basis.

Senator Desruisseaux: Mr. Chairman, this makes the Province of Quebec very envious.

Mr. Aitken: But, senator, much of the business we have done has come from the Province of Quebec.

Senator Connolly (Ottawa West): In other words, as far as Quebec or any other province is concerned, you are facilitating the sale abroad of products produced in Canada.

Mr. Aitken: The sale of equipment in Canada which will ultimately produce in the U.K

Senator Connolly (Ottawa West): This question arises from our work in the Standing Senate Committee on Foreign Affairs. When I was a member of cabinet I often used to wonder about this corporation insuring loans in South American countries, such as Chile, where Canadian organizations are selling capital equipment in areas where Canada is an important manufacturer of the product of the use of this equipment, such as paper mills. I do not ask this question in any carping sense, but are we by this process endowing a foreign country to the extent

that we will make it competitive enough to squeeze us out of markets and perhaps damage our economy?

Mr. Aitken: Senator, it is a very good question and one which concerns us. However, we feel that if we make the loan to purchase equipment in Canada on a basis comparable with the term and at the rate of interest which the borrower or buyer could get from other countries, we tend to benefit rather than hurt the Canadian economy, even in the case of pulp and paper mills.

Our very first transaction was in Chile, with a company called Industrias Forestales. It was in the order of a $30 million pulp and paper mill and we put up the foreign exchange costs of about $14 million. We were in competition for that business with the Germans and we just managed to beat them out on a question of price. We offered the same credit terms, the same rate of interest, but my feeling and contention, which I believe is supported certainly by the manufacturing community, is that to the extent our financing is provided to help produce capital equipment sold abroad it enhances the capacity and capability of the Canadian manufacturer. This should ultimately tend to benefit the purchaser of that type of equipment in Canada who, admittedly, will be producing pulp and paper in competition with Canada, but today is selling that pulp and paper, made with Canadian equipment, into Mexico.

There is no doubt that it would appear at first blush that it is perhaps creating competition for the Canadian manufacturer of the same end product, but the fact remains that if we do not do it, someone else will and their manufacturers will have more business and exports and be better off as compared to ours.

The Chairman: Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Chairman: We shall now consider Bill C-191, to amend the Farm Improvement Loans Act, the Small Businesses Loans Act and the Fisheries Improvement Loans Act.

Mr. Passy, Chief, Guaranteed Loans Administration, Department of Finance is here.

Mr. Passy, will you just tell us what you propose to do, and how successful you have been in what you have done so far?

Mr. F. C. Passy, Chief, Guaranteed Loans Administration, Department of Finance: Mr. Chairman, the purpose of this bill is to extend existing legislation on the three guaranteed loans programs for the three areas mentioned—farmers, small businesses and fishermen. The present legislation is due to expire on June 30, 1971, and the main purpose of this bill is to extend it for a further three years in each case, and to provide new loan pools for the chartered banks to lend under the programs. I would imagine most honourable senators are aware of these three programs, which have been running for a number of years. The farm program has been going since 1945 or 1946, the fisheries program was introduced in about 1955, and the small business one in 1961. All three programs are designed to facilitate the availability of credit for use by these three groups for a wide range of capital projects.

The Chairman: Take the first group, the farm improvement loans: what would be the total of those, and how have they worked out?

Mr. Passy: The farm program has probably been the most successful. There has been a very substantial sum of money loaned under the farm program. Since inception a total of $2.3 billion has been loaned.

Senator Connolly (Ottawa West): By "inception", what year do you mean?

Mr. Passy: Nineteen forty-five. The normal annual rate, you might say, for this program over recent years has been about $200 million a year. It has dropped off. It dropped off in 1968 because the interest rate then in force, fixed in the original legislation, was 5 per cent, and by that time 5 per cent was not a particularly attractive rate, in 1968, so lending dropped off. The act was amended, along with the other acts, in 1968 to remove the fixed interest rate in legislation and provide for a formula related to the yield on Canada Bonds which would provide a rate more in line with the current rates at that time. At present the rate on all three programs is, I think, 8½ per cent.

Senator Connolly (Ottawa West): It is related, is it not, to the cost of money?

Mr. Passy: Plus one per cent.

The Chairman: What has been your experience? You have loaned $2.3 billion over that period. What losses, if any, have there been?

Mr. Passy: The loss on all programs is less than one-tenth of one per cent. Certainly that on the farm and fishery ones is a good deal less. The loss on the small business program is perhaps slightly more—just over one-tenth of one per cent.

The Chairman: The $2.3 billion is in relation to the farm improvement loans?

Mr. Passy: That is correct.

The Chairman: What is the total figure on which you have determined losses of one-tenth of one per cent?

Mr. Passy: That is in respect of the farm program. The losses have amounted in total to $3 million, of which about $0.5 million has been recovered.

Senator Connolly (Ottawa West): So the net is $2.5 million?

Mr. Passy: Right.

The Chairman: And on the other two programs?

Mr. Passy: On the small business program the total of loans to date is just under $200 million, and the claims paid amount to $800,000 odd. There has been a small recovery.

The Chairman: What do you say the loss was?

Mr. Passy: The loss was $870,000.

Senator Welch: What is the limit on a small business?

Mr. Passy: The maximum loan is $25,000.

Senator Connolly (Ottawa West): What is the security?

Mr. Passy: They normally take section 88 security under the Bank Act, or a chattel mortgage on the equipment purchased, or mortgage security if they feel it is required.

Senator Connolly (Ottawa West): When you have been able to make recovery, is that because of the security?

Mr. Passy: Before the claim is paid the security must be realized upon. Our losses are net after the security has been realized. In many cases the security may well be adequate at the time the loan was made. I am thinking here, for example, of a tractor or thresher on a farm; the man is taking five years to repay it, and after two or three years of depreciation the sale would not cover it.

The Chairman: During hearings we conducted on the White Paper on taxation we were told by small business people who appeared, and also by the banks who appeared, that full use was not being made by small business of this facility. I think the suggestion was that they could do better elsewhere, or they did not have the security that would enable them to borrow. Have you any comment to make on that?

Mr. Passy: I would make the general comment that part of the rationale in merely extending these programs at the moment is that on all three we are at present conducting a major review of the effectiveness of the programs. It will be impossible to complete this by June 30, 1971. Therefore they are being extended to allow completion of this review.

The Chairman: What are the points at issue?

Mr. Passy: Under the small business loans program, particularly, there is criticism in relation to the definition of a small business itself. Under the present act it means a business whose gross annual revenue is, I believe, $500,000. This was set three or four years ago, and it is now reckoned to be unrealistic in terms of a small business today.

Another point is the loan ceiling of $25,000, which is considered to be inadequate for the purpose. For example, a motel wishing to build two or three more units could a few years ago have covered the cost with the $25,000. Today the same units would cost in excess of that.

There are a number of other points. The loan terms and the security have also been criticized. There is a maximum loan term of 10 years on most of these programs. Some of the items are less; vehicles and so on are only three years.

The whole construction of the legislation is now under review. It is a major chore and will take some time. We are receiving representations from interested groups, all of which are being considered. As I say, it proved impossible to complete this before the 30th of June and it is necessary to keep the acts going in the interim.

Senator Connolly (Ottawa West): In other words, in the next three years we will come back to provide a radically altered act?

Mr. Passy: I would hope so. I am sure we shall.

Senator Welch: Could I ask a question about small business loans? When do you consider it a small business loan?

Mr. Passy: The act at the moment limits it to certain types of business—manufacturing, retail, wholesale, transport, and communications. There are specific businesses nominated and in order to qualify within those types of business the gross revenue...

Senator Welch: Do you set your sights on the capitalization of a business, or how do you define it?

Mr. Passy: It is the growth revenue basis and the growth revenue figure in the act at the moment is $500,000 as the maximum. Any business with a growth revenue of more than that at the moment would not be considered a small business.

Senator Welch: If the business is, say, a $500,000 one, a $25,000 loan would be a small loan.

The Chairman: Nowadays, yes.

Mr. Passy: The original definition was $250,000 gross revenue, and I believe two or three years ago it was raised to $500,000, and at that time the loan limit was not changed. It had been $25,000 throughout.

Senator Welch: Then I suppose this is recommended through the local bank, is it?

Mr. Passy: An essential feature of these programs is that it is through the local bank or other designated lender. Some credit unions, and some trust, loan and insurance companies are eligible to make these loans, if they apply for designation, and a number have done so.

Senator Welch: I cannot see where a $500,000 business could be recommended by the local bank for $25,000. I think it should be raised to the vicinity of $100,000.

The Chairman: That is what Mr. Passy has been saying, that this whole thing is under review now, because in the light of today's money situation, et cetera, the revenue limit, if it is to be continued, is too low, and the loan limitations are too low. That is the public concept, I think. Therefore, you could look forward, when this study is complete, to some further legislation. It may take an entirely different approach.

Mr. Passy: It may take an entirely different approach.

Senator Carter: What is the average loan to small businesses? I know that $25,000 is the maximum.

Mr. Passy: The average loan at the moment is about $11,000.

Senator Carter: So you are lending only about 50 per cent of the maximum now.

Mr. Passy: On average.

Senator Carter: Is not part of the trouble with the Small Business Loans Act that there are restrictions as to the purposes for which the loan can be given? You cannot get a loan for anything. You can get it only for certain purposes. Although a businessman may need money, if he cannot use it for a particular purpose, he cannot get it.

Mr. Passy: That is correct. That is another of the areas to be looked at, the purposes for which the present legislation permits loans. There are no working capital loans, for example.

Senator Carter: Perhaps the area should be extended.

Mr. Passy: I would not like to say at this stage. Certainly we are receiving representations that the area should be extended but we have not come to any conclusion yet.

The Chairman: This study that the witness talks about embraces both the limitations on the classes of business and the size of the loans, and also the gross revenue base, and I suppose it involves the question of whether that is the basis that one should apply. All these factors are under review.

Mr. Passy: Yes. Even the question of the guarantee system is also under review. The whole area is under review.

Senator Cook: Also, the borrower has to show that he has a good purpose, that it is not a loan to keep him from going bankrupt.

The Chairman: Would you turn now to the fisheries area?

Mr. Passy: The total lending there is approximately $10 million and the losses have been $13,000. I should mention here that all these acts have considerable facility for variation of loan terms. I have given you the actual loss ratio here. There is an interim stage which we call a default stage, where the loan has gone into default. At that stage the bank will endeavour to revise the borrower's terms in order to allow him longer to pay, and so on. This is done in a fairly large number of cases. It does reduce the ultimate loss ratio.

The Chairman: It spreads out the period for repayment.

Mr. Passy: That is right.

The Chairman: And makes the instalment payments smaller each year and on that basis the borrower is able to continue to be in business.

Mr. Passy: That is right.

Senator Welch: What is the limit on fisheries loans?

Mr. Passy: $25,000.

Senator Welch: That is also for $25,000. I did not ask the limit on the farm loans.

Mr. Passy: The farm loan is $15,000 for each of the purposes specified in the act, one of which is for land purchase—that is, acquisition of additional land to an existing farm. If that is one of the purposes for which he has loans in the year, he may go to $25,000.

Senator Connolly (Ottawa West): In that case, do you take a mortgage on the land?

Mr. Passy: Yes.

Senator Carter: I would like to know the average of the fisheries loans, if that is available.

Mr. Passy: The fisheries loan average is a little difficult to say just now. It used to run at about $3,000 or $4,000 when the loan limit was $10,000. It is only 18 months ago that the limit was raised to $25,000 and we have not really got sufficient experience with the new loan limit to know where the new average is. It is rather difficult to give it now.

The Chairman: Are there any other questions? Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Chairman: Thank you very much, Mr. Passy. This concludes our work for today.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 13

WEDNESDAY, MARCH 10, 1971

Complete Proceedings on Bill C-217,
intituled:
"An Act to implement an agreement for the avoidance of double taxation with respect to income tax between Canada and Jamaica".

REPORT OF THE COMMITTEE

(For name of witness—see Minutes of Proceedings)

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23500—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 3, 1971:

"Pursuant to the Order of the Day, the Honourable Senator Denis, P.C., moved, seconded by the Honourable Senator Giguère, that the Bill C-217, intituled: "An Act to implement an agreement for the avoidance of double taxation with respect to income tax between Canada and Jamaica", be read the second time.

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

The Bill was then read the second time.

The Honourable Senator Denis, P.C., moved, seconded by the Honourable Senator Fournier (*de Lanaudière*), that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, March 10, 1971.
(15)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider:

Bill C-217, "An Act to implement an agreement for the avoidance of double taxation with respect to income tax between Canada and Jamaica".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Aseltine, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook and Hollet—(10).

Present, but not of the Committee: The Honourable Senator Denis—(1).

In attendance: E. R. Hopkins, Law Clerk and Parliamentary Counsel and P. Godbout, Assistant Law Clerk, Parliamentary Counsel and Director of Committees.

Witness:

Department of Finance:

Mr. R. A. Short, Chief,
International Tax Policy Section.

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

At 10:20 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, March 10, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-217, intituled: "An Act to implement an agreement for the avoidance of double taxation with respect to income tax between Canada and Jamaica", has in obedience to the order of reference of March 3, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, March 10, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-217, to implement an agreement for the avoidance of double taxation with respect to income tax between Canada and Jamaica, met this day at 9.30 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, this will be a short meeting. We have one bill before us, Bill C-217, dealing with the tax convention with Jamaica.

Senator Aseltine: Do we already have a treaty with Jamaica?

The Chairman: No.

We have with us this morning Mr. R. A. Short, Chief of the International Tax Policy Section of the Department of Finance. Senator Denis gave an explanation of the bill on second reading. I take it he can assume that we wither listened to it or read it. Do you have anything more you want to add at this time, Senator Denis?

Senator Denis: On second reading Senator Grosart asked me for a list of those countries with which Canada has similar agreements.

The Chairman: I suppose we can get that from Mr. Short.

Senator Denis: Perhaps Mr. Short can give the names—he gave me a list—and I can repeat the information on third reading so that it appears in *Hansard*.

The Chairman: Yes, you could give the list on third reading. Do you have that list, Mr. Short?

Mr. R. A. Short, Chief, International Tax Policy Section, Department of Finance: I did send a list across. I do not have a copy of it myself but I can recite the names of the countries.

Senator Denis: Perhaps you would take my copy, Mr. Short.

Mr. Short: Thank you very much. Alphabetically the list is as follows: Australia, Denmark, Finland, France, the Federal Republic of Germany, Ireland, Japan, the Netherlands, New Zealand, Norway, South Africa, Sweden, Trinidad and Tobago, the United Kingdom and the United States. The total is fifteen.

The Chairman: Perhaps we should top this off by having a very short statement from Mr. Short as to the points that are covered by this proposed convention. Would you develop this, Mr. Short?

Mr. Short: By way of background I should say that this is not a tax treaty similar to those that we have with the 15 other countries. We have referred to these as comprehensive tax agreements which cover all aspects of income taxation. This agreement is a limited agreement entered into for the specific purpose of dealing with a number of problems that have arisen because of a reform in the Jamaican tax system, as it affects the taxation of company profits and distributions in Jamaica. It is not a comprehensive agreement embracing all aspects of income taxation, simply because until the Canadian tax reform is settled it is difficult to expect Canada or any other country to negotiate on the basis of a system the shape of which is unknown at this time.

So this particular agreement covers dividends and provides a restriction in the rate of with holding tax which will be imposed on those dividends. It covers management fees and technical service fees and a number of other similar type payments.

It also covers the salaries of teachers and it covers the income of non-residents in the form of salaries and wages from employment.

The Chairman: The teachers, I take it, would be teachers who are engaged in teaching in Jamaica?

Mr. Short: Yes, that is correct.

The Chairman: And if they have a residence in Canada, it is to exempt the income by way of that salary in one of those countries?

Mr. Short: Yes, that is correct.

Senator Connolly (Ottawa West): Which one would it be?

Mr. Short: Jamaica. Jamaica has given up its right to tax those Canadians who visit Jamaica for a period of two years for the purpose of teaching.

Senator Connolly (Ottawa West): Is the rate in Jamaica a lower rate?

Mr. Short: Do you mean lower than the Canadian income tax rate?

Senator Connolly (Ottawa West): Yes.

Mr. Short: It varies considerably, depending on the personal circumstances.

Senator Connolly (Ottawa West): I wonder whether the provision would discourage teachers from going there.

Mr. Short: No, the purpose of the provision is to encourage teachers to go to Jamaica. The Canadian teacher, on going to Jamaica, may well give up his Canadian residence, in which case we lose interest in him from a tax point of view. He is then a non-resident and is not taxable in Canada, except on his income from sources in Canada. In the ordinary case he would take up Jamaican residence and would be subject to the full rate of Jamaican tax—unless, by virtue of this treaty or some other special arrangement, the teacher were exempt. And this treaty provides an exemption from Jamaican tax for those Canadians who go down there and teach.

The Chairman: Only if they retain their Canadian residence.

Mr. Short: No.

The Chairman: In any event?

Mr. Short: In any event, even if they become residents of Jamaica.

Senator Denis: Does it apply to new teachers and old teachers? Do they get that if they have been there two years? It is only if the teacher goes there for the first two years they are exempt? What about those who are already there?

Mr. Short: It would apply to those teachers who are down there now, but it would only apply for the two years of his teaching assignment in Jamaica. Therefore, if a Canadian had been in Jamaica for, say, ten years, this would not apply. The agreement does not extend back beyond the first of January 1970. But a teacher who had gone down last year, for example, would fall within the terms of this exemption.

The Chairman: Article 6 of the agreement, which is at page 7, provides:

> A professor, teacher or instructor who visits Jamaica for the purpose of teaching at a university, college, school or other educational institution in Jamaica and who is or was, immediately before that visit, a resident of Canada, shall be exempt from tax in Jamaica on any remuneration for such teaching received within a period of two years from the date on which he commenced teaching in Jamaica.

Senator Denis: Commenced.

The Chairman: Commenced yes. But the next application has two prongs to it. One is that he visits Jamaica and at the time he visited and took on this teaching job he was then or he was immediately before this visit a resident of Canada. That is one point. The other is that he gets exemption in Jamaica on this income for a period of two years from the date on which he commenced teaching.

Senator Denis: Commenced.

The Chairman: Yes, but I think the "commenced" must also be related to his visit to Jamaica.

Senator Denis: But that must be after or since January 1970. When one is teaching since 1969, he does not benefit there?

The Chairman: No. I raised this point because of something Mr. Short said, that Canada is not interested in the teacher teaching down there unless he retains his Canadian residence, so that he would be subject to some tax because if he is a taxpayer Canada is interested in him. All the visitor has to do is to cease to be a Canadian resident and then I would take it that this exemption from Jamaican tax may not apply?

Senator Hollett: He pays income tax in Canada during those two years, does he not?

Mr. Short: No. The wording here is that it is an exemption from Jamaican tax, not Canadian tax. In order to qualify for that exemption in Jamaica, he must be or must have been a Canadian resident immediately before he went to Jamaica. So that, if he retains his Canadian residence, of course he will qualify for the Jamaican exemption.

Senator Connolly (Ottawa West): But not being a Canadian resident, he would not be taxable here?

Mr. Short: If he is not a Canadian resident, he would not be taxable here on his Jamaican income.

Senator Burchill: And for the time he is in Jamaica he does not pay any income tax at all, either in Canada or Jamaica.

Mr. Short: For the two year period.

Senator Connolly (Ottawa West): And only on the Jamaican income.

Mr. Short: Unless he remains a Canadian resident.

Senator Denis: Most of the time they go there for a couple of years, or for three or four years, on a contract.

Mr. Short: I understand that very often they will give up their Canadian residence, when they go to Jamaica they will take the wife and family and establish Jamaican rather than Canadian residence, for that period.

Senator Connolly (Ottawa West): They give up their residence, they do not give up the Canadian domicile or citizenship. The citizenship is still retained. The residence in Jamaica qualifies them for exemption on the Jamaican income. That is, while they are teaching there for the period of two years, subject to the condition which the chairman has pointed out.

Senator Hollett: But he pays it in Canada during those two years.

Mr. Short: No.

Senator Hollett: During that period?

Mr. Short: No.

Senator Hollett: He does not pay any income tax?

Mr. Short: On his Jamaican income from teaching.

Senator Hollett: That is what I mean.

Mr. Short: Yes.

Senator Hollett: I am going right away.

Senator Cook: Does he pay in Canada?

The Chairman: If he maintains his Canadian residence, he pays income tax in Canada on the salary he earns in Jamaica, but he will not pay Jamaican tax.

Senator Cook: Some people seem to be under the impression that he is free of taxes altogether in the two years.

Mr. Short: He will be free of all taxation, if he ceases to be a resident of Canada.

The Chairman: Yes.

Senator Blois: What do you mean by "ceases to be a resident of Canada"? That he would not hold property here?

The Chairman: He gives up his residence here and does things that are reasonably consistent with giving up residence in Canada.

Senator Connolly (Ottawa West): As I understand it, the question of residence is a question of fact. The question of domicile and of citizenship is quite different from the question of residence. If a teacher goes to Jamaica and takes his family with him and sets up house there, or, if he is unmarried, and goes down there and lives for two years, he is resident there and he qualifies then for the exemptions.

Mr. Short: That would be correct.

Senator Carter: How long does he have to be in Jamaica before he ceases to be a resident of Canada? How does he terminate his residence in Canada?

The Chairman: Those are two different things. He terminates his residence in Canada by doing certain things in Canada that are inconsistent with being a resident of Canada. For example, if he has a home and sells it and does not establish any other residence in Canada; if he moves out of Canada everything he owns here in the way of tangibles; if he writes a letter to the Minister of Finance and says he has given up his residence in Canada; these are all ways of terminating his residence. But they have to be tangible things that you do to indicate a change of residence, otherwise you might end up with a residence in both countries. That is not unheard of.

Senator Cook: I see the point of the agreement in saving the teacher from double taxation, but I do not see the point of it saving him from any taxation at all.

The Chairman: He does that quite apart from this agreement. The Canadian does that by giving up his Canadian residence. Canada can no longer tax him. Then the question is whether, in those circumstances under this treaty, Jamaica does not tax him. It would appear to read in such a way that that is the situation for two years.

Senator Cook: That is quite right. I do not see what the rationale is for the Jamaican government to give up the right to tax a person living there who is not resident in Canada.

The Chairman: The answer is that they are so keen to get teachers.

Senator Connolly (Ottawa West): That is the answer. There is no question about it.

Senator Denis: But he is still a Canadian and has to pay Canadian income tax.

The Chairman: Not if he is not a Canadian resident.

Mr. Short: Taxation in Canada is based strictly on the concept of residence. Domicile and citizenship do not enter into it.

The Chairman: In the United States it is citizenship, but aliens also pay taxes as well.

Senator Blois: I have occasion to go to Jamaica once a year for a short stay and I know slightly a university teacher there who owns property in Canada. He will be coming back here for about two and a half months. What would happen to a person who has been in Jamaica for two years and still owns property in Canada and comes back to Canada for two and a half months?

Mr. Short: If I understand you correctly, senator, he would still come under the Jamaican exemption. Whether he would be exempt from tax in Canada is not a question I can answer, unless it could be determined on the basis of all the facts surrounding his case that he is in fact a resident of Canada. Under the facts that you have presented, he may or may not be a resident here. There is a constellation of factors that would have to be taken into account to determine whether or not he was a resident of Canada in the year.

The Chairman: We are agreed that the first thing he would have to do is take positive steps to terminate his Canadian residence. Then, if he wants to come in as a visitor for two and a half months in the year, his position would be sure.

Senator Cook: In that case the onus would be on him to prove that he was beyond the act.

The Chairman: Certainly.

Senator Aseltine: Referring to Article 6, what happens after the two-year period lapses? will he be taxed in both places?

The Chairman: If he is a Canadian resident during that two-year period, then at the end of that period, if he continues to teach in Jamaica, he would be subject to Jamaican tax. If he still retains his Canadian residence, he would be subject to Canadian tax. I would say that under our Canadian system of taxation he would have an offset.

Senator Aseltine: That would be double taxation.

The Chairman: No, I say he would have an offset. He would have a deduction of the tax he pays in the foreign jurisdiction in respect of the earnings there.

Senator Denis: Income tax is based on residence.

The Chairman: That is right.

Senator Denis: Then suppose the teacher in Jamaica has some other kind of revenues in Canada, does he pay tax on his other revenues in Canada?

The Chairman: Oh, yes.

Senator Denis: He is not a resident any more.

Mr. Short: We tax the non-resident on his income from sources in Canada. So that if he had dividends, interest, royalties, then these would be subject to the non-resident withholding tax that we apply to any non-resident. If he carried on business in Canada, then he would be subject to the income tax on profits of that business.

Senator Connolly (Ottawa West): It is not so different from the system that applies in the Department of External Affairs. For example, if a family goes abroad and rents its home furnished, then, I assume, they are taxed on the net income they get from that while they are abroad.

Mr. Short: Yes. There is a rather complicating factor there, however, in that if they are sent abroad and work for the Canadian Government abroad they would generally fall within the diplomatic immunity provisions to be exempt from taxation abroad. But we do not generally regard those people as having given up Canadian residence.

Senator Cook: It would be like the CBC. They would be clear of tax.

Mr. Short: Do I have to comment on that?

Senator Aird: Mr. Chairman, my question relates to CARIFTA. Mr. Short pointed out that we have an agreement with Trinidad and Tobago, and they are on the list at the present time. I see in item (g) of Article 2(1) that there is an extension, as I understand it, of the provisions of this so-called convention with members of CARIFTA. Is this convention therefore being extended, in fact, to all members of CARIFTA beyond Jamaica? In other words, is this going beyond the primary target of Jamaica? If it does, is there any conflict with the present agreement we have with Trinidad and Tobago which are included in CARIFTA?

Mr. Short: No. This agreement does not extend to any country other than Jamaica. The purpose of the definition of the "Caribbean Free Trade Association" in Article 2 has to do with some other specific provisions within the agreement itself. For example, on dividends the rate of withholding tax provided by the agreement will be 22½ per cent, or such lower rate as Jamaica may agree to with any other country outside CARIFTA. So that, for example, if the United States and Jamaica were to conclude a tax agreement which provided for a withholding tax on dividends of 15 per cent, then the rate under this agreement would automatically fall to 15 per cent. But Jamaica, being a member of CARIFTA, did not want to give us this most-favoured-nation protection, if you wish, for dividends paid by a Jamaican company to a shareholder resident in one of the CARIFTA countries. So that is the purpose of the inclusion of the definition of "Caribbean Free Trade Association". It is for the purpose of the article relating to taxation of dividends, and it is also for the purpose of Article 4 relating to interest, rents, management fees and that sort of thing. But it has no purpose beyond that.

Senator Aird: Is there any place in this convention where there is mention or a description of an "open company"?

The Chairman: They use the word in Article 7.

Mr. Short: The word "open company" is a term in Jamaican tax law. It refers, generally speaking, to a company whose shares are listed on the Jamaican Stock Exchange, and would correspond, I suppose, to a widely held or listed Canadian corporation. An open company in Jamaica is subject to a lower rate of company profits tax than is a company that is not an open company—perhaps a close company.

Senator Cook: What we used to call a private company.

Mr. Short: That is correct. The purpose of including a definition of "open company" in Article 7 is to ensure that a Canadian company or the Jamaican subsidiary of a Canadian company that is itself a widely held company in Canada will be taxed in exactly the same way as would an open company in Jamaica. Let me give you an example to bring it into clear perspective. An open company in Jamaica would be subject to a rate of company profits tax on its earnings of 30 per cent. If it is a closed company, it would be subject to a company rate of profits tax of 35 per cent. There are additional taxes as well. But if an open company in Jamaica were one whose shares were listed only on the Jamaican Stock Exchange, that would mean that a widely held Canadian company in Jamaica would not qualify as an open company, because its shares being listed on the Toronto or Canadian Stock Exchange would not meet the test set out in Jamaican law. It would therefore be subject to a company profits tax of 35 per cent. The purpose of Article 7 is to have this effect, namely, that a Canadian company such as one of the Canadian banks whose shares are widely held or listed on a Canadian Stock Exchange or its subsidiary in Jamaica will qualify as an open company and therefore will be subject to the lower tax applied to those companies. That is the purpose of Article 7.

Senator Aird: No doubt you have given consideration to the question as to whether or not it should be more fully defined. I suppose my question really is this; are you satisfied that Article 7 is complete?

Mr. Short: Yes.

The Chairman: The difficulty is that we cannot change this agreement.

Senator Connolly (Ottawa West): It is an all or nothing proposition.

The Chairman: I should like to call Mr. Short's attention to the fact that when we were dealing with the White Paper in so far as it relates to foreign or interna-

tional income, there was quite a discussion on what was called passive income. I took this to mean income which had no reasonable business purpose to justify such income developing in the foreign country and coming to Canada. The proposal was that the income derived from those profits earned would be treated as income of the person who had the ownership of the company. That is the law which is now sought to be applied by the Income Tax Division. If they decide there is no substantial business purpose to be served, then they treat the profits as part of the income of the Canadian who may own the company.

Now, let us apply this treaty to that situation. Let us suppose the company in Jamaica is a Jamaican company wholly owned by a Canadian company and it does have profits; if it remits those profits to Canada, then the profits are subject to the withholding tax in Jamaica at not more than 22½ per cent under this agreement, and in Canada the person receiving that income would be entitled to a credit either at the highest withholding rate that Canada applies in a reverse situation or at what the Canadian rate is. If you get the situation where Canada says "That is not a dividend; if any money comes to you, it is an alter ego for you in Jamaica and therefore the profits are your profits," how does this treaty deal with that situation?

Mr. Short: Well, that is a very complicated question but I shall deal with it as best I can. There are two features of this that I think I should draw to your attention. The first is within Article 2 itself where it deals with the question of the residence of a corporation. That is very often a difficult question and very often the attack on these foreign companies that lack much substance, or the attack of the Department of National Revenue, is to try to treat the foreign company as either being resident in Canada because it is managed and controlled in Canada, as an agent of the Canadian shareholder, or as a foreign company which is really not in existence or not having any real substance at all—a sham, if you like. I am not aware of any case in which the existence of the foreign company has not been accepted when in fact there is a foreign corporation, but I do know that there are a number of disputes that centre on the question as to where a company is resident. In these circumstances if the company is managed and controlled in Canada, it would ordinarily qualify as a company resident in Canada.

The Chairman: Why do you say "ordinarily"?

Mr. Short: Under our rules of residence, in the absence of anything else, a company will be regarded as resident where it is managed and controlled. There are a number of cases on this.

The Chairman: You mean where it is an emanation of a Canadian company?

Mr. Hopkins: Is there not a specific provision in this treaty?

Mr. Short: In this treaty there is. You see a company might have two residences; it might be managed and controlled both in Jamaica and in Canada and in those circumstances the company could have a dual residence. But for the purpose of resolving this problem we have provided in Article 2, subsection (2) a special provision that says that where a company which is otherwise resident in both Canada and Jamaica is incorporated in Jamaica, it shall for the purposes of the agreement be regarded as a company resident in Jamaica.

The Chairman: So this brings us to the conclusion to which I was attempting to lead you. If that is the situation then the vehicle in Jamaica is a company incorporated in Jamaica regardless as to whether it is an alter ego of the Canadian company and regardless of the fact that management and the direction are being given from Canada, and the incidence of tax in Jamaica will apply. If there is a corporation tax it will be paid by the company to the Jamaican Government. Then under our law this company also has a residence in Canada and it will be entitled to offset whatever tax it pays in Jamaica against Canadian tax otherwise payable.

Mr. Short: Yes, that is correct. It is a vexing problem for a number of companies. Take a large Canadian company which might have a Jamaican subsidiary in order to carry on a mining operation or a banking operation within Jamaica. It is clearly under a certain amount of control from Canada, and it is a fine question of degree as to whether the control exercised in the ordinary course of carrying on business abroad through a foreign subsidiary is enough to bring that subsidiary into Canada as a resident of Canada.

I think it is fair to say that in the ordinary circumstances the fact that a company carries on a bonafide operation in a foreign country through a subsidiary incorporated in that country will be recognized by our administration as a company other than one resident in Canada. It will be recognized as a foreign corporation. However, it is still quite a problem, because as times get more difficult, or depending on how close the relationship between the two companies is, there will, in fact, be a greater or lesser degree of contol exercised in Canada.

In the case of a Canadian smelter, for example, where they are using a Jamaican subsidiary to supply raw material for a smelting operation in Canada, there will be a considerable degree of control.

Senator Cook: The problem will soon be solved because they are going to nationalize them all anyway.

Mr. Short: So far Jamaica has made no attempt to do so.

Senator Aseltine: I take it we have no power to amend the Convention itself.

The Chairman: That is right.

Senator Aseltine: If we do not like the Convention and we do not pass the bill, what happens?

The Chairman: The Convention has been signed, and there it is as a signed document, but it does not have the sanction of parliamentary approval.

Mr. Short: It needs that approval, of course, before it takes effect.

Senator Connolly (Ottawa West): And there is a provision in it to that effect, is there not?

Mr. Short: Yes.

The Chairman: It does not become operative until there is parliamentary approval.

Senator Denis: Of the two countries.

Mr. Short: Yes.

The Chairman: There is one thing that strikes me, if I may take a minute to comment on it, and that is that I often wonder why the Caribbean countries, when they are looking for revenues, do not investigate this aspect. It seems to me there was a natural for revenues in levying a withholding tax on dividends moving from the Caribbean area to Canada, because they are not really penalizing the Canadian because when he brings . . .

Senator Bennidickson: How do you define "a Canadian"?

The Chairman: I mean, if a Canadian resident is receiving dividends from an operation in the Caribbean area.

Senator Benidickson: Are you speaking of a Canadian resident or a Canadian national?

The Chairman: "National" has nothing to do with it. I am talking about a Canadian resident.

Senator Benidickson: I am thinking of tax havens.

The Chairman: It struck me that here was a source of revenue if in the Caribbean area they had a withholding tax on dividends coming to a Canadian resident, because they are not penalizing that Canadian resident because he would have to pay here in Canada; but by paying in the Caribbean area he gets an offset on the payment here. We have done this in Canada in our tax laws vis-à-vis the United States in many situations, and here is a source of revenue. Jamaica is certainly alert to it here, and I am wondering why they are not all alert to it. It seems to me they would not scare off Canadian investment in their country, because it would not be increasing the tax load unless the withholding tax in Jamaica, for instance, were greater than the withholding tax in Canada in the reverse situation. I guess they will tumble to it some day, Mr. Short.

Mr. Short: I suppose one of the factors involved is that so much of the investment by Canadians in the Caribbean is through Canadian corporations who hold these investments in a foreign subsidiary or, certainly, foreign affiliates. Those dividends are not taxed in Canada, and any Jamaican withholding tax imposed on the dividend would fall directly as a burden on the Canadian company, since we do not relieve a foreign tax on income which we do not tax. Under the Income Tax Act a dividend received by a Canadian company from a foreign subidiary is not taxed in the hands of the Canadian company.

Senator Benidickson: You are probably familiar with this situation. I hate to mention corporate names, but last year I found that the relatively new Holiday Inns in the Caribbean were oprated under a corporate name, Canadian Commonwealth Holiday Inns. That would be in the category about which you have just spoken. They have Holiday Inns in Canada and the United States operating under the corporation that was set up some years ago in the United States. In the Caribbean they seemed to operate under the title Canadian Commonwealth Holiday Inns. They would pay the full Canadian tax, would they?

The Chairman: One thing you did not say was whether the Canadian Commonwealth Holiday Inns was a Caribbean, or Bahamian, company or a Canadian corporation. Which is it?

Senator Benidickson: In other words, the Holiday Inns in Ottawa might not belong to that corporate name.

The Chairman: Is the company that you call Canadian Commonwealth Holiday Inns a Bahamian or a Canadian incorporation, because the approach to the question would be different depending on what it is.

Senator Benidickson: Take another hotel, say, at Nassau, which reputedly some years ago was a Canadian-financed hotel. Then again, the lack of certainty in the matter is not helpful for you to answer. It could conceivably be Canadian capital operating what then was a very prominent hotel, but it was general knowledge it was Canadian money. You need more information to answer a question of that kind, of course.

Mr. Short: I think I could answer a hypothetical question though. If the hotel in Jamaica is run by a Jamaican company, then when the dividends come back to Canada, to the Canadian parent company, they would not be taxable in Canada, provided the Canadian company owned more than 25 per cent of the issued voting shares. But if the hotel in Jamaica were owned by the Canadian company which, in fact, dealt with the hotel as a branch operation in Jamaica, in those circumstances the Canadian company would be fully taxable in Canada on the income from carrying on business in Jamaica, with, of course, the full offset for any Jamaican tax imposed on those earnings.

I suppose that is really one of the reasons why most operations abroad, at least those that turn a profit, are carried on abroad through foreign corporations rather than through a branch.

The Chairman: Under section 28 of the Income Tax Act, if they have more than 25 per cent of the voting shares of that foreign incorporation they can bring the dividends in without affecting the Canadian tax.

But there is an angle. If we are concerned about revolution or overthrow of governments there could be advantages in having a branch operation as against having a domestic company, because in branch operations the country that is being overthrown might have assets somewhere else and one can go after them. This may be one of the reasons why in a lot of situations Canadian banks have maintained branch operations rather than local incorporations. If we had had local

incorporation rather than branch operations at the time of the overthrow in the Dominican Republic it might have been an entirely different story.

Senator Aird: And in a similar fashion in Cuba.

The Chairman: Yes, and in Cuba.

Senator Aird: That was very much the same situation. I should like to ask a question of Mr. Short. I do not want to ask him particularly when the tax reforms will be concluded either in Canada or in Jamaica, but it seems to me that this is a fairly prevalent situation throughout the world. In nearly every country that I know of is going through tax reform of one kind or another.

Senator Cook: Tax change.

Senator Aird: I should like to ask Mr. Short whether we are now about to be faced with a series of limited agreements of this nature. Are these types of so-called limited agreements now being pursued, for example, with a number of Caribbean countries?

Mr. Short: No, they are not. Once our tax reform is out and the dust has settled, we will have no cause not to conclude comprehensive agreements.

The Chairman: How will you know when the dust has settled?

Senator Benidickson: Who is to guess who will win the next election?

The Chairman: I liked Senator Cook's interjection when Senator Aird was using the word "reform". Everybody seems to concede that when we change the tax law it is tax reform. It is change, not reform.

Senator Aird: The reason I used the word is because it is in the preamble.

The Chairman: Yes, I noticed that.

Senator Benidickson: They called it White Paper reform. On the news this morning it said in substance that it will not be carried out.

The Chairman: Are there any other questions on this bill? Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Chairman: Thank you, Mr. Short.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

N° 14

WEDNESDAY, MARCH 17, 1971

Complete Proceedings on Bill C-185

intituled:

"An Act to amend the Crop Insurance Act".

REPORT OF THE COMMITTEE

(For names of witnesses—see Minutes of Proceedings)

23502—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 11, 1971:

Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Molgat, seconded by the Honourable Senator McNamara, for the second reading of the Bill C-185, intituled: "An Act to amend the Crop Insurance Act".

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

23502—1½

Minutes of Proceedings

Wednesday, March 17, 1971
(14)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider:

Bill C-185, "An Act to amend the Crop Insurance Act".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Blois, Burchill, Carter, Desruisseaux, Everett, Hollett, Kinley, Macnaughton and Welch—(11).

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

The following witnesses were introduced and heard:
Honourable H. A. Olson, Minister of Agriculture;
Mr. Larry C. Rayner, A/Director, Crop Insurance, Department of Agriculture.

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

At 10:25 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Georges A. Coderre,
Clerk of the Committee.

Report of the Committee

Wednesday, March 17, 1971

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-185, intituled: "An Act to amend the Crop Insurance Act", has in obedience to the order of reference of March 11, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Minutes of Proceedings

Wednesday, March 17, 1971
(14)

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At 10:25 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Georges A. Coderre,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, March 17, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-185, to amend the Crop Insurance Act, met this day at 9.30 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, we have before us Bill C-185 which deals with certain amendments to the Crop Insurance Act. The Minister of Agriculture, Mr. Olson, is here with Mr. Larry C. Rayner, who is the Assistant Director of Crop Insurance, Department of Agriculture.

Mr. Minister, would you like to start off by telling us what this bill proposes?

The Honourable H. A. Olson, Minister of Agriculture: Mr. Chairman, I appreciate the opportunity of being in your committee this morning to discuss the amendments which are proposed by Bill C-185 to the Crop Insurance Act. The purpose of these amendments is to provide for contributions to insurance programs which would cover losses from pre-planting expenses. This would include such things as the purchase and application of fertilizer, preparation of the land, purchase of plants, et cetera, which would be investments that the farmer would have to make whether or not he planted the crop. Of course, the farmer would have to meet certain requirements to carry this kind of insurance, such as holding a continuing and valid insurance contract, because the new coverage will cover a period outside the growing season itself.

There have been requests from both Ontario and Manitoba that this kind of coverage should be available, because in some places, as much as 80 per cent of the cost of producing a crop is in fact paid out—or at least the obligation is made—by the farmer before he does in fact plant the crop. We have had cases where a farmer has had what we refer to as a continuing valid insurance contract. Even though he may have made as much as 90 per cent of the cost of growing that crop, if he did not physically get it into the ground he would have no insurance against those pre-planting expenses.

The Chairman: Is the scheme of this insurance policy the result of an agreement by a province with the growers?

Hon. Mr. Olson: Yes.

The Chairman: They know the Government re-insures part of the risk, but does it make grants or loans to the provinces?

Hon. Mr. Olson: Yes, in the master agreement which we have between the federal Government and the provincial Government, if the provincial Government does set up an insurance scheme with premiums that make it actuarially sound and meets the other conditions of our statutory requirements, then we pay 25 per cent of the premiums and 50 per cent of the administration costs. In addition to that we re-insure part of the risk in excess of their fund and that is the contribution that the federal Government makes to these contracts. We do not deal directly with the farmers. The agreements are made with the provinces and the provinces administer them.

The Chairman: How many of the provinces have these insurance agreements or contracts?

Hon. Mr. Olson: Perhaps Mr. Rayner could answer that question. I believe it is only eight.

Mr. Larry C. Rayner, Assistant Director, Crop Insurance, Department of Agriculture: That is correct

Senator Carter: Are the contracts similar or do they vary from one province to another?

Hon. Mr. Olson: There are variations because the conditions of production of particular commodities vary from province to province. Obviously there is a different kind of insurance scheme, for instance, for tree fruits than for cereal grains. There are conditions set down in our statute that must be met by all of the provinces. There is one exception and that is the Province of Quebec where we have not been able to make statutory payments because their scheme thus far has not met the criteria. What we have done until now is make a payment to them as if they had met the conditions on a pilot or experimental basis so they will get a crop insurance developed which will fit the criteria in our bill, and we expect that will happen next year.

Senator Burchill: What percentage of the premium does the farmer pay?

Hon. Mr. Olson: In most provinces it is 75 per cent, but I believe in Quebec they make a contribution to the premium as well.

The Chairman: It is voluntary as far as the farmer is concerned?

Hon. Mr. Olson: That is right.

The Chairman: What would you say overall as to the percentage of those who would be eligible to apply for insurance and those who actually do?

Hon. Mr. Olson: This varies widely. I can give you some examples of particular provinces. Manitoba was the first province which made insurance available to all areas. In other words, it was available to 100 per cent of the geographical area that is producing crops. About 50 per cent, or slightly less than 50 per cent, of the farmers in that area did in fact buy insurance. In Saskatchewan I would think that in the cereal grain sector it is substantially less. I am not quite sure of the percentage of the geographical area where it is available, but perhaps a little over 50 per cent. In Alberta, about 90 per cent of the province is covered. When we get into the other provinces where there is a variation, for instance, in the commodities that are grown, it is not quite as easy to determine because there are crop insurance schemes available for corn in Ontario and tree fruits in British Columbia. There are some other soft fruits, or small fruits as we refer to them, where they have not as yet evolved a scheme that is workable.

The Chairman: Your contribution is available for whatever the scheme may be in relation to growing crops?

Hon. Mr. Olson: That is right, and there are new crops being added almost every day.

Senator Desruisseaux: That was the net expense to the government in the last year?

Hon. Mr. Olson: I believe our total cost was about $8 million.

Senator Desruisseaux: That is the share that the Government paid?

Hon. Mr. Olson: That is the contribution that the federal Government made. I am sorry, I wish to correct that statement. I am advised that last year it was about $5½ million in total.

Senator Desruisseaux: Does it vary a great deal from year to year since it has been in operation?

Hon. Mr. Olson: It does, although it is an expanding program so it is going up.

The Chairman: I suppose the realm of contributions would be something like this: The provinces that administer these carry 50 per cent of the administration costs?

Hon. Mr. Olson: That is right.

The Chairman: The fund has to carry itself with the contribution by the growers and by the federal authority.

Hon. Mr. Olson: That is right.

The Chairman: If there is any deficiency in the fund the federal authority fills in the gap?

Hon. Mr. Olson: We make a loan to the province. In most provinces there is a fund building up.

The Chairman: Would you say that when you make a loan to the province that means the province has a liability to repay at some time?

Hon. Mr. Olson: Loans and reinsurance; if the pay-out exceeds the amount of the premiums plus the reserves that we have.

Senator Welch: What is covered in regard to tree fruits?

Hon. Mr. Olson: There are a number of risks which are covered. Under this program we do not have specific risks, such as hail insurance or tornado insurance. The insurance is based primarily on a calculation of what an average crop might be, and then insurance can be taken out up to 80 per cent of what that yield would be and whatever the loss from it is. It is called an all-risk insurance scheme. In other words, it is insurance based on something which would reduce the yield, whether it is drought or for some other reason. It is not specific risk insurance, nor is it what we call spot loss. For example, if a farmer should lose a small part of his field where he had 100 per cent loss, but did not have a reduction in yield below the percentage of insurance that he took over his entire farm, then we would not pay him, although the provinces have been putting a great deal of pressure on us to pay the spot losses. W do not have that in the scheme yet and I am not sure that we will.

Senator Welch: Would there be a difference in the rate of tree fruits and grain crops?

Hon. Mr. Olson: There would be a marked difference because the premiums are set up on the historical basis of what the risk is.

Senator Desruisseaux: Are the farmers satisfied with the operation or have there been any complaints or suggestions as to how it could be improved?

Hon. Mr. Olson: I do not think it would be fair to say, Mr. Chairman, that the farmers are entirely satisfied with the program. There have been representations made to increase the contributions to the premium, and there have also been suggestions that we reduce the calculation or change the factors in the premium, particularly in Ontario on certain crops, but the premiums we have established or agreed to are primarily based on a calculation that would make it actuarially sound.

Senator Blois: How is the amount of coverage determined?

Hon. Mr. Olson: We review the historial yield in a particular area. Suppose we talk about a grain crop where the average yield is perhaps 30 bushels per acre. Once that is established then a farmer can buy up to 80 per cent of that, which is the maximum. Some provinces are not offering 80 per cent on all crops and indeed a farmer does not have to buy 80, but can buy 60 per cent if he wishes.

Senator Kinley: Is this bill applicable to the whole of Canada?

The Chairman: Yes.

Hon. Mr. Olson: There is one point which I think we ought to make, that this is strictly in terms of the insur-

ance which could be reduced to dollars. This is actually based on a production guarantee, and the price involved is for any commodity at the actual market price. When we talk about 60 per cent or 80 per cent, we are talking about that percentage of the average production.

The Chairman: I take it the loss must occur while the crop is in the ground.

Hon. Mr. Olson: That is right, except for these amendments which are dealing with the expenses or the growing of that crop that indeed would have been made prior to planting.

Senator Carter: Could you tell us what two provinces are not covered?

Hon. Mr. Olson: Newfoundland and New Brunswick.

Senator Desruisseaux: Mr. Chairman, I am just looking at subsection (1)(b), and wondering what "other agricultural hazards" is. Has it been defined anywhere in the act?

Hon. Mr. Olson: Subsection (1)(b) provides:

> Loss arising when the seeding or planting of a crop is prevented by excess ground moisture, whether or other agricultural hazards.

Senator Desruisseaux: What is that?

Hon. Mr. Olson: We did not have a precise explanation of those "other hazards", but it would be in so far as these amendments are concerned, such as hazards that would prevent you from planting that crop. In most cases, of course, it would be excess ground moisture—I am sure that is going to be the major hazard—climatic conditions that would prevent a farmer from getting on the land, and other agricultural hazards which may fall into that same category.

The Chairman: I would think the expression "other agricultural hazards" is a matter of law and legal interpretation.

Senator Aird: Accepting the fact that is the legal interpretation, what is the historical practice of the department?

The Chairman: This is occurring in this bill which is before us. It does not presently occur in the act.

Senator Aird: Has it been widely or narrowly interpreted?

Hon. Mr. Olson: Other agricultural hazards?

Senator Aird: Yes.

Hon. Mr. Olson: I do not think there have been very many other hazards that would be applicable to these amendments other than excessive ground moisture, but we have a number of very severe cases in both Manitoba and Ontario. As I said, up to 90 per cent of the costs had already been incurred, but, because of excessive ground moisture or unfavourable climatic conditions they were unable to get seed in the ground. Of course, their continuing insurance contract which is also required under these amendments is not valid, because it says the crop has to be in the ground.

Senator Carter: Would it cover pests, plague, et cetera?

Hon. Mr. Olson: Yes. I think perhaps in the general crop insurance it would, but I cannot visualize in practical terms any situation where pests would, in fact, prevent you from planting the crop.

Senator Desruisseaux: There must be some kind of a definition about other agricultural cases. If there is none, will the claimant have the insurance?

Hon. Mr. Olson: Yes, he would have insurance, but, of course, a contract is written between the farmer and the crop insurance authority within the provinces. I am sorry, but I do not have a copy of that with me. Indeed, they will be amended this year, but the contractual arrangements will be such that they will be capable of being settled in a court of law.

Senator Carter: How widespread would the situation have to be? Would it apply to a single farmer, or would it just apply to a single province? Would it have to be province-wide, or narrowed down to a single farm?

Hon. Mr. Olson: No, it does not, and indeed some arrangements are now being made in some areas within a province where it is reduced to an individual farmer. In Manitoba, for example, they are almost getting down to the point where they could write the premium on the basis of that individual farmer's performance of the yields, and so on.

Senator Desruisseaux: Does it cover the lower value of grains?

Mr. Rayner: Yes, there is a quality insurance included in the guarantee for some plans in some provinces, but it costs extra money.

Senator Everett: I was wondering how average costs are determined under the amendment. I am referring to subparagraph (ii) of paragraph (b) of subsection (1) which says:

> eighty per cent of the average cost of such of the following operations as have been carried out—

Hon. Mr. Olson: I do not think it would be too difficult in any area to arrive at the average cost of summer-fallowing. The reason we want that in there is because we would not like to be in a dispute where a farmer claimed, or had the right to claim, what he says are individual costs if indeed they were excessive and above average. It would not be difficult to arrive at the average cost of summer-fallowing or cultivating land. We get down to (C) which is "fertilizing the land". We can obtain figures from almost any area as to the average amount of fertilizer which is put on that field for whatever crop the farmer intended to grow. We would use that figure rather than a claim which he may make that is in excess of the average. When we get to purchasing plants and that sort of thing I suppose we would make inquiries into the area to find out how much the average cost of plants or seed

would be. It would require us to make a survey in the area. We have field men, as have the Crop Insurance authorities within the provinces. They are quite knowledgeable on what the average should be.

The Chairman: I take it the work of checking on costs or where claims are made is done first by the staff of the Crop Insurance administration.

Hon. Mr. Olson: That is correct.

The Chairman: Do your staff go out and verify and check these figures or do you accept them?

Hon. Mr. Olson: Yes, we accept them. What we are asking here, of course, is statutory authority for us to make a contribution to the provincial crop insurance scheme based on these factors, and not on the present statutory conditions which we have.

Senator Everett: When you are dealing with a crop loss, is it not a percentage of a fixed figure?

Hon. Mr. Olson: Yes.

Senator Everett: So that it is determinable when you take on the insurance policy?

Hon. Mr. Olson: Yes. I should say that there are some averages of crop yields for any particular commodity in an area.

Senator Everett: Would you agree on that when you take the insurance out?

Hon. Mr. Olson: We agree on more than that. The farmer makes an application of how much of that production he wants insured, and the maximum is 80 per cent of that average.

Senator Everett: He also agrees on the yield and the price at the time he takes out the insurance.

Hon. Mr. Olson: We do not guarantee the price, but we do guarantee the production. For example, if he buys an insurance policy which is up to the maximum of 80 per cent of the yield, that is then based on whatever the market price is.

Senator Everett: At the time of the loss.

Hon. Mr. Olson: Yes.

Senator Everett: That is a determinable amount that cannot be argued—the quantum is exact.

The Chairman: It depends on what you mean by "determinable".

Senator Everett: Is it determinable at the time of the loss—that is, a market price? The yield is agreed upon when the insurance contract is entered into—the percentage is agreed upon—so it would be very difficult for the farmer to argue the quantum of the loss. It seems to me that this term "average cost" leaves the matter wide open for losses. It is average cost of what, and over what area? He might suggest that it is the average cost of his immediate neighbourhood, or it could be average cost of the province. I am just wondering if there is not a way to define the term "average cost" more precisely.

Hon. Mr. Olson: I will ask Mr. Rayner to comment on the details of this administration, in addition to what I said a minute ago about using these words "average cost" in the area, because we would like to avoid situations where claims that were in excess of the average would be valid.

Mr. Rayner: This particular amendment may not apply very extensively in Canada. We think there will be only certain areas where the farmers will be interested in this coverage protection prior to the date of seeding. The purpose of putting the words "average cost" in this permissive legislation is to be as a guide to the provinces. The provinces have come to us with this proposal and our purpose is that they provide coverage to a farmer who is unable to seed his land. That does not guarantee to the farmer more than what he has put into his crop. It is not our intention to pay him an indemnity of what he would have obtained if he had grown that crop. We have crop insurance which is a production guarantee to protect the farmer after he has seeded the crop. We are trying to give him some protection prior to the seeding.

There have been representations to sell insurance to a farmer for, say, $30 per acre to help him out on the income he would not have received. We say that this is not the purpose, but that the purpose is to protect him on the investment. In actual practice I think the provincial plans will have proposals which arrive at a conservative or reasonable estimate of the average cost of growing several crops in Essex and Kent, for example. When you consider the cultivation and early application of fertilizer—perhaps tile draining—it does not take very long to see that the farmer has probably got $10 or $20 per acre invested even before he puts the seed in the ground.

Senator Everett: I understand that. If I understand you correctly, you are saying that the average cost will be determined by provincial regulation?

Hon. Mr. Molson: Yes.

Senator Everett: Why do we not put into the act that the average cost is determined by provincial regulations? What is really happening here is that the farmer is entering into an insurance contract. He has a right under the insurance contract to be paid for his pre-planting costs if he suffers a loss due to such hazards as excessive moisture. It seems to me that the method of determining the quantum of the loss is too broad for what is essentially an insurance contract. If you are leaving that definition up to the provincial government involved, I think it should be average costs as determined by provincial regulations, or, alternatively, average costs with an arbitration feature, or there should be someone who can at least decide what the average cost is.

Hon. Mr. Olson: May I make a suggestion that might be helpful? The statutory authority we seek in this bill, or indeed in the total crop insurance statute, is for entering into agreements with the provinces. We do not have,

as a federal government, contracts with the farmers at all.

Senator Everett: I do not think that changes my point, because eventually someone has to define it.

The Chairman: By reason of what is in this bill the federal Government will have to stipulate the terms of coverage in relation to what the federal authority has said must be in the protection. That is, all the farmer can be assured of is not necessarily his costs. It is his cost if it does not exceed the average cost of doing that kind of work. I think it might be a mistake to try to define it too narrowly at this time. The farmer applies for this insurance, and for this excess he is paying 75 per cent of the premium. He is the one who will be looking very carefully at the coverage which he is given.

Senator Everett: That is precisely my point. If the loss is paid on the basis of the definition of the words "average cost" it seems to me that you are going to entertain a number of arguments as to what the average cost is.

The Chairman: Of course, you will do that in any case where you have a contract.

Senator Everett: Not if the terms of the loss are defined.

The Chairman: I do not think anybody can write a contract which consists of nothing but prohibitions.

Senator Everett: It is a matter of degree. Under the crop loss itself, the quantum is determinable by the market price and the yield and percentage agreed upon.

The Chairman: You are moving ahead to the stage of the loss. What I am saying is that the initial step is that the farmer applies for the insurance coverage, and also for this extension. If he does not like the definition he will not pay his 75 per cent and take the insurance.

Senator Everett: I would have to disagree. He might very well, if he is in an area which is subject to a lot of heavy moisture early in the springtime. What I am concerned about is the fact that, having suffered a loss and having entered into a negotiation for the settlement of the loss, he might disagree quite violently with the definition of average cost. It is just too loose a definition in my judgment.

Hon. Mr. Olson: I think I should repeat partly what I said, that the contractual arrangements are, in fact, put in the provincial regulations because the provinces, of course, administer them. What we are seeking here is a kind of master agreement of statutory authority which we can enter into with the province. The details of the regulations and the administration of individual provincial crop insurance schemes, of course, are spelled out in their regulations. Although I am not absolutely certain about this, all of the other terms and conditions under which the insurance is purchased and the obligations by the crop insurance authority to the farmer is in the provincial regulations. What we have to be concerned about is that our overall agreement with the provinces does provide them with authority to make regulations, taking into account these factors which are not in our statutory authority at the present time.

Senator Carter: Would it help if you had the average cost related to the size of the farm? The average cost on a small farm would certainly be higher than on a very large mechanized farm.

Hon. Mr. Olson: Mr. Chairman, summer fallowing and the cost of cultivating land and putting fertilizer on it would be based on an acreage determination. I realize there could be some difference in costs, related to scale, but here again it is reduced to an acreage cost.

The Chairman: I suppose the question is whose cost is being insured.

Hon. Mr. Olson: In this context it is the average cost that the farmer would have incurred for those items which are listed under (A), (B), (C), (D) and (E).

The Chairman: Let us take, for instance, the summer fallowing of the land which he might have done the previous summer or fall.

Hon. Mr. Olson: That is right.

The Chairman: When he cannot get his seed in, that is regarded as a loss.

Hon. Mr. Olson: It would be calculated into the cost of his pre-planting expenses.

The Chairman: The cost ultimately gets down to the cost of the particular person who has suffered the loss. If he has 100 acres of land and he summer fallows 50 acres of it, is it likely that his costs for part of that 50 acres will vary?

Hon. Mr. Olson: I suppose it could. It would depend upon weed conditions and the number of times he would have to cultivate. Here again it seems that we would be avoiding a great deal of difficulty like putting in average costs rather than attempting to determine the precise cost of that individual farmer. It would also depend upon how many times he may have summer-fallowed it or cultivated it—five times, or in another case three times. I suggest that we would be completely at the mercy of claims if we did not use the average cost.

Senator Everett: That is why I would be satisfied if you put in average cost as determined by provincial regulations. That would then be a directive to the provincial authority as to who defines a loss and what the quantum of the loss is, and that they must have a regulation determining or defining average costs.

The Chairman: I think there has to be a provision in the contract indicating what the coverage is, and what you get if you take out that insurance. The federal authorities simply say that if you want us to be a party to this extra, in the way of pre-planting losses, then you must have a provision of this kind. We are not tying them down as to how they read the definition.

Senator Everett: Nor am I.

Hon. Mr. Olson: I am sure, senator, that in the totality of the province's administrative regulations, that, along with one hundred other things, will be included.

Senator Desruisseaux: How long would it take to have the claim processed and the insurance paid?

Hon. Mr. Olson: That is a very difficult question to answer for all of the various crops which are involved, because there are cases where damage is done for some reason where the totality of the loss cannot be determined until harvest time. An example of one case was a widespread hailstorm which went through an area and wiped out the farmer's entire crop. In this case it is possible to make an assessment of the loss even before harvest time. I am not sure that I can give you any precise details as to when the payments are made.

Senator Desruisseaux: Based on the experience of the department, surely you have claims which you have settled. How long would they take, on the average?

The Chairman: The average time between the filing of the claim and the payment?

Senator Desruisseaux: Yes.

Hon. Mr. Olson: I am advised that in some cases it only takes a very few days if the assessment of the total loss can be determined quickly.

Senator Desruisseaux: I was trying to find out the actual experience of that department.

Hon. Mr. Olson: I think it is fair to say, Mr. Chairman, that on crops such as cereals, which have reached a stage of maturity, there is no chance of recovery and it is relatively easy to make an assessment of the damage. In this case the payment is made within a few days, but as I said, with some other crops it takes a little longer.

Senator Desruisseaux: Is it a matter of a year?

Hon. Mr. Olson: No.

Senator Desruisseaux: What is an average?

Hon. Mr. Olson: It is much less than a year.

Senator Everett: Would the minister tell me whether this loss was one that might have been paid in the past under PFAA?

Hon. Mr. Olson: I do not think so. There is a bit of difficulty in answering that question, because under PFAA if all the other conditions are met, such as widespread crop disaster over a block of twelve sections, and so on, the payment is made to the farmer on his cultivated land, which includes summer-fallow. Where unseeded acreage insurance is going to be applicable, for the most part, PFAA is not available anyway. I could hardly visualize a situation, although there may be one or two, where this problem would arise with respect to cereals. That is mostly what unseeded acreage insurance is designed to cover, such as tomato crops, where the farmer has already purchased the plants and has done so much work on it. I do not think generally that it would be applicable to the same kind of coverage as PFAA.

The Chairman: Section 9(1) of the existing act provides:

> The cultivated land of a farmer in any area to which an insurance scheme extends is not eligible for assistance under the Prairie Farm Assistance Act if an insured crop is grown by the farmer on any part thereof.

Hon. Mr. Olson: That is another part in which anyone who has a valid crop insurance contract cannot receive the benefit and he is also relieved of paying the levy.

Senator Everett: I assume it is the wish of the Government that the Crop Insurance will replace PFAA.

Hon. Mr. Olson: As rapidly as it can be done. We have indicated in the last few days that when the Grains Stabilization Act program comes in we may move even more rapidly than just relieving the PFAA levy from those who have bought crop insurance. We may extend it even beyond that once the stabilization program is in place.

Senator Everett: Extend it?

Hon. Mr. Olson: Extend the withdrawal or the relief of the farmers paying PFAA.

Senator Everett: Which would mean that they would not be eligible for PFAA.

Hon. Mr. Olson: That is right.

Senator Everett: You could have a situation in which a farmer might not have either crop insurance or PFAA.

Hon. Mr. Olson: Eventually we will reach that stage, but my concern in this regard is that before we withdraw PFAA I think that crop insurance ought to be available to the farmer. Whether he buys it or not is his own choice, but I am a little reluctant if he does not have an option open to him. There are areas in Saskatchewan and Alberta where crop insurance is not available in the same areas where PFAA is available now.

Senator Everett: You mention the stabilization policy affecting your judgment in this matter. How does it do that?

Hon. Mr. Olson: There are two reasons. One is that I think if we have a farm receipt stabilization program in place, such as outlined in the proposals, which my colleague, Mr. Lang and I have put before the farmers, that this would go a long ways towards stabilizing the income in that area. On the other side of the coin, where there is going to be a 2 per cent levy for that program on the farmer, we think that most farmers would probably support a withdrawal of the one per cent for PFAA so it would not be three per cent of the gross receipts.

Senator Welch: Is this insurance sold through insurance brokers or the provincial Government?

Hon. Mr. Olson: The provincial Government agencies.

Senator Welch: They issue the policies?

Hon. Mr. Olson: Yes.

Senator Welch: Who sets the rates?

Hon. Mr. Olson: The rates are set by the provincial authority, but there is a condition to our participation that those rates be actuarially sound.

Senator Desruisseaux: Is there much variation between the rates between the different provinces?

Hon. Mr. Olson: Yes, I think there is. I do not think there is a great deal of variation between provinces who have essentially the same crop insurance and the same climatic conditions. There are some variations between crops and the totality of the risks in various areas.

Senator Welch: Last year one orchard lost 7,000 trees because of destruction by mice. Would that be covered by insurance? This, of course, would interfere with his crop and kill his trees, and therefore he would not be able to grow a crop.

Mr. Rayner: There is no protection in British Columbia at the moment, and that is by choice of the provincial Government. They have said that wild life should be considered controllable, including starlings, and they also felt this should be something considered within the control of the orchard operator and should not be insured. There are some cases in which wild life damage is included. We have not taken the position one way or the other, particularly if there is doubt about the control and the premium rates are sufficient to pay for that kind of indemnity. That is the kind of program the farmers desire.

Hon. Mr. Olson: Mr. Chairman, these amendments, in my view, are not going to be widely used in the grain growing areas. They will be more widely used in vegetable growing areas where these pre-planting costs are substantially greater. They will be used particularly in Ontario and certain parts of Manitoba where they are growing these types of crops. There has not been any great demand in respect of cereal grains in the Prairie provinces.

The Chairman: Shall I report the bill without amendment?

Hon Senators: Agreed.

The Committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable JOHN J. CONNOLLY, *Acting Chairman*

No. 15

WEDNESDAY, MARCH 24, 1971

Complete Proceedings on Bill C-225

intituled:

"An Act to amend the Income Tax Act and to amend An Act to amend that Act."

REPORT OF THE COMMITTEE

(Witnesses—See Minutes of Proceedings)

23585—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Hayden, seconded by the Honourable Senator Smith, for the second reading of the C-225, intituled: "An Act to amend the Income Tax Act and to amend an Act to amend that Act".

After debate, and—

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

23585—1½

Minutes of Proceedings

Wednesday, March 24th, 1971.
(15)

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

Bill C-225, "An Act to amend the Income Tax Act and to amend An Act to amend that Act".

Present The Honourable Senators Beaubien, Burchill, Carter, Connolly (*Ottawa-West*), Cook, Gélinas, Hays, Hollett and Kinley. (9).

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

On motion of the Honourable Senator Cook the Honourable Senator Connolly (*Ottawa-West*) was elected *Acting Chairman.*

On motion of the Honourable Senator Beaubien, it was resolved: That 800 copies of these proceedings be printed in English and 300 copies in French.

The following witnesses were heard:

Mr. F. R. Irwin, Director,
Personal, Commodity and Estates Tax Division,
Department of Finance.

Mr. A. E. Thompson, Director,
Corporation and Business Income Division,
Department of Finance.

After discussion and on a motion of the Honourable Senator Hayes, it was resolved to report the Bill without amendment.

At 10.45 a.m. the Committe adjourned.

ATTEST:

Georges A. Coderre,
Clerk of the Committee.

Report of the Committee

Wednesday, March 24, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-225, intituled: "An Act to amend the Income Tax Act and to amend An Act to amend that Act", has in obedience to the order of reference of March 23, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

John J. Connolly,
Acting Chairman.

Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, March 24, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-225, to amend the Income Tax Act and to amend An Act to amend that Act, met this day at 9.30 a.m., to give consideration to the bill.

Senator John J. Connolly (Acting Chairman) in the Chair.

The Acting Chairman: Honourable senators, we have before us this morning Bill C-225, to amend the Income Tax Act, and we have as witnesses Mr. F. R. Irwin, Director, Personal, Commodity and Estates Tax Division, Department of Finance, and Mr. A. E. Thompson, Director, Corporations and Business Income Division, Department of Finance.

Mr. Irwin, perhaps you have read the discussion in the Senate on March 16 when Senator Hayden explained the bill, but I am sure you did not have an opportunity of reading the very impressive address made last evening by Senator Beaubien which was supported by a great many other senators. Senator Beaubien happens to be here now and will have an opportunity of asking questions relating to the matters which he has discussed. Perhaps you would like to give us a general outline of the bill first of all and then the questions can follow.

Mr. F. R. Irwin, Director, Personal, Commodity and Estates Tax Division, Department of Finance: Mr. Chairman, there is very little I need to say by way of explanation of the bill. Mr. Thompson and I are here at your invitation to answer any questions you may have and to help in any way we can as you consider the bill. As you have said, Mr. Chairman, we have read the report of the debate in the Senate a few days ago when quite a full explanation of the bill was given. As was pointed out then the bill has only two clauses, the first of which amends the Income Tax Act by making a change with respect to the definition of capital cost, and the second clause extends the surtax. The fact that the second clause extends the surtax accounts for the rather unusual title of the bill because clause 2 would amend a section of an Act to amend the Income Tax Act. You will recall that the Act which amended the Income Tax Act in 1967/68 to impose the surtax also had a coming into force provision which said it would apply for certain years and this bill merely amends that provision which deals with the duration of the tax. This is why we have a some what unusual title for this bill.

Senator Burchill: How long was the period for which it was orginally imposed?

Mr. Irwin: It was imposed for the taxation years 1968 and 1969.

Senator Cook: This is another stage in the reform of the Income Tax Act.

The Acting Chairman: This was the imposition of an additional tax for revenue purposes, I presume.

Senator Beaubien: How much will the 3 per cent surtax on the personal income tax produce, and how much will the 3 per cent surtax on corporation tax produce, in your estimation in one year?

Mr. Irwin: There is a slight problem when you mention the period of one year. The budget speech referred to a yield of $245 million in 12 months, and of that we estimated that $178 million would be from the tax on individuals and $67 million from the tax on corporations.

Senator Kinley: Mr. Chairman, I note the expression "manufacturing and processing business" is used. The Order in Council classifies "manufacturing" as being 1 per cent below what used to be 64 per cent. Does this "processing" get us out of the classification of "manufacturing"?

The Acting Chairman: I think what Senator Kinley is asking is whether there is a definition of the two words "manufacturing" and "processing".

Mr. A. E. Thompson, Director, Corporations and Business Income Division, Department of Finance: Mr. Chairman, as is indicated here in the bill, the definition of "manufacturing and processing" will be contained in the regulations.

Senator Kinley: I think it is in the regulations now.

Mr. Thompson: There will be new regulations once this bill is passed for the purposes of carrying out this particular measure. Mr. Mahoney indicated in the Commons that the definition would be much the same as set out in class 19 of the regulations at the present time.

Senator Kinley: Let us take ship repairs as an example. So much of the material used in ship repairs must be manufactured in a factory, and it is so classified. But I think our firm does more manufacturing than anybody on the shore, but they will not allow ship repairs in and we cannot get credit for this in this and other legislation for depreciation because it is manufacturing, and I think this is unfair.

The Acting Chairman: Along the line mentioned by Senator Kinley, I was looking last night at class 19 in the income tax regulations. It seems to me that there is no

definition there of manufacturing or processing, although there should be one by implication. It refers to a business in which the aggregate of its net sales, as determined under paragraphs (f) and (d) of subsection 2 of 71A of the act, are of goods processed or manufactured in Canada by the business. Section 4 refers to an amount equal to that part of its gross revenue that is rent from goods processed or manufactured in Canada in the course of its business.

There is another reference to magazines and newspapers. There is the exclusion of gas and oil as well as logging, mining, construction or a combination of two or more of the classes set out in paragraphs 6 to 9 inclusive. There is no specific definition.

Mr. Thompson: That is right. A lot of the definition depends on the general meaning of the term "processed or manufactured".

Senator Kinley: In the Maritimes our markets are too small. We are in ship repairs, electrical contracting and other fields. Last year ship repairs amounted to 64 per cent. We could not go into manufacturing. The percentage is 117 per cent in the legislation, but if you do research you get 110 per cent. If you invent a winch you can get 110 per cent on that.

Mr. Thompson: Perhaps the honourable senator is thinking of the 150 per cent deduction which used to apply.

Senator Kinley: Yes.

The Acting Chairman: One hundred and fifty per cent deduction on research?

Mr. Thompson: Yes. There are dividing lines for determining the taxpayer's business activity, and in class 19 two-thirds of one's revenue is supposed to be from processing or manufacturing.

Senator Kinley: If I do a lot of ship repairs I do not qualify. I think I see why they did it on ship repairs. They had a subsidy to build a ship, but they do not get that subsidy now.

Mr. Thompson: I do not know whether that is the intention, but it sounds as if the two-thirds rule applied.

Senator Kinley: Iron ships get a percentage but not wooden ships.

The Acting Chairman: Logging, for example, is one of the businesses excluded from the definition of manufacturing.

Mr. Thompson: In class 19.

The Acting Chairman: Yes. Suppose a logging operation decided to process its material and ground the wood up into some kind of board or plywood, would that be considered a manufacturing process for the purpose of class 19?

Mr. Thompson: I do not think they would qualify unless the processing of the wood into plywood was its principal business. If its principal business was logging and it did a bit of processing on the side it would be excluded the way class 19 is written.

The Acting Chairman: In the case of mining there is a good deal of talk about selling our natural resources and having the processing done abroad, with the result that processing is done abroad. Suppose a company engaged in mining decides to process materials beyond the raw ore stage, the shipping ore stage, perhaps to enrich the product that is shipped—and I take it that would require very special equipment—would that be regarded as a manufacturing process within class 19?

Mr. Thompson: Not within class 19 if the principal business is mining. That raises a broad question of whether a measure like this applies to a special resource area like mining. As you know, the processing of our mining resources has recently been the concern of governments. Last summer it was reflected in the proposals that the Minister of Finance made to the provinces concerning tax reform proposals as a whole, and the way they affected the mining industry. The proposed changes would encourage processing of minerals in Canada.

For the purpose here of the 115 per cent allowance, the Government's intention, as indicated by Mr. Mahoney in the House of Commons, was that it would apply to classes 3, 6 and 8. Classes 3 and 6 are the usual building classes and 8 is the class for machinery and equipment. Nearly all buildings and machinery and equipment used in mining fall into class 10 and would not generally qualify under this 115 per cent allowance.

Senator Carter: May I ask a supplementary question about logging? What would be the position of a wood lot owner who has a small saw mill and who saw logs into lumber and sells them? Would he have to saw through two-thirds of his stock to come under this class?

Mr. Thompson: That would be one of the difficult borderline situations. The way that class 19 is drawn up, two-thirds of his revenue should be...

Senator Carter: It is based on revenue and not on the amount of wood cut?

Mr. Thompson: It is based on revenue from goods sold. He may well qualify if he were sawing up his own logs and that provided his main revenue. It is based on two-thirds of his revenue from goods processed by him.

The Acting Chairman: You are talking about section 71A(2) I take it?

Mr. Thompson: It is similar, but I think it is best to keep to class 19.

The Chairman: Neither in class 19 or in section 71A(2) do I see a figure of 66 per cent.

Mr. Thompson: It is in class 19, at the top of the right-hand page. It refers to not less than two-thirds of the revenue.

The Chairman: Yes, I see that.

Mr. Thompson: This measure applies where the emphasis is on processing and manufacturing.

The Acting Chairman: That certainly looks after one of the questions Senator Hayden raised in his speech in the Senate on March 16.

Senator Hayden also referred to section 11 (1) (a) which provides that capital cost allowances shall be established by regulation, although the language that is used is that it is a write-off of the capital cost. Senator Hayden thought there should be some relationship or tie-in between the clause in the bill and section 11 (1) (a). He went on to say that there should be some expansion to indicate that the base might be either capital cost or the deemed capital cost under certain provisions of the bill.

Senator Kinley: What is capital cost, Mr. Chairman?

The Acting Chairman: Perhaps Mr. Thompson can answer that at this time.

Senator Kinley: Does it refer to transportation? Is it the invoice of the cost of materials or the cost of transportation in handling the goods and other costs on the goods?

Mr. Thompson: Senator Kinley, as in the case of some of the other very important things in the act such as income, capital cost is not defined. It mainly rests on the general meaning of the term. If you had to transport equipment or building materials to a particular site in order to make the machinery or the equipment, that would be part of the capital cost under normal commercial usage.

Senator Kinley: But would you have to put it in as 100 per cent or 115 per cent?

Mr. Thompson: Ordinarily it would be the actual cost. That is the ordinary meaning. For this particular measure the new provision in Bill C-225 says that capital cost would be taken as 115 per cent of what it would otherwise be. In other words, it would be 115 per cent of the actual cost.

Senator Kinley: Then that is a relief; it is not a cost. If it costs you $100, then you put in at $100 on your statement instead of $115.

Mr. Thompson: Well, it would still only cost you $100, but for tax purposes you can claim it as if it had cost you $115. It is suposed to give the taxapayer a break.

To answer the question that Senator Hayden had raised, it is really a matter of drafting technique. Senator Hayden wondered whether it would make it clearer if section 11 (1)(a) in the act specifically said the taxpayer could claim such an amount in respect of deemed capital cost—to flag the fact that the amount you could claim was based on something other than actual capital cost.

The Acting Chairman: Exactly.

Mr. Thompson: Now, that is really a question for the draftsmen in the Department of Justice, but, if you take a look at section 11 (1)(a) of the Income Tax Act, which is the starting point for all capital cost allowances, it starts off by saying:

> (a) such part of the capital cost to the taxpayer of property—

That sounds as if it were based on the actual capital cost, but then it goes on to say:

> —or such amount in respect of the capital cost to the taxpayer of property

The Acting Chairman: You think that would include deemed capital cost.

Mr. Thompson: Our legal advice is that this indicates it does not have to be based on the actual capital cost. That is the approach the Department of Justice took in drafting this legislation.

The Acting Chairman: If that interpretation is given, would that be satisfactory, honourable senators?

Hon. Senators: Agreed.

Senator Hays: Mr. Chairman, are there any exemptions to the 3 per cent surtax?

The Acting Chairman: I believe that comes under clause 2 of the bill, senator. Would you mind if we dealt with that just a little later?

Senator Hays: Not at all.

The Acting Chairman: In the course of his discussion in the Senate, Senator Hayden, by way of illustration, used the case of a company that was going to make an investment that would cost $100,000. He said the result of that investment for the purpose as set out in clause 1 of the bill would then be that the company could claim a capital cost allowance of $115,000. If the interest he has to pay on $100,000 is 9 per cent, that is $9,000. In the case of machinery, rather than buildings, he will get a capital cost allowance of 20 per cent of $115,000 instead of the actual $100,000. In other words, he would get the normal $20,000 under the act as it stands now and then he would get an additional 20 per cent of the extra $15,000 in the first year, which is $3,000. The effect of the new provision for practical purposes is to give him his money at a reduced rate. If it cost him 9 per cent it will now cost him 6 per cent.

Mr. Thompson: How do you arrive at 6 per cent, Mr. Chairman?

The Acting Chairman: It would be the 9 per cent, or $9,000 on the $100,000, less the 20 per cent on the extra $15,000, which is $3,000.

Senator Cook: Mr. Chairman, he only gets half the $3,000. The other half of that goes to taxes.

The Acting Chairman: Oh, yes, that is right. It would still have the effect of reducing the rate. Instead of 9 per cent it would be 7½ per cent.

Mr. Thompson: For that particular year.

Senator Cook: Mr. Chairman, apart from the 115 per cent deal, generally speaking, are the rates of depreciation under our income tax regulations more generous or less generous than the rates used in the United States, the United Kingdom, Europe and Japan?

Mr. Thompson: That is a pretty broad question. If I could just make a comment in relation to the United States. Even in that context it is a difficult comparison to make because they have a much more complicated depreciation system than we have. In addition to having general categories of assets such as we have, they also have guidelines which cover all the assets in particular industries. These moreover are just guidelines. If the taxpayer can show his actual depreciation is greater, he can claim more. However, if the administration can see from experience that his depreciation is actually less, then they can cut back in the claims. In other words, it is a much more flexible and complicated system than we have, but with that qualification our rates on the general class of machinery equipment have been quite close to what theirs have been. Just recently they did liberalize their depreciation for machinery equipment, partly to help stimulate their economy.

Senator Beaubien: They are more generous.

Mr. Thompson: No, not more generous. When we take into account the 115 per cent I think ours is slightly more generous.

Senator Cook: You only get 115 per cent if you qualify under the regulations?

Mr. Thompson: Yes, in these industries, but their change is related to manufacturing equipment as well.

I suppose a short answer would be that the basic systems provide comparable rates and at the moment the measures in each country come close to adjusting to about the same amount.

Senator Cook: Would you care to comment on the others such as Germany, Japan and the U.K.?

Mr. Thompson: It is such a changing picture I feel it would be too dangerous to try and generalize.

Senator Beaubien: Mr. Thompson, in the American system can the corporation write off against the federal tax taxes that it has to pay the state? They can do this in their income tax. Can the corporations do that also?

Mr. Thompson: I believe the corporations can claim the state income taxes as expenses. I think that is the general rule. However, I have not checked on it recently.

Senator Cook: This is not so much a question as an observation. I assume the department informs itself as to the current rates allowed in competitive countries with which we are competing. Would it be in order to ask that a statement be furnished, broadly indicating our depreciation rates compared with these four competitive countries?

The Acting Chairman: Perhaps Mr. Irwin might answer that question.

Mr. Irwin: First of all, it is difficult to keep up to date on information from other countries regarding this sort of thing. Remember, that it is usually provided by regulation or something comparable under their system, therefore, one cannot just pick up their tax act and find it. In the past, some European countries had capital cost allowances which were a matter of negotiation and arrangement with some industries.

The Acting Chairman: By way of encouragement?

Mr. Irwin: I assume so. It is difficult to make a general comparison between countries for all taxes and particularly for features of tax systems. We would certainly like to help by looking at what information we have available. Sometimes it takes a long time to get this information, because we have to contact people in other countries. If we are able to find something from the available information in our department perhaps we could arrange to send it to you.

The Acting Chairman: I was going to say that if the information could be collected and made available to us it would be useful, because this is a matter constantly cropping up in this committee.

Senator Cook: The minister said in his White Paper that he was going to do such and such with the tax. He also intimated that perhaps the depreciation allowances were too generous and should be looked at. In my way of thinking I do not care if it is the heel or the foot, whether you take more away by tax or collect more by reducing the depreciation allowance. The net result for the taxpayer is still unfortunate. I think we should have an idea as to what the other competitors are doing. In other words, we should not have a free hand for up and down depreciation of what suits us. We should do what the citizens of other countries which are competing with us are doing.

The Acting Chairman: Thank you, Senator Cook. If within some reasonable time this information could be made available to us by way of a memorandum perhaps you would send it to the chairman of the committee or the Clerk of the Committees.

Mr. Irwin: We will do what we can.

Senator Burchill: Mr. Irwin said that some of these countries had special arrangements with certain companies in order to encourage them. Canada has the same arrangements, have they not? There are special depreciation arrangements with certain industries in the first, second and third year. Were they not able to write off?

Senator Beaubien: Those are the mining industries.

Mr. Irwin: The arrangements in the Canadian tax law are published in our act or regulations.

Senator Burchill: There are some special ones.

The Acting Chairman: There are incentives, Senator Burchill, in the Canadian tax law which are reproduced either in the act or the regulations. For example, unearned depletion is a good example.

Senator Cook: Going back to the question of depreciation, I shall have the duty in a few days time of sponsoring this new textile bill. That is an industry which depends very heavily on machinery. I gather from Mr. Irwin's answer that it is quite possible some of our competitors would have a special deal, whereby they would allow their textile manufacturers 50 per cent depreciation or something of that nature. In that way they will put themselves in a much better position to compete with Canadian textile industries where we publish our rates.

Senator Hays: With what other countries are we competing in textiles?

Senator Kinley: The Japanese are bringing in textiles and it would be disastrous for Quebec.

Senator Carter: Mr. Chairman, in the case of a fish processer who buys a filletting machine or a freezer as part of his plant and receives aid from the new program of regional economic expansion, what is the situation? Let us say the capital cost is $30,000 and he receives a grant of $6,000 which means he has to raise $24,000 for himself. Now if his capital cost is $30,000 which he must have to satisfy the program, he would still be able to add on 15 per cent and get the benefit of the 115 per cent.

Mr. Thompson: That is right, but this will apply only to the amount net of the grant. Under the Income Tax Act, the capital cost for the purpose of depreciation would be $30,000 minus $6,000 so his capital cost would be $24,000, and he can add the 15 per cent to the $24,000. Under the ordinary rules of the act, the 15 per cent would apply to the net.

The Acting Chairman: That seems to cover the situation with respect to clause 1 of the bill. Now, can we come to clause 2? I have a question here that perhaps might help us somewhat because it is a fairly general one. Clause 2 of the bill purports to amend section 104A of the Act which was passed in 1968. Last night in the Senate, Senator Burchill asked the question as to whether or not the 3 per cent surtax prescribed by section 104A, subsection (1) applied to personal income tax, and I would say that it does. At any rate I said last night that it does.

Mr. Irwin: Yes, the 3 per cent surtax applies both to individual income tax and corporation income tax.

The Acting Chairman: Under subsection (1)? I thought subsection (1) applied only to individual income tax.

Mr. Irwin: Subsection (1) of 104A applies to individuals and subsection (2) applies to corporations.

The Acting Chairman: But subsection (2) is being repealed by clause 2 of this bill.

Mr. Irwin: No, sir.

The Acting Chairman: Let me read clause (2):

> (2.) Subsection (2) of section 4 of *An Act to amend the Income Tax Act,* being chapter 38 of the Statutes of Canada 1967-68, is repeated and the following substituted threefor:

Mr. Irwin: Subsection (2) referred to here is subsection (2) of section 44 of An Act to amend the Income Tax Act which was passed in 1968. The subsection (2) of section 104A is part of the Income Tax Act.

The Acting Chairman: Could we get the Statutes of 1968-69? As I recall the wording in that section, it is identical with what I find in subsection (2) of section 104A.

Mr. Irwin: I believe, Mr. Chairman, that that Act, although I do not have it before me, in section 4 would amend the Income Tax Act and would have a section 1 which would be identical to what we have here. Subsection (2) of that Act was the section which was not reproduced in the Income Tax Act. That is the section which provided for the coming into force of that particular piece of legislation. It said it would apply to the 1968 and 1969 taxation years. This bill repeals that coming into force provision of the 1968 bill, and enacts a new coming into force provision which in effect merely adds 1971 and changes 1971 to read 1972 and 1970 to read 1971 in the appropriate places. This is illustrated by the underlining on page 2 of the bill before the committee.

The Acting Chairman: Well, perhaps we can leave that until we get the book here.

Senator Hays: As I understand these amendments, they would provide a surtax of 3 per cent which in turn would produce $245 million, of which $178 million will come from personal income and the balance from corporate tax. What exemptions by regulation are there, if any, or what could be exempt from this?

Mr. Irwin: This is a tax on a tax, and therefore any exemptions which exist in the Act in computing the individual income or the corporation income tax would of course apply. Personal exemptions, for example, have a bearing on the amount of basic individual income tax one pays which in turn has a bearing on the amount of surtax one pays. But there is no exemption from the surtax as such with one very important exception in the case of individuals. The surtax applies only to basic tax in excess of $200.

Senator Hays: In other words if you do not pay more than $200 in tax, then you are exempt.

Mr. Irwin: That is right, and if you pay only $400 of basic income tax, then the surtax would apply to only $200 of that. Section 104A of the Income Tax Act, subsection (1), reads as follows:

> 104A. (1) Every individual liable to pay tax under Part I for a taxation year shall pay a tax for the year equal to 3 per cent of the amount by which the tax payable under Part I by the individual for the taxation year exceeds $200.

Senator Beaubien: If the personal 3 per cent surtax produces $178 million, then the personal income tax must produce over $6 billion. I did not think the figure was that high.

Mr. Irwin: The basic revenue? Yes.

Senator Beaubien: A few years ago it was about $3.5 billion. It would be over $6 billion, because $200 is exempt for everybody.

Mr. Irwin: The budget speech of December 3, 1970 showed a revenue forecast for the year 1970-1971 from personal income tax of $5.3 billion. That is after abatement of 28 points for the provincial tax. The abatement from individual income tax is 28 per cent of federal tax, otherwise payable.

The base on which the 3 per cent surtax applies is greater than the $5.3 billion forecast as federal revenue. The surtax applies to tax before the provincial abatement.

Senator Beaubien: The $5.3 billion is roughly 70 per cent of the whole tax?

Mr. Irwin: Yes, in very rough terms.

The Acting Chairman: Honourable senators, I have before me the Statutes of Canada 1967-1968, chapter 38. It is an act to amend the Income Tax Act, and clause 4 (1) says:

> The said Act is further amended by adding thereto, immediately after section 104 thereof the following heading and section:

Then it provides to enact Part IA in which section 104A(1) enacts the surtax for individuals, which has just been read by Mr. Irwin, and section 104A(2) enacts the surtax for corporations at 3 per cent. The bill before us repeals section 4(2) of chapter 38 of the Statutes of 1967-68 which leaves in effect the 3 per cent surtax for corporations. I therefore apologize to Senator Beaubien because I said that it seemed to me that what was being done by the bill before us last night was in effect making a change in the surtax applicable to corporations. We are not making that change.

In the Senate the other evening Senator Hayden raised another point in connection with this matter. He referred to a ruling which we did not have before us, and which we do not have before us at the moment. The ruling was issued by the Department of National Revenue on January 26, 1971. He said the effect of that ruling was that:

> —where a corporation elects to pay taxes as provided in sections 43, 43A, 85E and 85F, the tax under these sections is not computed under sections 39 or 69.

These are the sections referred to in section 104A(2).

> Consequently, that tax is not subject to the surtax levied under 104A(2).

It would appear that 104A(2) is all-inclusive in its scope for corporations, because section 39 is the section that deals with the basic corporate income tax, and section 69 deals with investment companies; is that right?

Mr. Irwin: Yes.

The Acting Chairman: Perhaps Mr. Irwin could tell us about this ruling and its effect.

Mr. Irwin: The ruling is contained in an interpretation bulletin issued by the Department of National Revenue. Perhaps I might say a further word in explanation of this. The surtax is a tax on tax. It is quite different from the usual income tax which is a tax on taxable income. The Income Tax Act has numerous sections providing for the calculation of special taxes or providing a special formula for the calculation of tax in particular circumstances.

For example the act provides for calculating tax under sections 35, 36, 43, 43A, 85E and 85F. There are taxes on undistributed income, and there is a 15 per cent tax on the Canadian investment income of life insurance companies. There is a special branch tax, and there are taxes on non-residents. There are quite a number of taxes computed under various sections of the Income Tax Act.

In imposing a surtax a decision had to be made about which taxes would be liable to the surtax. In the case of individuals the surtax applies to what could be called basic tax, or what the act describes as tax payable under Part I which is defined in a special way. It does not apply to the Old Age Security tax, or to the social development tax. It does apply after the dividend tax credit has been applied, but before the foreign tax credit has been applied.

In the case of corporations the surtax applies only to tax computed under sections 39 and 69. It does not apply to the 15 per cent tax on Canadian investment income of life insurance companies or to all the other taxes that I mentioned under a number of sections. The tax is not all-inclusive, but the decision had to be made that it would apply to tax computed under certain sections.

Senator Hays: I think this tax on tax is an insidious tax. But since I think we are stuck with it I should like to move that we report the bill without amendment.

Senator Cook: We reluctantly report the bill without amendment.

The Acting Chairman: I think we have had a good run at it. Certainly, the questions that were raised in the Senate have been very clearly dealt with by both Mr. Irwin and Mr. Thompson and we are very grateful to them for that.

Shall I report the bill without amendment?

Senator Burchill: Senator Hays says we are stuck with it. We are stuck with it for two years, according to this bill.

Senator Hays: That is policy.

The Acting Chairman: We are stuck with it for 1971, I am informed.

Senator Burchill: We are stuck with it until 1972, are we not?

The Acting Chairman: No, just for 1971.

Senator Beaubien: I should like to add one comment, Mr. Chairman. We are now using about 38 per cent of our gross national product in this way. That is 10 per cent more than the Americans are using. This continued increase of our taxes in this way is gradually smothering any kind of development in this country, and you can see that wherever you look. It is a terrifying thing when you look around and see people being laid off here and there. I tell you it is terrible, and yet we sit back and say, "We are stuck with it." Why haven't we got the guts to get up and say that this sort of business is just nonsense? Just look at the people Bourassa went to see in the United States. Do you realize that if those people down there were all of a sudden to say that Canada, and Quebec in particular, was not a good risk, it would mean disaster for us? Do you not understand that it would bankrupt our country? Do you know that two life insurance companies in New York, the Metropolitan and the New York Life, own about $2 billion of Quebec Hydro bonds alone? Do you know that Quebec Hydro has to sell half a million dollars worth in bonds in the next 12 months, and if they cannot sell half of that amount in New York then they cannot sell the other half anywhere.

Knowing these things are happening, seeing them happening and seeing the effects of them everywhere, it is preposterous that no one has the fortitude to get up and say that it makes no sense, because it is just nonsense.

Senator Cook: Another American insurance company has about $2 billion invested in Labrador.

Senator Beaubien: Well, I just mentioned the Quebec Hydro bonds because I happen to know the figures involved there.

The Acting Chairman: What Senator Beaubien says is a fact of life. He has the figures.

Senator Beaubien: It is a terrifying fact of life, but nobody seems to realize it.

The Acting Chairman: We do have the bill here, and it embraces a question of policy. We cannot ask the officials from the department to deal with questions of policy. Perhaps it would be more effective if Senator Beaubien made his speech in a more appropriate forum.

Senator Hays: It was a short, quick speech.

The Acting Chairman: It was a very effective speech. Is it agreed that I report the bill without amendment?

Hon. Senators: Agreed.

The Acting Chairman: Honourable senators, the meeting is adjourned.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 16

WEDNESDAY, MARCH 31, 1971

Complete Proceedings on Bill S-12

intituled:

"An Act respecting Central-Del Rio Oils Limited."

REPORT OF THE COMMITTEE

(For list of witnesses—see Minutes of Proceedings)

23587—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Aseltine	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Hollett
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(29).
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Orders of Reference

Extract from the Minutes of the Proceedings of the Senate, March 23, 1971;

Pursuant to the Order of the Day, the Honourable Senator Manning, P.C., moved, seconded by the Honourable Senator Quart, that the Bill S-12, intituled: "An Act respecting Central-Del Rio Oils Limited", be read the second time.

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

The Bill was then read the second time.
The Honourable Senator Manning, P.C., moved, seconded by the Honourable Senator Quart, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

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

Robert Fortier,
Clerk of the Senate

23587—1½

Minutes of Proceedings

Wednesday, March 31, 1971
(16)

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

Bill S-12, "An Act respecting Central-Del Rio Oils Limited".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Benidickson, Burchill, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Everett. (9).

Also present but not of the Committee: The Honourable Senator Manning.

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

The following witnesses were heard:

Mr. David Alexandor,
Legal Counsel, Central-Del Rio Oils Limited.
Mr. A. B. Beaven,
Corporate Secretary, Central-Del Rio Oils Limited.
Mr. R. D. Viets,
A/Director, Corporations Branch,
Department of Consumer and Corporate Affairs.

After discussion and on motion of the Honourable Senator Beaubien, it was Resolved to report the Bill without amendment.

At 9.50 a.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Georges-A. Coderre,
Clerk of the Committee.

Report of the Committee

Wednesday, March 31, 1971

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-12, intituled: "An Act respecting Central-Del Rio Oils Limited", has in obedience to the order of reference of Tuesday, March 23, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, March 31, 1971

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-12, respecting Central-Del Rio Oils Limited, met this day at 9.30 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, I call the meeting to order. We have before us this morning one bill, S-12, respecting Central-Del Rio Oils Limited. The witnesses are: Mr. David Alexandor, Legal Counsel for Central-Del Rio Oils Limited; Mr. A. B. Beaven, Secretary; and Mr. John Taylor, the President of the company. Mr. R. D. Viets, the Acting Director of the Corporations Branch, Department of Consumer and Corporate Affairs is also present. Senator Manning spoke on this bill in the Senate. Have you anything further to say, senator?

Senator Manning: As I said in the house, Mr. Chairman, the purpose of the bill is obvious. It is a simple piece of legislation, and the officials are here to answer any questions.

Mr. David Alexandor, Legal Counsel for Central-Del Rio Oils Limited: Mr. Chairman and honourable senators, as the bill was outlined by Senator Manning at the time of second reading, if it is agreeable to you, Mr. Beaven, the corporate secretary, and Mr. Taylor, the president of the company, will be pleased to answer any questions honourable senators may put.

The Chairman: It may not be necessary to answer any questions, in view of the simplicity of the bill. An opening statement might tell us why you are here.

Mr. A. B. Beaven, Secretary, Central-Del Rio Oils Limited: Mr. Chairman and honourable senators, Central-Del Rio Oils Limited is at the moment an Alberta incorporated company, incorporated in 1947. It proposes, as a result of the passage of this legislation, to amalgamate the parent company, Central-Del Rio Oils Limited, with its wholly-owned subsidiary, Canadian Pacific Oil and Gas Limited, which is a company incorporated under the Canada Corporations Act.

The purpose of the bill is simply to move Central-Del Rio from the provincial to the federal jurisdiction, so that we can follow with an amalgamation under section 128A of the Canada Corporations Act.

The Chairman: I understand there is a provision in the existing corporate law, statutory law in the province of Alberta, under which this may be done.

Mr. Beaven: That is correct, sir.

The Chairman: And the effect of the merger will be that what was formerly a provincial company will become a federal company in all respects and subject to the provisions of the Canada Corporations Act.

Mr. Beaven: That is correct.

The Chairman: And it will then be subject to the federal law, without being subject to the provincial statute?

Mr. Beaven: That is correct.

Senator Connolly (Ottawa West): What kind of company is it? Is it a developer of both oil and gas?

Mr. Beaven: It is a petroleum exploration and development company. We have oil wells and gas wells, and they are fully operative in the petroleum industry—short of marketing. We do not have service stations.

Senator Connolly (Ottawa West): Why is it desirable to have a federal charter? Does it operate in various provinces?

Mr. Beaven: Yes.

Senator Cook: You want a federal charter in order to amalgamate—so that you can amalgamate with your parent?

Mr. Beaven: That is correct.

Senator Connolly (Ottawa West): And the parent operates in various provinces?

Mr. Beaven: Central-Del Rio is technically the parent. The federal company is the subsidiary, Canadian Pacific Oil and Gas. We are moving the parent company so that it will be able to amalgamate with its wholly-owned subsidiary. This legislation in Alberta is fully reciprocal. You could move the federal company to Alberta.

Senator Connolly (Ottawa West): Senator Manning told us that at the time of his explanation.

Senator Burchill: In what provinces do you operate?

Mr. Beaven: We operate in the provinces of Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, and in the Northwest Territories and the Yukon.

Senator Desruisseaux: Will you be continuing under the name Central-Del Rio?

Mr. Beaven: Initially, Central-Del Rio, assuming this legislation passes, will become a Letters Patent company

under the Canada Corporations Act under that name. But, subject to the approval of our shareholders, we have entered into an amalgamation agreement with our subsidiary. One of the provisions of the agreement is that there will be a new name for the amalgamated company. That will not take effect until the amalgamation has been completed. The new name will be Pan-Canadian Petroleum Limited.

Senator Burchill: Where did you get the name Central-Del Rio?

Mr. Beaven: That came from two companies which were put together in 1957: Central Leduc Oils Limited, which from 1947 to 1957 worked very closely with a company named Del Rio Producers Limited. When those two companies combined, as a result of a purchase of assets, the two names were also combined, in effect, and the new company was called Central-Del Rio.

Senator Burchill: What is the name of your subsidiary?

Mr. Beaven: Canadian Pacific Oil and Gas Limited.

Senator Burchill: That is under federal charter?

Mr. Beaven: That is correct.

Senator Burchill: What provinces does it operate in?

Mr. Beaven: Virtually in the same provinces as Central-Del Rio.

Senator Burchill: Is it in the same kind of business as you are in?

Mr. Beaven: Exactly. The objects of both companies are virtually identical.

Senator Carter: I understand this company already has a provincial charter. Does the provincial charter become redundant when the company becomes incorporated federally, or do you retain the advantages of both?

The Chairman: No. There is a reciprocal arrangement between the Canada Corporations Act and the provincial Corporattions Act of Alberta which permits an Alberta company to become federally incorporated, in which event, from that movement, it ceases to be a provincial company. The reverse can also be done. There are these reciprocal provisions in the provincial statute and in the federal statute.

Mr. R. D. Viets is here and, being the Acting Director of the Corporations Branch of the Department of Consumer and Corporate Affairs, he may have something to add. Do you see any objection to this procedure, Mr. Viets? It is provided for by statute, is it not?

Mr. R. D. Viets, Acting Director, Corporations Branch, Department of Consumer and Corporate Affairs: Correct, sir. The transjurisdictional aspect is not yet provided for in the way it is for the western provinces and Ontario, but if Parliament approves this bill, this legislation will be quite acceptable to us.

The Chairman: You mentioned transjurisdictional provisions. Would you develop that?

Mr. Viets: Yes, sir. Under the Alberta act and under the new Ontario Corporations Act there is provision that a transferor jurisdiction can transfer its company to a transferee jurisdiction, providing that the transferor jurisdiction has such provision in its act and providing that the transferee jurisdiction has the power to receive the company in its act. Unfortunately, those provisions are not yet in the Canada Corporations Act, although I believe they are under consideration by a task force which is reviewing our act. Consequently, this special act is necessary to enable Central-Del Rio to come under our act.

The Chairman: The contemplated provisions, or the reciprocal provisions, as and when they are finally brought into the Canada Corporations Act, will make unnecessary an application to Parliament.

Mr. Viets: Correct, sir. I belive there may be one or two other applications of this nature before such provisions do become part of our act.

The Chairman: But Parliament, in its own way and within its constitutional authority, can do anything it wishes.

Mr. Viets: Yes, sir.

The Chairman: So if it wishes to pass this bill there is nothing to prevent it from doing so.

Mr. Viets: That is right, sir.

The Chairman: There is certainly no objection from your department acting thereafter in granting their petition.

Mr. Viets: There is no objection, no, sir. I have spoken to counsel for the company, who said they will send us the amalgamation agreement under section 7 of this bill for our comments, because it will be subject to subsections (2) and (3) of section 128A of the Canada Corporations Act. The only thing that will really concern us, then, is to see to it that at that time the agreement complies with those two subsections.

The Chairman: It is really procedural.

Senator Connoly (Ottawa West): I hope the passing of this act will not create a problem in respect of the amalgamation agreement.

Mr. Viets: I have reviewed the act, sir, and I cannot see that any problem would arise. The amalgamation agreement will have to comply with the provisions of subsections (2) and (3) of section 128A of the Canada Corporations Act, and otherwise it is subject to the provisions of the Canada Corporations Act.

Senator Connolly (Ottawa West): Clause 7 of the bill states that the amalgamation agreement "shall be deemed to be an amalgamation agreement for the purposes of section 128A of the Canada Corporations Act".

Mr. Viets: "provided that..."

Senator Connolly (Ottawa West): Yes, "provided that such meeting complies with the requirements of subsections 2 and 3 of section 128A". I see that "such meeting" refers to the meeting at which the application is approved. I assume that counsel can give us assurances on that point. So far as the rest of clause 7 is concerned, "and that the said agreement is adopted by the shareholders as required by subsection 4 of the said section", I understand from Senator Manning's explanation that that has been done, as required by section 4 of the said section.

I wanted to make sure that there would be no difficulty for the company proceeding if the Corporations Branch of the Department of Consumer and Corporate Affairs found some defect in the amalgamation agreement.

Mr. Viets: I am sure that could be easily worked out in a procedural manner.

Senator Cook: This act is only permissive anyway.

The Chairman: I take it from what Mr. Viets has said that he has seen the agreement.

Mr. Viets: Not yet. I understand from the company's counsel that it is in the mail to us now.

The Chairman: If you look at the requirements of subsections (2) and (3) you will notice they are not very difficult. Subsection (2) says:

> Companies proposing to amalgamate may enter into an agreement for the amalgamation prescribing its terms and conditions and the mode of carrying the amalgamation into effect.

Now, they have made an agreement which has been approved by the shareholders, so obviously they have met the requirements of subsection (2). There is an amalgamation agreement providing for the basis on which the amalgamation shall be carried into effect.

Then if you look at subsection (3) you will see that it says as to particulars of the agreement:

> The amalmagation agreement shall further set out
>
> (a) the name of the amalgamated company;
>
> (b) the objects of the amalgamated company;

I assume those provisions have been complied with, Mr. Beaven?

Mr. Beaven: Yes.

The Chairman: Then it goes on to say:

> (c) the amount of its authorized capital, the division thereof into shares and the rights, restrictions, conditions or limitations attaching to any class of shares;

I should think that that has been done. I would imagine what you would like to look at there, Mr. Viets, would be to see whether any of those restrictions or conditions, etcetera, exceed what is permissible under the Canada Corporations Act.

Mr. Viets: Yes, that would be so. I believe that there is a section in the Act which says that the capital should be the same before as after the passage of this bill.

Mr. Beaven: That is correct. There will be no change in the capital of the company.

The Chairman: Then going on with the conditions, it says:

> (d) the place within Canada at which the head office of the amalgamated company is to be situated;

I assume the agreement does that?

Mr. Beaven: Yes.

The Chairman: Then it says:

> (e) the names, callings and postal addresses of the first directors thereof;

I assume that is in order?

Mr. Beaven: Yes.

The Chairman: Then it says:

> (f) when the subsequent directors are to be elected;

I assume your agreement provides for that.

Mr. Beaven: Yes, Mr. Chairman.

The Chairman: Then it goes on to say:

> (g) whether or not the by-laws of the amalgamated company are to be those of one of the amalgamating companies and, if not, a copy of the proposed by-laws;

I assume you have met that condition.

Mr. Beaven: They are attached as an annex to the agreement.

The Chairman: Then it says:

> (h) such other details as may be necessary to perfect the amalgamation and to provide for the subsequent management and working of the amalgamated company and the manner of converting the authorized and issued capital of each of the companies into that of the amalgamated company as determined pursuant to paragraph (c) above.

I suggest those conditions are simple and straightforward. With the exception of what has been mentioned and which has now been satisfied by Mr. Beaven, there does not now appear to be anything in subsections (2) and (3) of 128A that would be likely to cause you to say, "Your amalgamation agreement has some provisions which are not acceptable".

Mr. Viets: That is correct, sir.

The Chairman: Any other questions you want to ask, honourable senators?

Senator Benidickson: This company is substantially controlled by Canadian Pacific Investments?

Mr. Beaven: That is correct, sir.

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

The Chairman: Is it agreed, honourable senators?

Hon. Senators: Agreed.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 17

TUESDAY, APRIL 6, 1971

Complete Proceedings on Bills S-10 and S-11,

intituled respectively

"An Act respecting the consolidation of the Statutes, Part 1 of the printed Roll of the Revised Statutes of Canada, 1970"

and

"An Act respecting Statute Law (Consolidation)"

REPORTS OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

Mr. Beaver: That is correct, sir.

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

The Chairman: Is it agreed, honourable senators?

Hon. Senators: Agreed.

The committee adjourned.

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THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 17

TUESDAY, APRIL 6, 1971

Complete Proceedings on Bills S-15 and S-16,

intituled respectively:

"An Act respecting the consolidation of the Income Tax Act in the printed Roll of the Revised Statutes of Canada, 1970"

and

"An Act respecting Mic Mac Oils (1963) Ltd."

REPORTS OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis–(27)
Giguère	

Ex officio members: Flynn and Martin

(Quorum 7)

Orders of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"The Honourable Senator Cameron presented to the Senate a Bill S-16, intituled: "An Act respecting Mic Mac Oils (1963) Ltd.".

The Bill was read the first time.

With leave of the Senate,

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

After debate, and–

The question being put on the motion, it was–

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Cameron moved, seconded ty the Honourable Senator Burchill, that the Bill be, referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was–

Resolved in the affirmative."

Extract from the Minutes of the Proceedings of the Senate, March 31, 1971:

"Pursuant to the Order of the Day, the Honourable Senator Stanbury moved, seconded by the Honourable Senator McLean, that the Bill S-15, intituled: "An Act respecting the consolidation of the Income Tax Act in the printed Roll of the Revised Statutes of Canada, 1970", be read the second time.

After debate, and–

The question being put on the motion, it was–

Resolved in the affirmative.

The Bill was then read the second time.

With leave of the Senate,

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

The question being put on the motion, it was–

Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

23589–1½

Minutes of Proceedings

Tuesday, April 6, 1971.
(19)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider:

Bill S-16, "An Act respecting Mic Mac Oils (1963) Ltd."

and

Bill S-15, "An Act respecting the consolidation of the Income Tax Act in the printed Roll of the Revised Statutes of Canada, 1970".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Benidickson, Blois, Carter, Connolly (*Ottawa West*), Croll, Macnaughton and Willis–(10).

Present, but not of the Committee: The Honourable Senators Cameron, Lafond and McLean–(3).

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

Bill S-16, "An Act respecting Mic Mac Oils (1963) Ltd."

WITNESSES:

Mic Mac Oils (1963) Ltd.:

Mr. W. J. Hope-Ross, Counsel;
Mr. K. H. Burgis, Director and Corporate Vice-President of Hudson's Bay Gas and Oil Co.

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

At 9:40 a.m. the Committee proceeded to the consideration of Bill S-15.

Bill S-15, "An Act respecting the consolidation of the Income Tax Act in the printed Roll of the Revised Statutes of Canada, 1970".

WITNESSES:

Department of Justice:

Mr. J. W. Ryan, Director, Legislation Section;
Mr. R. L. du Plessis, Legislation Section.

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

The Committee then proceeded to discuss the action to be taken respecting its consideration of Bills S-9 and C-180.

At 10:15 the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,

Clerk of the Committee.

Report of the Committee

Tuesday, April 6, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-15, intituled: "An Act respecting the consolidation of the Income Tax Act in the printed Roll of the Revised Statutes of Canada, 1970", has in obedience to the order of reference of March 31, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,

Chairman.

Tuesday, April 6, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-16, intituled: "An Act respecting Mic Mac Oils (1963) Ltd.", has in obedience to the order of reference of March 30, 1971, examined the said Bil and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,

Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, April 6, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-15, respecting the consolidation of the Income Tax Act in the printed Roll of the Revised Statutes of Canada, 1970, and Bill S-16, respecting Mic Mac Oils (1963) Ltd., met this day at 9.30 a.m. to give consideration to the bills.

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

The Chairman: Honourable senators, I call the meeting to order. We have two bills before us this morning—Bill S-15, an act respecting the consolidation of the Income Tax Act, and Bill S-16, an act respecting Mic Mac Oils (1963) Ltd. One week ago we passed a bill similar to Bill S-16 in form and substance. I refer to that respecting Central-Del Rio Oils Limited.

This morning we shall deal with Bill S-16 first. Mr. W. J. Hope-Ross, the counsel for Mic Mac Oils, will give us a short explanation

Mr. W. J. Hope-Ross, Counsel, Mic Mac Oils (1963) Ltd.: Mr. Chairman, honourable senators, I am Jim Hope-Ross, counsel for Mic Mac Oils (1963) Ltd. With me is Mr. Kenneth Burgis, a director of Mic Mac Oils (1963) Ltd. and corporate vice-president of Hudson's Bay Oil and Gas Company Limited.

Mic Mac Oils (1963) Ltd. is a wholly-owned subsidiary of Hudson's Bay Oil and Gas. Mic Mac is incorporated under the Alberta Companies Act. Hudson's Bay Oil and Gas is a federal Letters Patent company. Because Mic Mac holds petroleum interests in Nova Scotia, Prince Edward Island, Manitoba, Saskatchewan, Alberta, British Columbia and the Northwest Territories and because Hudson's Bay Oil and Gas holds interests in the same jurisdictions, there is obviously considerable administrative overlap. It is our intention to amalgamate Mic Mac and another subsidiary with Hudson's Bay Oil and Gas. In order to do so both companies must be in the same jurisdiction.

Section 158 of the Alberta Companies Act enables an Alberta company to continue federally. As yet there is no adoptive procedure in the federal act. It is our intention by this bill that we shall be authorized to apply to the Minister of Consumer and Corporate Affairs to have Letters Patent issued for Mic Mac Oils thereby continuing it as a federal company. Amalgamation can then take place under section 128A of the Canada Corporations Act.

As you see, it is a simple bill but an essential one that closely follows a similar bill sponsored by Senator Manning, which was passed recently by the Senate, with respect to Central-Del Rio Oils.

Mr. Burgis and I shall be pleased to answer any questions the honourable members of the committee may have.

The Chairman: As and when this bill becomes law, Mic Mac Oils will be a federal company.

Mr. Hope-Ross: That is correct, sir.

The Chairman: That is a preliminary step so that you may then amalgamate Mic Mac and Hudson's Bay Gas and Oil.

Mr. Hope-Ross: Yes. The amalgamation will probably take some months to complete, but this is the logical step.

If I may point out to the committee the difference between our bill and that respecting Central-Del Rio, ours is simpler in that we do not require the act to refer to the amalgamation. Because of the wholly-owned status it is a simple matter to call a shareholders' meeting to prove amalgamation. On the other hand, Central-Del Rio, with their large public holdings, for the sake of economy included the amalgamation agreement in their bill.

Senator Benidickson: Mr. Chairman, this bill is comparable to the bill that was introduced by Senator Manning.

The Chairman: Yes. It accomplishes the same thing.

Senator Benidickson: They simply want federal status instead of provincial status.

The Chairman: That is right. They intend to proceed to amalgamate once the two companies have federal status.

Senator Connolly (Ottawa West): Mr. Chairman, if the Canada Corporations Act had in it the same provision the Alberta act has for allowing a provincial company to become federal, there would be no necessity for coming to Parliament for special legislation.

The Chairman: That is correct.

Senator Connolly (Ottawa West): I hope some day, Mr. Chairman, that change will be made in the Canada Corporations Act.

The Chairman: Senator Connolly, a few years ago when we were working on the Canada Corporations Act I presented a draft of a provision which would accomplish that. There was fear and trembling in Ottawa that that provision might, in some fashion, intrude on the independent status of provinces and the federal authority.

I think Mr. Ryan recalls that, because he was one of the nervous ones. So we abandoned the idea at that time, but we still have it in reserve. I think possibly the Department may be approaching more closely the point where we will now get it done within the foreseeable future, otherwise we will try it again ourselves.

Are there any other questions?

Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Chairman: We shall now consider Bill S-15, respecting the consolidation of the Income Tax Act in the printed Roll of the Revised Statutes of Canada, 1970.

We have with us this morning Mr. J. W. Ryan, Director, Legislation Section, Department of Justice, to take us through and the complexities of this bill that make for hard reading.

Mr. Ryan, would you make a statement which to simplify this bill?

Mr. J. W. Ryan, Director, Legislation Section, Department of Justice: Mr. Chairman and honourable senators, the purpose of this bill is set out as concisely as it is possible to do so in the first paragraph of the explanatory note. I can expand on this to some extent by explaining the circumstances in which the Revised Statutes of Canada may appear at this time. As you know this revision has been under way for some considerable length of time, and as of last August 14 we were finally and irrevocably committed to the whole text that had been consolidated to that date. That is now in course of completion and should very shortly be reported to the Government by the Statute Revision Commission. At this time that manuscript or roll, whatever you want to call it, contains the Income Tax Act as one of the consolidated Statutes, and that Income Tax Act will replace the present or current Income Tax Act on the date that the Revised Statutes of Canada are proclaimed in force. The immediate result of that will be that the current Income Tax Act will be replaced by the Act in the Revised Statutes. I had a quick look at our manuscript before I came over and the last section numbering in the current Income Tax Act is, I believe, 144 while the last section numbering in the manuscript for the consolidated act is 207, which means there are some 63 added sections. That is, of course, numbering of sections and not of provisions.

Senator Connolly (Ottawa West): Do you mind if I stop you there? I take it that this increase in the numbers results from the additions of large sections identified by capital letters such as A, B, and c, etcetera.

Mr. Ryan: Yes, and going down to K in some cases.

Senator Connolly (Ottawa West): It is for the most part a re-numbering job.

Mr. Ryan: Yes, we go down through the numbering consecutively, and we avoid all the A's, B's and C's. This is traditional with revisions and has been for almost 100 years—at any rate from 1886.

Now, if the Income Tax Act that has been amended is brought in within a period of, say, 12 months, work on the current Income Tax Act will be in progress. I understand that that has been going on for some time, because it is very difficult for persons preparing bills to shift to a new numbering system, particularly when that new numbering system is no part of the law and no part of their knowledge. So, the effect of bringing the revised Income Tax Act into force at this time will be to cause some confusion, because any bill the Government brings in will relate to the current Income Tax Act.

We will have at that time in the House and for the public what amounts to three sets of numbers and that, of course, will cause some considerable difficulty in relating one set of statutes to another, and if this bill which the Government is proposing—and I suspect it will be although I have no direct knowledge of it—is by way of amendment of the current Income Tax Act, then there is a distinct possibility and almost a statutory requirement, if the practice of this present Parliament is carried out, that we will have to prepare an Income Tax Act in the second supplement. So, there is a distinct possibility of having four series of numbers in a period of 12 months. You can imagine the difficulty that this will cause to income tax lawyers, chartered accountants, parliamentarians, and the public generally.

The Chairman: Do not forget the taxpayer.

Mr. Ryan: Yes, and, of course, the administrative officials trying to prepare the forms for the taxpayers. The whole purpose of this amendment is to side-step that situation by preventing the Income Tax Act in the revision from coming into force so that the status will be maintained until the situation resolves itself.

The Chairman: Which Income Tax Act will be contained in the Revised Statutes if they come out before any amendments are brought into force to the existing law?

Mr. Ryan: The revision will carry the current Income Tax Act, and will automatically repeal that current law and substitute for it the version in the Revised Statutes which by law is not new law but a continuation of the old law. In effect, the current Income Tax Act will be replaced by the act in the Revised Statutes.

Senator Connolly (Ottawa West): That is assuming that this bill is passed?

Mr. Ryan: No, assuming that this bill is not passed.

The Chairman: That is not what I was asking. I wanted to know which Income Tax Act would be the one contained in the Revised Statutes if they are published febore these tax changes that are talked about take place.

Mr. Ryan: That is what I answered you, senator.

The Chairman: Perhaps you had better have another run at it, because I was trudging up the hill.

Mr. Ryan: This is the last consolidation of the Income Tax Act that I have, which is 1966-67. There is a later one, I hope.

The Chairman: Yes, there is.

Mr. Ryan: This is what has been brought into the consolidation in the Revised Statutes of Canada, and this is what will be repealed by the Revised Statutes. There is a technical repeal.

The Chairman: Of course, otherwise you would have two statutes reading the same way.

Senator Connolly (Ottawa West): Assuming, Mr. Ryan, assuming that Bill S-15 is passed, what will appear in the Revised Statutes for the Income Tax Act? Nothing?

Mr. Ryan: Fortunately, it will be this one as revised. It will be there physically, but it will not be there in law.

Senator Connolly (Ottawa West): In other words, what you will have in the Revised Statutes is what we now have in the Income Tax Act?

Mr. Ryan: Yes.

Senator Connolly (Ottawa West): With all the sections A, B, C and D carried through. It will be consolidated, but it will not be revised.

Mr. Ryan: It will be revised and consolidated, but it will not be in force.

Senator Connolly (Ottawa West): I see; it is only to appear in the Revised Statutes?

Mr. Ryan: It is already there in the manuscript, and unless the whole revision is to be redone there would be no way of getting it out.

Senator Connolly (Ottawa West): If Bill S-15 is passed, then what appears in the Revised Statutes for the Income Tax Act is not the law.

Mr. Ryan: That is right.

Senator Connolly (Ottawa West): The law will be what is in the Income Tax Act and in amendments hereafter.

The Chairman: That is right. Mr. Ryan, let us take this a step further: let us assume that at some time during the lifetime of this Parliament or during this session there are amendments to the existing law. Will you then publish a supplement to the Revised Statutes, and if you do, what will you put in it in relation to the Income Tax Act?

Mr. Ryan: Mr. Chairman, are you speaking generally now, or are you speaking specifically of the Income Tax Act?

The Chairman: Specifically of the Income Tax Act.

Mr. Ryan: Assuming that this bill is not passed and amendments are made to the Income Tax Act in the same manner as other amendments have been made to other statutes in this session that are contained in our Revised Statutes, then what we would have to do would be to take these amendments and alter them–revise them, if you like–and put them in a second supplement to make them correspond to the numbering and the provisions of the Income Tax Act in the revision.

The Chairman: But if we pass Bill S-15, you will then have all this revision of what is the existing income tax law, but it will be of no force and effect.

Mr. Ryan: That is correct.

The Chairman: And the existing law, with its numbering, will continue?

Mr. Ryan: That is right.

The Chairman: And when changes are made at this session or the next session, they will be made in line with what is presently in the existing law.

Mr. Ryan: That is correct.

The Chairman: What I am really asking is: At what stage will you consolidate the existing law, and how will you go about it, because this will be after the event?

Mr. Ryan: Yes. We will assume we are talking about some time in 1972.

The Chairman: All right.

Mr. Ryan: The Income Tax Act will have been amended in the interim period, and the current Income Tax Act, with its amendments, would be put out in a consolidated form–not a legislatively authorized consolidation, but a consolidation that we call an "office copy" such at this one. They will be put out by commercial outfits, and will retain the same numbering and will do so until there is another revision commission that has authority to alter its numbering.

Senator Connolly (Ottawa West): Or until the Income Tax Act specifically is revised by Parliament and the new act is passed.

Mr. Ryan: Yes, substituted.

The Chairman: So even with the Revised Statutes of Canada that are to come out available, you will not go there to find out what is the income tax law.

Mr. Ryan: That is right.

The Chairman: You will have to take the existing law and follow it through, together with all the amendments.

Mr. Ryan: Yes.

Senator Connolly (Ottawa West): I think this is a question of policy and perhaps it is improper to be asking it of Mr. Ryan at this time, but I think we should say something about it, Mr. Chairman. The Income Tax Act has been amended so frequently that it is not just difficult but practically impossible for the average citizen–and I would say even for the average lawyer–to follow it. After the new Revised Statutes of Canada have been published, I would hope that an early effort would be made on the part of the Government to consolidate the Income Tax Act, and to pass a new act that would, in effect, make it look like the revised act as contained in the Revised Statutes.

The Chairman: I think what you are saying, senator, is that if at some stage you have a substantial revision of the existing income tax law, what should be done is what is done very often when we are amending a section of an act–that is repeal the section and then substitute the new one.

Senator Connolly (Ottawa West): That is right.

The Chairman: If the amendments that may occur are very substantial, perhaps the proper way for Parliament to deal with it at the time they are enacting the amendment is to repeal the act and substitute a new act.

Senator Connolly (Ottawa West): Yes.

The Chairman: We could than achieve a renumbering in that fashion. However, this is speculating.

Senator Connolly (Ottawa West): Yes, it is, but I would like to see the committee air the view that it is a desirable step to take. I am sure that the department has thought about this and that in time it will be done, but I hope it will be done sooner rather than later.

The Chairman: Well, this is being reported and Mr. Ryan has been here to hear what we have to say. We will get the message across somehow.

Mr. Ryan: May I make one observation on that? It is not simply a matter of replacing the Income Tax Act. It is a fact that there are about nine income tax acts in the provinces which are tightly tied in with the federal Income Tax Act at the present time. So, it is not a simple matter.

Senator Aird: I think, Mr. Chairman, what, in effect, we are doing today is making an open-ended exception to the Revised

Statutes, and that is the point Senator Connolly is trying to underline. I am very pleased to have it on the record, that it is open-ended and there is no terminal date. What we are endeavouring to place before this committee and before Mr. Ryan is our concern that efforts be made to come forward with a sensible and comprehensible Income Tax Act.

The Chairman: When we change the format and the numbering of the existing law, then we are presenting a problem for different provinces to tie in, so it is a big job. The effect of what we are doing here is not to disturb that situation but to continue the existing law. Is that right?

Mr. Ryan: That is correct.

Senator Connolly (Ottawa West): Mr. Chairman, there must be some way of simplifying this very complicated act. We have talked about this often in this committee. The sections are inordinately long, and exceptions are put in. The text is almost impossible to read and follow. Perhaps there is some way of breaking up the act into different pieces of legislation. It may be that subject matter that affects the provinces could be segregated from the main body of the act. It should be simplified. Has any research been done on this, Mr. Ryan?

Mr. Ryan: Mr. Chairman, I am not aware of any because, fortunately for my state of mind, I am not very closely tied in with work on the Income Tax Act. I think others would have to speak on that score.

The Chairman: And I take it you are not ready to accept an assignment of that kind!

Mr. Ryan: Senator, I enjoy coming here far too much with regard to corporations and other matters.

Senator Macnaughton: It may be forced labour before long.

The Chairman: One of the complications you have in trying to wade through the income tax law, as it is now, is that no matter what thought is put into a subject matter in respect of which it is wished to legislate, doors are immediately opened; and I would say that at least as many doors are opened as are closed every time there is an amendment to the Income Tax Act. This seems to be an inevitable situation. The people who are on one side of the fence practising in that field have at least as much knowledge, ability and discernment as those who are drafting, and it is when they get their experience that the amendments start coming in. The ultimate idea, I suppose, is to have a perfect statute, which never seems to be achieved, in which there are no more doors that can be opened. I would say that that is Utopia–if you can use the word "Utopia" in relation to a tax bill.

Are there any other questions on this bill? I think the purpose is clear, and we have had some useful discussion with regard to the suggestion that efforts be made to produce a more simplified bill. But I am not as optimistic as Senator Connolly that that will happen.

Senator Connolly: I am not a bit optimistic.

The Chairman: Shall I report the bill without amendment?

Hon. senators: Agreed.

The Chairman: We have two other bills referred to us–C-180, the Packaging and Labelling bill, and S-9, to amend the Copyright Act.

Concerning Bill C-180, we have had requests from at least seven different organizations indicating their wish to appear before the committee to make representations. The period of time available since the bill was referred to committee has not been sufficient to enable the witnesses to prepare themselves. This is a very important bill. It is one of great public interest, and one which may be helpful to the public in many areas. Therefore, we have to examine it in considerable detail. We owe that to ourselves and to the public–not only the consumers but also those manufacturers who are affected by it. As I indicated to the minister a few days ago, we are unlikely to commence our study of the bill until after the Easter recess.

The purpose of Bill S-9 is to remove the performing right which, under the Copyright Act, record producers presently enjoy, and because of which they can collect royalty payments.

Although this provision has existed in the Copyright Act for years, manufacturers have never filed any tariff. When the bill was originally introduced in the Senate a year ago and subsequently withdrawn, the various groups described as record producers, and who enjoy this performing right, filed a tariff with the Copyright Appeal Board as provided for in the act, and hearings regarding that tariff are now being held. When those hearings have been concluded we will have a better idea of what is involved from the aspect of dollars and cents, and the kind of tariff the Copyright Appeal Board will approve.

Many members of the public representing both sides of the question have indicated a wish to be heard.

Senator Willis: The Economic Council has now brought in its report that was requested two and a half years ago, but it was not brought in at the time I spoke on this bill in the Senate.

The Chairman: Yes. The report points out that the copyright law is very complicated and requires expert knowledge to understand it. At first the council was hesitant, but then it jumped right in and made a recommendation in line with this bill, that the performing right be removed from the act.

However, when considering the removal of a right that has existed for years, we should study it carefully from the point of view of both sides. The minister will be present at the committee hearings with his representatives and the committee will certainly want to hear what he has to say. Those likely to be affected by the legislation will also wish to be heard.

Senator Benidickson: Have we to deal with this bill promptly?

The Chairman: We will deal with it with our usual promptness in the time available. Following the Easter recess we will deal with both these measures. There is no great pressure to pass the bill tomorrow.

We should hear whatever representations are to be made, and those who are appearing before the Copyright Appeal Board will no doubt wish to appear before the committee to present their views. One facet of their views is already being presented to the Copyright Appeal Board, and since the bill affects an existing right we should approach the subject seriously and as promptly as possible.

Senator Carter: It is possible that the Copyright Appeal Board may bring in a nil tariff which would have the same effect as this bill. The right would be there, but there would be no benefit from it.

The Chairman: Senator Carter has raised an interesting point. The Copyright Appeal Board is charged with the duty of setting the tariff. I doubt whether it has the authority to decide that there shall be no tariff. This is similar to the provision contained in section 91 of the B.N.A. Act. Many cases have arisen over the years because of this constitutional aspect.

The legislation then being considered had included a prohibition in relation to an item of trade or commerce, and the courts pronounced that the prohibition was not subject to regulation. There is authority to determine a tariff but not to make a decision that Parliament has not made, namely, that there should be no tariff. If we wish to do away with the performing right, and therefore the right to have a tariff and to collect a royalty, then it has to be done by legislation.

Senator Carter: Such matters can develop beyond present concepts. The right that we may be taking away now may be of consequence later and we may have to put it back again.

The Chairman: That is possible. There is a whole new field of copyright law which may have considerable effect on computers. Material fed into computers may be of Canadian content or subject to copyright. This is a problem that may have to be resolved sooner than we think.

Senator Carter: We may soon have not only recorded sound but also a recorded picture on the same record.

The Chairman: That is right.

Senator Carter: Whatever might be said with regard to using a sound that is performed, when it is expanded to include graphic material it becomes a different field, in which the right probably has more significance.

The Chairman: That is something we shall have to consider when discussing the bill. It deals with the performing right, which is an existing right to the manufacturer of records. The performer, of course, is paid when he performs, even for the purpose of making the record, so he also has a right.

Senator Benidickson: Mr. Chairman, I came in late and I apologize. I am concerned about this matter of copyright.

The Chairman: We are not dealing with it today. We are simply discussing it, but our hearings will not commence until after the Easter recess. There are many who wish to be heard, so there will be plenty of opportunity to ask questions and for you to put forward your point of view.

This is all the business we have. Are you agreed now that we should adjourn? Senator Aird has a committee meeting at 11 o'clock, and I informed him that we would be finished before that time.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable JOHN J. CONNOLLY, P.C., *Acting Chairman*

No. 18

WEDNESDAY, APRIL 21, 1971

First Proceedings on Bill C-180,

intituled:

"An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products"

(Witnesses:—See Minutes of Proceedings)

23735—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28)

Ex officio members: Flynn and Martin

(Quorum 7)

Orders of reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Heath, seconded by the Honourable Senator Kickham, for the seond reading of the Bill C-180, intituled: "An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products."

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

The Bill was read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, April 21, 1971.
(20)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider the following Bill:

Bill C-180, "An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products".

Present: The Honourable Senators Beaubien, Blois, Carter, Connolly (*Ottawa West*), Desruisseaux, Everett, Flynn, Haig, Hays, Isnor, Macnaughton, Martin, Molson, Sullivan, Walker and Welch—(16).

Present, but not of the Committee: The Honourable Senators Heath and Méthot—(2).

Upon motion the Honourable Senator Connolly (*Ottawa West*) was elected *Acting Chairman.*

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

Upon motion it was Resolved to print 800 copies in English and 300 copies in French of the Proceedings of this day.

WITNESSES:

Grocery Products Manufacturers of Canada:

Mr. G. G. E. Steele, President;

Mr. N. Murray Brown, Chairman (President, Christie Brown & Co. Ltd.);

Mr. John M. Lindley, Director (President, Campbell Soup Company);

Mr. Don C. Gibson, Chairman, Marketing Council (Vice-President, General Foods Ltd.) and

Mr. Philip V. Moyes, Executive Vice-President.

Canadian Food Processors Association:

Mr. E. T. Banting, Executive Vice-President.

Packaging Association of Canada:

Mr. James M. Scott, President (Vice-President, Reid Press Ltd.);

Mr. John A. Whitten, (Vice-President, Christie Brown & Co. Ltd.) and

Mr. Lyn G. Jamison, Executive Vice-President.

At 12:20 P.M. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, April 21, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-180, respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products, met this day at 9.30 a.m. to give consideration to the bill.

Senator John J. Connolly (*Acting Chairman*) in the Chair.

The Acting Chairman: We have before us this morning Bill C-180, the Consumer Packaging and Labelling Bill. There are witnesses representing three organizations, the Grocery Products Manufacturers of Canada, the Canadian Food Processors Association, and the Packaging Association of Canada. If it is satisfactory to the committee and to the witnesses I will call them in the order I have just mentioned. Is that agreed?

Hon. Senators: Agreed.

The Acting Chairman: Mr. Steele, will you come forward.

Mr. G. G. E. Steele, President, Gorcery Products Manufacturers of Canada: Thank you, Mr. Chairman and honourable senators. I should like to introduce the gentlemen who are here with me. I am the President of the association and a permanent officer. Mr. Murray Brown is Chairman of the Board of Grocery Products Manufacturers of Canada and President of Christie Brown & Co. Ltd. Mr. John Lindley is a member of the Board of Directors of our association, and President of Campbell Soup Company. Mr. Donald Gibson is Vice-President of General Foods Ltd. and Chairman of the Marketing Council of our association. We are here as a delegation and we thank the committee for the opportunity of making some comments on Bill C-180.

The Acting Chairman: I need not remind the committee that Mr. Steele was formerly Deputy Minister of the State Department, and formerly Secretary of the Treasury Board. He has had a very distinguished career in the Public Service and is now retired. Mr. Steele, you may proceed.

Mr. Steele: Mr. Chairman and honourable senators, we have circulated in advance a brief which we prepared for the joint use of the House of Commons and the Senate dealing with our comments on the bill. We thought we would not take the time of the Senate this morning to go through this again in full, because the brief was the subject of our appearance before the house where there was considerable discussion on the details that we brought out at that time.

On behalf of our association I wish to say that we are disappointed that more of the concerns that we expressed in this brief were not reflected ultimately in the bill when it passed third reading in the house. I have prepared a separate smaller submission for the purpose of this morning's hearing based on three or four of the main points which still seem to us to be very important indeed with regard to this bill. We have brought to the committee copies of this submission in French and English, and if I may take the time of the committee I would like to go through it. It is a summary of what we still consider to be the main points of concern from an industry point of view.

The Acting Chairman: Is that agreed?

Hon. Senators: Agreed.

Mr. Steele: Mr. Chairman and honourable senators, we bring to the attention of the Senate of Canada, now considering Bill C-180, that our Association, Grocery Products Manufacturers of Canada, which contains some 70 companies engaged in the packaged food and non-food manufacturing business in Canada, will be greatly affected by the various new requirements set out in this bill.

As we indicated in our brief, our membership does not object to a new law of this kind which envisages a more comprehensive set of labelling and packaging requirements, but we do point out that our industry has for many years been regulated under many other statutes of the Parliament of Canada, some 15 in number—these, by the way, are listed in the back of our original brief as a list of all statutes which presently, in one way or another, govern this industry—so that our concern focuses more directly on the new requirements which appear for the first time in this bill.

Our concerns have not been greatly alleviated to date by the small number of amendments which the Government proposed during the committee stage of this bill in the House of Commons. These concerns essentially relate to the following:

Firstly, a number of areas which presently are covered by the Combines Investigation Act would now, if the bill passes in its present form, be the subject of detailed regulation by the Governor in Council. Therefore, decisions about what may constitute misleading or deceptive statements for the future in the many thousands of packaging and labelling situations which we experience will

become a matter for judgment by those preparing regulations rather, than by the courts of the land.

Essentially we are referring to the provisions of clauses 7, 9 and particularly 10 of the bill. Many rather onerous, detailed requirements are prescribed for listing information on labels. There will now be a right in the Governor in Council to decide really what constitutes a misleading or deceptive statement on the label of a prepackaged good. As I have indicated, this aspect of the law has up to this point in time been handled under the provisions of the Combines Investigation Act, section 33, which has the power, as you know, to bring action before the courts where there is any complaint of deception or fraud.

Secondly, we are very concerned that, in attempts to seek some standardization of package sizes and shapes, the Government and the minister under clause 11 of the proposed bill make no provision whatsoever for any form of mandatory consultation with those who are going to be regulated against. The arguments which the minister has brought forward to justify direct action in this way by the Governor in Council fail, we regret to say, to convince our industry that there will not be many problems unless there is some legislative assurance given that we will be consulted as a matter of right.

Thirdly, the other major area of concern has related to the strong powers of seizure and detention and the role of the inspectors as contemplated in this bill. The minister introduced some clarifying amendments to clauses 14 to 17, which have at least made it clear that in seizing product, inspectors would normally limit these seizures to the amount required to make adequate tests and as evidence, but power still resides with the inspectors to seize whole shipments or major quantities of both product and other materials, as defined in this act, on the inspector's own interpretation of what the public interest requires, and we would like to comment on this point at greater length while this matter is before your committee.

Could I just add that we emphasized very strongly when we had an opportunity to discuss this before the house committee that these powers seem to us naturally to make eminent sense when dealing with health or the safety of products. However, this is a packaging and labelling bill and it seems to us that to have the same broad powers of seizure and detention and to keep a product off the market because there may be some offence relating to the wrapper or label calls for further attention. Apparently there has just been a transference of this type of thinking from the one situation to the other.

In looking at the bill, therefore, on a clause-by-clause basis, we would refer the Senate to the following specific points.

Clause 3 of the bill was not amended in its progress through the House of Commons, although it was spoken to at some length by some of the Members of the Opposition. This is an unusual section stating that Bill C-180 would take precedence over the other acts and regulations which may at the present time deal with matters covered by Bill C-180.

During the committee hearings in the house, a witness appeared from the Department of Justice, a Mr. Beseau, and he did not really clarify the situation too much when he said that the powers under Bill C-180 would apply:

> —only to the extent that another act is amended where a power has been given in Bill C-180 to do such things in such form and manner as may be prescribed by the regulations in Bill C-180.

Senators will note, for example, that in addition to the regulation-making power in clause 17, there are several clauses in Bill C-180 where the words "as may be prescribed by regulations" leave a considerable degree of uncertainty about what is intended. There would still seem to be some clarification needed of just how this broad power of clause 3 would work and also what is intended here in terms of setting aside the many acts and regulations with which our industry has become familiar over the years.

We realize that a comprehensive statute must contain some power which deals with the existing law and regulations. However, to include power of regulation which can in effect amend the statute law strikes us as unusual. We have been searching for a positive solution to this problem. Perhaps the power should be limited to amending regulations under the other statutes. Most of these cases would deal with regulations under the statutes, but it is a most unusual power.

The Acting Chairman: I take it, Mr. Steele, that this comment refers only to clause 3 (1)?

Mr. Steele: That is quite correct, Mr. Chairman.

The Acting Chairman: For the sake of the record it might be well to read clause 3 (1):

> Subject to subsection (2) and any regulations made under section 18, the provisions of this Act that by the terms of this Act or the regulations are applicable to any product apply notwithstanding any other Act of the Parliament of Canada.

As I understand it, your comment is that although the terms of the act may vary other statutory provisions, you question the appropriate character of the further provision of this subclause, which says that regulations made under this act would take precedence over other statutory provisions that might conflict with those regulations?

Mr. Steele: That is our main point, Mr. Chairman. We find it most unusual that regulation-making power would be given to amend statute law. I do not believe I have participated in a sufficient examination of this point at any level, including such statements as I have heard by the minister as to why this power is needed. It simply places into the hands of those who will be making regulations a considerable power to review all the statutes and regulations in this field. We are afraid that we are replacing the familiarity and custom that we know in other acts and regulations by something about which we really do not know much.

The Acting Chairman: Perhaps it might be helpful if you would again read the statement of Mr. Beseau, of the Department of Justice.

Mr. Steele: When Mr. Beseau was asked this question before the House of Commons committee, he said that clause 3 (1) would apply more "only to the extent that another act is amended where a power has been given in Bill C-180 to do such things in such form and manner as may be prescribed by the regulations in Bill C-180." It is difficult, not having had a chance to examine him when he made this statement, to be precise about what he intended, but he may have said that this will only apply if Bill C-180 actually has had the effect of amending another statute.

Senator Walker: He is really giving it the power of the Bill of Rights, is he not—an overall omnibus bill?

Mr. Steele: Yes, he is, The question whether or not this applied to the Bill of Rights was asked by some members in the house. This is not a point we raised in our own testimoney, but it is not clear if this does have the effect of setting aside the Bill of Rights, because it just says "any act of the Parliament of Canada".

Senator Carter: When we had the Hazardous Products Bill before us, it empowered the Governor in Council to add or delete articles in Schedules A and B, and these additions or deletions had the force of amendments to the act. You will remember that the committee took a fairly strong stand on that point, to the extent that I think there was incorporated by this committee a clause which would have the effect that any amendments brought about in this way through the regulations would come back to Parliament within a specific period of time for ratification.

The Acting Chairman: Was it a positive or a negative thing?

Senator Molson: Two years was it not?

Senator Carter: I think it was two years.

The Acting Chairman: The device used, as I recall it—I may be wrong—is that the change in the schedule would be made by order in council, and it would remain unless within a certain period of time appropriate action was taken in one of the Houses of Parliament.

Senator Carter: That is right. I think the regulation had to be tabled, and then there was a ten-day period in which anyone who had objections to the regulation could raise the issue. I think that was the form it finally took, but there is nothing like that in this bill.

The Acting Chairman: No. It is a useful precedent.

Senator Macnaughton: Surely the best way to get the best evidence on this is to have Mr. Beseau here.

The Acting Chairman: Mr. Beseau or someone from the Department of Justice, I should think. I am sure the committee will do that. The chairman will arrange for it, and I will bring this to his attention when he comes.

Mr. Steele, I am afraid we interrupted you, but I thought this was an important point in your submission and that we should perhaps clariy the facts before we proceeded.

Senator Molson: Mr. Chairman, just before we move on, I am looking at clause 3 and then going to clause 18, paragraph (h) of which says, "subject to any other act of the Parliament of Canada". Is that not a contradiction? One says it may amend another act afnd this one says "subject to any other act" the Governor in Council may do certain things.

The Acting Chairman: That is a valid point to raise. I think our earlier comment, particularly the reference Senator Carter made, plus the one Senator Molson has now made, make it important for some explanation to be given from the Department of Justice on this issue. Thank you, Senator Molson.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: May I just point out the opening words of clause 3 do say:

> Subject to subsection (2) and any regulations made under section 18.

The Acting Chairman: Would you say that had the effect of eliminating the caveat in paragraph (h) of clause 18?

Mr. Hopkins: I think the Governor in Council would be left free under clause 18 to do what he likes. It could include a caveat of the kind in here.

The Acting Chairman: I think the question is whether the Governor in Council is left free under clause 3.

Mr. Hopkins: I merely point out that there are two exceptions in clause 3, and that is as far as I am going to comment at the monent.

The Acting Chairman: Obviously it is a complicated problem on which we should have an explanation.

Mr. Steele: My only observation was that we found confusion here in trying to relate clause 3 to the old clause 17, now clause 18, and also because of the fact that in addition to the specific regulation-making powers under the regulation clause there were these words attaching to some of the other clauses of the bill, "as may be prescribed in regulations", which are not referred to in the regulation-making clause. It is a rather difficult bill to work through in this respect and realize its full implications for industry.

Going on from clause 3, we did make reference to this problem of the relationship between this bill henceforth and the Combines Investigations Act as we have known it. Clauses 7 and 9, which deal with misleading advertising and labelling, brought forth a comment from our members in our brief that we have a strong preference for the approach under section 33 of the Combines Investigations Act. We were not reassured when the minister

made a statement during his committee appearance, from which I quote:

> Regulations are necessary not to prejudge what is an offence, as the Grocery Products Manufacturers put it, but to remove from the courts and to put into clear law what the policy should be.

I think that rather aggravated our concern, as a matter of fact, because one of the things we have tried to stress is that business, in operating, develops a degree of certainty out of knowledge of the number of instances where cases have come before the courts, and it is guided by them pretty much and observes them fairly closely. However, if we are now to get into a situation where there will be regulation writing in this area, considerable element of uncertainty rather than certainty will emerge from the point of view of industry activity here.

The Acting Chairman: Would you not think, Mr. Steele, regulations could clarify the intent of the legislation itself? It seems to me that as long as the regulation is within the four corners of the act, then it can clarify and make more precise what is very general in the act. So far as your members are concerned, would they not know in a good deal more detail what they are required to do if the regulations are clear and precise and are seen to apply to them? I am not suggesting they may like the regulations. It is a question of clarification; I think it is something that can be cleared up by regulations.

Mr. Steele: It should be, I hope, Mr. Chairman. I think we should take just a moment to look at clauses 7 and 9. The thing that concerns us most is that there is a considerable extension through this bill of the areas of what may be described as misleading or false information, where large areas of judgment are going to be exercised by someone.

Until we know more precisely, I suppose, just exactly how regulations will be written in this area, we have a considerable amount of concern about what will be in peoples' minds. For example, clause 7(2)(a) on page 4 reads:

> (a) any representation in which expressions, words, figures, depictions or symbols are used, arranged or shown in a manner that may reasonably be regarded as qualifying the declared net quantity of a prepackaged product or as likely to deceive a consumer as to the net quantity of a prepackaged product;

And then it goes on in (*b*) and (*c*) to elaborate more on what it is that they have in mind. These are all areas of considerable judgment in terms of how one interprets information on a label. There are just thousands of these situations. This is the point we are making on this.

No one is arguing that there should be any attempt to deceive the consumer deliberately by the information that is on a label or packaged goods. But the writing of regulations in this amount of detail in this area is worsened. The principle at least that we have been following so far is that people are free to make judgments in this area, knowing what the courts have said about what is misleading and deceptive, and to be guided by these decisions.

Senator Beaubien: Mr. Steel, in the United States, is this sort of legislation administered under the state or the federal jurisdiction?

Mr. Steele: It is administered by the Federal Trade Commission, under the Secretary of Commerce.

I think it would be fair to say that this would be a much more detailed and comprehensive statute than appears on the books in the United States at the present time. The minister, in fairness to him, in speaking on this bill, said that it was deliberately so, because in the United States they have run into difficulties with what they call the Fair Packaging and Labelling Bill. Nevertheless, there are a considerable number of safeguards for discussion built in between the Secretary of Commerce and industry generally in their law which do not appear in this one.

The Acting Chairman: This in effect, I suppose, would, for the purposes of safety, compel every manufacturer who prepackages his goods, to apply to the authorities for approval of his label?

Mr. Steele: It will in effect create that kind of situation, sir, because there will be so much uncertainty that it seems to me that the course of wisdom on the part of any manufacturer will be to check in advance. This creates a climate which is worrisome, too, that he must come to some one and actually say "do you think this will get by under the regulations?" There is this constant interpretation going on.

This has been one of the problems with the whole labelling and packaging area in the past, to try and get definiteness and certainty, so that there would not be a need to move to Ottawa to get a pre-check on this every time one wanted to make a change.

That is our main point on clauses 7 and 9, namely, that they introduce a completely new concept into the packaging and labelling area from that which we have been experiencing under section 33 of the Combines Investigation Act.

Senator Walker: Have you any suggestions as to a substitute for this?

Mr. Steele: Our recommendation, frankly, in our own brief was not to try and modify this but to raise very seriously the question whether this was a good move, whether we should not stick with the law we know in section 33, and not attempt to have regulation-writing powers in a packaging and labelling bill which deals with what we would call advertising on the package. Advertising is controlled under section 33 now.

Senator Molson: What about the frozen food requirements under the Food and Drugs Act?

Mr. Steele: They certainly deal, Senator Molson, with the safety and health aspects of our food. Of course, you may not advertise in conflict with regulations under the Food and Drugs Act. But here again over the years a certain amount of uncertainty has grown up as to what the Food and Drugs Act will or will not permit. For

example, you cannot make claims as to the nutritional quality of a product, or you cannot misrepresent the health or nutritional aspects of any product. That is a form of advertising, if you will, but it has to do with the objectives of the Food and Drugs Act. It seems to me that this bill takes us further into the area of advertising and promotion generally. That is a thing which takes us away from the straight health and safety aspects.

Senator Molson: You have other requirements under the Food and Drugs Act as regards to contens of the package, have you not?

Mr. Steele: Yes, there is quite a comprehensive set-up under this, as a matter of fact.

The Acting Chairman: There is a good deal of regulation under some of the other acts mentioned in your general brief where, by regulation, certain standards are prescribed for labelling and for claims, and indeed for content of the prepackaged goods.

Mr. Steele: Yes.

The Acting Chairman: I think it might be helpful to the committee, if the committee agrees, for you to read from your original brief, Appendix A, which sets out the various acts to which people in this industry are subject. Would that be helpful to the committee, to know about these acts? Would you care to put those on the record?

Mr. Steele: Yes. This is Appendix A to our main brief. It is a list of the current acts of Parliament providing consumer guarantees, standards and protections. There are fifteen of them. They are:

Weights and Measures Act

Fish Inspection Act

Meat and Canned Foods Act (Fisheries and Agriculture)

Food and Drugs Act

Proprietary or Patent Medicine Act

Canada Dairy Products Act

Fruit, Vegetables and Honey Act

Maple Products Industry Act

Canada Agricultural Products Standards Act

Meat Inspection Act

Combines Investigation Act

Hazardous Products Act

Textile Labelling Act

Broadcasting Act, because there are considerable regulatory powers referring to advertising, as you know.

National Trade Mark and True Labelling Act.

The Acting Chairman: These are all federal statutes?

Mr. Steele: Yes, they are all federal statutes.

Senator Macnaughton: Is there an area in the provincial acts that we have to cope with now, with requirements as to language, and so on?

Mr. Steele: Yes, at the present time there is no statute, for example, in Quebec, but there are regulations made under their agriculture act relating to bilingual labelling within the Province of Quebec. These are well understood by our industry and in fact we have a code of practice in this field. Each of the provinces—I will not say all of them but an increasing number—are developing consumer protection acts of one kind or another, to deal with the areas within their own jurisdiction. I might just cite one kind of example, which is very recent and very bothersome to use. We were just out to British Columbia and making representations in their legislature. The legislature of British Columbia has passed a Synthetic Food Products Act, which will be administered by the Minister of Agriculture in British Columbia. This in effect is taking the same powers in that jurisdiction, in British Columbia, to regulate the way in which natural and artificially composed or formulated food products must be marked in that province.

So we are getting into quite a worrisome situation here, when some of the provinces now move in to establish independently a view of the concern from their own particular interest. There are real problems in British Columbia in some of these agricultural areas.

We have been trying to keep them in line so we do not get too many sets of rules going at one time in this country. We are as an industry concerned about this problem. All of the large companies in our association are national companies and depend very much on being able to understand the rules that operate from one side of the country to the other. In this respect we favour whatever law comes along so long as it is a nationally-accepted law that others can accept and work with.

Senator Desruisseaux: Mr. Steele, with respect to the broilers that are coming into Ontario from the province of Quebec, does the labelling or packaging of them require that they be sold under a permit?

Mr. Steele: The burden of the amendments which Mr. Stewart has before the Ontario legislature now is to give to the local marketing board the power to seize any product not licensed by the Ontario marketing board. British Columbia precipitated the same type of situation when it made sure that products moving from Alberta into British Columbia were licensed by the authorities in British Columbia.

Only one province has seen fit to challenge this at the moment, and that province has a case going through the courts on its way to the Supreme Court of Canada as a test case to try to determine just what the jurisdictional boundary lines are.

It is a very worrisome type of development, because there seems to be an upsurge of the use of provincial powers to deal with matters within their own jurisdictions, thereby, in effect, producing a situation where barriers are being put around the provinces so far as trade is concerned.

The Acting Chairman: The trade problem has very serious consequences, and perhaps we should deal with that separately; on the other hand, there is the matter of labelling and the importance of true labelling in order to communicate the true message to the consumer or pur-

chaser. In this respect, there is concern not only at the federal level but at the provincial level as well. I gather that most provincial legislatures are trying to correct this situation. I can see where the question might very well arise as to where the true jurisdiction lies. Has your association given consideration to the question of whether or not the power that is being taken here to label is a proper federal authority that is being invoked or is a provincial authority?

Mr. Steele: We have taken legal advice on this point, Mr. Chairman. I do not know whether this would be regarded as a proper posture for us to be in, but we strongly support the idea of having a national or Canadian set of standards here which would be acceptable in all of the provincial jurisdictions. Therefore, we have not wanted to identify certain of the sections here where one might be worried about this. But we are assured by some legal counsel who have looked at the bill that there are reasonable grounds for doubting whether some of these powers do in fact reside with the federal Parliament.

One general comment should be made. This is a worrisome aspect to us, too, because more and more the Criminal Code power is the one that is being used to extend and to make it quite clear that the federal Parliament has power to move into these areas. But this is a trade and commerce bill. In fact, it is a bill to regulate commerce in the country, and in the commerce-power field you would get real questions whether or not you could at the federal level make regulations which would apply within a province.

As I understand it, although there has been no public discussion about it, questions have been raised about this whole matter by the attorney general of Quebec. We understand further that other attorneys general may follow suit. It is our job to try to wrestle this out at this time. Our position is that if we are going to have this bill, then the concept of the bill should be one that everybody across the country will understand. We wanted to be as defined and as clear as possible so far as the industry is concerned.

Senator Hays: Mr. Steele, in so far as the objections you have to the bill are concerned, can you give us specific examples in the grey areas with certain specific products that you see trouble with in respect of the clauses you have already mentioned?

Mr. Steele: Yes, we can, sir. Would the committee wish to take a quick look at one or two of these problems? With respect to section 7 and section 9 we have already been given some indication of what the views of the minister and his officials would be, and those views raise some real points as to how products should be marketed or sold to the public. For example, we brought along some of the products of Mr. Gibson's company. With respect to these his company just accepts the fact that it is possible for some of its approaches in the way it markets products to be taken right out of its hands altogether.

Perhaps Mr. Gibson would like to speak to this matter. The question really is whether he should be able to put the picture of a fruit, for example, on the front of a package if it in fact does not contain fully the natural fruit product depicted.

The Acting Chairman: Perhaps it might be helpful to the committee to have that kind of information, if the committee agrees.

Hon. Senators: Agreed.

Mr. Don C. Gibson, Chairman, Marketing Council, Grocery Products Manufacturers of Canada: Mr. Chairman, honourable senators, if I may I will just line up these packages of JELL-O. They are ten, separate, individual flavours of JELL-O jelly powder. Out of a total line of 16 flavours there are ten that are red flavours, as indicated by these packages. They are red in colour. These packages cover various combinations of fruit flavours, but they are all of the red fruits, such as cherries, strawberries, raspberries and so on.

As do many other companies, we have used pictorial illustrations of the original fruit from which the flavour is derived. Our submission is that if we as manufacturers were to be in a position of not being able to use illustrations of the natural fruit, it would be a disadvantage to the consumer. We suspect the consumer would have much more difficulty in identifying an individual flavour out of a large array of products on the shelf.

The Acting Chairman: The picture of the fruit is there simply as a symbol?

Mr. Gibson: The fruit is depicted to represent the flavour. It is not there to suggest that that particular fruit is contained inside the product. It simply illustrates that one package contains a cherry flavour and another a strawberry flavour and so on. We believe that symbols are the best way of communicating information instantly to the housewife doing her weekly shopping. We feel that we may create a substantial problem for the housewife in identifying what flavour a package contains should we not be able to use symbols to communicate that information.

Senator Molson: What is the descriptive wording on the package?

Mr. Gibson: Where imitation flavours are used, senator, it is clearly stated in the ingredient line.

Senator Molson: I see that it says that it is wild cherry jelly powder.

Mr. Steele: We chose this example, Mr. Chairman, not because it is a stark one—and it is that—but it does raise two or three interesting points. There is the view around, which I suppose is reasonable, that you should not be misleading the public about the real product that may be inside if, in fact, it is not made out of the real, natural product. Of course modern food technology permits the exact reproduction of these things. This was the essence of our discussion in British Columbia that whereas they were complaining about the competition of these apple-

flavoured drinks or apple crystal drinks, when dealing with their own problems of apple juice in British Columbia, one cannot claim it is nutritionally inferior to the other product because it would not be permitted. The problem we are running down and which bothers us about this type of legislation is, who is going to be making these judgments? Are we going to have a chance to consult with them about these things?

There is another aspect about symbolism which Mr. Gibson might have mentioned, and that is that there are many people in this country who do not understand either French or English too well, and symbols do have a meaning when people are looking around for goods.

The Acting Chairman: Well, your concern, Mr. Steele, is in connection with the regulations that might be made in respect of, say, clause 7(2)(b). The proposed law provides that where there is "any expression—or symbol that implies—that a prepackaged product contains any matter not contained in it", the use of that symbol is prohibited. Now in the case of the product which you have put before us you have a package of JELL-O which has, say, a raspberry flavour and you have a picture of a raspberry on top of a prepared dish of jelly. There is in fact no natural raspberry in that, but there is an artificial raspberry flavouring in it, is that so?

Mr. Steele: That is correct, sir.

The Acting Chairman: But your wording describing the content of the package says that it is raspberry flavouring rather than natural raspberry?

Mr. Steele: That is right.

The Acting Chairman: In that case I take it that your complaint is that since there is no natural raspberry in that then by law the regulation would have to require you not to use the picture of a raspberry.

Mr. Steele: It might, unless we won an argument that we were not reasonably depicting this as containing something it does not.

Senator Molson: Why is that carton not labelled "raspberry flavour"? It says "Raspberry JELL-O" or in the case of the package I have it says "Wild Cherry JELL-O". Why does it not say "wild cherry flavouring"? Surely that would cover the point pretty satisfactorily because when I see "wild cherry' on it, to me there is the natural assumption that the package contains wild cherry.

Senator Carter: It says in fact "Wild Cherry Jelly Powder" but in fact it is not wild cherry jelly powder. It is wild cherry flavour. So your statement is not actually correct.

Senator Hays: It is like picking a wife; you look at her face and legs and take a chance on the rest of her.

The Acting Chairman: I think your wife should feed you unseasoned JELL-O, senator, after that. I think Senator Molson's point is a valid one but I think there is also the further proposition that you would be prohibited under the clause I have cited, clause 7(2)(b), because you did not have the natural juice of the fruit in question and then you would be prohibited from using the picture of the piece of fruit.

Mr. Steele: Yes, in any form, to identify it. This is the real concern we have. It is a more complicated world than this too, Mr. Chairman, because in some products, and I would not know whether this applies to the product we have been looking at, but I do know that in some others you get a mixture of natural fruit essences and some artificial ones. You get a very complex situation to try to cater for.

Mr. Gibson: Mr. Chairman, if I may talk to the point Senator Molson raised about the use of the word "flavour", this is not of concern because this can be done in respect of many products about which that statement is made. It is of no detriment to anybody in manufacturing. And if this clarifies it for the consumer, then that is fine. I think the issue is this; can we use pictorial symbols to communicate?

Senator Molson: I would think with respect, Mr. Chairman, that if it was clearly marked that that was the flavour that there would be a much stronger argument for the use of the symbol than there is in this particular instance. Personally I would think that the use of the symbol and the statement of the fact that it was artificial flavouring would be extremely useful from the point of view of the user as well as from the point of view of the manufacturer as long as that was clearly understood, and it was made clear what was in the package. I personally do not go to supermarkets very often, but if you have to go around and read the fine print on packages, then I think it would be extremely difficult to fill your cart. It seems to me that the use of the pictorial representation suitably protected is a very good one.

Senator Blois: Mr. Chairman, I make this point to support Senator Molson. I took the time to go into some of the supermarkets here and this is one of the items I looked at. Several of the ladies to whom I put the question said "Don't ever take that off because I can't see." They told me they go by the little emblem on that, whether it be cherry, raspberry, or strawberry. Perhaps it should be worded differently, but I think the emblem is necessary to the average woman who is doing the buying.

Senator Isnor: From the advertising point of view it is also very important. You are using it on television?

Mr. Gibson: Yes, sir.

The Acting Chairman: The neat question then is as to whether or not this section of the act would allow you to use the symbol and whether they could write the regulation in contravention of that section of the act. Is this the point you are concerned about?

Mr. Steele: Yes, we are very concerned about that because we feel, as you have indicated, that there is a likelihood that we would not be able to use symbolic representation of any kind.

The Acting Chairman: Well, I think you can visualize a situation where the official in charge of the regulations and who is going to write them would be approached by you and you would say "We would like to use the raspberry symbol" and he would say "Well, you do not have raspberry in it, and section 7(2)(b) does not allow me to let you use that symbol." That is the neat point, is it not?

Mr. Steele: Yes, sir. Regarding clause 11, in the minister's defence of his not wishing to change any part of clause 11 about package standardization—this is what he spoke about in the committee of the other house—he refers to the various packaging situations in our industry where some standardization already exists. He mentioned particularly the canned fruit and vegetable area. It is a far cry, however, from his example to the many thousands of different packaging situations which henceforth would be covered by clause 11 without benefit of any mandatory consultation. It is the view of the minister, with which we disagree, that he feels it is not necessary to call in the Standards Council, a new body created by the Standards Council Act, and that it is sufficient for manufacturers and consumers to sit down in a number of instances to work out what is required. We would submit that this would be a wrong course of action and that, if views are held by the Consumers Association and Government about what industry should do, these views should be referred to an independent body such as the Standards Council with a request that the matter be studied and a plan worked out to bring in changes if these are indicated. We would like the Senate to review our statement on this again and to consider favourably the amendment of this section to require some form of mandatory consultation with industry. The minister feels that such mechanism would take months or years to come to grips with the problem and he would like to get on with the job of passing judgment on examples of undue proliferation of shapes and sizes and of discussing regulations with the industry on this matter.

We think this is a most important point and that what is needed is some mandatory requirement that the minister consult with those who are likely to be affected. The industry is really the only one who can understand the problem and give the minister an indication of what the reaction and cost will be. This is our main point about clause 11.

Senator Walker: When advertising JELL-O you have always indicated that artificial flavouring is used.

Mr. Steele: Yes, whenever artificial flavouring is used the product is so marked. That is a requirement under the Food and Drug Act.

Senator Walker: What is the minister's objection?

Mr. Steele: One would assume from the statements reflected in the minister's comments that there is too much prominence given in this type of product advertising to the pretty picture on the package, which attracts people to buy it in the first instance, without asking them to be discriminating about what they find in the package. We come again to the point I mentioned about standardizing shapes and sizes of packages which is of even deeper concern in some respects because it is completely new. Although the Government is moved to do something, in our view the way to approach this matter is that there should be prior consultation down the line with industry before regulations are passed which say that a particular product in a particular area might have only x number of sizes in such and such a form.

The examples used time and again by the minister are those which come up in certain specific product areas, such as toothpaste and detergents. There are many sizes of detergents. Our point is that there are so many thousands of similar examples in the packaged goods area, that to have regulations made in such areas without a consultation requirement of a mandatory kind would create a real problem for the industry, the consumer, the Government and everyone else.

Senator Hays: There is a right of appeal to somebody.

Mr. Steele: We feel that it is very important that when the minister exercises the power to make a determination on what is an undue number of sizes he should come to the industry and say "I think there are too many sizes" and should start negotiations and receive the views of the industry on how many sizes there are and what purpose likely to be served.

Senator Hays: Such as an eight-ounce size instead of a seven-ounce size.

Mr. Steele: Yes. There are all sorts of examples which could be cited of the great variety that exists on the shelves.

Senator Molson: Is there any unanimity in the industry as to the proliferation of sizes?

Mr. Steele: I could give examples indicating how difficult this problem is. Perhaps I should mention the case of tea. It is always said that the industry will not move in these areas unless it is forced to. This is really an unfair over-simplification of the problem. I take as an example packaged tea because we have within our one association all the major tea blenders and manufacturers in Canada. The majority of the larger ones quickly reached the conclusion that in packaging a pound of tea in different bag size you could have a range of 32, 64, or 120 bags, which would cover most of the marketing situations.

We have studies this problem and we know that we can reach agreement among the major companies. Is it appropriate for an industry such as this to have a standard of regulation put out by the Government if its effect will be to put certain tea companies out of business? One company wrote to me from England stating that they understood that in Canada we were studying a regulation of this kind. That company explained that they marketed their tea all over the world in a size that would not come within the range used in Canada. They explained that they used 144 tea bags to the pound, the reason being that they found a high degree of acceptability for that

size. In order for such a company to enter the Canadian market, would it be forced to use the Canadian standard?

We find this a difficult problem to wrestle with in terms of suggesting that it is nice and cozy for the companies that are already there, but we exclude someone who chooses not to package in that format. It is an interesting philosophical point. In the United States the Government has taken the view that it will not by means of regulation put certain people out of business.

Senator Molson: That is not one of the numerically greatest container problems?

Mr. Steele: No; it happens to be a fairly simple one.

Senator Molson: You are not comparing that to cans of juices, soups and vegetables?

Mr. Steele: In the soup, fruit and vegetable area we have some standardization for a number of years under the Agricultural Products Act. The minister uses this as an example of successful standardization. There are problems here to which I think a major company president such as Mr. Lindley would wish to speak. We find, in other words, after a review of the situation, product area by product area, that there are convincing arguments why every one of the sizes that are represented by our own companies' products exist in the marketplace in this form.

We attempted to demonstrate to the committee of the House of Commons that there are bound to be variations in the contents of packages of such products as cereals or detergents, depending on the density of the products.

Senator Molson: Some of them contain dishes, dish towels and various other items.

Mr. Steele: Quite apart from that point of promoting the product, the same amount of detergent product will at least be found in the package, whether or not it includes a bonus offer. The quantity which will go into the standard shell size depends on the type of cereal. The reason that shell size is used is that it makes sense in the market.

Senator Carter: Is there not an extra cost factor involved in all these proliferations of sizes? Are varying sizes not automatically more expensive than a standard size?

Mr. Steele: I would certainly like my colleagues, who deal with this problem on a day-to-day basis, to speak to it. We did not know whether we would have the time to present some of these points to you. You ask whether there would be an additional or lessened cost factor to standardization?

Senator Carter: Yes; would the cost to consumers not be reduced if there were fewer standard sizes?

Mr. Steele: This involves the question of increasing the assembly line capability in the plant in order to run two or three at the same time. High speed packaging equipment in the plants can accommodate a standard size of shell such as in this illustration that I am showing you. At the bottom, by the way, is an exact illustration of the present method of packaging three standard types of cereal. The dimensions of that package are the same for all three and at a high speed packaging line the only concern is dumping and measuring the product through the line. This is a much simpler process than actually taking that same packaging equipment and adjusting it. The dow time involved in adjusting equipment for variations in the outside container size involves far greater cost than that involved in just switching from one product to another using the same line.

A company with three or four very high volume items may find it necessary to install literally $150,000 or $200,000 worth of additional packaging plant on a line in order to meet their packaging requirements.

Mr. Brown, who is the president of a major biscuit and bread manufacturing company, Mr. Lindley and Mr. Gibson can tell you better than I what would be involved. I think the reverse would be true, Senator Carter.

Senator Carter: I have never been able to understand the reason for having packages of seven or 17 ounces, one ounce more than one pound or one ounce less than one-half pound. At one time there were simply one pound, one-half pound and one-quarter pound packages. Somehow we have arrived at all these odd sizes. How did that happen and why was it necessary?

The Acting Chairman: Your question implies with or without thumb, Senator Carter. In the old days that was the real problem; it is different now.

Mr. John M. Lindley, Director, Grocery Products Manufacturers of Canada: The various sizes and shapes in which a consumer good is packaged and sold are embarked upon initially by the manufacturer in an attempt to fill a market need and attain market acceptance of a product, whether new or an extension of an existing product.

In most instances we deal in a wide range of family requirements. Some are those of one person living alone in an apartment. Families can range up to 10 or 12, all having different requirements. The manufacturer constantly seeks to provide that wide range of family requirements with goods packaged to meet their needs most economically. A family of one or two buying in a small package may pay higher per ounce or some other measure, but the waste is nil. If they were obligated to buy a larger unit because we wished to restrict the number of sizes in which we sell packaged goods, they may pay slightly less per unit of measure but the resultant waste due to the larger package would offset the lower cost.

This probing of cost by the manufacturer has developed the existing range of packages. The response of the consumer to this dictates what we sell and do not sell. If we develop four sizes of a given commodity the consumer will soon indicate by the performance in the store whether or not two or all four sizes meet her need. The retailer has to display a large number of items in limited space so he therefore becomes a check point, because if the

consumer does not buy the product he cannot afford to leave it on the shelf and it disappears.

All of us here and many others in other types of industry could cite example after example of probing to fill a market need and failing because we have misread and then had to withdraw the product from the market. It is a balance and a counterbalance, which I think you will agree has been very successful in the marketplace of North America as compared to many other marketplaces around the world.

Senator Macnaughton: I understand that the point of the witness is that he objects to the attitude that father knows best, father in this case being the Government and industry has the best knowledge of its own position.

Mr. Lindley: Industry and the consumer.

Senator Hays: Has cost or price anything to do with it?

Mr. Lindley: From what standpoint?

Senator Hays: If a person needs 13 ounces of corn flakes rather than 16 ounces, should he buy the 16-ounce or 15-ounce package or two 7-ounce packages?

Mr. Lindley: Consumers should and will buy what fits their need. Unfortunately, of course—or fortunately—the manufacturer does not set the retail prices. During our appearance before the House of Commons committee one of the members of that committee attempted to bring to light the fact that a 13-ounce package of a commodity and the same commodity packed in a 16-ounce package may not represent value based on the eased size. This is the function of the retail store. Ninety-nine per cent of prices at which manufacturers sell to the wholesale trade represent lower unit costs, but that will not carry through to the retail store because of the manner in which they price the product. We have no control over that.

Senator Desruisseaux: Do consumer associations agree with the views you have just expressed?

Mr. Lindley: They rightly become concerned when they see a 13-ounce bottle or can costing less per ounce than the same product packaged in a 20-ounce size. They should be concerned about this, because it is confusing. But this is a function of the retail market place. First there is the discount war, which opened in the Ontario markets in the last three or four months. The retailers are again attempting to get a competitive gain over their friend down the street, and they may take a 16-ounce bottle of something and drastically under-price it, sell it below cost, because they feel that may be the most dominant size sold of that product, and they are trying to get a competitive gain in order to attract people to their store. That size may be by far the best value. A size containing double that amount sitting on the shelf at that particular point in retail price time may not represent as good a value as the 16-ounce size. Certainly it is confusing to her, but this is also a function of that total competitive market place.

Senator Desruisseaux: There has been no great complaint?

Mr. Lindley: I do not think there has been. We do not agree with her, but this can be a confusing situation.

Mr. Steele: Could I just emphasize one very important follow-on point from what Mr. Lindley has said. We fail to see how any action taken by the Government under clause 11 can help to improve the situation just described by Mr. Lindley. We were forced to discuss at the house committee level some of the retail practices. The discussion got on to unit pricing and whether this could improve things. It is a fact that these are two completely separate parts of the total market place structure, and the manufacturers do not control retail prices; that is a fact. Therefore, whatever happens by way of any regulations will not have the effect necessarily of improving the easy arithmetic that the consumer is going to have at the retail shop level.

The Acting Chairman: Senator Heath has a question. The rest of us will probably immediately recognize, after the question is asked, that we are amateurs and she is a pro in this field.

Senator Heath: Mr. Chairman, you are putting me on the spot here. I was wondering if in Mr. Steele's view a slight change in the wording of clause 11, even in the present proposed legislation, by saying that there shall be consultation rather than there may be consultation, would perhaps improve the situation. I cannot really see the manufacturers can gain too much by not having more standardization, and not having this unit price. If it is made possible for the consumer to do her own swift mental arithmetic, so that she is not faced with 7.26 ounces of one brand of canned fish and 7.25 ounces of another brand, if they are all eight ounce tins, I cannot see there is any difficulty with a particular class of product. If the wording were changed from "shall" to "may" I think you would be home free. I do not see the problem really.

Mr. Steele: It would improve the intent of the bill. We agree that it would do that. We were trying to make the point that really the whole thrust of this clause was put in such a way as to mean a worsening for us, because we feel in an area like this there has to be the closest requirement for consultation right down the line. If these thinge are to be done with the consumers' interest in mind, because there are very definite cost factor relationships here, unless a person knows what he is doing in this industry area there can be many foolish decisions made about what standardization is likely to do to the consumers' end price or the range of products on the market.

The Acting Chairman: Mr. Steele, would you say you generally agree with the concept of this clause, that more standardization is desirable than now exists in the market place, or would you controvert that?

Mr. Steele: I would not agree, Mr. Chairman. I could not agree, as we have stressed in our brief, it is an area

that lends itself to regulation or control, if you will, in the way in which clause 11 is setting out. In other words, I think these decisions, as has been indicated, are made on the basis of some pretty complicated judgments on the industry side. The problem as we see it has been one of explaining more effectively to the consuming public why these situations arise, but we do not find it an easy route to simplify it by suggesting that all you need to do is standardize these things across a range of products.

I would just make one brief comment on Senator Heath's statement. No manufacturer who has a range of products that he has respect for, and which he knows the public demands in a very strong way, would agree that he should be told to standardize the size of his product alongside a competitor's on the ground that there really is not any difference between these two products, and if you have them in the same sizes people will just be able to make a better judgment. This is just not true. No manufacturer will agree with that. This is something that in a way the consuming public would like to see greater simplification of. There has been great discussion of the unit price possibility in the house committee.

No, Mr. Chairman, I think, coming back to your point, that we disagree that this is a good move, because it will lead to a lot of complexities which we worry about.

Senator Molson: Have there been any disadvantages where some greater standardization has been achieved, as under the Canada Agricultural Products Standardization Act, which you mentioned? Have there been any disadvantages to the manufacturers or the marketing of those products, which I think you said were soups, vegetables and fruits?

Mr. Steele: This is a two-edged sword. There are some economies, obviously. First of all, it has been in the system a long time, so people are used to it. That is a factor.

Senator Molson: But my question still stands.

Mr. Lindley: I think in the canned fruit, vegetables and soups area there is still a broad range of canned sizes offered for sale to the consumer. Referring to soups, for instance, we have what we consider 8-ounce, 10-ounce, 19-ounce and 48-ounce sizes. Juices are sold in a wide range of can sizes—6-ounce, 10-ounce, some 12-ounce, some 19-ounce. Because there is standardization of size does not necessarily mean you will completely eliminate proliferation of sizes, because again the consumer and manufacturer are probing for items that meet changing needs.

A good example would be a recent change in apple juice can size. It was sold at one time and in a can that we refer to in the industry as 211 x 400 size diameter, which is the size you would recognize as the soup can size. The industry requested and obtained permission to change that size, but they did not eliminate the 211 x 400 for juice; they wanted an additional size. This was granted to them, and it merely put 10-ounce apple juice into a narrower, taller can, still holding 10 fluid ounces of juice.

There are many other instances I could quote of our going to those who regulate our container sizes for given commodities because of a change in market conditions, and we requested approval to change the size and obtained that approval.

The Acting Chairman: What was the changed market condition that brought about that change?

Senator Desruisseaux: Vending machines?

Mr. Lindley: Partially vending machines, if you are speaking of the food service industry. I think just the consumer recognizing that there are more and more instances where one or two people live in an apartment and their needs are so drastically different from those of the average family of five or six.

The size needs change and the types of foods they buy are of a very different pattern. I think this is a function of society. If you go back far enough to the rural oriented farm family where they had products, such as the present frozen foods, in vegetables and fruits—they did not freeze them, but they canned them and put them in jars—I think the evolution away from that to the buying of these goods in the stores and not being processed in the homes is another factor that has created a demand for a lot of ranges of sizes in these commodities.

Senator Molson: Is there not a change in refrigerator size as well to adapt to various sizes?

Mr. Steele: Yes.

Senator Isnor: Would not the cost of a greater number of sizes increase your general overhead in marketing?

Mr. Lindley: No, sir. I do not wish to refer to a particular company, but it is a product with which I am familiar, so I will use it as an example. We have been selling a vegetable juice product for a number of years in this country in three container sizes. There has been a growing demand for a smaller size can of this juice and we decided we should attempt to fill that need. We decided to explore the market potential for it, with the smaller size. We entered the market with the smaller size in the last nine months in Canada, in the United States a year ago, so we have also had some experience.

The acceptance of that smaller size is just phenomenal. The sales are just running rapidly far ahead of some of our other standard sizes, which we have been selling for years, because we are filling an apparent need for some people who want to buy that juice in a smaller sized unit than we had been selling before.

Senator Isnor: Did you drop any of the other sizes?

Mr. Lindley: No, sir. We have now increased the number of sizes, but we have also greatly increased the volume we sell. The additional cost to equip our operation to run the smaller sizes far offsets the increased cost of the increase in our operation.

Senator Heath: It is very difficult to see how this proposed legislation is going to curtail the sizes, to the extent that you seem to be worried about, Mr. Steele. It does not look so restrictive to me.

Mr. Steele: I think the point we were trying to make before, Senator Heath, is that we are going into an unknown area. It is unknown certainly to those who are going to attempt to regulate it here. There is no knowledge on our part of just what they may have in mind by way of pre-conceptions. We are trying to ensure that we have a system set up in this law which will require that we be consulted about how they are going to regulate. In other words, we want to make sure that the uncertainty is followed right down the line, so that we are able, at the end of it—presumably and hopefully—in agreement with them or on a set of regulations which will meet their criteria and ours.

Mr. Gibson: Mr. Steele, you have an illustration of a pudding product there. If I may, I would like to talk to a couple of points raised, one by Senator Heath and one by another senator. U have an illustration here of some of the end products made by the company which I represent. It is JELL-O Puddings. There are some seven or eight different flavours, but they are packed in three different sizes, three weights. We have four sizes that are packed in 3½ ounce packages, one size that is packed in a 4 ounce container, and another size that is packed in 3¾ ounce packages, three more sizes, three more flavours, packed in 3¾ ounce packages.

When I say that there is a great deal of standardization even in this commodity, it may sound strange, but there is. There is standardization of the shelf price, normally, for each of these different products, even though the quantity of powder inside may be somewhat different. There is standardization in the end product that goes in the bowl, the same quantity ends up in the bowl. Very important, too, is the fact that the housewife finds there is standardization in measurement. She uses one cup of milk, not to reconstitute but to carry through the recipe in order to make the product. The only non-stadardized part is the quantity of product that goes into the package in order to produce an acceptable end result that, through our research, consumers have told us they prefer in the flavour.

So we end up with a variation in weights, in order to standardize at the other end of the line. I think this is one of the problems that we might be concerned with. Remember that our packages are the vehicles through which we do our business and this is why we are so interested in them. If we had to standardize to 4 ounces, for example, in the three sizes, we are probably not going to come out with the same satisfaction at the other of the line, or we are going to ask the consumer to measure a fraction of a cup of milk in order to get the end product she desires, or the recipe has to be changed, if the packages are standardized. As Mr. Steele says, that is not an easy thing to do.

Senator Hays: Is the quality the same that goes into those three packages?

Mr. Gibson: The flavour is. But the differences in weights are essentially created by the differences in flavour. The flavour levels and the various flavours—butterscotch, chocolate, vanilla, banana and so one. We have selected flavour levels which the consumer has told us she prefers, either stronger in chocolate or weaker in chocolate. These are the reasons why there is a slight variation in each.

Senator Hays: Are these selling at the same price—the 3¾-ounce and 4-ounce sizes?

Mr. Gibson: Yes, the same. The same shelf price.

Senator Hays: One is more concentrated than the other?

Mr. Steele: It is the density of the dried ingredients in the package, Senator Hays. Another aspect is that they go down the same packaging line, so the packaging machine is adjusted to one size of outside wrapping for the product.

Mr. Gibson: If there is standardization, there is another point—and I think this applies to a question which was asked earlier. This makes four servings, this product. There is on the market in Canada today, and has been for about a year, a product that is packed—not by us but by another organization—that is in a one-serving container. If we had regulations last year, for example, that said we can only pack in this particular 4-ounce product package, that manufacturer could not have manufactured a single-serving product. We do not know yet, but there is evidence that there may be a consumer need for people who live in small apartments, working housewives, and so on, who want a single serving. Perhaps if we had that regulation, the person or the companies who perceived the potential need might not have had the opportunity to fill it.

Senator Isnor: You have only shown one size of package on television advertising, have you not?

Mr. Gibson: In many cases that is ture, senator; not in all.

Senator Isnor: Is it not in all? I have never seen you show two sizes on television, and I have watched it very closely as advertising.

Mr. Gibson: The reason for showing the package itself normally is simply to familiarize the consumer with the package so that she will recognize it when she goes into the store.

They have the same packaging visual characteristics, for example.

Senator Isnor: I am asking a lot of questions about the initial cost of this packaging because, of course, that is reflected later in the retail price to the consumer.

Mr. Lindley: Most manufacturers will also embark on a new size as an extension to an existing line. Built into that price is all the cost associated with going to market with that new size. They do not add the cost to the existing sizes. That new product must bear its full cost, it must stand on that shelf at that price. If the consumer says that price is too high, then for that number unit of that product it will not be around for long. I would guess that is so in our company and I expect also in most other

companies. If there is an extension made to a line, that extension has to bear the full cost. We cannot spread it through the existing line.

If I may, Mr. Chairman, I should like to return to some of the other points we are concerned with. Coming back to clauses 14 and 16 which deal with the powers of an inspector et cetera, as we have indicated the amendments introduced in the House of Commons have made it clear that products will be seized only when needed to carry out tests and to prepare a case, but it is left with the inspectors still to make a judgment whether or not a whole shipment or a major quantity of a product or other material should be held off the market. The minister, in reviewing our arguments before the parliamentary committee, took strong exception to our view that there was no economic justification for this kind of penalty to be invoked.

In other words, the minister was defending the point that certainly there can be economic loss and harm as well as the point we were mentioning about health and safety hazards and things of that kind. Of course one cannot disagree with the minister on that point. But, in effect, we stated then and still maintain that arbitrary action here could cripple many businesses.

Our point here is that this is a very high-volume-low-return type of business and if you are taken off the market for some reason which later turns out to be incorrect—or perhaps you win an argument about whether or not it is in conflict with a regulation—if you are off that market for a week or even a day in some cases you can suffer considerable economic loss. We point out that in the food and grocery manufacturing and retail business this is of very serious concern.

The minister countered by stating that he felt there were situations where such action might be justified, but the example he gives is one which is so patently obvious in the circumstances, namely, an incorrect weight labelling being applied to a package, that one could not possibly argue against this point. Our contention is that there will be so many other areas of straight judgment involved in the kind of regulations which will, or may, be forthcoming that it will be very difficult to anticipate in advance when an inspector, acting in his own personal judgment and capacity, may interpret the public interest a certain way and confiscate a crippling amount of product. There is still necessity it seems to us for a further clarification of the role of inspectors as contemplated in this act, and we contend that there should be some requirement for a court order if product is to be held for an extended period of time. The most that the Government has conceded so far is to reduce an originally suggested 90-day confiscation period to 60 days. That is to bring it in line with the normal period allowed under other statutes.

The basic question we are raising is whether it should rest with an official of the Government to make a judgment of that kind without having the right of way to secure some kind of backup judgment for his from some party which will be acceptable to both sides. It is very difficult for us to suggest amendments in this statute, but we still remain very concerned about the effect which these powers can have here if we run into a number of confiscation procedures.

Clause 20(3) of the bill as passed by the House of Commons deals with a very special and worrisome point that, even though an action against a corporation for some offence alleged under this act may not be proceeded with, there must still be power in the bill to proceed against a director or an officer of that same corporation. Examination of this tricky point before the parliamentary committee produced an interesting and obscure opinion by a Department of Justice lawyer who pointed out that there need be no formal charge against a company, no formal conviction of the company, no formal finding of guilt in proceedings against the company, but that if one proceeds against a director—he never mentioned officer but the act does—you have to prove in court beyond a reasonable doubt that the company was guilty of the offence as well as the individual. He makes the curious legal point that there is a distinction between a company being guilty and the company being convicted. The examples which have been cited as precedents are those in the Income Tax Act and the need sometimes to get behind the corporate veil or the dummy corporation situation to pursue individuals.

It would still seem to us to be necessary for the Senate to examine this particular section to ensure that it is well understood and equitable. Our own view is that on the explanation of it to date, it is a worrisome principle since we cannot conceive of any situation amongst our company membership where it would be at all appropriate or equitable to take an action against a director or an officer of a company without pursuing the company in the first instance.

In common with all our membership, I find this a very difficult point.

Senator Carter: Mr. Chairman, it would appear that clauses 14, 15, 16 and 17 are identical to certain sections in other acts, such as the Hazardous Products Act. They seem to be standard clauses.

Mr. Steele: They are also found in the Textile Labelling Act, the Feed and Drugs Act and the Canada Agricultural Products Standards Act.

Senator Hays: Is clause 20(3) also found in some of the new provincial acts?

Mr. Steele: I am not aware of whether it is in the provincial acts, but it is in the federal Income Tax Act, Senator Hays. But with respect to the recent amendments to the corporate law in the provinces, I do not know.

Senator Sullivan: This may not be an appropriate question for these gentlemen to answer, Mr. Chairman, but in respect of a labelling act, I cannot see how it would be possible to label in detail a phial that is practically microscopic in size. It is difficult enough just to get the name on it let alone give a detail of what the contents are and put that in two languages.

Mr. Steele: That is a good point, sir. We have not wrestled with that ourselves, however.

Senator Sullivan: We may have to wait for the officials of the department to come in order to get an answer to that question.

Mr. Steele: In conclusion, Mr. Chairman, there have been one or two other points in the bill where the minister has added new clauses in the committee stage and where there was no opportunity for those witnesses who were called before the minister made his final appearance to comment on them. One of these is an addition to section 10(b)(iii) dealing with labelling where the word "age" has been added to "size, material content, etc.". This is to make it clear, in the view of the minister, that the Government will have power to regulate requirements relating to the showing of shelf life or date of manufacture, or whatever, on the many types of food or other products which appear on the market in packaged form.

We would only observe that this again is a very complex question which has many aspects to it which would benefit by some special discussion with the manufacturers and, as indicated, since the matter was brought forward by the minister in the form of an eleventh-hour amendment, there has been no opportunity to make our views known to Parliament, nor would we wish at this point to do more than to indicate that this is a matter upon which we hope there will be ample opportunity for discussion before regulations are passed.

This whole question of the shelf life of products and the cost effect which this might have if you get the public into the mood of always searching around for products that are otherwise acceptable, except that one has a later date on it than another, is going to produce problems we have not even begun to think about yet.

The minister has also added after clause 11 a new clause 12 relating to research and studies which have to do with the whole subject of the marking of unit prices on packaged goods, and to research on the date and storage marking and shapes and sizes of containers. Again, there has been no opportunity to explore in advance either with the department or with the House of Commons committee what is intended by this section, and we can only hope that there will be a full opportunity to pursue these matters prior to the writing of regulations.

Mr. Chairman, the foregoing points constitute the issues which we as an association still regard as important for further consideration prior to the passage of Bill C-180, and we wish to thank your committee for this opportunity to make our views known.

The Acting Chairman: Are there any other comments that the members of the delegation wish to make?

Mr. Steele: I think we have covered the ground fairly well, Mr. Chairman.

Senator Carter: The question of cost was raised this morning in so far as it relates to the proliferation of sizes and weights. Are you looking forward to the time when we will have the metric system and you are going to have to change these things?

Mr. Steele: We might have mentioned as we did in our brief, Senator Carter, and here we had to take a neutral position, that if it is the wish of the country to set out to plan and adapt and change our entire system, our whole production, distribution and standards system to the metric system, then, of course, we along with the rest of industry are going to co-operate with this as best we can. But it is unique in the packaging and labelling bill in that this is the first bill where they have introduced a mandatory requirement that there should be a declaration both in metric and in our standard units of measurement even though the manufacturing processes have not caught up with this at all. The question is this; is this additional education to the consumer, which is put on arbitrarily and has nothing to do with anything else, helpful to the consumer in that right away it introduces fractions and calculations of a different kind? The evidence seems to be that if you go out into the street—and tests have been done on this—only about 20 per cent of the population at large at the present time really understand the metric system at all. So it would appear that we are going to be used to educate them.

Senator Blois: Mr. Chairman, as I said earlier, I spent a considerable time in the supermarkets recently. One day I spent with a lady who has brought up a family which is now grown up and another day I spent with a lady who is bringing up a very young family. One thing which was brought to my attention very forcibly had to do with a number of products but particularly with washing powders and things of that nature. A bottle or package containing, for example, 8 ounces would be a certain price while a container of 16 ounces of the same material would very frequently be dearer—in other words it was cheaper to buy two 8-ounce containers than one 16-ounce container. Now this does not seem to be reasonable. Is there any explanation for this kind of thing?

Mr. Steele: I think the point made earlier by Mr. Lindley is simply this; this is one of the functions of the retail pricing system and it can only be understood in the context of what their philosophy of what pricing is. If they want to move the smaller sizes and price them more attractively vis-à-vis the larger size, that is their prerogative. The manufacturer may be critized for seemingly being party to the fact that the unit prices are smaller for smaller sizes, but in fact this has nothing to do with the manufacturer.

Senator Blois: But you would naturally think that where they had to use two containers for the same amount of goods, it would be somewhat cheaper to buy the larger single container, but this is not true in many cases. I realize this may be a matter for the individual stores concerned.

Mr. Steele: There is no easy answer to this, but as Mr. Lindley has already indicated for most situations where you are selling into the wholesale level from the manufacturing level, what you say is true, and there are

economies of scale. Generally the larger sizes will come out at a lower per-unit cost than the smaller sizes. But when it gets to this stage the manufacturer is out of the situation.

Senator Carter: How frequently are changes made in sizes in a particular line, say in detergents or breakfast foods? Are changes going on all the time, or do you make a change, keep it for four or five years and then change again?

Mr. N. Murray Brown, Chairman, Grocery Products Manufacturers of Canada: Many of these high-speed packaging lines are just not changeable. They must continue to produce along the same line. In the industry in which I am interested, the biscuit and cracker industry, we have a half-pound line in which we package crackers. We also put about 12 other varieties in that package. Now that line cannot be changed because there is approximately one quarter of a million dollars involved in the equipment for that line and if we had to have a series of those to produce the 12 lines, we would have to build a pretty big bakery. Then of course that equipment would be standing idle much of the time because we would be running it for, say, four hours and then have to move over to another line. This also answers one of the other questions you raised about the odd sizes and the odd ounces that come in because of the different densities of the products we put into different package lines.

The Acting Chairman: Are you ever forced to adjust your own equipment by a competitor who decides to change the size of his package? Perhaps I should not ask that of you specifically, but is one segment of the industry producing a given sized package or box ever forced by a move on the part of a competitor to adjust its packaging style and change the size of the package or the quantity of the material contained in the package?

Mr. Brown: I think, Mr. Chairman, that we go back to the question Mr. Lindley answered here. We believe that the law of the marketplace still decides and determines what size you produce, and our research tells us there are many more things other than size and price and value and in all these things we have to go back to the consumer because she is still queen of the battle and determines what sizes we produce and market.

Senator Carter: I still do not know what the average frequency is. We know that the changes are made and one of the witnesses said that these changes are made because of the market research that is done by which you found out what the housewife wanted. But I would like to know what is the time interval between these changes.

Mr. Lindley: Mr. Chairman, I think it would vary so much from product to product that it would be very difficult for us to give you an average. For instance we have sold a number 1 size soup, 10 fluid ounces, since we have been in Canada—we started in 1931—and we have changed it. We have added others, but that one has not been changed. I think Mr. Brown is attempting to point out that the cost of making frequent changes in product size because of the machinery required and the patterns of warehousing which becomes distorted is a real brake on how often you can change or on how many new sizes you can produce. We think the growth is more in the development of new sizes than in the changing of existing sizes. Therefore I think it would be difficult to pick out what would be an average. You would have to do it product by product.

Senator Carter: Well, I cited detergents and breakfast foods as examples. Do these change every two years, every five years or how often do they change?

Mr. Lindley: Speaking for our own products, it is very seldom that we change from an existing size to something else.

The Acting Chairman: Are there any other questions? Honourable senators, on your behalf I thank Mr. Brown, Mr. Lindley and Mr. Gibson for coming here today and for the very helpful information they have given, and particularly I would like to thank Mr. Steele. The other gentlemen are in various branches of the industry and Mr. Steele has been the catalyst who has brought the whole question into focus because he is able to take an overall look at the industry. We are indebted to him as well as to the other witnesses.

Mr. Steele: Thank you, Mr. Chairman.

The Acting Chairman: We have a submission from the Canadian Food Processors Association. Mr. E. T. Banting, the Executive Vice-President is present and I understand that he has one point which he particularly wishes to make. Mr. Banting, if you will be kind enough to come forward we will proceed.

Mr. E. T. Banting, Executive Vice-President, Canadian Food Processors Association: Thank you, Mr. Chairman. I should like to express the regret of my President, Mr. Anderson of the Green Giant Company, who hoped to be here with me this morning but at the last moment could not make it. I wish to say at the outset that in our original brief we supported the Grocery Products Manufacturers' presentation. We worked very closely with Mr. Steele and we support the presentation his delegation made this morning. I wish to speak mainly for the seasonal products fruit and vegetable processing industry which has specific problems which are perhaps a little different from others of a seasonal nature. With your permission, Mr. Chairman, I should like to read a short presentation and then I will be most willing to answer any questions.

The Acting Chairman: Is that agreed?

Hon. Senators: Agreed.

Mr. Banting: On behalf of the members of the Canadian Food Processors Association, I wish to thank you for this opportunity to appear before this committee and to express our views regarding Bill C-180, the Packaging and Labelling Act, as it applies to the food processing industry.

The Canadian Food Processors Association is a voluntary trade association which has been in existence for 24 years. It represents 102 firms located in all parts of Canada which produce a wide variety of food products. We regard this legislation of major importance to our industry since it represents a significant change in Government policy.

As we stated in our brief to the House of Commons Standing Committee on Health, Welfare and Social Affairs, our greatest objection to the original draft of the bill was the discretionary powers of the inspector to seize and detain products for minor packaging infractions or misrepresentation without recourse to the courts. We pointed out that firms, particularly small independent firms, could be put out of business by such action.

We are pleased to see that this part of the proposed legislation was amended to read:

> . .an inspector shall not seize any product or other thing pursuant to subsection (1) where in his opinion the seizure of the product or other thing is not necessary in the public interest.

The Acting Chairman: What section is that? I understand it is on page 9, section 15(2).

Mr. Banting: This is certainly an improvement over the original draft. However, if we interpret the bill correctly, a firm still does not have any recourse to the courts for compensation if at any time those concerned are found not guilty of an alleged infraction of the regulations. Under today's marketing system, the seizure or detention of a product can result in:

(1) loss of shelf space at the retail level due to retailer's reaction,

(2) loss of customer confidence,

(3) loss of product due to the relatively short shelf life of certain products.

We believe that such arbitrary powers given to the inspector when there is no danger to health or fraud involved places the supplier in an untenable and most vulnerable position without any recourse.

One of the amendments made by the Minister of Consumer and Corporate Affairs to the original draft was the addition of the word "age" to the mandatory information which must appear on the label. This is in section 10. Our industry believes that this will substantially increase costs of seasonal products to the consumer. For this reason, we hope the Minister of Consumer and Corporate Affairs will carry out extensive research and thoroughly examine the broad implications of such a requirement.

Many factors determine the shelf life of a product, such as the method of preparation, storage temperature, and handling procedures. We ask who is qualified to determine the shelf life of a product when conditions which determine shelf life are the responsibility of many individuals or organizations.

The act states in section 12(2):

> The Minister may, in carrying out any research or studies pursuant to subsection (1), consult with or seek the advice of any department or agency of any government, any dealers or any organization of dealers or any organizations in Canada of consumers.

We sincerely hope that the minister will, on every occasion, consult with the industry concerned and determine the economic aspects of any regulation which will affect this industry. Industry is concerned about the rising costs of consumer products and additional labelling and packaging demands which require extensive label and packaging changes are often very costly.

Our industry is very concerned at the present time about the responsibilities and jurisdiction of the various departments. There is confusion and duplication which is time-consuming and costly. We would welcome uniformity of label regulations and inspection services and would be pleased to work with Government in trying to bring this about. We believe that if a concentrated effort were made to co-ordinate inspection services and develop uniform labelling regulations, it would not be necessary to hire new inexperienced personnel and set up an army of inspectors to further regulate an industry which is already the most regulated industry in Canada.

In closing, I would just like to remind you that, unless very carefully administered, Bill C-180 could result in considerable increased costs to the consumer. This is particularly true of seasonal products. Is the consumer prepared to pay for the additional costs that could result from this legislation? We suggest that this aspect of the Bill C-180 be thoroughly examined before regulations are implemented.

Once again, thank you for this opportunity to appear before you. Our association is prepared to work with Government at all times to assure that Canadian industry is able to compete on world markets and continue to supply Canadian consumers with quality products at reasonable prices. Thank you, Mr. Chairman.

The Acting Chairman: Thank you, Mr. Banting. Are there any questions?

Senator Carter: "Age" is not defined in section 1. Does it indicate the date of its manufacture?

Mr. Banting: This would have to be spelled out in the regulations. It could be either the date on which the product was manufactured, or the length of time it is suitable for sale. This is a point of concern to us.

Senator Carter: Does that mean that the date a product becomes unsaleable would be printed on the package?

Mr. Banting: That is correct.

Senator Molson: That is done with milk today.

Mr. Banting: Yes, it is done with certain products today.

Senator Heath: Yeast is another.

Mr. Banting: That is true.

Senator Hays: How long will a canned product such as clams remain fit for consumption?

Mr. Banting: Each product varies considerably and even industry does not have enough information. We have records where canned corn, for instance, is quite edible after 15 or 20 years. On the other hand, this all depends on the storage conditions. Frozen food really gives us concerns. It could be quite acceptable to eat in two, five and, yes, we have seven years in storage at the proper temperature. The same food may not be fit to eat in three weeks if the conditions are not right.

Senator Sullivan: That is right.

Mr. Banting: Therefore, to put a date on that product could give the consumer a very false sense of security. It does not have to be thawed; bacterial action starts when the temperature is above zero. The product could still be frozen at 20 degrees above zero, but there could be a great deal of bacterial action making the food unfit for consumption. The display of an age date could give a false sense of security, affecting not only the consumer but the packer. Something may have happened in the processing plant, over which he has no control, but his name is on the container.

Senator Hays: Who is responsible in the case of death after consumption of, for instance, a can of fish?

Mr. Banting: If it is definitely the fault of the original processor, there is no doubt as to the responsibility. However, in the case of frozen food thawing out in the retail store, or even after the consumer took it home, causing bacterial action, the responsibility has never really been determined.

Senator Carter: Who normally bears the cost of that? Does the grocer return this type of product to the manufacturer when the time expires and it becomes unsaleable, or does he bear the loss?

Mr. Banting: In some cases, yes; in some cases, no. It all depends on the arrangement or agreement between the processor and retailer. If it is still in the case and the electricity fails, usually the retailer bears the loss. If the damage occurred during transportation it would probably be returned to the processor. It varies.

Senator Carter: Does the retailer have to take extra insurance?

Mr. Banting: I would presume so, but I cannot answer exactly.

Senator Isnor: In your presentation the following sentence appears:

> Is the consumer prepared to pay for the additional costs that could result from this legislation?

What do you mean by that?

Mr. Banting: For instance, we are very concerned about seasonal products, in which the volume of production varies with yields, weather and climate. It may happen that with a high yield in a particular province in the previous year because of ideal weather conditions there is a large carryover to the next year. In another province there may have been no carryover so their product is dated the present year, whereas that of the first product, being a carryover is dated the previous year. The consumer seeing that date considers the product to be a year old, yet there may not be anything wrong with it. The consumer, quite logically, buys what he considers to be the fresher of the two products. The carryover product may have to be taken back from the retailer, becoming a loss factor.

Some of our members have carried out studies of this carryover problem and estimate that it ranges from 5 to 50 per cent. They feel that to be on the safe side, considering all the seasonal products across the board, there would have to be a 5 per cent to 20 per cent increase in cost of operations because of the losses incurred due to carryovers.

Senator Isnor: That exists at the present time, quite apart from this legislation.

Mr. Banting: Yes, but because of the fact that the date appears the consumer will logically buy what she considers to be the freshest and newest product. At the present time this is not the situation although the carryover product is in excellent condition.

Senator Hays: Are most products coded today?

Mr. Banting: Yes, they are.

Senator Hays: They therefore bear the date?

Mr. Banting: Yes.

The Acting Chairman: I simply quote to the committee the provisions of clause 10 (b) (iii):

> such information respecting the nature, quality, age,...

And it is age with which you are concerned at the moment?

Mr. Banting: That is correct.

The Acting Chairman:

> —size, material content, composition, geographic origin, performance, use or method of manufacture or production of the prepackaged product as may be prescribed.

I assume that your request is that when the regulations are drawn and the prescription laid down provision be made for these factors in respect of age?

Mr. Banting: That is correct.

The Chairman: By consultation, I take it, with appropriate members of the appropriate industries?

Mr. Banting: Yes. I fully support the statements made by the representatives of the grocery products manufacturers of Canada. Because of the economic aspects involved it should be mandatory that the minister contact the industry that will be affected by any of these regulations. We feel that it is important that these be taken into consideration during the preparation of any regulations.

Senator Carter: Do you desire that because you fear that the minister will make regulations without your knowledge? If you know about it there is nothing to prevent you from making representations to the minister.

Mr. Banting: That is true, but before regulations are drafted it is usually better to be aware of all problems involved. By means of prior consultation with industry, with which that industry can live, can be drafted to produce the required results.

Senator Carter: Yes. Although an attempt is made to bind the minister to consultation, he does not have to take your advice. He can still proceed with whatever he had in mind. What is your real problem? Is it that the regulations will be drafted without your knowledge and therefore you will have no opportunity to make representations?

Mr. Banting: The point we are trying to put across is that we feel it is most important that representation be made by the industry concerned with these particular regulations.

Senator Carter: There is nothing to prevent you making representations except that you would not know when to make them. Is that it?

Mr. Banting: Yes, provided there is enough time when changes are made, so that they can be implemented without a great deal of cost as well, which is another factor that concerns us very greatly.

The Acting Chairman: I think I would like to draw the attention of the committee to the top on page 2 of Mr. Banting's presentation, where he says, "However, if we interpret the bill correctly a firm still does not have any recourse to the courts for compensation" in the event there is an improper seizure and detention. I draw the attention of the committee to clause 16, which has been pointed out to me by our legal counsel. There is a provision there that permits the minister to extend the period of seizure of 60 days by application to a magistrate in the circumstances therein described. This is a right of recourse to the courts that the minister takes in this proposed legislation. Certainly there is nothing in this bill on the question of compensation. Have you taken any advice from counsel on your basic rights under the law to seek compensation in the event that a product is improperly seized and detained?

Mr. Banting: Our major concern here, of course, is this: Take a small independent canner who puts out one line of product, say a tomato product. For some infraction of labelling—there is no health hazard, no fraud involved; it may just not meet all the requirements of Bill C-180—his product is detained. He could be put out of business, because for 60 or 90 days his product is not on the shelf; once it is taken off the shelf it is most difficult to get back on. It was just an opinion of the inspector that led to the original seizure, and even if the courts decides the canner was not in violation of the regulations he is put out of business because of that interpretation by the inspector. This is a matter of great concern to our organization, in which there are a lot of Canadian-owned small independent organizations. This is one of their main concerns about the bill.

Senator Carter: What is the general practice with regard to shelf space? I remember when I was on the Joint Committee on Consumer Credit about five or six years ago there was some controversy because certain manufacturers would buy up shelf space and the retailer would have no control over that shelf space.

Mr. Banting: This is in the retail area, but I would think the retailer who made the original agreement, if there was such an agreement, would be the person in control of it, it being his shelf space.

Senator Carter: It was one of the problems put before the committee by some retailers, that they did not always have a free hand, and competition was curtailed because they were bound by certain agreements over that shelf space, which was reserved for certain products; some large manufacturers could bind retailers in this way while a small manufacturer could not afford to do so.

Mr. Banting: I would think it was an agreement that the retailer entered into originally. I cannot see how any manufacturer could control it unless the retailer agreed to it in the first place.

The Acting Chairman: Senator Carter's point is that larger manufacturers could buy up the shelf space and the smaller manufacturers do not find any room on the shelves for their products.

Senator Molson: It is in the hands of the retailer, Mr. Chairman.

Mr. Banting: Quite.

Senator Molson: This bill will not change that.

The Acting Chairman: It does not touch that.

Senator Carter: What the witness is saying is that they are at the mercy of the retailer because once the product is taken off the shelf space they cannot get it back. That was the argument I was replying to.

Mr. Banting: This is true. Shelf space is at a premium, and you can appreciate the ratailer's point of view. Shelf space is at a premium and if a product is taken off because of an alleged infraction—the retailer does not want it on his shelf and it is taken off—it is most difficult to get it back, particularly for a small firm. As I said earlier, a large percentage of our membership is made up of small Canadian operations which may pack only a limited number of products.

This brings up the other point of the cost factor to the small people. If there is a label change or package change, a large firm may buy a few million labels that will last them a year, but to get that same price a small firm may have to buy enough labels to last two years, three years or five years. Two years is quite common, and it could be three or five years. Therefore, when any label change is required—and, as I mentioned, we are going to the metric system and everything else, which all

require label changes—we therefore have very high inventories, especially of the slower moving products, and we would hope that plenty of time will be given to use up these inventories, otherwise the costs will enter into it, which eventually somebody has to pay for.

The Acting Chairman: Are there any other questions? Mr. Banting, thank you very much indeed for your presentation, and we will certainly take it into consideration.

Honourable senators, the Packaging Association of Canada is here. We have present Mr. James Scott, Mr. Lyn Jamison and Mr. John Whitten. Mr. Scott will speak to the brief.

Mr. James M. Scott, President, Packaging Association of Canada: Mr. Chairman and honourable senators, the Packaging Association of Canada welcomes this opportunity to present its views to the committee of the Senate of Canada considering Bill C-180, the Consumer Packaging and Labelling Act.

Before proceeding, may I first of all introduce my colleagues. On my immediate right is Mr. John A. Whitten, Vice-President of Christie Brown & Co. Ltd. On Mr. Whitten's right is Mr. Lyn G. Jamison, Executive Vice-President of the Packaging Association of Canada. My name is James Scott, and I am Vice-President of Reid Press Ltd., and President of the Packaging Association of Canada. PAC was formed 21 years ago to promote the study, knowledge and undrestanding of packaging, to encourage better use of graphic arts in the industry, to collect and disseminate packaging information, and to foster mutual understanding among the various branches of the industry. PAC has Chapters in the Atlantic Provinces, Montreal, Toronto, London, Winnipeg, Calgary and Vancouver. Currently, the Association represents 297 member companies and 908 associate or individual members. The membership embraces a diversity of users, suppliers and manufacturers of packaging materials, including paper, paperboard, wood, metal, glass, plastics and films.

When the bill was referred to the House of Commons Standing Committee on Health, Welfare and Social Affairs, we were greatly concerned at many of its clauses. Some of these clauses were improved by amendment during the committee hearings, for instance: clause 9(2) is a valuable improvement which will protect both consumer and manufacturer. Other clauses, although still in the bill, were explained by the Minister to be less wide-ranging than we had feared. In this regard, we must accept the explanations of both the Minister and the specialist from the Department of Justice that clause 3, subsection (1) does not mean that the regulations under Bill C.180 will supersede the statutory provisions of other acts of Parliament. But we wish that the Bill could be more explicit.

During the clause by clause study by the Commons committee, the minister showed a much greater understanding of the problems which the marketplace would encounter from over-regulation than had been apparent before. For example, during the discussions on February 23 he referred to the U.S. regulation which specifies the actual position of the net weight on the package, and pointed out that it had been decided not to include such specifications in the statutory provisions of this act. The reason he gave was reluctance to use packaging and labelling as some sort of non-tariff barrier to trade.

We appeal to this spirit of reason and understanding for a further study of that feature of this Bill which still worries us most of all—the fact that there is no mandatory requirement to consult outside the department before publishing proposed regulations under clause 11, subsection (2).

Considerable time was spent in discussion of this clause in committee. To our mind, the Minister's point that he did not feel it wise for his staff to be restricted as to whom should be consulted—since each regulation would have a logical group which could supply expert assistance—constitutes a solid argument in favour of making such consultation mandatory. We are not suggesting there be any restrictions on the ultimate right to regulate, but only that the principle of consultation—and even in some cases the possibility of resulting voluntary industry action—is bound to provide a more effective compromise, and less likelihood of over-regulation.

One of the early drafts for this bill, which was presented to us for comment, included a provision that such consultation would be held, and that the aim would be voluntary action. Only in the absence of satisfactory action would regulations be made.

We feel this is still the best form for this clause, and ask that you consider changing it.

Clause 19 currently reads:

> A copy of each regulation or amendment to a regulation that the Governor in Council proposes to make under section 11 or 18 shall be published in the *Canada Gazette* and a reasonable opportunity shall be afforded to consumers, dealers and other interested persons to make representations with respect thereto.

The onus is left on 'other interested persons' to make then representations, and we think this is unwise. Consultation between the minister and appropriate industry organizations might reveal that the proposed regulation or amendment is unnecessary. Yet once the proposed regulation or amendment is made public, this is a visible intent of the Government, and governments do not like publicly to revoke their expressed intents. Once again we would ask that advance consultation be made mandatory and written into the bill.

I would draw your attention to statements made by Mr. Basford in addressing the House of Commons Standing Committee on Health, Welfare and Social Affairs on February 16 of this year:

> The writing of regulations itself takes a great deal of time. It will be done in consultation with representatives of those who will be affected. I gave that undertaking clearly when I was here before. It will be in consultation with those who are affected—consumers, manufacturers, producers—and with other departments which administer other Acts with labelling provisions.

> Under this Bill,... it will be possible, by means of regulations—in the drawing-up of which, of course, all those concerned with consumer packaging and labelling will be consulted throughout...

Here Mr. Basford clearly undertook to provide consultation opportunities between his department, other departments and other organizations, including those of the packaging industry and other appropriate sections of industry.

We do not doubt Mr. Basford's intention to carry out the consultation he promises here. But ministers change, and we would like to have the assurance and protection given by Mr. Basford on February 16 written into this legislation.

Further, as for clause 12 (2) it is certainly our hope that in carrying out research or studies relating to packaging and labelling, he would see fit to consult members of our industry. To that extent we would be pleased to see here a direct reference to 'any appropriate industry organization representing packagers or manufacturers'.

Mr. Chairman, we have restricted our representations concerning Bill C.180 today to the few points which I have highlighted. There are, needless to say, other areas of the bill which we question, and which in some instances we would like to see changed.

However, all we ask is that the assurances Mr. Basford has made publicly about his department consulting with industry be made mandatory where standards are being established, or where regulations or amendments are being considered.

Thank you for this opportunity of appearing before you. We would be most pleased to answer any questions, Mr. Chairman, which you or the other members of this committee may wish to ask us on this bill.

Senator Carter: Mr. Chairman may I start the ball rolling by asking Mr. Scott what he visualizes by "consultations"? Do you visualize a delegation having verbal consultations, or are you thinking of written representations?

Mr. Scott: I would like to refer that question, Mr. Chairman, if I may, to Mr. Jamison.

Mr. Lyn G. Jamison, Executive Vice-President, Packaging Association of Canada: Senator Carter, as to "consultation", I think we would not have verbal consultation first of all. We would first receive a draft statement or outline of what the department would have in mind in drawing up the regulation. At that time, we would be given the draft and allowed to study it in the light of the marketing requirements, production requirements, distribution requirements and possibly the material requirements. We would then come up with our points of view. Then we would meet in a round table discussion with the department and give them full information relating to all these things so that they would be able to consider them in the light of our objections. That is how we would visualize it.

Senator Carter: You would want to see the draft regulations before they are actually published in the *Gazette*, before they are actually proclaimed?

Mr. Jamison: Before they become public property, so that there can be an exploration to avoid some of the problems outlined by the Grocery Products Manufacturers, and in order to take in futures, because this is what we are concerned with—futures, what packaging will be like in the future. We have some idea.

Mr. Scott: To add to what Mr. Jamison has just said, Mr. Chairman, the market place does change, packaging changes, materials change. We think that with the expertise of the member companies of the Packaging Association and other interested individuals in our industry, we can help the minister if we see these draft regulaitons and avoid pitfalls that at some time in the future may be somewhat more difficult to look after. I think this is exactly our point.

Senator Macnaughton: The same point was made by the other delegation this morning. In effect, you would like to be the expert advisers to the Government. You are the people who will operate it.

Mr. Scott: Yes, sir.

The Acting Chairman: Mr. Scott, I draw the committee's attention to page 3 of your memorandum. There is a quotation you have given, from Mr. Basford's address to the House committee on February 16. You interpret it as a clear undertaking to provide consultation. I then draw the committee's attention to clause 12(2) of the bill, which is an amendment made by the committee which reads as follows:

> (2) The Minister may, in carrying out any research or studies pursuant to subsection (1), consult with or seek the advice of any department or agency of any government, any dealers or any organization of dealers or any organization in Canada of consumers.

How far do you think that goes towards meeting the point you seek to make in your presentation?

Mr. Scott: Mr. Chairman, I do not believe it goes quite far enough. Mr. Whitten presented our brief to the Standing Committee on Health and Welfare of the House of Commons and I should like to refer this to Mr. Whitten.

Mr. John A. Whitten, Vice-President, Christie Brown and Company Limited: Mr. Chairman, the amendment was actually included to provide for more detailed study of the possibility of subsequent unit pricing action. It arose in that session following considerable discussion of that type. But I believe this also leaves the onus entirely on the minister. The word "may" is still in this clause so that in this case we would have the same basic objection to each of them so far as we are concerned.

The Acting Chairman: What you suggest, then, is that the subclause in question should be amended by changing the word "may" in line four to the word "shall"?

Mr. Whitten: Yes.

Mr. Scott: Precisely.

The Acting Chairman: Would you say that the agencies or organizations that are proposed to be consulted by this subclause are sufficient in number? Do you have any objection on that count?

Mr. Whitten: No, sir. I think that that would be extensive enough. The minister made the point that each regulation would naturally involve a particular group of interested bodies which could supply pertinent information.

The Acting Chairman: You think the descriptions there are adequate for at least the industry you represent?

Mr. Whitten: Yes, sir, I do.

Senator Molson: Mr. Chairman, the word "shall" might present some difficulty to the department. Would it not be worthwhile considering using the words, "shall, where practicable," or "shall, were possible"?

The Acting Chairman: My purpose in asking that question, Senator Molson, was only to make crystal clear that the suggestion raised by these gentlemen, and the reason for it, is that how we deal with it will depend not only on this evidence but on other evidence we will receive in future, including evidence from the department. So all we really want to do is to clarify the position.

Senator Heath: As a point of interest, Mr. Chairman, may I ask Mr. Scott in view of the fact that it sounds as if his organization is interested in tying the consultations very closely into the regulations and making this mandatory, a written part of the legislation, what is his opinion of the English position? I suppose this is rather a philosophical point of view, but I understand the English legislation leaves everything pretty well open to the manufacturers, producers and packagers and so on, so long as they are within the intent of the existing legislation. If they go against that, then "boom"! Now nothing is particularly regulated there. At least that is my understanding. I have not discussed the point with anyone. But that is completely different from tying groups in by regulation, but leaving everything open. Then you are really at the mercy of the courts if anything goes wrong. But you have a tremendous amount of latitude, which perhaps gives a great deal of scope for innovation and invention and so on. Have you considered that aspect at all?

Mr. Scott: First of all, Mr. Chairman, I am not precisely familiar with the English law in that area. I should like to make the point that throughout the packaging industry in Canada both suppliers and users of all types from coast to coast have compiled over the years a tremendous amount of expertise. We know what packaging costs, as an example. We know the kinds of technology involved. We are familiar with what is happening today and we hope, with the prognosis for tomorrow, that we will be able to continue on with the kinds of developments necessary to fund and field the types of products that are on the market today. We have a wide range of products today which, 15 years ago, were just not on the marketplace.

What we are getting at here, Mr. Chairman, is that if it can be written into the act, which is really in fact a packaging and labelling bill, then as such we can aim that and help, if we are included. We do not suggest that we dictate at all. We are simply saying that we have a lot of expertise we understand the need for sensible regulations and we are more than prepared and willing to act in that kind of capacity as a consultant.

Both the industry and technology are changing at a fantastic rate, and I think perhaps we are better versed to keep up with this kind of technology where it may well affect consumers in years to come.

Senator Carter: Mr. Chairman, you referred to the minister's commitment, and you read from page 3 of the presentation. Does not section 19 cover that?

Mr. Scott: I should like to refer that question to Mr. Whitten.

Mr. Whitten: This point was covered in the opening statement, Senator Carter, in that the problem with the regulation, once it is published as a proposed regulation, is that it is in effect a position that has been taken. I should like to refer this back to the creation of the present packaging regulations under the Food and Drugs Act some years ago. To my mind those are still some of the best regulations ever written. They have covered and still cover successfully those products which were then visualized—and I might say visualized very adequately.

They came about very largely as we suggest here. There was consultation with the grocery products industry. There was a long period of consultation with the packaging association by Dr. Morel, who was then the director, before the first draft was published, and when it was published there was joint consultation and the result, I think, provided a way around the pitfall not only in the packaging then existing but to a very large extent on what has transpired since then.

Senator Macnaughton asked a question earlier, and I think there is a logical extension to the answer to that. Most of us in this industry are not thinking of the packaging which is on the market today but of the packaging which we expect will be on the market five years from now. It is very difficult, it would be well nigh impossible, indeed, for a Government agency, however well meaning, to take this into consideration and to limit it at that stage. It would very severely limit the consumers' quality in future years.

Senator Carter: I think I know what you are really objecting to. When I asked earlier what you envisaged by consultation, the reply was that the drafting regulations would be sent out to your association and to other organizations like your interested parties. It is only a question of procedure whereby the Minister instead of sending it out to you puts it in the *Gazette*. So it is this procedure you are objecting to, isn't it? It seems to me that it is the same thing but there is just a different method of doing it.

The Acting Chairman: Obviously I do not pretend to speak for the Association, but I think the point made in the original submission was that the industry prefers to consult with the officials before the drafts are made rather than after.

Mr. Scott: That is correct.

The Acting Chairman: I think that is the point made in their original submission.

Senator Carter: If I understood him correctly, he said that they would be furnished with draft proposals and then they would come and sit around the table and have a consultation after they had studied them. That is my understanding of the reply I got.

Mr. Whitten: Perhaps it is a semantic difference. I think what we were visualizing was a preliminary draft of proposed sections of regulations. I would assume that the intent of this clause is that the proposed regulation would be published in its finished form whereas what we are visualizing is something of a more preliminary nature, parts of which might be better drawn with the kind of consultation which we visualize.

Senator Carter: But they are not being published in the *Gazette* as regulations, only as proposals.

Mr. Jamison: I think, senator, when I made the comment I was trying to say the Department would turn around to a group of commodity packagers and say "We want to regulate packaging in this area; these are our theories on the subject of why we should do this; give us your point of view as to how it would affect marketing, distribution and manufacturing." They would give us all of their theories behind their thinking which we could then supply the answers to and give direction and also talk about the future, so that when they come to drafting the proposed regulation or eventual submission to the industry they will do it with full knowledge of all the pitfalls and other things involved. Then we would not have proposed regulations presented to us, because sometimes when regulations are presented, because of a firming up of attitudes and ideas, they are very difficult to change.

Senator Carter: Let us assume the Government followed your procedure and wrote to you and said "We are going to draw up regulations in this particular area," and then you write back and you say "These are points you should consider because this is what is going to happen" and so on. Then on the basis of that the Government draws up regulations. Would you not still have to make representations again at a later stage?

Mr. Jamison: Not necessarily. I think you would have the structure and then you would be filling in the blanks or smoothing off the rough spots so that eventually you would have a very workable permissive type of legislation rather than restrictive legislation. This is what Senator Heath was pointing out. The regulations should be permissive to allow us to take advantage of new methods, new systems, new materials and new processes.

Senator Macnaughton: It seems to me unless the Government is going to operate the industry itself it should be left to the people who created it. They are the people who can best anticipate developments. How on earth can it be left to the government unless they are to take over the whole of the industry?

Senator Carter: I would like to reply to Senator Macnaughton. The reason we have this legislation now before us is because we have done exactly that in the past; we have left it to industry to settle these points and they have not done it.

Senator Macnaughton: But the times are changing now.

The Acting Chairman: I think the difficulty arises out of the use of the word "proposes" in clause 19. I think what the witness is saying is that a proposal published in the *Canada Gazette* as to what the regulations should contain is in fact a decision that may be very hard to change. I assume that is a fair statement of what the idea is.

Mr. Scott: Yes, it is, Mr. Chairman.

The Acting Chairman: Arising from that I wonder whether this question does not suggest itself. Assuming that these are in fact proposals and not firm and final decisions, is there a better way to do it than the way suggested by clause 19? In other words, if they are proposals for discussion then what the bill suggests is that they should be published in the *Canada Gazette*, and in so publishing everybody affected, officially at least, has his attention called to the proposal and the opportunity is then given to make submissions and representations, and a reasonable opportunity by the very section itself is afforded consumers, dealers and other interested people to make their representations. It is a question of procedure and it is a question of how you handle what we now can see to be a very complicated situation. The question is simply this; is this a reasonable way to do it?

Senator Molson: Mr. Chairman, is not the key or the operative part of clause 19 the fact that the Government has the intent to make these amendments or to make these regulations or changes to regulations? Would it not perhaps be more suitable for the Government to announce its intentions to make changes and then give notice so that any interested manufacturer, consumer, retailer or whoever might be affected could get in touch with the Government and find out what is proposed? We all know that in certain instances proposals are very hard to change once they are set forth. It is easy to say that it gives everybody an opportunity to go ahead and take a whack at them, but this is frequently taken as opposition and sometimes even as political opposition. But discussion before publication can often be very easy, and, as has been suggested by the witnesses, the people affected are able to give advice that leads to regulations which are much better.

The Acting Chairman: In advance of the actual drafting? That is the point. That is why I put the question the

way I did and I think Senator Molson has brought it out very clearly.

Senator Beaubien: Mr. Chairman, could we not put something in there to say that there should be consultation with the industry before publication in the *Canada Gazette*?

The Acting Chairman: What Senator Molson suggests is that there should be a publication in the *Canada Gazette* of a notice of intention to amend certain groups of regulations which would alert the industries affected and would then result in consultation before the drafts were made.

Mr. Scott: Mr. Chairman, we would be very pleased if that should happen.

The Acting Chairman: Are there any other questions?

Senator Beaubien: Would it be in order to ask the Law Clerk to draw up some kind of an amendment?

The Acting Chairman: Yes. I think we will have a good deal of evidence on this point at further meetings of the committee and no doubt the matter will be taken up at that time. Mr. Scott, Mr. Jamison and Mr. Whitten, thank you very much for your help.

Mr. Scott: On behalf of my colleagues I thank you very much for your introductory remarks and for your co-operation.

The Acting Chairman: I understand there will be three other presentations made at the next meeting of the committee, which presumably will be a week from today at 9.30 in the morning, by the Canadian Manufacturers' Association, the Retail Council of Canada, and the Canadian Feed Manufacturers. The briefs will be distributed by the end of this week.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 19

WEDNESDAY, APRIL 28, 1971

First Proceedings on Bill C-215,

intituled:

"An Act to establish the Textile and Clothing Board and to make certain amendments to other Acts in consequence thereof"

(Witnesses:—See Minutes of Proceedings)

23737—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28).

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, April 22, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Aird, for the second reading of the BIll C-215, intituled: "An Act to establish the Textile and Clothing Board and to make amendments to certain other Acts in consequence thereof".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, April 28, 1971
(21)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider the following Bill:

Bill C-215 "An Act to establish the Textile and Clothing Board and to make certain amendments to other Acts in consequence thereof".

Present: The Honourable Senators Salter A. Hayden (*Chairman*), Aird, Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Everett, Isnor, Kinley, Martin, Molson, Sullivan, Welch and White—(18).

Present, but not of the Committee: The Honourable Senators McNamara, Methot and Sparrow—(3).

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

WITNESSES:

Department of Industry, Trade and Commerce:

The Honourable Jean-Luc Pépin,
Minister;

Mr. Bruce Howard, M.P.,
Parliamentary Secretary to the Minister;

Mr. J.M. Bélanger,
Chief, Industrial Policy Division,
Office of the Industrial Policy Adviser;

Mr. L.F. Drahotsky,
General Director,
Office of the Industrial Policy Adviser.

At 11:00 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, April 28, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-215, to establish the Textile and Clothing Board and to make certain amendments to other acts in consequence thereof, met this day at 9.30 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, the plan for the meeting this morning is first to hear the minister in connection with Bill C-215, the Textile and Clothing Board bill. This is by way of assistance to the Minister having regard to his other responsibilities and demands on his time, geographically and otherwise.

After hearing the minister and whatever questions arise, we will continue our consideration of Bill C-180, the Consumer Packaging and Labelling bill. A few minutes ago I was asked how you package and label a consumer. I assume it should really be called "the Consumer Goods Packaging and Labelling bill". We will return to that as soon as Mr. Pepin has finished his remarks and has answered any questions there may be.

Mr. Pepin, this is your opportunity to give a full explanation of the bill. You may choose your language of communication, and you may change en route, while going through your explanation.

The Honourable Jean-Luc Pepin, Minister of Industry, Trade and Commerce: Thank you very much, Mr. Chairman for giving me this opportunity to address your committee on the Textile and Clothing Board bill. My job is lightened because of the excellent presentation by Senator Cook on second reading, and I thank him for his assistance in that respect.

I take it for granted that all members of the committee are now familiar with the subject, and also that they have paid me the honour of reading the statements I made on May 14 last and when introducing the bill on second reading in the House of Commons, so I will not bore you with that. Those of you who want to be very conscientious in the fulfillment of your responsibilities could pay me the additional honour of reading all the statements and analyses made during the House of Commons committee study of this bill, during which much information was given. Although I am sure most of you have already read it. Instead of repeating what has already been said, I will try to single out the most important features, of the bill and emphasize the most important aspects of the matter.

If I were to be asked the main reason for introducing the bill, I would say it is because there is a crisis in this industry. Everybody in it—producers, manufacturers and the unions—have said to the federal Government, "Make up your mind. Tell us what you expect this industry to become in the future. Give us a framework. Give us a pattern of operation. Give us an indication. Do you want the indusry to disappear? If you want the industry to disappear, tell us so, because we, the owners of these plants, will close them and put our money elsewhere."

It is in answer to this request that this bill is introduced now. The most important aspects are the objectives. I am not following a written paper so you can interrupt me at any time. If you ask me what the basic objective is, I find it in the words of my statement of May 14:

> To create conditions in which the Canadian textile and clothing industries can continue to move progressively towards viable lines of production on an increasingly competitive basis internationally.

I put the words "continue to move" because I would not like anyone to have the impression that this is, globally speaking, an outmoded industry. Those of you who have seen some of these plants know very well that the facts are the opposite. In many cases these are plants as efficient as any you will find in the world. Too many people have the impression that the textile and clothing industry is outmoded and backward. This is not the case. If you think so, we will arrange for you to visit some of the plants. I am not here to say that all of them are totally efficient, but I will not accept, either, the thought that as an industry this is a backward sector of the Canadian economy. I am not saying that. So, the idea is movement.

Some of these plants have already reached the maximum or the optimum efficiency. Some other areas of this industry will never reach it. They have no possibility of doing so. The idea there will be to phase out thee sectors as elegantly and in as humanitarian a way as possible. This is why you find in the bill some measures to cushion the disappearance of some sectors of this industry.

Senator Isnor: What is the main reason for their not being successful?

Hon. Mr. Pepin: In some cases they cannot meet the international competition. They should not even try. There is a division of labour in the world and others can do these things better than we can ever hope to do them ourselves. It would not be in the best interests of the Canadian population for us to try to do things that so obviously can be done at a better price elsewhere.

This is accepted by members of this industry. As a matter of fact, decisions have been made based on that

line of thought. Plants are closing now in anticipation of the policy. When the manufacturers, the producers, the owners of these plants issue a communiqué saying that this particular part of their operation will be phased out, they say, "In accordance with the policy that the federal Government has introduced, we, in anticipation, have decided to do that."

This is one of the reasons why I complain. On one side, the policy is being used to justify phasing out, to justify the closing of some plants or parts of a plant; and on the other side I am accused by others of having established legislation that is protectionist. I say to these people, "Make up your mind; it cannot be both at the same time." Anyway, the first idea is the idea of movement, that this industry is moving and will continue to move. The Government is not giving here a *chèque en blanc*, a blank cheque, for inefficiency. Not at all. That is the first idea.

The second idea I would like to leave with you is that this legislation, Bill C-215, is global. It has commercial, financial, social and aesthetic aspects. It embodies a global policy.

It has commercial aspects, as you have seen. It will try to accentuate the export aspect of this industry. As you have been told by Senator Cook already, some important movement is taking place with respect to exports. In some cases it will also try to control the imports from low-cost countries. I will come back to that in a moment. It will try to rationalize the tariff. It will also see to it that methods of inquiry on dumping are improved. So, the first aspect of this bill is a commercial one.

Secondly, there are also financial aspects to the bill. There are already subsidies for research and development in the textile industry. As you have been told already, the General Adjustment Assistance Program, GAAP, will be applied to the textile and clothing industry not only to develop exports but also to make it possible for them to rationalize with respect to the domestic market. This is an important change in the previous use of the GAAP.

There are also some social aspects to this bill, as we have already indicated. You have already been told by Senator Cook of a sort of pre-retirement program that is included in the bill. You have seen how well qualified it is. The gentleman must have been 54 years of age. He must have been in the industry for a number of years. In the last period of his activity he must have used all his unemployment insurance benefits. He must be willing to recycle himself. He must be willing to move if there is the possibility of a job for him elsewhere. There are all kinds of conditions.

Senator Benidickson: This is part of the Honourable Mr. Mackasey's program.

Hon. Mr. Pepin: That is it. It has been acclaimed elsewhere as a most innovative, social minded piece of legislation from that point of view. But I emphasize how cautious we have been, because someone can very well say, "Why do this for the textile industry and not do it for other sectors?" This is a very good question. There are some precedents to this legislation, as you may know. In part, this was done under the automobile agreement. It was also done in the DEVCO legislation in Cape Breton. But this is new, and we have moved into it with great care. People can very well say that what is good enough for the textile industry is good enough for the electronics industry or the aviation industry; and that if it is good enough for the manufacturing industry it must be good enough for the fishing industry and for agriculture also. This is why we have moved very carefully. We were well aware that on the basis of this legislation there would be requests for extension of these clauses to other segments of the industry. So, there is a social aspect to this legislation.

I also said that there was an aesthetic aspect, in the sense of the "Fashion Canada" program and centres for productivity in the clothing and textile industry. The purpose of these aesthetic measures is to bring up the fashion content of this industry. I look around and I see many senators wearing their coloured shirts this morning. Well, this is part of the fashion preoccupation of this industry.

Senator Connolly (Ottawa West): A new look in the Senate.

Senator Carter: Have you anything in the bill to keep them from going out of style too soon?

Hon. Mr. Pepin: I was told yesterday that we might return to the white shirt. Let us not rush into that.

Senator Connolly (Ottawa West): Some of us have never left it.

Hon. Mr. Pepin: I just emphasize that, because in these days we all realize that men are getting much more fashion minded than they have ever been. We are beginning to look like a bunch of peacocks.

Senator Sullivan: Are they men?

Hon. Mr. Pepin: Yes, why not? What is good enough for the girls must be good enough for the men, too.

Some Hon. Senators: Oh!

Senator Molson: That is a good question.

Hon. Mr. Pepin: Some of what is good enough for the girls must be good enough for the men, but not all.

Let me remind you what I have tried to indicate. First of all, I have tried to indicate that this bill means movement. It is not a static thing. We are not trying to freeze the industry. On the contrary, we are trying to push it. The second point I have indicated is that this is a global policy. It is probably the first attempt ever made by the Government to look at one industry globally, from all angles. From that point of view, this is original. Some of you may not like it for that very reason. I do not know.

The third point that I would like to deal with is in answer to the question: What would be the most debatable, the most...

Senator Beaubien: Controversial.

Hon. Mr. Pepin: Yes, thank you very much—the most controversial aspect of this policy. Obviously, the answer is in clause 26, which says that in cases of serious injury or threat of injury from low cost import countries the Government would be willing to accord special protection, unilaterally, when necessary, in order to facilitate strengthening of the more viable lines of production.

Here I can only repeat what I have already said elsewhere, that we must have a determination of serious injury or threat of injury. Not only must we have that, but the Textile and Clothing Board must, in addition, demand—request from the companies coming to ask for this protection, plans that would indicate that they intend to continue to move towards the viable line. Again it is not a blank cheque, not by a long shot. They would have to demonstrate all of that.

It is only then that protection can be considered. So it seems to me that the maximum protection is really taken. There are a number of safeguards written in, and I think of clause 26 in particular. You must have prior and formal determination of serious injury. Injury must result from imports. Imported goods must be like, or directly competitive with, goods being produced by producers seriously injured. The use of the control is limited to the extent and for the period necessary to prevent or remedy the injury. In other words, we have extended ourselves as much as possible to prevent this from becoming a protective type of legislation.

My experts will give you as many facts on that as you would care to have, but I can assure you that this is the most liberal textile policy now available in the world. If you say that we have to be purer than the purists, then maybe you will disagree with this bill, but in a world of relative sinners we are terribly vituous.

The Chairman: That is a nice combination of words, Mr. Minister.

Hon. Mr. Pepin: I am supposed to be a professor; I am sometimes accused of being an academic; but I have found in my short experience in politics that there are a number of businessmen and farmers who are much more academic than I am. They talk about free trade and protectionism in more theoretical terms than I ever found in any textbook on these subjects. I am trying to be realistic.

Senator Isnor: Mr. Minister, from the viewpoint of manufacturers, which is more important, the import or the export business?

Hon. Mr. Pepin: In this case exports represent about 5 per cent of the production of the industry. Globally speaking, the imports at the moment represent about 30 per cent of the domestic consumption. That gives you an idea.

Senator Isnor: What I am interested in is the home market compared to the export market.

Hon. Mr. Pepin: Would you repeat that, please?

Senator Isnor: I am making a comparison between the future export business and that of the home market.

Hon. Mr. Pepin: I was going to come to that in a moment. I was going to say that we have to judge this policy in relation to the world of textiles and in relation to the policies of other countries in the world. I was going to say that we cannot judge this thing *in abstracto,* in a vacuum. We have to compare it to what other countries of the world are doing. If the world of textiles was a liberalized one, if Canadian companies had full access to the world to sell their textile goods, it is obvious that this bill would be different. But that is not the case. Textile goods and agricultural goods are the two areas of world trade which have not been liberalized.

Senator Desruisseaux: Are we even more liberalized than the United States?

Hon. Mr. Pepin: That is my firm conviction, and we will come back to that, if you want to make a comparison.

I was saying that this bill must not be debated *in abstracto.* It must be debated in a concrete way. I was saying that we have taken all kinds of precautions, and I was indicating some of those precautions. The Government is not abandoning its responsibilities, because, after considering the real damage and after looking at the plans introduced by the company, the board can only make recommendations to the Government as to the degree of protection needed, and then the Government must make that decision.

Senator Benidickson: It is presumably for more efficiency.

Hon. Mr. Pepin: Yes. The fourth remark I want to make is in a rather philosophical vein again. It is that this bill is a balanced one. The bill says in clause 18 that the Textile and Clothing Board will look at the interests of all parties—producers, employees, consumers, workers—and at all aspects, including Canada's international obligations and interests. All aspects will be taken into consideration.

Let us call it a balancing act. If you question the consumers, if you reason with them, they will say that it is important that some people should have sources of revenue. If you question importers, they will say it is important to be sure of a certain domestic production. Even the most anti-protectionist importers will recognize that it is good to have domestic sources of supply. So we have looked at all the interests and we have tried to balance them in the most viable way possible.

On the subject of free trade I should like to caution you again. I have looked, for example, at all the representations made to the federal Government in the lst few years by the Canadian Chamber of Commerce, by the Canadian Federation of Agriculture and by the Canadian Labour Congress. I should like to tell you, and again I could cite pages, that everybody in Canada is in favour of free trade. Everybody! I have not met one person who is against free trade. Everybody is in favour of free trade—but everybody qualifies it immediately: "Inasmuch as it is possible." And usually what is not said is: "Inasmuch as we are not affected by it."

Senator Sullivan: That is right.

Senator Beaubien: That has always been the American point of view.

Hon. Mr. Pepin: So do not give me that free trade business too much. I have always believed in it as strongly as anybody here. But you have always to qualify that. I would suggest for your amusement that you read the last presentation of the Canadian Federation of Agriculture to the Cabinet in Winnipeg. It was presented a few months ago. It starts out by saying that the Canadian Federation of Agriculture is in favour of free trade, especially in industrial products. I am almost quoting. It goes on to say that the Canadian Federation of Agriculture feels that at times quotas and subsidies are necessary. So I say "Amen" to that. Anybody can say "Amen" to that. But it is the "inasmuch as it is possible" that is always difficult to define.

The same thing applies in the House of Commons and in the Senate. Every Member of Parliament is against Government intervention, except in his riding. In his riding nothing must happen that will be disadvantageous to his electors. However, if a plant is about to close, then, irrespective of his party, whether he be Conservative or Liberal, he will move in to ask the Government to intervene to prevent that. I am just suggesting here as humourously as I can that this is not an academic debate, so if you talk of free trade, talk about it in terms of a desirable objective that must take into consideration the facts of life. This is really what we have tried to do, and I hope you will agree that we have done a reasonably good job.

The fourth of my five observations, Mr. Chairman, is that the system of control of imports from low-cost countries will still be based on the search for voluntary restraint agreements from exporting countries. In other words, unilateral action of a protective nature will never be used unless and until all efforts have been made to convince the exporting country that it is in their own best interests to accept voluntary restraint. I have done that on a number of occasions. I have said to them, "Look, don't you prefer to have a regular market in Canada for years to come instead of going out for the fast buck, for the fast sale?" And most countries of the world prefer to have this orderly marketing than immediate advantages.

Senator Cook referred to the 18 countries of the world with which we have voluntary restraint agreements, and this search for voluntary restraint agreements will remain the pillar of the system. It is only *in extremis* that we will act unilaterally, and then only if voluntary restraints are found to be impossible. Bear in mind that the bill is not so revolutionary because the Government already has the power to impose a surtax, which is not very pleasant. So, as I say, the bill is not so terribly revolutionary in the sense that nothing of that kind existed before.

I might also say to you that a number of countries with which I have been negotiating have said to us, "Why don't you, like all others, have the possibility of establishing quotas?" I could name countries where I have been told that Canada is the only country that does not have the proper equipment to deal with these problems, and they said to us, "Why don't you have a quota system?" Presumably these countries would hope to have more exports to Canada under a quota system than they have under voluntary restraint agreements. Presumably, were we to enforce a quota agreement, then, if they were not particularly well served on their quota system they would be the first to ask for voluntary restraint agreements. I have no illusions on that subject. I just wanted to indicate that a number of countries in the world have said to us, "Why don't you have the possibility of establishing quotas?" I mention this because in some countries of the world the policing of voluntary restraint agreements is rather difficult. They say, "Why dont' you do it? After all, it is your job. You are the one who asked us to restrain ourselves. So why do you not have the proper agreement to see to it that this is done properly?"

Senator Isnor: How would you establish a quota system in the case of, say, Japan, from whom we import certain articles such as wearing apparel and shirts?

Hon. Mr. Pepin: There are different possibilities, as you know, and we have not established quotas as yet, so we have not defined how we would go about it if we had to. I am just emphasizing here that we hope not to have to do it too often. As I said, it is only *in extremis*, and after using the voluntary restraint approach, that we would consider that. My experts could go into the different possibilities. You could have a general quota, or a quota by country. You could have different ways of administering the quota by distributing licences domestically. There are different possibilities there.

Senator Connolly (Ottawa West): A quota is an imposed restraint, and the voluntary system is an accepted one.

The Chairman: Yes, it is by agreement.

Hon. Mr. Pepin: Usually when you use a voluntary restraint agreement, everybody smiles a little because they know there was a little bit of pressure on the exporting country to accept that.

Senator Connolly (Ottawa West): But we have no imposed quotas? We have no quota system in this country, is that not so?

Hon. Mr. Pepin: No, not in the textile and clothing industry anyway. This would be new from that point of view. But we have surtaxes. As you know, there is one on shirts now. The surtax is a method by which you say everything which comes in at a certain price will be taxed at a higher level.

Senator Benidickson: And percentage wise it is fairly substantial. It can be $2 on $3.

Hon. Mr. Pepin: Yes.

[*Translation*]

Senator Desruisseaux: Mr. Pepin, that is what protects the preferential tariff, or a tariff ...

Hon. Mr. Pepin: No, all that is over and above the tariff.

Senator Desruisseaux: Yes, but it is a substitute.

Hon. Mr. Pepin: You have to understand the prohlem we face with respect to countries where production costs are low. The problem cannot be solved by means of tariffs. In other words, their capacity to produce at lower prices is so great that it is not possible to prevent imports everywhere in Canada merely by imposing tariffs.

[*English*]

Another remark I wanted to make—and this would require a longer analysis on your part—concerns a comparison of our present and future legislation on textile and clothing imports with the legislation of other countries of the world—the United States, Britain, the EEC, Sweden, Switzerland and Japan. I have all that here. The conclusion of the study is that we have been more liberal than anybody else. If you compare the degree of penetration of the Canadian market with the degree of penetration of the United states market or the European market, you find that ours is usually on the top because, as I say, we have taken a more liberal approach to these things than has anybody else. I am not emphasizing these things too much because you can very well say, "It is because we have better reasons to do it," and I go along with this argument. Canada is so dependent on international trade, and 25 per cent of our gross national product is international trade, as opposed to 4 or 5 per cent in the United States. Consequently, we have to take in more than others take. And this is not contradicted by businessmen in this industry. They just say that there must be a level that makes sense and that must be accepted, if you want to keep the viable sectors of this industry going in Canada.

Senator Burchill: Did I understand you to say that 25 per cent of our total manufactred goods are exported?

Hon. Mr. Pepin: No, I said 25 per cent of our gross national product is made up of exports. But if you look at the manufacturing side, 50 per cent of manufactured goods must be exported from Canada, which gives a very clear indication of the degree of our dependence on international trade, and this explains our international trade policies very well too.

Senator Connolly (Ottawa West): May I ask a question? You spoke about the posture of Canada being liberal in respect to trade.

Hon. Mr. Pepin: In textile and clothing matters.

Senator Connolly (Ottawa West): Is this virtue recognized in your Gatt negotiations and things like the Kennedy Round? Do other countries recognize that this is the philosophy with which Canada approaches these talks?

Hon. Mr. Pepin: That depends on their interest. For example, as you may know, I have explained this policy to a number of countries so they would not say that they were caught unawares. They say, "That is your interest." As a matter of fact, we have some of it in our own. But when it comes to defending their trade interest with Canada they will not generally admit these things. They will say that we tend to take a rather protectionist attitude. You are familiar with international negotiations. I do not have to tell you how it is done.

The Chairman: They should know that a rose by any other name...

Hon. Mr. Pepin: At the same time we say two things. We say that our textile and clothing policy in this bill is the most liberal that exists in the world today, and we recognize why we have good reason to take that position. It is always in the spirit of balancing advantages and disadvantages that we talk.

The Chairman: There is no conflict with GATT in what you are proposing to do?

Hon. Mr. Pepin: On the contrary, we are the only one implementing Article XIX of GATT which says that you have to prove damage or the possibility of damage. The Americans do not.

Senator Connolly (Ottawa West): Do the other parties to GATT recognize the posture that you are taking?

Hon. Mr. Pepin: Really, I did not have a chance to discuss that with the various countries.

The Chairman: To the extent that there is provision in GATT and there is a basis for dealing with a situation like this, we must recognize that they do recognize it.

Hon. Mr. Pepin: When I went to see Mr. Miyazawa the Minister for Industry in Japan, he said: "We are always interested in one thing, that you use Article XIX of GATT, that you prove there is damage or the possibility of damage."

Senator Connolly (Ottawa West): The only reason I raise this question is that if the other parties think that Canada is in fact wedded to the idea of removing trade restrictions, hidden or otherwise, then our position at the negotiating table is made more credible whenever we have to deal with problems affecting ourselves.

Hon. Mr. Pepin: This gives me the opportunity of saying that the bill by itself is fairly neutral. It says simply "This is the way we are going to go about it. We will consider this factor and that factor." The bill is essentially a framework bill. A decision of the Government based on the recommendations of the Textile and Clothing Board will be the important thing. This is where a protectionist or liberal line in theoretical terms will be established.

Senator Cook: The bill is an enabling bill.

Senator Connolly (Ottawa West): There is no doubt too that the board does not force the Government to act in a vacuum. It is going to act now as a result of a finding. Heretofore this has been a problem. There have been crises and various governments have had to take strong action at certain times, sometimes without the full knowledge, or at least the amount of knowledge, they would have with a finding of this board.

Hon. Mr. Pepin: I repeat that we do not know what the line will be, but I do not think we have any reason to believe that it will be dramatic either way. The same balancing act that presided over the writing of the bill will preside over the implementation of the bill. I can tell you that we have in recent months negotiated with a number of countries on voluntary restraint agreements, and in most cases, as Senator Cook said in his speech, we have come to terms with them.

At the moment we are negotiating with the Japanese. They have not used the legislation as a reason for not negotiating with us. As a matter of fact, we are negotiating with the Japanese earlier than at any time in the past.

Senator Connolly (Ottawa West): Did you say "easier"?

Hon. Mr. Pepin: "Earlier." As you recall, these things are usually done in December, for the year ending.

Senator Carter: Is it fair to say that despite our GATT philosophy and our efforts under GATT, this bill is based on the assumption that we do not see any great liberalization of the textile industry in the foreseeable future?

Hon. Mr. Pepin: I think that is a good assumption. Again, the philosophy of the bill is this, that there are factors in this industry that are viable, that can become viable—areas in the textile and clothing industry where Canada can make a contribution, can produce without impairing the interest of consumers. There is an area there. Let us put our bets on that. Let us help this to go forward. Let us support it when needed.

Then there is another area where opportunities are almost non-existent. Let us have some social cushion to help with the phasing out of these things.

Senator Carter: Will that phasing out take place?

Hon. Mr. Pepin: It is taking place now.

Senator Carter: My question is, will it take place geographically or everywhere in that phase of the industry?

Hon. Mr. Pepin: I think it will take place everywhere. Wabasso in Trois Rivières is phasing out part of its plant. Bruck Mills in Sherbrooke is phasing out part of its plant. When Bruck Mills, which is a very good company, phased out some of its operations, they said to the employees, "Look, in anticipation of the Government textile policy we have decided to phase out this thing because we do not think it is viable." They say it is going to be bad and everybody regrets it. But at the same time they say, "We are going to emphasize this particular aspect of our production, and although we are regretfully throwing out 150 people now, in two or three years' similar workers will be employed by the company in these viable sectors. As a matter of fact there will be more than the 150 people that we have unfortunately to throw out now."

You see, this is it. This is painful. I have been told by some people that I am heartless. But my contention, my answer, is simply that maybe it is better to do it now than have to do even more in three, four or five years' time. Maybe it is better to take the pain now than to have to take more later.

Senator Cook: But you do provide just assistance?

Hon. Mr. Pepin: Yes. That is about all that I wish to say.

The Chairman: I should like to ask a question. Is the effect of this bill to intervene between the Government and policy decisions to the extent that the board must first act before the Government can make any determinations on policy in relation to the textile trade?

Hon. Mr. Pepin: Please continue your line, because it is not too clear to me yet.

The Chairman: The provisions of this bill ascribe certain duties to the board.

Hon. Mr. Pepin: Yes.

The Chairman: That board may go into action on a notice of complaint.

Hon. Mr. Pepin: Yes.

The Chairman: Or on a reference by the minister. They then conduct an inquiry and make a report and recommendations.

Hon. Mr. Pepin: That is it.

The Chairman: The Government then makes a policy decision as to whether it will accept those recommendations under this bill.

Hon. Mr. Pepin: Right.

The Chairman: Does this then mean that the policy decisions in every case must wait until the board has acted, has conducted a hearing and made its recommendations?

Hon. Mr. Pepin: Yes.

The Chairman: In other words, there is no scope for independent action by the Government?

Hon. Mr. Pepin: No, that is quite right. We have to wait until we have the views of the board on the protection needed.

The Chairman: I would say that is essential, having regard to Article XIX of GATT.

Hon. Mr. Pepin: Yes, but that does not mean that nothing will be done unless the board or the Government delivers an opinion. There are many cases where the companies will themselves know that they are in a viable sector of the industry and do not need the opinion of the board. For instance, the carpet industry is viable and its members do not need the opinion of the board; the companies have an advantage. In other cases, for example, a particular company does not have to have the recommendation of the board and a decision of the Government to go to GAAP for financial support.

The Chairman: That was not my point. What is the starting point? In this legislation it is the reference to the board.

Hon. Mr. Pepin: Yes.

The Chairman: And that can be by complaint or it can be initiated by the Government.

Hon. Mr. Pepin: Yes.

The Chairman: Once that starts it has to take its course and there has to be a recommendation or a statement that they recommend that no action is necessary.

Hon. Mr. Pepin: Yes. I am trying to be careful because, first of all, the board will not decide on every aspect of this industry. The Government may very well wish to enter into a restraint agreement with Hong Kong on a particular aspect of imports where the board has not yet made a recommendation.

The Chairman: This is just my view. I would not think it is all necessary in connection with negotiating restraining agreements to go to the board. This is an area for Government action.

Hon. Mr. Pepin: I wanted to make sure that you understood that.

The Chairman: Yes, I understand that.

Senator Molson: You are speaking, Mr. Chairman, of voluntary agreements.

The Chairman: Yes. They do not need to go to the board for that.

Senator Molson: There would be no change in that aspect, is that correct?

The Chairman: Under this legislation the board may start to function on a notice of complaint, on a reference by the minister on some question, or itself initiate the procedure.

Hon. Mr. Pepin: The Government could not take unilateral action without the board; that is the whole purpose of the exercise.

Senator Benidickson: That is new under the provisions of this bill.

Hon. Mr. Pepin: Yes.

The Chairman: That course is necessary.

Hon. Mr. Pepin: And the recommendation of the board is the protection which the Government takes to itself and gives to the population before proceeding unilaterally.

Senator Benidickson: I would like to pursue that with respect to certain other types of board which have been established since approximately 1967, including the Anti-Dumping Tribunal.

The Chairman: Senator Benidickson, I have a note to ask the minister questions on that point. The Anti-Dumping Tribunal was established during the 1967-68 session, but dumping had to be established as a basis for their inquiry as to whether any industry or trade was suffering. However, in the 1969-70 session amendments to the act were passed under which the same power was given to the Anti-Dumping Tribunal as is now being given to the Textile Board. How are their areas of operation decided when the jurisdictions are split like this?

Hon. Mr. Pepin: I will have an expert explain that. I think your interpretation is right, Mr. Chairman, but it is a question of determining what goes where. Mr. Drahotsky might speak to your question.

Mr. L. F. Drahotsky, General Director, Office of Industrial Policy Adviser, Department of Industry, Trade and Commerce: I am not aware that the Anti-Dumping Tribunal now has the power to initiate inquiries as to injury. If you are referring to the recent amendment to the Anti-Dumping Act, this merely provides the Governor in Council with the power to refer to the Anti-Dumping Tribunal cases with respect to which the Government wishes to have injury determinations. It is true that the Governor in Council may now ask the Anti-Dumping Tribunal to undertake an injury inquiry with respect to products which in fact may not be dumped, for which there is no prior determination of the Department of National Revenue that these in fact are being dumped.

The Chairman: The following statement was made by me in the course of the evidence of Mr. Gauthier, Vice-Chairman of the Anti-Dumping Tribunal in the Committee hearing on Bill S-6:

> But, what we are talking about this morning is a situation in which there is no dumping. We then look at the circumstances under which these imports come into Canada, and the allegations that their entry is threatening or causing injury to Canadian production. This is a new authority.

Is that not the type of authority which will be granted to the Textile Board?

Mr. Drahotsky: No, there is a slight difference, in that for the Anti-Dumping Tribunal to undertake an injury inquiry it has to be so directed.

The Chairman: That is right.

Mr. Drahotsky: By the Governor in Council.

The Chairman: That is the only procedure.

Mr. Drahotsky: There are two possibilities, however, with respect to dumping goods: following an inquiry by the Department of National Revenue and a finding that goods are being imported at dumped prices; or, under the amending provisions, at the request of the Governor in Council, the cabinet.

The Textile and Clothing Board will be able, in fact, to undertake injury inquiries and make injury findings on their own initiative. That is the difference. In other words, their powers will be broader than those of the Anti-Dumping Tribual.

The Chairman: Let us be realistic. The minister used that word and I like it. You say that anybody other than the Anti-Dumping Tribunal can function in relation to dumping where the basis of the inquiry is as to whether or not there has been dumping as defined in the Anti-Dumping Act and in relation to Article XIX of GATT?

Mr. Drahotsky: No, there is only one body, namely the Anti-Dumping Tribunal, which has the authority to make injury findings, injury attributable to dumping.

The Chairman: So that the Anti-Dumping Tribunal retains that authority completely?

Mr. Drahotsky: That is correct.

The Chairman: The Textile Board then operates in the area of damage only?

Mr. Drahotsky: Injury attributable to goods imported at prices which cause injury to Canadian industry.

Senator Carter: But not necessarily dumping?

The Chairman: No, that is quite true, because it must go to the Anti-Dumping Tribunal if dumping is part of the allegation.

Mr. Drahotsky: That is correct.

The Chairman: Your explanation as to the difference, then, is that the Anti-Dumping Tribunal can deal with injury cases only by reference by the Governor in Council.

The Textile and Clothing Board can function either on complaint from somebody affected or on reference from the minister, or on its own initiative.

Mr. Drahotsky: That is right.

Hon. Mr. Pepin: Clause 26 is very useful. It is an extension of what you have been talking about with Mr. Drahotsky. Clause 26 says:

> Section 5 of the Export and Import Permits Act is amended by adding thereto the following subsection:
>
> "(2) Where at any time it appears to the satisfaction of the Governor in Council on a report of the Minister made pursuant to
>
> (a) an inquiry made by the Textile and Clothing Board with respect to the importation of any textile and clothing goods within the meaning of the Textile and Clothing Board Act, or
>
> (b) an inquiry made under section 16 of the Anti-dumping Act by the Anti-dumping Tribunal in respect of any goods other than textile and clothing goods within the meaning of the Textile and Clothing Board Act.

So before we add something to the Export and Imports Permits Act list we have to have a *nihil obstat,* to use a Catholic term, of either the Textile and Clothing Board or the Anti-dumping Tribunal, depending on the subject matter: if it is textile and clothing, from the Textile and Clothing Board; if it is something else, from the Anti-dumping Tribunal.

The Chairman: But what I am pointing out is that the authority given to the Anti-dumping Tribunal last year is limited only by the statement that it is in relation to importations that they may make the injury determination. That is the authority of the Textile Board in this bill. Therefore, to the extent that the Governor in Council may make a request, he could go either to the Anti-dumping Tribunal or the Textile Board.

Hon. Mr. Pepin: Depending on what he wants to have determined.

The Chairman: Well, in connection with textiles.

Hon. Mr. Pepin: In connection with textiles, yes.

The Chairman: You can go the other way.

Senator Cook: He cannot go to the Anti-dumping Board unless it is in connection with dumping.

Hon. Mr. Pepin: If he wants to have dumping determined he goes to the Anti-dumping Tribunal; if he wants to have prejudice determined he goes to the Textile and Clothing Board.

The Chairman: What I am pointing out is, if he wants to have prejudice established he may go to either board, if he goes through the Governor in Council.

Hon. Mr. Pepin: The experts say "Yes," so you are an expert!

Senator Sullivan: You may very much want to.

The Chairman: You mean by osmosis.

Senator Benidickson: Before you leave the subject, although it was not where I proposed to start any questioning, I should like to point out that for years we lived with the Tariff Board jurisdiction of 1932. For years it was a great subject of philosophic difference in Parliament if we interfered very much, by increasing or reducing protection. We lived with this for a great number of years. What bothers me is that we introduced the Anti-dumping Tribunal, and we did this within very recent years. We had the Machinery and Equipment Advisory Board in 1967. That had some elements of protective possibilities in it. We had what the minister referred to, the Motor Vehicles Tariff Order of 1965, with the so-called free trade pact. Well, it has not been free trade, in that the prices of automobiles in this country and in the United States differ, although they may be produced by the same company.

We have referred to the Anti-dumping Act, and of course the amendment that came before the Senate in the subsequent year. Now we have another board, which seems to have some additional form of policing with respect to dumping, or have aspects that are protectionist.

The Chairman: Prejudiced?

Senator Benidickson: Protectionist. Why have this proliferation within such a short period of time, when we lived for so long with the Tariff Board jurisdiction of 1932?

I recall that in 1945 a government that I supported, or was supposed to support at that time, had a very small majority of twelve. More than twelve of us said we would not support a rather modest increase in tariffs at that time. The minister withdrew his proposal. In 1953 there was another proposal by the same government with respect to machinery, that there be some increase in protection. There was protest. In that case, instead of withdrawing anything they simply did not introduce in the House of Commons a resolution that normally would have followed the budget.

This has gone on. In 1960 and 1962 we had considerable controversy about what was "class or kind" of items. That involved a difference between parliamentarians on the matter of protection—more protection or less. You will recall that the Senate at that time opposed some of the legislation in the early 'sixties. However, the government of the day insisted that that legislation be proceeded with.

Then we go along quietly for some time, but in the last three or four years we have had these various new boards and new items of legislation, which to my mind have a very strong flavour of opportunity for the prohibition of the entry of goods, which I will call perhaps "anti-cosumer" in their interest. Why do we suddenly have all these boards, and to what extent do they overlap?

Hon. Mr. Pepin: I think the best answer I can give is to send you a copy of the speech I made the other day to the Importers' Association in Montreal.

Senator Benidickson: I have your speech made in Windsor, but I have not the one made in Montreal.

Hon. Mr. Pepin: The one in Montreal was on imports. My plea really was for maximum flexibility, in the sense that you cannot, as possibly existed in the past, deal with all these problems with a single instrument. In many cases the instrument you need is exactly the opposite of the instrument you need in another case. For example, you give a protectionist leaning to the machinery program. I would not accept that. The machinery program is one by which imports are encouraged; there is remission of duty to encourage imports, but not to encourage them when somebody in Canada is producing the same thing. That is, if I have ever seen it, a use of intelligence. You encourage imports of machinery not produced in Canada by giving a remission of the 15 per cent, or whatever it is, and protect your own domestic producer by not doing so if the machinery is produced in Canada.

Senator Benidickson, we keep on importing into Canada 50 or 60 per cent of the machinery we need. So I do not think the machinery program could be interpreted as a protectionist measure.

Senator Molson: That is processing machinery, Mr. Minister.

Hon. Mr. Pepin: If you talk about the automobile pact, that was an entirely different approach. There we went to conditional free trade, and the results are there for everybody to see. We have now more than $6 billion worth of trade with the United States in automobile parts. The contention I have is that in the past the instrument was really a sledge-hammer: now we operate with a scalpel. I think with this variety of instruments you underline that theoretically, anyway, the Government is in a position to do a more precise job than it was in the past with a single instrument.

Mr. Drahotsky, would you like to add something?

The Chairman: Just before he speaks, is the sum total of what you are saying that this is an area for specialization?

Hon. Mr. Pepin: You have the objective and you try to achieve it in the best possible way. You cannot do it with one instrument.

The Chairman: No, you need a lot of roads.

Senator Benidickson: You are going further, and perhaps this word that we often hear, "rationalization", has some relevance, including the program of your colleague, the Minister of Labour.

Hon. Mr. Pepin: That is it. If you could, in five years from now, have a meeting here to review this, we could say that because of this textile and clothing bill we have now in Canada a more concentrated textile industry, with lower tariffs, in order to favour the coming into Canada of the foods that we are not producing, which could very well and probably will happen. I think that we will all rejoice in that. But you cannot use the entire dumping tribunal to do this work. You cannot use the machinery program to do this work. You need a special instrument, and this is what we are talking about.

Senator Benidickson: Am I right in thinking that when the Tariff Board considered the predicament of the textile industry, they ended up by using the test of the merit of a higher or lower tariff by comparing our costs, our form of manufacture, our styling and other matters of that kind more with the United States than with the underdeveloped or developing countries? I was going to ask you a further question. You did appear before the Senate Foreign Affairs Committee. I am not a member of that committee, but Senator Aird, the chairman of that committee, was good enough to send me your evidence at that time. I was rather surprised that there was very little said about acrimony or great difficulty with some of these developing countries, particularly in the Pacific rim, where we are expanding our export trade. You referred to a couple of publications, foreign trade magazines and so on, which I have looked at, and I find there is not very much evidence in public print of really unfriendly bargaining in some of these matters. Is that generally true?

Hon. Mr. Pepin: Really I do not think we should be ashamed of our conduct at all, with respect to these countries. When I was in Japan, the Minister of Industry and Commerce of course brought up the difference in the commercial balance between Canada and Japan. I said, "Would you like to trade that situation? I will trade it with you at any time." We are exporting to them huge

quantities of raw materials and semi-semi-processed material. They are exporting to us huge quantities of manufactured products.

Senator Benidickson: Including textiles.

Hon. Mr. Pepin: You have to put that in the balance.

Senator Benidickson: Including shirts.

Hon. Mr. Pepin: Including shirts. When I said to the Japanese minister, "Would you like to trade? We will export to you $500 or $600 million worth of manufactured goods and you will export to us a billion dollars worth of raw and semi-processed. Can we trade on that?", he burst out laughing, because he knows very well that Japan is much better off with $500 or $600 million worth of trade to Canada in manufactured product, than Canada is with raw and semi-processed materials at the level of $1 billion. So you have to include that in the equation. I do not think we should be ashamed of our conduct in textiles in the past. I am not, anyway.

Senator Benidickson: I am glad to have that explanation on the record.

The Chairman: There is just one other question I have—for your expert, maybe. I notice in the Anti-dumping Tribunal Act that the tribunal is made a court of record and in your bill this is not done. Is there an explanation why?

Hon. Mr. Pepin: Yes, there is one. Mr. Drahotsky or Mr. Belanger?

Mr. J. M. Belanger, Chief, Industrial Policy Division, Office of Industrial Policy Adviser, Department of Industry, Trade and Commerce: Mr. Chairman and honourable senators, we were told by our legal counsel that it was not a court of record. The only reason we have had to put certain things in is because of the powers of inquiry. But we are not a court of justice *per se*. We considered that possibility, because there is one clause with regard to the Customs Act. The Anti-dumping Tribunal has the right to requisition customs documents by defining themselves as a court of justice and a court of record.

The Chairman: I think part of the answer is that the Anti-dumping Tribunal, in dealing with dumping aspects and injury in a combination, may make an order which is final, and it is provided that it be subject to appeal to the Exchequer Court. Here the Textile Board cannot make an order; it may make a recommendation.

Mr. Belanger: The determination of injury is, but it is supposed to be a final determination.

The Chairman: In this bill?

Mr. Belanger: It is different; it is part of the process of getting to the recommendation. It is not an acting document *per se*, whereas in the anti-dumping tribunal it is directly there.

The Chairman: I notice in this bill that the board shall make a written report to the minister setting out the reesults of the inquiry and containing a recommendation as to whether in its opinion special measures of protection should be implemented. Notwithstanding that, the minister is not bound to accept that; he makes his own decision. Is that right?

Hon. Mr. Pepin: That is right.

The Chairman: So this may be why you have this basic difference.

Mr. Belanger: But it is not as important as in the Anti-dumping Tribunal. In the Anti-dumping Tribunal, its determination of injury is the final one, it is the end-all of it. Here it is only as part of the process of getting to the examination.

Senator Molson: Could we ask the minister how long he thinks this process might take in any given but not too complicated case presented to the board?

Hon. Mr. Pepin: You are quite right. It will depend on the degree of complication, or the number of applicants. In the first case we had, in the yarn application where there were only five or six applicants, it took three and a half months. The board itself can make full use of everybody around who knows anything about this subject. First of all, they will receive the views of the producers and the plans of the producers. They have their own little staff, as you know. They can consult also with experts in my department, in Finance, in External Affairs. All this continues to exist.

Senator Molson: I am just wondering about delays. From your point of view, do they look as though they will be of a reasonable length, in order to make the actions efficacious?

Hon. Mr. Pepin: The purpose will be to do it as rapidly as we can. That is one reason why I would like it if you told me that you wanted to meet again in the coming days—because I am very keen to see this legislation through, as you can very well imagine.

Senator Benidickson: Are we likely to see you again before this committee?

Hon. Mr. Pepin: Any time you say—in private or in public.

Senator Benidickson: Some people have voiced concern that the powers contained in this bill to establish the Textile and Clothing Board go well beyond those that would be necessary to deal solely with textile and clothing matters. Does this come back to your reference to clause 26?

Hon. Mr. Pepin: Yes, senator.

Senator Benidickson: What would that include? Footwear is explicitly excluded. Would it include carpets and things of that sort?

Hon. Mr. Pepin: No, carpets and things of that kind are included in textiles and clothing. There is no problem there. The real problem was well defined in Senator Cook's speech, when he explained what the Export and

Imports Permits Act applied to as understood now. It applies to three things. This is what Senator Cook said in his speech at page 855:

> The Export and Import Permits Act makes it possible for the Government to control imports of: (1) articles which are scarce in world markets;—

So we can put on the Export and Import Permits Act articles that are scarce in the world.

Senator Benidickson: That is a fairly wide power, is it not?

Hon. Mr. Pepin: Yes, but I do not think it has been abused.

Senator Benidickson: It has not been used yet. The act has not been passed.

Hon. Mr. Pepin: I am sorry, but this is the Export and Import Permits Act as it is now. It can do that now. So, "articles which are scarce in the world markets" is one.

Then we have:

> (2) certain products under domestic price support;

Milk products, for example, which are under domestic price support can be put on that export list.

> (3) any article, when necessary to implement an inter-governmental arrangement or commitment. However, in its present form, the act cannot be invoked to control injurious imports, unless one of the three conditions is met.

Is that clear? So that is the Export and Import Permits Act as it is now.

In the House of Commons—and I have all the quotations here—Mr. Harkness, for example, said that this was wide enough to bring in quotas on textiles and clothing. He has said that. I have the quotation. The department has always taken the position that it was not included now. So in order to get this power of having unilaterally-decided quotas on textiles and clothing we have had to have clause 26.

In the past people have also said in the house and elsewhere, "Why not apply it to all kinds of goods? You know, if it is good enough for textiles and clothing it must be good enough for other goods as well. You may need the same authority for other types of goods." So we have taken the bull by the horns and we have also put other goods in the legislation. As you know, Mr. Baldwin did not like it. It seems to me, since everybody is aware of it, that this is a legislative procedure which is quite acceptable, but some people are more severe on these matters than I am.

Senator Benidickson: I realize, Mr. Minister, that you were adamant in the matter of the suggestion that the board itself might be enlarged, but it would seem to me to be important that the membership of the board be widened. I have much respect for what Senator Sparrow said in our chamber the other night when he emphasized regional representation, but I am not keen on regional representation. I am slightly nervous about the representation as proposed, although I have the highest respect for the three men you have in mind to constitute the board. One is a man with whom I have dealt for a long time in the Civil Service; the second is an ex-manufacturer; and the third is an eastern economist. In no way do I slight their abilities, but what concerns me is that there seems to be no one on the board who would represent the consumer who has been, for example, buying shirts at, say, $3.25 and may have to pay $5.25 for them. I believe the bill is so important that the membership of the board should be widened.

Hon. Mr. Pepin: But is there anybody in the world who is specialized as a consumer?

Senator Benidickson: Would you repeat to this committee your strong objections to widening the board?

Hon. Mr. Pepin: The main argument was that we did not want representatives either from unions or from employers. We did not want the "representative" type.

Senator Cook: They could appear before the board as advocates, at any rate.

Hon. Mr. Pepin: Yes, everybody is entitled to come and put his case before the board.

We have really appointed people known for their good judgment and knowledge of economic problems in general. We did not even want somebody specialized in textiles, because we wanted him to take a wider view of these things.

I am very pleased with and proud of the three we have found. Mind you, they are certainly working for their money. The only suggestion that I would accept is that we might have done this on a wider geographical basis. I am quite sure that will be taken into consideration in future.

Senator Aird: Mr. Minister, how does the board operate? Does it operate by majority vote?

Hon. Mr. Pepin: They develop a concensus.

Senator Aird: It is a unanimous decision, then?

Senator Benidickson: No. This board would be like many other boards, as I understand the act, because it would have the right to delegate one of its members to actually do the investigating.

Hon. Mr. Pepin: They always sit as a group.

Mr. Belanger: They have the right to investigate. That comes under their powers of inquiry.

Senator Benidickson: It is like the National Energy Board, where one member of the board may go out and conduct an entire hearing and then come back and discuss what he has heard with his colleagues.

Hon. Mr. Pepin: I do not think they do that very often. I have seen them at work and they seem to work very much as a team. There is no provision for a vote in the group and that means that they have to come to terms with themselves.

Senator Sparrow: Mr. Minister, you just mentioned that in future you would want to look at regional representation. Is that what you said?

Hon. Mr. Pepin: No, I said that Senator Benidickson underlines the fact that these three gentlemen are from central Canada. Mr. Annis could not readily be identified in geographical terms. There is another member who is from Quebec, and another one from Ontario. I merely say that the next time round somebody will want to look at the possibility of choosing someone from the Maritimes or from the western provinces.

Senator Benidickson: Or from among those who are now so involved in Pacific Rim trading.

Senator Sparrow: Might I ask then what is your objection to regional representation? The reason I ask that question is that the bill refers to "not acting unilaterally," but you can act unilaterally not to act under the recommendation of the board. This becomes extremely important particularly if you have a recommendation by the board and then a recommendation comes forward to retract that, and then you can act unilaterally not to retract any provision that was made. This becomes, I believe, rather important in that there should be regional representation. I certainly would not want to see in the bill specific guidelines for representing agriculture or consumers, or this kind of thing, but at least for choosing the members regionally. Assuming there were four from the four regions of Canada plus an additional one to give you the odd number, they would certainly be able to concern themselves by acting unilaterally not to act. In the committee of the other place, or in the house, I believe you made the statement that this was setting a precedent, and this was you concern. But I see under the bill which deals with national farm products they are doing exactly that. They are making provision for regional representation under that act which, in turn, is very similar to this type of legislation.

Hon. Mr. Pepin: The reason I said what I said about regional representation is not to get a better board, but to get more popular support for the board. If there had been a westerner included, then maybe westerners would have felt a bit better about it. That is my only reason. It is not a question of competence at all. You must bear in mind that the board can only make recommendations with respect to the degree of protection to be afforded by the Government, and that eventual decision will be taken in Cabinet where regional representation is a known fact.

Senator Sparrow: These may or may not be regional representation.

Hon. Mr. Pepin: In the Cabinet? I assume there will always be regional representation in Cabinet.

Senator Sparrow: But there have been some situations where there has not been regional representation in Cabinet.

Hon. Mr. Pepin: May I continue for a moment? The other point is that my adamant position in the house, that Senator Benidickson referred to, was taken on an amendment to the bill which suggested representation of the provinces on that board, and I said, "To hell with that," because the provinces had been saying to the federal Government, "That is your responsibility," and you are not going to throw back the responsibility to them after that. This is why I was so adamant.

Senator Sparrow: I agree with your statement on that, but you are not then opposed to the fact that the bill should state that there should be regional representation. You are not opposed to that?

Hon. Mr. Pepin: If you do that you will have to have five members, to make sure that the various regions are represented, and then a sixth to make sure that the national interest is taken into consideration. If you operate on that basis, there is no end to the number of members you will have to have on that board. Then perhaps you will have to represent southern Ontario, as opposed to northern Ontario, and so on, in the conventional sense.

Senator Sparrow: But I am talking of regions now. If there are four regions in Canada, you would require the fifth.

Hon. Mr. Pepin: Are there four regions?

Senator Sparrow: Are there not four?

Hon. Mr. Pepin: Well, British Columbia has always claimed to be a region by itself.

Senator Sparrow: Well, how many regions do you say there are?

Hon. Mr. Pepin: Well, it would mean that there would be five, at least—and we could have a debate as to whether it should be four or five.

The Chairman: We will not have that debate here!

Hon. Mr. Pepin: You see, what will happen is this. If you want to represent the regions, then the consumers will come up, and the producers will say, "Certainly we are interested; we are spending the money." And the employees will say that they too have an interest. There is no end to it if you follow that course. What, in fact, I said was that it would have been wise and shrewd on the part of the Minister to see to it that this argument was eliminated. But I looked for good people before I asked myself where they were from.

Senator Sparrow: With regard to the national farm products, they have it in there. That is what I am getting at.

The Chairman: I am not sure that this is relevant senator.

Senator Sparrow: I believe it is relevant to his argument.

The Chairman: As I understood the Minister's argument today, it simply was that he explained that it may

well be that somebody from the west will or may be appointed. There is no prohibition against that. Whether you call him a regional representative in those circumstances or not, I do not know. He is a member of the board and he may be from the west, but there is no prohibition against that.

Senator Cook: And anybody who has an interest can come before the board and make representations.

Senator Molson: We have to hope, Mr. Chairman, that there are still impartial Canadians who can sit on a board and not be criticized because of the part of the country they come from.

Hon. Mr. Pepin: Mr. Annis has been associated for such a long time with the national aspect of these things that it would be very difficult for me to say which region of Canada he comes from. I have no idea.

The Chairman: We know him very well.

Now, honourable senators, the arrangement was that we would hear the Minister this morning, and that then we would revert to dealing with Bill C-180. So, Mr. Minister, I thank you very much for being with us this morning.

Hon. Mr. Pepin: I want to say that if my presence can be helpful to you in speeding up the passage of this bill, I shall endeavour to be as helpful as I can.

The Chairman: We will let you know.

The Committee then proceeded to the next order of business.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 20

WEDNESDAY, APRIL 28, 1971

Second Proceedings on Bill C-180,

intituled:

"An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products"

(Witnesses:—See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28)

Ex officio members: Flynn and Martin

(Quorum 7)

Orders of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Heath, seconded by the Honourable Senator Kickham, for the second reading of the Bill C-180, intituled: "An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products."

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

The Bill was read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

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Minutes of Proceedings

Wednesday, April 28, 1971.
(22)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce proceeded at 11:00 a.m. to further consider the following Bill:

Bill C-180 "An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products".

Present: The Honourable Senators Salter A. Hayden (*Chairman*), Aird, Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Everett, Isnor, Kinley, Martin, Molson, Sullivan, Welch and White—(18).

Present, but not of the Committee: The Honourable Senators McNamara, Methot and Sparrow—(3).

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

WITNESSES:

The Canadian Manufacturers' Association:

Mr. H. J. Hemens, Q.C., Vice-President, Secretary and General Counsel, Du Pont of Canada Limited;

Mr. R. F. Bonar, Legal Counsel, Colgate-Palmolive Limited;

Mr. R. Rhodes, Vice-President and General Manager, Food Services Division, General Foods Limited;

Mr. D. H. Jupp, Ottawa Representative, The Canadian Manufacturers' Association;

Mr. G. C. Hughes, Manager, Legislation Dept., The Canadian Manufacturers' Association.

Retail Council of Canada:

Mr. A. J. McKichan, President;

Mr. K. Lane, Assistant on Buying to the Vice-President of Merchandising, Simpson-Sears Ltd.;

Mr. N. A. Stewart, Company Packaging Supervisor, T. Eaton Co. Ltd.

Canadian Feed Manufacturers' Association:

Mr. C. L. Friend, Executive Secretary;

Mr. J. D. McAnulty, Director.

At 12:25 p.m., the Committee adjourned until Wednesday, May 5, 1971 at 9:30 a.m.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, April 28, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-180, respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products, met this day at 11 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, we have further delegations this morning in connection with our consideration of Bill C-180. We have with us The Canadian Manufacturers' Association represented by Mr. H. J. Hemens, Q.C., Vice-President, Secretary & General Counsel, Du Pont of Canada Limited; Mr. R. F. Bonar, Legal Counsel, Colgate-Palmolive Limited; Mr. R. Rhodes, Vice-President and General Manager, Food Services Division, General Foods Limited; Mr. D. H. Jupp, Ottawa Representative, The Canadian Manufacturers' Association; and Mr. G. C. Hughes, Manager, Legislation Department, The Canadian Manufacturers' Association.

Now, Mr. Hemens, are you going to make the initial presentation?

Mr. H. J. Hemens, Q.C., Vice-President, Secretary and General Counsel, Du Pont of Canada Limited: Honourable Senators, we are pleased to have the opportunity of appearing before your Committee this morning and discussing with you Bill C-180, the Consumer Packaging and Labelling Act.

I would like to introduce the other members of CMA's delegation. On my right are: Mr. Bonar, Mr. Rhodes, Mr. Hughes, and Mr. Jupp.

Copies of the association's submission in both official languages have, I believe, been made available to you. The submission is based on the bill as first introduced in the House of Commons and so does not reflect the amendments recently made by the house. I will deal, of course, with these amendments in this statement, but I must first tell you that our comments in the brief on clauses 12-23 do not reflect the fact that these clauses have been renumbered 13-24 respectively and that our comments on clauses 7(2)(a), 7(2)(c), clause 9, clause 14 and clause 17(1)(d) are now largely inapplicable because of these amendments.

I would like to highlight CMA's position on Bill C-180, taking into account the amendments made by the commons and the evidence which has come to light since the Bill was introduced last November.

The association is aware that there have been complaints about certain packaging and marketing practices and we recognize that Bill C-180 is a well motivated attempt by the government to control these practices. However, on the whole, we think the Bill is an overreaction and contains some important technical defects from a legal standpoint. The association's brief and my remarks today are directed towards improving C-180 as a piece of legislation and are, therefore, oriented towards a legal analysis of the bill. There are three areas which are of concern to the association. They are: standardization, the use of delegated power and the use of criminal law in C-180 and particularly in clause 20 of the Bill.

First, turning to clause 11 and standardization. Most of us are aware of the great number of package sizes and shapes of pre-packaged products and that this may disturb some consumers. There has been a fair amount of publicity on this point. Today, we do not want to deal at length with the pros and cons of standardization, because, as I have said, most of our comments are directed to a legal analysis of the bill and we have approached clause 11 in this light. Nevertheless, there are practical difficulties of standardizing which must not be overlooked. We believe that some other witnesses have pointed out problems that may arise through standardization, problems such as the necessity to increase the number of production lines and possible problems with the development of new products and new packaging techniques. Secondly, although there may be a negative side to proliferation of package sizes and shapes, the simple desire and enjoyment of having a variety of sizes and shapes from which to choose is and should be an important feature in our society. This section is concerned not with proliferation but with undue proliferation. The word "undue" is a term that we have had some problem with in the Combines Investigation Act.

I would now like to deal with the use of delegated power in C-180. From a legal standpoint, our most serious criticism lies in this area. Let us deal first with clause 3. It is our opinion that clause 3, which would allow regulations to override other statutes, is an unwarranted delegation of parliamentary authority and should be regarded very seriously by this Committee. We do not think that a good explanation has been given for this rather unprecedented provision. No doubt, there are good administrative reasons for having such a provision. We can see certain problems in having to amend other acts of Parliament when regulations under C-180 conflict with some provision in those other acts. However, all in all we think that it is more important for regulations not to have the power to amend any act of Parliament. There

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are two recent and eminent authorities in support of the proposition that there should be no authority to amend statutes by regulations: the Report of the House of Commons Special Committee on Statutory Instruments, known as the McGuigan Report on Statutory Instruments, and the Report of the (McRuer) Royal Commission Enquiry into Civil Rights.

Leaving clause 3, there are certain other objections we have to the regulation-making powers in C-180. Generally speaking, we think sound legal principles indicate that conditions precedent to the exercise of the regulation-making power and the precise ambit of the power once those conditions have been met, should be specified in the legislation. Usually, the condition precedent will be the wrong which the regulations are intended to correct: the ambit of the power will usually be an exercise of the power sufficient to remedy the wrong. These desirable principles have not been observed in the drafting of clauses 10, 11 and what is now clause 18. In clause 11 dealing with standardization, for example, we do not think that the criteria clearly define the wrong to which these regulations are directed. We also find it objectionable that clause 11 would give the Governor in Council unlimited power to limit package sizes and shapes once the conditions precedent for exercise of the regulation-making power have been met. In our opinion, sound legal principles indicate that the Governor should only have sufficient power to remedy the wrong.

Furthermore, while we are concerned with clause 11, I should like to support and even emphasize the view expressed before the committee by the Grocery Products Manufacturers of Canada. In respect to the standardization of advertising it would be most desirable and even necessary, if any useful objective is to be achieved, that those who package and know packaging—to wit, the manufacturers—be consulted before regulations are issued. Under the present wording such consultation is permissive; it should be mandatory.

With respect to clause 10, commented on at page 7 of our brief, the association is of the opinion that the Government is not justified in prescribing the form and manner of applying labels or prescribing the form and manner of showing any required information unless it is to prevent consumers from being confused or misled. We think, therefore, that confusion of consumers should be a condition precedent for valid exercise of the power to regulate.

Before moving on to the use of criminal law, we think it is worth while to note by way of general comment that, when the Minister of Justice recently introduced the Statutory Instruments bill, he indicated that regulation-making powers which might trespass unduly on personal rights and liberties, should not be granted except after careful deliberation. Can we suggest, Mr. Chairman, that corporations as legal personalities, as taxpayers and as entities substantially contributing to our wealth-making process, also have rights and liberties worthy of careful protection.

With respect to the use of criminal law in Bill C-180, we have a few criticisms. We believe it is undesirable to use criminal law to regulate commercial activity where that activity does not contain any real element of blameworthiness. For example, the broad definition of "misleading representations" found in clause 7 creates the possibility that there may be an offence where there is no real blameworthiness. In this connection it is important to recognize that symbolism found in most advertising does serve a useful purpose and is not intended to deceive consumers. Because of the constitutional difficulty the federal Government experiences in regulating many areas of commercial activity, there is a danger that in attempting to control what it considers undesirable commercial activity, it will needlessly create criminal offences. Perhaps it would be desirable for a civil tribunal to have jurisdiction to hear various types of complaints under consumer legislation. This tribunal could have power to issue, cease and desist orders and in this way criminal sanctions could be avoided.

If criminal law is used, the acts or omissions which constitute offences should be defined with certainty. I would refer you to our comments on clause 4(2) at page 5 of our brief in which we point out the uncertainty of the words "in distinct contrast."

With respect to misleading advertising, the association considers it desirable to have only one statute dealing with the subject. We note that the Combines Investigation Act presently has criminal provisions dealing with the subject and that clause 7 of Bill C-180 also contains criminal sanctions for misleading representations.

Clause 15(1) gives an inspector power to seize and detain products in various circumstances, including when he reasonably believes that a package label contains a misleading representation. This would permit an inspector to act both as policeman and judge in respect of a matter which in the Combines Investigation Act must be dealt with exclusively by the courts. Clause 18(1)(g) also empowers the Governor in Council to deem certain prescribed exceptions or symbols as false or misleading representations unless the contrary is proved in court. This effectively throws the burden of proof in a criminal matter onto the defence.

For these reasons we would prefer to see all matters relating to misleading representations dealt with in the Combines Investigation Act.

One of our most important comments relating to the use of criminal law concerns clause 20. Clause 20 has certainly puzzled the Association and for the reasons I shall explain, we consider this clause highly objectionable from a legal point of view. Nor do we think that the enigma of this clause has been removed by the explanation given to the House of Commons committee by the official from the Department of Justice.

Our main problem in understanding this clause is that from an evidentiary point of view we do not understand how a corporation can be guilty if it has not been prosecuted or convicted. We do not think that this question has been satisfactorily answered in the evidence that has been given. A second criticism of clause 20, which has not been brought to light, is the injustice which may arise in the case of a private company. In our brief on

page 10 we referred to the recent case of *Hartman vs. The Queen,* involving sec. 134 of the Income Tax Act which is identical in wording to clause 23. In that case Judge Bendis referring to the injustice which can arise, said:

> Unfortunately this is one of the instances where the courts are unable to grant relief. It is a matter for the legislature to remedy this situation.

We suggest that a subclause should be added to clause 20 to overcome the possible injustice which may arise in the case of a private company.

A final comment on clause 20 is that the Association thinks that the word "knowingly" should be inserted before the word "directed" in line 28 on page 15 of the bill, so that whatever was done would have to be done knowingly in order for there to be an offence under the act.

We would like to make some comments on the seizure and detention provisions. We think Mr. Basford is to be complimented for amending the seizure provisions so that an inspector may now seize only such a number of products as is required for purposes of evidence, unless in his opinion the public interest requires that he seize a greater number. We still consider, however, that it would be desirable to add a provision, similar to section 61 of the Hazardous Products Act, giving a person a general right to apply to a court for restoration of his goods seized. We also hope that in the administration of the seizure provisions and, indeed, the entire act, no more hardship will be invoked upon companies than is necessary to protect the public interest.

Finally, I would like to make a comment on clause 19. In view of the fundamental rights involved in this legislation, particularly respecting standardization, we recommend that an independent tribunal should be established to hear representations of interested persons with regard to the proposed regulations and that this tribunal should report and make recommendations on its hearing to the minister, which report should be made public. I should add that with regard to regulations, the Association is of course pleased that the government has seen fit to provide in the bill for publication of proposed regulations in the *Canada Gazette.*

Mr. Chairman, this completes my outline of the Association's views on this legislation. I hope you will find our comments assist you in your consideration of this Bill.

The Chairman: Mr. Hemens, I am interested in your statement suggesting that this proposed legislation should not invoke the element of criminal law. Under what authority could the federal Government act if it were not on the basis of criminal law?

Mr. Hemens: Mr. Chairman, that is the inevitable and perennial question. I can only give a personal opinion. There are great possibilities of action under the trade and commerce provisions, which I do not think have been fully tested.

The Chairman: Do you mean the regulation of trade and commerce?

Mr. Hemens: That is right.

The Chairman: I agree that maybe they have not been fully tested. However, to the extent that they have, they have not been a very fruitful source of authority for the federal Government.

Mr. Hemens: I believe the last test, Senator Hayden, had to do with an appeal to the Privy Council. Since that date such appeals have been abolished, and I have a suspicion that we might get a different ruling from the Supreme Court.

The Chairman: There seem to be quite strong statements in judgments in our courts, both the Court of Appeal of Ontario and the Supreme Court of Canada, that criminal law is continually enlarging itself in its application and that this is particularly so in the area of commercial operations. There are decisions. What is that case?

The Law Clerk: That is the *Proprietary Articles Trade Association* case.

The Chairman: Yes. If we assume that criminal law in our day and age is a growing thing in its applications, then applying it in a more extended field of commercial operations cannot in itself be objectionable. You would have to consider the merits of the particular application, would you not?

Mr. Hemens: I hold a different view, senator. I feel that the whole trend of society today is really to confine criminal law to what are distinctly *mala in se,* with some possibilities of *mala prohibita.*

The Chairman: I do not incline to that view. You used the word "blameworthy", which I am not prepared to accept as being an adequate description of the element necessary in criminal law. The question is the relationship to the public interest of what is proposed to be done. If it is against the public interest and the Government has authority to legislate, then that is an area in which criminal law could be invoked as an aid to protecting the public interest. Do you not agree with that?

Mr. Hemens: Not entirely, sir; I never have done.

The Chairman: Let us see. Maybe you will go 95 per cent?

Mr. Hemens: I have the firm conviction, first of all, that the public interest ought to define the region of criminal law, but I do not believe that the criminal law is necessary to protect the whole of the public interest. If so, then the Constitution of Canada really only requires one provision in favour of the federal arm. That is the right to enact that an offence against what they have enacted is a criminal offence. Surely, the whole of Canada is not composed of criminals, actual or potential? To say, as appears here, that a failure to have a particular reference on a label in distinct contrast is a criminal offence, rather appals me.

The Chairman: Let us go a little deeper than that, Mr. Hemens. This bill deals with the disclosure of pertinent information, the failure to give which may mislead those who are dealing with the article or seeking to buy and use it. Disclosure, will you not agree, and the requirement of disclosure, would be a proper subject matter in the public interest to be supported or sanctioned by criminal law?

Mr. Hemens: That is a very difficult question to answer.

The Chairman: Well, how else would you do it?

Mr. Hemens: I think you can do it by prohibitions, by cease and desist orders, the failure to comply with which would be contempt of court. There are innumerable means of dealing with this, means that have been used effectively in other countries. For example, a great deal of this sort of legislating in the United States is done under the regulations for trade and commerce and is civil in nature, not criminal.

The Chairman: Their provisions in relation to the enactment of criminal law are different from ours. There the major authority for enacting criminal law is vested in the state.

Mr. Hemens: But the federal Government also has powers of enactment of criminal law, as witnessed by the Sherman Act.

The Chairman: That is where the state authority has not entered the field.

Mr. Hemens: That could be, sir.

The Chairman: Let us get back to this subject matter. I am trying to appreciate what you say. Are you saying the subject matter of this bill should not be based on criminal law? Is that what you are saying?

Mr. Hemens: I am saying, in great part, that I personally—and I think this is the view of the association—am opposed to the generic or general use of criminal law as a means of establishing useful or desirable commercial practice.

The Chairman: I am not getting into a general discussion; I am talking about this bill. The subject matter of the bill is to secure for the public who are buying the product full disclosure in relation to the quality and quantity. In this particular case, is not that a good subject matter for criminal law, for creating an offence of the failure to do that?

Mr. Hemens: I am not going to answer that directly. I am going to answer it indirectly by saying that to the extent that there is fraud, or anything resembling fraud, it should be criminal law. To the extent that it is not fraudulent, or does not involve fraudulent practices, I do not believe it should be criminal law, sir.

The Chairman: Then what you are saying is that if I write another clause into this bill and provide that failure to make disclosure constitutes fraud, I have met your objection?

Mr. Hemens: No, sir, because I would argue that you are going to have to add a rather better definition; you are going to have to have a *mens rea* implication in that.

The Chairman: No, the *mens rea* comes into who may be charged in relation to the offence.

Mr. Hemens: Essentially, the *mens rea*—and I hesitate to dispute this with a man of your ability and reputation—has to do with the fact of a knowledgeable or knowing contravention.

The Chairman: Do not let us deal with the word "knowingly" at the moment, because there may be some areas of this bill in which we may ultimately decide the word "knowingly" should apply, so do not let us hang our argument on that. What kind of a sanction would you suggest, then, if we require certain disclosures as to quantity and quality to be exhibited on the labels of products that are covered by this bill?

Mr. Hemens: I think I must speak generally because the question is general. Generally speaking, assuming lack of fraud, a cease and desist order would satisfy nearly every requirement.

The Chairman: Then do you say that the disclosures required in this bill are necessary in order that the consumer may not be deceived as to what he is getting?

Mr. Hemens: The disclosures set out in this bill are essentially quantity...

The Chairman: And quality?

Mr. Hemens: If I recall correctly, sir—and maybe my friends could assist me on this—quality requires that your label does not allow the impression to be obtained by a consumer that something is contained in the product that is not in fact there, or that it conceals something in the product that is in fact there. Is that not correct?

The Chairman: Are you suggesting that if you find in the disclosure statements that might be concealing, or the effect of which may be to lead the consumer astray as to what is the quality of the product, that is not a kind of misrepresentation and fraud?

Mr. Hemens: I think there you make it into a question of degree, sir.

Senator Benidickson: Is this "knowingly"?

Mr. Hemens: I must always get back to knowingly.

The Chairman: Of course, but the man who is required under this bill to make this disclosure is the man who makes the product and offers it for sale. In those circumstances, he knows what he has put in, he should also know the weight.

Senator Cook: Or he could be careless and reckless, and does not stop to inquire. He may not do it knowingly, but he does it just as badly.

Mr. Hemens: I do not think we quarrel seriously—at least, I do not, although my colleagues may disagree with me—as to a misrepresentation about weight, for example. If the label says that the package contains a pound and there are in fact only 14 ounces, obviously somebody is being gypped. I think it is fair enough, that whoever does the gypping...

The Chairman: That is fraudulent.

Mr. Hemens: I think it gets very close to being fraudulent.

The Chairman: Well, you are certainly trimming your words.

Mr. R. F. Bonar, Legal Counsel, The Canadian Manufacturers' Association: One of the concerns, Mr. Chairman, is the fact that clause 10, to which we are referring, really has no condition precedent attached to it. It is simply a statement that certain things shall be shown on labels, and there is no criminal aspect set as a condition precedent to implementing regulations pursuant to that clause. However, the clause does bear a sanction that is a criminal sanction, which is imprisonment.

The Chairman: Well, that is one way of enforcing observance of requirements in relation to disclosure, is it not?

Mr. Hemens: Does it not get us pretty well back to the Middle Ages, when if you did not do what the king suggested you had to do you went to gaol, and that was the beginning and the end of it, or you got your head chopped off?

The Chairman: And that was the end of it! Surely, we do not have to go that far. I think you will agree with me that the area of criminal law is substantially enlarging.

Mr. Hemens: I think it is regretfully enlarging.

The Chairman: I assume you are familiar with the *Proprietary Article Trade Association* case?

Mr. Hemens: I have been, sir.

The Chairman: I would think so. The judgment of the Privy Council in that case is very interesting. May I just take a moment to read it? Lord Atkins said:

> In their Lordship's opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, 'the criminal law including the procedure in criminal matters' (s. 91, head 27).
>
> The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected 'which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others'; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. 'Criminal law' means 'the criminal law in its widest sense'; *Attorney-General for Ontario v. Hamilton Street Ry. Co.* It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence'; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

Mr. Hemens: May I comment on that, Mr. Chairman? I forget the date of that case. It is a few years back. Lord Devlin, for example, I am confident would not adhere to that statement on what is criminal and what is not criminal, and Lord Devlin is one of the authorities in this philosophical field.

The Chairman: Answering that first point, is it material for our consideration what a particular judge may or may not think, rather than looking at the decision of the highest court that dealt with this problem?

Mr. Hemens: I thought you referred to Lord Atkins as an authority.

The Chairman: No, I referred to him as the one who wrote that judgment.

Mr. Hemens: In response to the second part of your statement, I believe there is a strong feeling in legal circles—and I do not have a judgment to support it—that a reference to the Supreme Court of Canada today on the definition of "regulation of trade and commerce" would come out rather differently from that judgment at this time.

Senator Connolly (Ottawa West): That is interesting. Why do you say that?

Mr. Hemens: I have talked to a number of lawyers, sir. I am not sure I have not talked to you about it, as a matter of fact. I am not sure you do not participate in some little part.

Senator Cook: We will disqualify Senator Connolly.

Senator Connolly (Ottawa West): That is one of the reasons I asked the question. Do you think that there is a switch in the climate of opinion, whereby the federal authority might take jurisdiction under the trade and commerce section?

Mr. Hemens: I believe so. It is a personal opinion, shared by some lawyers with whom I have discussed it.

Senator Cook: Is not the area between criminal law and civil law such a grey one now that one spills over into the other?

The Chairman: It may be grey, but I think the boundary line is elastic. I wonder whether the federal authority can make use of that elasticity to keep pushing out and cover a greater area all the time. The only place—and this is my view—where you can challenge that is as to what is the genuine purpose of the legislation. Is it a colourable attempt to acquire jurisdiction under the guise of criminal law, whereas the main purpose is something else? The best illustration I can think of is the Oleo Margarine case to which I have referred before, where you had a prohibition on manufacture, sale and importation of Oleo margarine in 1885, and it was only in 1948 or 1949 that the Supreme Court of Canada said that that law in relation to manufacture and sale in Canada was unconstitutional and that it was a colourable attempt to acquire jurisdiction over the subject matter for a purpose other than the public interest. And the Privy Council upheld that. Outside of over-reaching, my own feeling is that the limits within which the federal authority can legislate criminal law are pretty broad.

Mr. Hemens: One of the things we are trying to suggest is that this is a dangerous and undesirable use of the criminal law authority. Let me refer to the Economic Council of Canada report on Restrictive Trade Practices and Anti-Trusts. They are suggesting, and suggesting very strongly—and the indications are that the minister is going to accept some of their suggestions—that there be few criminal aspects to that, and that most of it will appear under a civil situation rather than a criminal situation. That is a direct response to Lord Atkins, in fact.

The Chairman: The comment here, in this *Canadian Constitutional Law in a Modern Perspective,* is:

> The decisions of the Privy Council have forced the federal government to employ its criminal law power when dealing with restrictive trade practices. This, of course, means that prosecutions for such offences as price fixing must be dealt with as criminal prosecutions, employing the procedures appropriate to that law.

Then there are several more cases referred to here, with which I am sure you are familiar. There is *Regina v. Goodyear Tire and Rubber Co. Ltd.,* (1956), where the Lord Atkins decision was followed, and there is a later case, *Regina v Campbell* (1965), which went right through to the Supreme Court of Canada; and the Supreme Court of Canada upheld the Court of Appeal of Ontario and also accepted the Lord Atkins judgment.

Mr. Hemens: I think it may be that we are talking at cross-purposes, Mr. Chairman.

The Chairman: I think we are. It must be so, if that you are saying is that the federal authority has not jurisdiction to enact criminal law of this kind.

Mr. Hemens: No, I do not say they have not jurisdiction. I say they ought not to exercise that jurisdiction in this area.

The Chairman: Now we have got the definition in focus.

Mr. Hemens: I am sorry if I have misled you.

The Chairman: I understood your original statement was that there was not anything blameworthy in this and therefore it was not an area for criminal jurisdiction.

Mr. Hemens: That is a philosophical argument, sir. I think you have the jurisdiction, but I do not think it ought to be exercised for these purposes.

The Chairman: Now we have got our terms defined. I do not want to monopolize this, but I have a couple of questions I want to ask you. They deal with standardization. That section on standardization bothers you and, frankly, it bothers me, though that may be for a different reason.

It might well be suggested that the standardization of containers in clause 11 is a colourable attempt to ride on criminal law to achieve this result. Once you have the provision with respect to disclosure put on the label, as required here, would you say we could assume that that covers every aspect of information which it is material that the purchaser possess in order to know what he is getting and whether he is getting what he is paying for?

Mr. Bonar: I think there is a presumption that people are able to read before they buy. In that circumstance, if the bill properly requires a weight designation, a quantity designation, to be printed on each package, it will follow that if the consumer takes the time to read it. . .

The Chairman: He is fully informed.

Mr. Bonard: . .he is fully informed. Since there is ability under the regulations to prescribe the placement of the net weight marking and so forth, gething down to the point of the size of type and the location on the panel, it would be an extremely careless or uncaring individual who would be deceived about the contents of the package.

The Chairman: I do not think it is any part of our job to legislate against carelessness on the part of a person who is given the information, but will not read it and will not use it.

What I wanted to put to you was whether it really mattered, quantitywise, how many containers there are and how many shapes and sizes, so far as informing the public as to the quantity and other material information

required by this bill is concerned. If you have 100 or 50 containers, what difference does it make so long as the same information appears on the labels—that is, the net weight and all the other information required? Is that not full disclosure? In circumstances of undue proliferation, how can the size of a container be said to be likely to mislead the consumer?

Mr. Hemens: First of all, Mr. Chairman, we do not believe that there is essentially undue proliferation. I know of no manufacturer who is going to have more packages than he is required to have in order to get the greatest possible sales, because it costs money to have different packages and to keep inventories. However, there have been expressions of views to the effect that if you have "X" number of different sized packages of toothpaste somebody will be misled. If a person can read and can do a simple task of division, addition or multiplicaton, I do not believe that there is in fact any misleading or any failure to disclose, providing you have the quantity and the price there.

Senator Carter: You are basing the argument on the idea of misleading. What about confusing?

Mr. Hemens: How can you be confused, senator? Here is a pound at 84 cents. Here is half a pound at 45 cents.

Senator Carter: But if you have 17 ounces at 32 cents and 11 ounces at 19 cents, how do you distinguish between the two?

The Chairman: Senator, what is the purpose here? This bill requires the net weight to be put on the goods. Therefore, it is information that the people sponsoring this legislation feel the consumer should know. Now why is it being given to the consumer?

Senator Carter: Because as it is now the consumer has to carry round a computer to compare the value in one package with the value in another.

The Chairman: Then your argument has nothing to do with undue proliferation, because with those quantities appearing on the different labels you say there is confusion.

Senator Carter: I say there is confusion if an ordinary person cannot make a ready and easy comparison as to the value in each package.

The Chairman: Then what do you suggest should be added to the label, because that is where it should go?

Senator Cook: I think the argument should be that it should only be sold in stated quantities. In other words, you cannot sell a broken pound, such as 13 ounces. It should be either 8 ounces, 16 ounces or 32 ounces, and so on.

The Chairman: But some people shop only for a day at a time, some shop for two or three days, some shop for a week and some for a month. As a matter of fact, when I was in England recently I suggested to someone that supermarkets had certainly been a boon to the buying public. I was informed that in many areas the housewife still goes out to shop every day, firstly, because she likes to do so—she meets people there—and, secondly, because she only wants to commit herself for a day. Moreover, the origin of that day-to-day shopping was that consumers did not have refrigeration in relation to items that were perishable, so they developed this habit.

Now, if you cannot discern between a five-ounce tube of toothpaste and an eight-ounce tube when you are told what the rate is and what the price is, I do not know how you are ever going to deal with the situation.

Senator Connolly (Ottawa West): Mr. Chairman, the problem is not so simple as that. Let me be the devil's advocate for a moment on this point. The problem as suggested by Senator Carter is that when the consumer goes into the supermarket he sees various commodities in variously sized packages containing different rates and bearing different prices. In order to make a value judgment he has to make an arithmetical calculation. He may see a 17-ounce jar of pickles at one price and a 7-ounce jar of pickles at another price. He makes one calculation there. Then he goes to dry cereals and is faced with the same problem. But even within the pickle area, for example, the various producers set up their produce in different-sized jars. In other words, there is a multiplicity of calculations in order to find out how much one is paying per ounce or per pound, depending upon the product one is buying. It seems to me that the proliferation here, which is not by one company but by a great number of companies, can give rise to the confusion that Senator Carter mentions. It may be that the answer is to require products to be labelled at so much per unit. That might help a housewife and it might achieve the aim of the department without requiring a limitation being placed on the number of containers.

The Chairman: But, Senator Connolly, if you look at what clause 11 says in dealing with undue proliferation, you will see that it says:

> ...the effect of such undue proliferation of sizes or shapes is to confuse or mislead or be likely to confuse or mislead consumers. .

Here are the important words:

> ...as to the weight, measure or numerical count of a prepackaged product, ...

If the weight is stated on the product as this bill requires, if the measure or numerical count is contained on the package, then how can we assume that it is likely to mislead or confuse?—because the bill purports to require full disclosure.

Senator Connolly (Ottawa West): As a matter of fact, my whole point was that the confusion was with respect to cost.

Senator Carter: Yes.

Senator Connolly (Ottawa West): And the word "cost" is not there.

The Chairman: There is nothing about cost in this bill.

Senator Carter: I think it should be there. I do not see what point the clause has without the word "cost".

Senator Blois: Mr. Chairman, the trouble there is that the manufacturer does not set the price. The retailer does. How could the manufacturer possibly act in accordance with this bill if the word "cost" were contained in that clause? We all know that retail stores vary their prices on identical articles.

The Chairman: If they were handling the same product at the identical price, another arm of Mr. Basford's department might well come into play, and there might be some suggestion that they were acting in concert.

Senator Cook: This clause is innocuous. What they really mean is that it is misleading as to value, and value is not in there.

The Chairman: We are dealing with the clause as it is, and it is meaningless as it is.

Senator Connolly (Ottawa West): Mr. Chairman, perhaps the word "cost" is purposely omitted from that clause. It may be a question of jurisdiction.

The Chairman: You cannot justify the clause on the basis that it may be confusing as to cost, if you do not make "cost" a term in clause 11.

Senator Carter: I do not think cost is the important factor. I think value is. What the consumer is interested in is comparative value.

Mr. Hemens: But what is value?

Senator Carter: What the consumer is getting for his money compared with something else.

Senator Cook: Or what he is not getting for his money.

Mr. Hemens: But the manufacturer, under the law, is forbidden to set unit prices.

Senator Cook: Nobody is talking about setting unit prices, Mr. Hemens. But when the consumer goes into a store he is so confused by the number of sizes, weights and so on, and values, that he does not know what he is getting for his money. That is what we are talking about. We are not talking about anybody setting a price.

Mr. Hemens: We have talked about this confusion. Where is the evidence of confusion?

Senator Kinley: Are there inspectors going around to check these packages? Is the liability not the customer's? Who is going to enforce this law anyway?

The Chairman: Well, senator, even the supermarkets themselves have comparative shoppers.

Senator Cook: I am not saying that I agree. I am just saying that the section as it is now does not mean much.

Mr. Bonar: Well, senator, the section is so broadly based that if te Governor in Council determines there is this element of confusion, the scope for control of package size and shape is just absolute. I agree there is great uncertainty about what exactly the section is getting at, but there is very great danger in the fact that it is uncertain.

Senator Cook: But, as the Chairman says, if the weight, the count and the measure are put on the tags, how can anybody be confused unless they are illiterate? And there are not very many illiterate people around today.

The Chairman: Well, we do not want to belabour the horse to death. We have stressed this point and we have your views.

Now, we have dealt with two of the points, Mr. Hemens. You talked about delegated power, and I do not think we need spend too much time on this, because this committee has taken the position time after time that it is not going to give authority to amend a statute by regulation. If the effect of clause 3 is to permit the amendment of this statute by regulation, well I can tell you there will be a struggle in this committee on that point because we have asserted that position time after time.

Mr. Hemens: I think it goes beyond that. The regulations under this act could, in fact, substantially repeal another act.

The Chairman: This is what I am going to refer you to. There is an act called the Fertilizers Act, which was originally passed in 1957. There are regulations under that act administered by the Department of Agriculture. So they have not only the statute, but they have the regulations which provide for disclosure of the contents, for the guaranteed analysis and for labelling. The moment this bill we have before us becomes law, the Fertilizers Act and the regulations under it dealing with labelling will be ineffective. In dealing with a product like fertilizer, who is likely to know most about it? The labelling disclosures are very full; they require the name and the address of the manufacturer. As a matter of fact, the labelling disclosure required is almost in line with what is in this bill so far as the language is concerned. So immediately this bill becomes law we have rendered ineffective the Fertilizers Act and the regulations under it. That is the difficulty in split jurisdiction. In the grocer's brief the other day they listed about 18 or 20 statutes which deal with the same subject matter, and yet the only one that is exempted from the application of this bill is the Food and Drugs Act.

The question we then have to ask ourselves is: Do we think there should be great exemptions? Because if we approve of this, it would appear to me that we are saying to ourselves, in effect, that the labelling and disclosure provisions in existing legislation—even, as I say, in this Fertilizers Act—are inadequate. It is a very large order to say that. The provisions for labelling in the Fertilizers Act are in section 16, which covers a little more than a full page in all as to the items that must be developed, and included in that are the weights and the registration number, because these fertilizers must be registered with the Department. It covers every detail. So it is going to be a large order for us to say—and I am using this as an

illustration—that we should wipe out, by approving this legislation, the provisions of other acts that have stood the test of time for many years.

Senator Cook: You would have to examine every other act to see which should prevail.

The Chairman: That is right, because the moment we agree to this bill we wipe out all the others.

Mr. Hemens: And some you may not have thought of, because of the regulations to come.

The Chairman: That is right. Is there anything else you want to add?

Senator Welch: Are we going to deal with the Fertilizers Act under Bill C-180?

The Chairman: The Fertilizers Act was passed in 1957, chapter 27. Its provisions in relation to labelling, etcetera, would become ineffective the moment Bill C-180 becomes law in the form in which we have it before us.

Senator Welch: The reason I ask that question is because I think that fertilizers are not properly marked as to what is in them. It is most confusing. As a matter of fact, I do not think there is anything in writing on the package to tell you what is in it.

The Chairman: I do not pretend to be an expert on fertilizers. All I can do is read what they say about the labelling, and they require more information on the label than would be required under Bill C-180.

Senator Kinley: Of course, fertilizer is a bulk product.

The Chairman: Let us see what section 16 of the Regulations says. It says:

> 16. (1) Subject to subsections (2), (4) and (5), every package containing a fertilizer shall have a label affixed to it on which shall be printed
>
> (a) the name and address of the manufacturer of the fertilizer or of the registrant or, in the case of a fertilizer that is not registered under these Regulations, the name and address of the person who caused the fertilizer to be packaged;

This is to some extent required under Bill C-180.

Then it goes:

> (b) the brand of the fertilizer, if any;
>
> (c) the name of the fertilizer;
>
> (d) the registration number of the fertilizer, where applicable;
>
> (e) the guaranteed analysis prescribed in section 15;
>
> (f) in the case of a fertilizer-pesticide or a specialty fertilizer, the directions for use;
>
> (g) where the fertilizer is a fertilizer-pesticide, the cautionary statements required by the Minister as set forth on the certificate of registration;
>
> (h) the weight of the fertilizer;

This is also a requirement under Bill C-180.

Then it continues:

> (i) where the fertilizer is other than a specialty fertilizer and has intentionally incorporated in it or is represented to contain boron, copper, manganese, molybdenum, or zinc or, in the opinion of the Minister, has a natural high content of one or more of these lesser plant nutrients, the following cautionary statement:

Then there is a cautionary statement that must appear.

It reads as follows:

> (2) Where a fertilizer is sold in bulk, the information required by this section shall be shown on the shipping bill or on a statement accompanying the shipment.
>
> (3) The information required by subsection (1) to be shown on a label of a registered fertilizer shall be the same as the information set forth on the certificate of registration.

And so on. I would say they are requirements. I am not discussing what is done in practice; I am talking about the requirements. All this bill does is set out the requirements.

Senator Welch: On a fertilizer bag you may have "10-10-10-", or "10-12-6", or any other formula. That indicates the proportions of phosphorus, nitrogen and potash, but it does not say so.

The Chairman: If they are in violation of the act, then they are violating the act.

Senator Isnor: Coming back to the brief, it is suggested on page 6 that a subclause should be added to overcome a possible injustice. Have you any suggestion to make in regard to that?

Mr. Hemens: May I take a moment to explain subclause (3) of clause 20? The first thing that causes the problem there is the difficulty in interpreting subclause (3), which starts off by saying that where a corporation is guilty of an offence under this act, any officer, director, et cetera, is liable on conviction to be found guilty of the same offence. It goes on to say whether or not the corporation has been prosecuted or convicted.

I do not know how you find a corporation guilty of an office without having prosecuted or convicted the said corporation. As a matter of fact, I understand that an officer from the Department of Justice pointed out that to act under subclause (3) you would have to prove before a judge that the corporation is guilty of an offence before you could prove that the officer was. We then have the strange anomaly of prosecuting the corporation without giving any right to the corporation to defend itself. I suggest that is contrary to fundamental principles.

The Chairman: You need not labour your criticism of this subclause because it obviously limps badly.

Mr. Hemens: I was giving a direct answer to the honourable senator who asked the question. We were concerned with a case under the provisions of the Income Tax Act where a private company and an individual

were in fact the same person. He was subject to two convictions for the same offence, one as the corporation and the other as the principal officer of that corporation.

The Chairman: It seems to me that if you inserted the word "knowingly", so that it read "should knowingly direct", and if you struck out all the words after the word "presided", you might accomplish the objective very well. Are there any other questions?

Senator Carter: Before we leave the Fertilizers Act, on page 14 of the bill, subparagraph (h) of clause 18 reads:

> subject to any other Act of the Parliament of Canada...

Which would be the Fertilizers Act.

> ...extending or applying any provision of this Act to or in respect of any product—specified in the regulations that is not a prepackaged product but is ordinarily sold to or purchased by a consumer.

Does that not mean that the act can include all of these measures in the Fertilizers Act or exclude any?

The Chairman: The first answer would be the obvious one, that you would be amending legislation by regulation. This deals with what may be regulated. The definition of the word "product" in this act is so broad that it just about covers everything. It is defined in Bill C-180 this way:

> (j) "product" means any article that is or may be the subject of trade or commerce, but does not include land or any interest therein;

Under that definition, under the Fertilizers Act, fertilizer would be a product, the subject matter of trade and commerce.

Senator Carter: But they would be amending the Fertilizers Act only if they excluded something. If they embrace what is in the Fertilizers Act it would not be an amendment by regulation.

The Chairman: The Fertilizers Act is excluded by the requirements here as to what shall be put on a product. The effectiveness of the Fertilizers Act is gone. If they wanted to exclude the Fertilizers Act they would have to add it to those three where they have already excluded the Food and Drugs Act.

Senator Sullivan: Why did they exclude that?

The Chairman: They felt that the requirements of the Food and Drugs Act were sufficient in the matter of exposure and that the public were adequately protected.

Mr. Bonar: I might mention that the cosmetics portion of the Food and Drug Administration falls within Bill C-180. The Food and Drugs Act in toto is not excluded; it is just that portion of it.

The Chairman: It refers to a product that is a device or a drug. To the extent that you have cosmetics coverd by the Food and Drugs Act, they have been included in the bill.

If there are no other questions, we will proceed with the next hearing.

Mr. Hemens: May I say thank you very much, Mr. Chairman.

The Chairman: We now have before us representatives of the Retail Council of Canada. We have with us: Mr. A. J. McKichan, President; Mr. K. Lane, Assistant on Buying to the Vice-President of Merchandising, Simpsons-Sears Ltd.; Mr. J. Voigt, Vice-President, Merchandising, Dominion Stores Ltd.; and Mr. N. A. Stewart, Company Packaging Supervisor for the T. Eaton Co., Ltd.

Mr. A. J. McKichan, President, Retail Council of Canada: Mr. Chairman, may I first extend an apology on behalf of Mr. Voigt of Dominion Stores. He had hoped to be a member of our delegation today but unfortunately has been caught up in a difficult labour situation, and I ask the indulgence of the committee in this respect.

Mr. Chairman and honourable senators, it is a pleasure to be here today. We hope that we can be of help in your consideration of this significant bill. As you are aware, this council had the opportunity of appearing before the Commons committee when it considered the bill. We have attached as an appendix to our submission today a copy of the submission we made to that committee. As in the case of the manufacturers, we have not attempted to change references to a number of clauses in the original submission, which referred to the bill as presented to the Commons.

We have singled out for special treatment what we consider to be the most important point to retailers in that submission. We hope we may also discuss with you other of the concerns that we previously raised.

As demonstrated in our submission, we do not believe that the retailer or other third party should be held responsible for errors in labelling perpetrated by some predecessor in the distributing process, unless there is connivance between that person and the originator of the misleading material—or, I might add, unless the merchandise is imported by the retailer, who would be primarily responsible.

In our submission we remark on the fact that the United States Fair Packaging and Labelling Act, the British Trade Descriptions Act and, indeed, the Canadian Food and Drugs Act, provide relief in such circumstances. We recommend the introduction of similar relief in the current bill.

Perhaps, Mr. Chairman and honourable senators, I might refer you to page 4 of our submission to this committee. On page 4 of our submission we set out a suggested amendment to the original clause 19(2), which will now be clause 20(3).

The Chairman: That is subclause (1) and (2).

Mr. McKichan: Yes, sir. I might add, Mr. Chairman, that we brought this matter to the attention of the minister, not only during the House of Commons submission but also by letter. We were to some extent gratified that the minister, in replying to our letter, said that it would be the practice and intention of his department to place

the responsibility for violations on the source of the infraction. We are, of course, grateful for this assurance. On the other hand, we know that with personnel changes the original intent may become modified by practice.

The Chairman: Further, Mr. McKichan, how can any person charged with the administration of an act give you an assurance that if what you have done is an offence under a statute he will not prosecute you?

Mr. McKichan: Yes, sir. That is why we brought this matter to your attention today. As a matter of practicality we feel that it is somewhat unreasonable to expect a retailer to police every one of the thousands or, indeed, the hundreds of thousands of articles which may appear on his shelves. With the best will and intention in the world the retailer will not be able to guarantee that all his products meet the fairly detailed provisions of this statute.

The Chairman: Do you think the insertion of the word "knowingly" in clause 20(2) would remedy your problem— "...who knowingly contravenes..."?

Mr. McKichan: It would go a long way, sir, to meeting our concern. It would then involve the question of whether the action of a servant in fact prejudices the position of the employer.

The Chairman: Well, those are the tools through which a corporation operates, is that not correct?

Mr. McKichan: Yes, indeed.

We would also draw your attention to the following significant points:

Other parties, when appearing before you, have argued that reliance continue to be placed on the false and misleading advertising sections of the Combines Investigation Act, rather than on the regulatory, and largely discretionary, powers to be granted under the Packaging Act. In his appearances before the House of Commons committee, the minister—we believe with considerable justification—argued that adoption of this course might breed uncertainty and confusion. In our submission, we propose what we hope is a constructive compromise between these positions: we suggest that the disciplinary powers continue to be embodied in the misleading advertising sections, but that in amplification of these provisions and for the guidance and information of the trade, the department produce guidelines or trade directives establishing the labelling practices which it would regard as falling within the false and misleading category. It would then be open to any manufacturer, who felt aggrieved by the tenor of any such directive, to test it by ignoring it and thus inviting prosecution under Section 33 (d) of the Combines Investigation Act.

We still believe, Mr. Chairman, that there may be merit in utilizing to a greater degree than contemplated by the bill the technical expertise of the trade and the Standards Council, or some other independent body, in the determination of whether consumer confusion on packaging existed and, if so, steps to be taken to correct it.

The Chairman: You are suggesting that that be dealt with in legislation?

Mr. McKichan: We feel, sir, that the bill itself might contain a directive for a reference to the Standards Council, rather than a directive to the department to make the finding of when, first of all, proliferation had occurred and, secondly, if the proliferation caused confusion. Of course, at present the power, is permissive, but we feel that it might be a useful forum for determining these conditions, rather than relying on departmental discretion.

The Chairman: You mean something akin to the Board of Review provided in the Hazardous Products Act?

Mr. McKichan: Yes, sir. We regard the amendments made in sections 14 and 16—these are the inspection and seizure clauses—

The Chairman: These are the present clauses?

Mr. McKichan: Yes, sir—as improvements on the original proposals. The alternative to giving an inspector power to seize products, where he believes seizure is in the public interest, would be to require the minister to obtain an order from a magistrate—either before the seizure or, perhaps more practically, within a week or other short period after seizure, authorizing such seizure. We would have preferred either of these courses, but, if not adopted, we shall monitor how the proposed system work in practice, and if, in fact, it is unsatisfactory we will in due course of time propose changes in it.

Concern has been expressed to you by others on the terms of the former clause 19(2)—now clause 20(3). I know you have discussed that question at length and I do not propose to take up more of your time in relation to it.

It is perhaps also appropriate to comment on an addition made to the text of the bill at the committee stage, whereby in clause 10(b)(iii) the word "age" has been added to the words "nature, quality, size, material content," et cetera. There is here power to establish by regulation such information of this nature as is required to be shown on the labels. Insertion of the word "age" was, we understand, introduced to take account of arguments for the date-coding of products, particularly fresh or frozen food products.

The Chairman: Or candies, maybe?

Mr. McKichan: Yes, indeed, sir. We understand that concern, was particularly directed towards frozen foods. We should, at this point, simply mention that the informative and useful system of date-coding of frozen foods is one which has been closely studied by our members for some time. To date an economical, useful and practical system has not been devised. We do not despair of its being introduced, but feel we should add the warning that the present state of knowledge has not provided us with a practicable system.

We shall be happy to speak to any other clauses of the bill in which members of the committee are particularly interested.

All of which is respectfully submitted.

The Chairman: I take it that the reference to disclosing the age means the date the product was manufactured?

Mr. McKichan: Yes, sir, we assume that to be the case.

The Chairman: It does not refer to the useful life of the product?

Mr. McKichan: We did not understand that to be the intention, in view of the discussions before the House of Commons committee.

The Law Clerk: It would be open to the Governor in Council.

The Chairman: "Age" may be a word of such an indefinite nature that it might mean the life of the product.

Mr. McKichan: Yes, indeed.

The Chairman: We will have to consider that. Are there any questions?

Thank you very much, Mr. McKichan. You can see that we are becoming educated in this regard.

We now have the Canadian Feed Manufacturers' Association, represented by Mr. Friend, the Executive Secretary, and Mr. McAnulty, a director.

Mr. C. L. Friend, Executive Secretary, Canadian Feed Manufacturers' Association: Gentlemen, with the submission you have a pamphlet copy of the Feeds Act under which we operate and to which we make reference.

The Chairman: This is a summation of points?

Mr. Friend: Yes. We are pleased to present the views of the Canadian Feed Manufacturers' Association regarding Bill C-180 to this committee, particularly in view of the fact that our presentation to the House of Commons committee was well received. However, unfortunately, it did not achieve any change in the draft of Bill C-180 in respect to the items with which we are concerned.

In the interest of saving time maybe we can dispense with reading the paragraph referring to the size of the industry.

The Chairman: Yes, we have noted that.

Mr. Friend: The industry, as such, under the present legislation is working in respect of labelling and packaging under the Department of Agriculture's Feeds Act. The requirements under this act are co-ordinated with the requirements of the Food and Drugs Act as they pertain to poultry and livestock feeds containing drugs or medication.

The function of the Department of Agriculture in its inception was that of protecting the farmer-consumer, and thereby became very early in this century the first department of consumer affairs regarding agriculture. The act, as administered by the Department of Agriculture, has been of benefit to the farmer as well as our industry.

If I could just interpolate briefly, the sections dealing with packaging and labelling under the Feeds Act are sections 25 and 33.

We understand the aims of Bill C-180 are to standardize and control the packaging and labelling of household products. As our industry and those we service are users of products as input items in a further production scheme, we submit that the products we buy and sell are not household products, and we request that the definition of "product" and of "sell" be more definitive, so as to exclude the feed manufacturer or farmer as a consumer.

As our industry currently complies with these regulations under the Food and Drugs Act and the Feeds Act, we can foresee considerable problems, particularly as we interpret the definition of "product" under clause 2(j), which states:

> "Product" means any article that is or may be the subject of trade or commerce, but does not include any land or any interest therein.

The Chairman: There is no question about that, that you would be covered.

Mr. Friend: Oh, no question.

The Chairman: Unless there is some exception.

Mr. Friend: It came recently to my attention that in the act in the States, where they have product labelling, their definition of "product" is "household or personal goods" rather than an all-comprehensive product definition.

Under the definition in this bill it would make very little sense to apply labelling requirements to a boat load of grain, a truck load of formula feed, a shipment of Canadian or United States corn, or many more items too numerous to mention. On the question of bagged or packaged feeds, presently controlled under the Feeds Act, which of the regulations will our industry have to follow—those of the Feeds Act or those of the proposed legislation contained in Bill C-180? We foresee a considerable conflict and duplication of effort, time and money.

We urge that you consider this whole question of under which act the feed industry will be working—either the Feeds Act, as it pertains to packaging and labelling, or this new Bill C-180. The possibility of having to serve two masters at the same time looms very large on the horizon and can only complicate matters and hinder our industry in respect to package information under the two acts.

The Chairman: You understand from our discussion earlier today that the effect undoubtedly would be that you would be under Bill C-180.

Mr. Friend: I do not believe Bill C-180 would give as much information as the Feeds Act presently does.

Senator Burchill: It is in the same category as the Fertilizer Act.

Mr. Friend: Yes.

The Chairman: As I told you, the grocery people gave a list of about 18 bills. I have collected them now. I have not analyzed them all, but I have been through a number of them, and the provisions seem to be quite extensive, although I am not an expert. As to the requirement, you can see what that would lead to. As to the content of the products, and I would think its requirements of, say, the Fertilizer Act and the Feeds Act are more in the interest of the public than the meagre amount of information required in this bill.

Senator Isnor: Did I hear you correctly to say that you were not an expert?

The Chairman: I meant on fertilizers.

Senator Carter: Did these witnesses make these representations before the House of Commons committee?

The Chairman: Yes, he said so, and he said they were well received, but nothing happened. Are there any other questions?

Thank you very much, gentlemen. We understand the problem, I think you will agree.

Mr. Friend: Yes. The point is to get the action now.

The Chairman: Well, we are not known to be an inactive committee.

We will now adjourn until next week, when we expect to include in the appearances the minister, if he wishes to come, and his staff when we are dealing with this bill. consideration of the Copyright Bill.

Senator Carter: We have a brief from the Fisheries Council. When will they appear?

The Chairman: We were in touch with them, and they said they were not appearing.

Senator Carter: They just submitted their brief?

The Chairman: Yes.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 21

WEDNESDAY, MAY 5, 1971

Third Proceedings on Bill C-180,
intituled:

"An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products"

(Witnesses—See Minutes of Proceedings)

23835—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28).

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Heath, seconded by the Honourable Senator Kickham, for the second reading of the Bill C-180, intituled: "An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products."

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

The Bill was read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

23835—1½

Minutes of Proceedings

Wednesday, May 5, 1971.
(23)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to *further* consider the following Bill:

Bill C-180 "Consumer Packaging and Labelling Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Flynn, Isnor, Kinley, Lang, Macnaughton, Martin, Molson, Sullivan, White and Willis—(18).

Present, but not of the Committee: The Honourable Senators Casgrain and Methot—(2).

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

WITNESSES:

Consumers' Association of Canada:

Mrs. Jean M. Jones, President;

Mrs. B. D. Lister,
Executive Member, Ottawa Valley CAC;

Mrs. Frances Balls,
Executive Secretary.

Department of Consumer and Corporate Affairs

Mr. J. B. Seaborn,
Assistant Deputy Minister,
Consumer Affairs Bureau;

Mr. G. R. Lewis, Chief,
Commodity Labelling Division,
Standards Branch.

Department of Justice:

Miss O. C. Lozinski,
Departmental Services Section.

After discussion it was agreed that, if possible, the Honourable Mr. Basford would appear Wednesday, May 12, 1971 with respect to the above Bill.

At 12:25 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, May 5, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-180, respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products, met this day at 9.30 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, we have for further consideration this morning Bill C-180, and we have a representation from the Consumers' Association of Canada. Mrs. Jean M. Jones, President of that organization, is going to make an opening statement, after which she will answer our questions.

Mrs. Jean M. Jones, President, Consumers' Association of Canada: Mr. Chairman and honourable senators, as an association representing consumer interests in Canada, we are pleased to present our views on Bill C-180 to you. Having read our brief to the House of Commons committee studying the Consumer Packaging and Labelling Act, you will be aware of our major concerns—misleading packaging, confusing labelling, lack of information. These concerns have been expressed for many years by consumers who talk and write to CAC at local, provincial and national levels. These problems are consistent across Canada; a strong packaging and labelling bill is required to at least the number and types of problems now occurring.

We are pleased that Bil C-180 requires the declaration of net quantity on all products. Consumers often ask us why certain products such as chocolate bars and handsoaps are not labelled as to quantity.

The Consumers' Association strongly supports section 7 which provides control of false or misleading representations. We have been concerned that the provisions under the Combines Investigation Act for misleading advertising would not be applicable to labels on products. Section 7 of the Packaging and Labelling Act assures consumer protection in this area.

Section 10 of this bill will allow many different types of information to be included on a package. We believe this enabling legislation essential in order that consumers be properly informed about products they are buying.

Section 11 will also answer a need by reducing package proliferation, a great annoyance to consumers, and we welcome the addition of section 12 commending in particular its allowance of research by the Minister, related to unit pricing, date and storage marking, and shapes and sizes of containers.

We note that changes have been made in the parts of the act relating to inspection and seizure. These changes appear to be adequate for enforcement of the act.

CAC considers Bill C-180 to be a well thought-out piece of legislation which will give Canadian consumers protection from misleading or confusing packaging, which will allow for more informative labelling and which will provide a fair and equitable marketplace, one in which consumers can buy products on the basis of informed and rational choice.

We would ask the committee to proceed with all possible speed in its consideration of this act. We believe the act should be implemented in as short a time as possible in order to correct many of the abuses now prevalent in the marketplace.

The Chairman: Are there any questions?

Senator Carter: The witness emphasized clause 11, which would reduce package proliferation. We have been having some difficulty in finding out just what is package proliferation. Could the witness give us some idea of the number of sizes and weights, and what is necessary as a minimum?

Mrs. Jones: I think we could very quickly demonstrate what we consider to be proliferation. I think Mrs. Lister is the person to demonstrate that for us.

Mrs. B. D. Lister, Executive Member, Consumers' Association of Canada: I have not got examples here today, but I will read off some of the things that we consider to be proliferation. Spray starch would be one. I demonstrated to the parliamentary committee five different examples of spray starch. All the cans looked the same size, but they ranged from 12 ounces to 16 ounces. Also they were all different prices. For the housewife to make a comparison she would have to be an expert mathematician.

Senator Cook: What is spray starch?

Mrs. Lister: It comes in a can. It is the ordinary method of starching garments. You spray before you iron. It comes in an aerosol can. They looked the same size, but they ranged from 12 to 16 ounces and they were all different prices.

The Chairman: I was wondering what is the difference between the spray starch in these cans in this range you have mentioned from 12 to 16 ounces. What is it to which you object? Is it the number or what?

Mrs. Lister: I think that a product such as spray starch which comes in that size of tin should have a standard weight. The consumer could compare the price per ounce. But if she has to choose one at 12 ounces, one at 14 ounces, one at 15 ounces and another at 16 ounces and start dividing the ounces into the price, then it is difficult to come to a price per ounce.

The Chairman: Mrs. Lister, let us see what you approve of. You approve the requirements in clause 4 of the bill as being a step forward in the disclosure of necessary information to the consuming public who are buying. What this requires is a declaration of net quantity of the produc tin terms of their numerical count or unit of measurement and as a Canadian unit of measurement set out in schedule 2—that is if we eventually accept the European system. This requires a net quantity. If the label contains the statement of net quantity of whatever the package contains, then that will tell you what is in the package. I do not see anywhere here, in any of these clauses, reference to price.

Mrs. Lister: I am not saying that the price should be standard. I am saying that the consumer cannot make a decision on what is the best buy.

The Chairman: Why not? You mean that she cannot do arithmetic? I have not found a woman who was not fast in mental arithmetic when she wished to buy something.

Mrs. Lister: But if she has to make a choice between five cans of spray starch and she is buying 50 items for her grocery cart, she has to make mental calculations and her shopping expedition is liable to end up by taking hours.

The Chairman: Well, don't they?

Mrs. Lister: Not for busy people.

Senator Beaubien: Once she bought a can of one size, would she not be able to recognize the other sizes? After all, you only get caught once.

Mrs. Lister: She would have to divide the number of ounces into the price for each tin to decide which gave her the best buy.

The Chairman: Supposing the price for 12 ounces was 48 cents.

Mrs. Lister: A 15-ounce can might be 53 cents and a 16-ounce can might be 54 cents. It becomes a very complicated matter.

The Chairman: I understand you to say that you wish to avoid all that by having one standard weight.

Mrs. Lister: Yes.

The Chairman: In other words, instead of having from 12 to 16 ounces in cans of spray starch, you want one size?

Mrs. Lister: One standard size, 16 ounces.

Senator Carter: We have raised these points ourselves.

Mrs. Lister: Could I go on to paper towels?

Senator Cook: You are not arguing for one standard size?

The Chairman: Yes, that is what the witness wants.

Mrs. Lister: In spray starch there is just that one similar-looking tin, but if they put out a super large size and a small size, i.e. two ounces, and they were standardized...

The Chairman: You want standardization in two senses, as to weight and uniform packaging?

Mrs. Lister: Yes.

Senator Beaubien: If you took the four or five sizes and divided the prices, what would be the difference?

Mrs. Lister: The 12-ounce tin was six cents per ounce, the 15-ounce tin was 4.6 cents per ounce, the 14-ounce tin was 3.6 per ounce, the other 14-ounce tin was 4.9 cents, and the 16-ounce tin was 3.1 cents per ounce.

Senator Molson: None of those were on special sale?

Mrs. Lister: No.

Senator Cook: Can spray starch come in different quantities?

Mrs. Lister: If the consumer cannot make a price comparison to start with, then she cannot get off first base.

Senator Beaubien: Would it not depend on the quantity they want?

Mrs. Lister: There is very little difference between the 14 and 16 ounce cans, but there is when you are paying for it.

Senator Connolly: What you want primarily is a standard position in respect of price. Do you also want a uniform price for a particular size?

Mrs. Lister: Well, it would facilitate things.

The Chairman: What she has said is that she is not asking for standardization in price. She is asking for standardization in weight and in packaging. In other words, you would have uniform packaging and standardization in weight. Is that a general statement or are you limiting your comments only to spray starch?

Mrs. Lister: That is a general statement.

Senator Benidickson: I apologize for arriving late. Before I came in was there any reference to the number of articles that might be reduced as a result of this process?

The Chairman: No. We have been talking only about spray starch, which comes in various containers from 12 to 16 ounces.

Senator Molson: With reference to the spray starch, do the cans represent the weight of the starch or the weight of the starch and the propellant?

Mrs. Lister: I am not sure, sir. I really don't know.

Senator Molson: The unit price in that case might not be a very valuable calculation.

Mrs. Lister: It might be how long the tin lasts, in other words.

Senator Cook: Did I understand you to say that there is some difference as to quality?

Mrs. Lister: Yes.

Senator Cook: That is another problem.

Senator Blois: Mr. Chairman, I think one point is being overlooked. In talking to some of the manufacturers of starch I understand that the weight varies according to the starches and the weight of the propellant can vary as well. That would affect the price. They may not be the same quality. You cannot expect to have the same price if you have a difference in quality.

Mrs. Frances Balls, Executive Secretary, Consumers' Association of Canada: We are not asking for the same price. We are saying that if the weight of the tin were standardized we would be able to compare the prices.

Senator Blois: But you are overlooking another point, if I may continue. The starch is the heavier material and if there is more starch than propellant in one can compared to another, you will not have the same weight in the two cans made by different manufacturers. Some manufacturers would only put in something to lower the quality of the starch. You are defeating your own purpose by asking for this particular thing. I am not against marking it this way, but you are overlooking the quality factor, I think. You have to pay more if there is more starch and less propellant.

Mrs. Jones: My understanding is that the aspect of content relates to the starch content and not to the weight of the propellant. Perhaps we are leading to some confusion by concentrating on spray starch only. We are talking of that only as one example where there is such proliferation within a very narrow range of sizes and that proliferation defeats the efforts of the consumer to examine the quality. You really are in a position then, if you have the same quantities in two different cans, after use to know whether brand A, for example, really allows five more starchings than brand B. But you do need to start with this base of some kind of common factor between the two products. Then you can proceed to all the other issues that we are discussing.

The Chairman: You had some other examples, I believe.

Mrs. Lister: Yes. Another is paper towels. This is really one of the most confusing things. I had six different brands. They were all different prices. The number of sheets per package ranged from 150 to 240. The size of the sheets ranged from 9.4 inches by 11 inches, to 11 inches by 11 inches. This means that not only can the consumer not compare the number of sheets in the package and the unit price of each sheet, but she cannot compare at all because each sheet is a different size.

The Chairman: Not in the same package.

Mrs. Lister: Oh, no. Each different brand has a different sized sheet and a different number of sheets per package.

Senator Molson: If you had the weight of the roll on the package that would be a better indicator than you have at present.

Mrs. Lister: Yes, it would, because it would indicate the quantity.

Senator Molson: Yes.

Mrs. Lister: And you would then be able to compare the price.

The Chairman: Senator Molson, this bill requires, according to clause 4, that there must appear on the label a declaration of net quantity of the product in the form and manner required by or prescribed under this act and in terms of numerical count. The count would mean the number of sheets, and I would assume the size of the sheets. That is part of the quantity. This legislation does require that, but in that clause requiring that information it does not limit the sizes of the packages. It is clause 11 that you referred to, Mrs. Lister, and it is not against proliferation. It is against undue proliferation. So the bill does not go as far as you are urging it should go.

Mrs. Lister: But this gives an example of the need.

The Chairman: Maybe you can tell us what you regard as being undue proliferation, which is the language of the bill.

Mrs. Lister: I think the sizes of those starch cans are an example.

The Chairman: Which is the one that makes it undue proliferation? Do you mean anything over one?

Mrs. Lister: No.

Senator Molson: It is just too many.

Mrs. Lister: Too many, yes.

Mrs. Jones: Within a narrow range. Mrs. Lister already indicated that for a large and a small unit this is reasonable, and I think really we are examining this matter of undue proliferation where it is within a small range and is really not meeting the needs of the large or the small family.

Mrs. Balls: A good example of this is in the packaging of soaps, where you have king size, family size and giant size. You no longer have large, medium and small. Who is to say which is the largest size as between king, family and giant?

The Chairman: The people who use them.

Mrs. Jones: That is a type of proliferation.

Mrs. Lister: I have some toothpaste here. This might give you an example. Here is the super size. Here is the family size. This is the giant size and this is the regular size. Now, the smallest is the regular size. The largest is the super size. The family size is next to the super size.

The Chairman: What happened to the giant?

Mrs. Lister: The giant is smaller than the family size and smaller than the super size. Would you be interested in knowing the price per ounce?

Senator Carter: Definitely.

Mrs. Lister: The Super size is 15.5 cents per ounce. The family size is 14 cents per ounce. The giant size is 22.5 cents per ounce and the regular size is 27 cents per ounce. So your best buy is the family size.

The Chairman: The super is the dearest?

Mrs. Lister: No, the dearest is the regular. But the family size is a better buy than the super size.

The Chairman: It is the old story of buying in volume and paying less.

Mrs. Lister: No, it is not, because the largest is less than the second largest.

Mrs. Balls: The super costs more per ounce than the family size.

Senator Connolly (Ottawa West): Can you tell us how many ounces there are in each package?

Mrs. Lister: There are $8\frac{3}{8}$ ounces in the super. There are $5\frac{5}{8}$ ounces in the family. There are $2\frac{7}{8}$ ounces in the giant, and $1\frac{1}{2}$ ounces in the regular.

Senator Connolly (Ottawa West): Those are ounces that you have quoted.

Mrs. Lister: Yes.

Senator Blois: These are all made by the same company?

Mrs. Jones: Yes. Another brand family would not necessarily have the same sizes. They would use different terminology.

Senator Connolly (Ottawa West): They would have different sizes of packages and different quantities of material.

Mrs. Balls: And they would use fifths of an ounce rather than eighths of an ounce.

Senator Molson: The cost of those containers is pretty much the same from the smallest to the largest.

Senator Connolly (Ottawa West): There is no doubt that there is confusion in that set-up. This is the point you wanted to make. First of all, you know what the quality is, because you know the product you are buying, but what you cannot determine readily—and I take it this is the burden of your message here—you cannot determine readily which is the best but in that group of four products put out by the same manufacturer.

Mrs. Lister: Yes.

Senator Cook: You would not retain only one package, would you? You would have a choice?

Mrs. Lister: You would have to have a choice. People use different quantities.

Senator Connolly (Ottawa West): Would you agree that from time to time the requirements of the market vary, and therefore the manufacturers feel that they should meet the demands of the public with respect to various sizes of containers for various quantities of their product that are merchandized?

Mrs. Lister: I maintain that if the consumer is confused then her demand cannot be registered, because in the confusion the demand is lost. She might think this is the best buy, being the largest, whereas if she could make the choice of the best buy she would probably buy this one, therefore letting the manufacturer know that this was the one which was in the largest demand.

Senator Connolly (Ottawa West): You say that you want perhaps two of those four put on the market. Some of the people who have been here have told us that there should be a change to suit the convenience of people and they agree that these two which you want from that group will be manufactured, but perhaps a year from now people will want a different size from the two that are put out. Would you agree that that kind of change should be made?

Mrs. Jones: We are not at all demanding that there not be response from industry to changing consumer demand. We are asking that industry be responsive to the consumer demand.

Senator Connolly (Ottawa West): You want to eliminate the confusion.

Mrs. Jones: I think one reason we particularly welcome the introduction of section 12 is that there would be research into the matter of containers.

Senator Connolly (Ottawa West): Do you say there is no response from the manufacturer now to the demands of your group?

Mrs. Jones: Specific industries give some response, but I think Mrs. Lister's point is that it is very difficult for the consumer to register her demands. When she is in this confused state, she does not know how to register an intelligent decision which demands her doing a certain amount of arithmetic, and concluding that she wants a certain size because it is reasonably appropriate for the size of her family and it is the best buy.

The Chairman: Mrs. Jones, if this bill becomes law in the form in which it is, all the information you would get would be as provided at the top of page 3: Quantity

numerically or by weight. As to the additional contents of the label, you would get that by section 10, which you have approved here this morning. At the top of page 6 you have section 10(b)(iii)—such information respecting the nature, quality, age, size, material content, composition, geographic origin, performance, use or method of manufacture or production of the prepackaged product as may be prescribed. You have approved of that?

Mrs. Jones: Yes.

The Chairman: I take it you have approved of these requirements of disclosure on the basis that this would give full disclosure to the buying public. What additional factor does the undue proliferation add if you are still going to have more than one size? You still have to do the arithmetic which you are talking about?

Mrs. Balls: If you have all products of different manufacturers the same size...

The Chairman: I see. In other words you would restrict the individuality of the manufacturer?

Mrs. Balls: No, we would not restrict the individuality of the manufacturer. We would ask that consumers be given such information so that they could make a true comparison of the basis of price and quantity.

The Chairman: Undue proliferation does not do that for you.

Mrs. Balls: We have right now legislation controlling canned goods. Those are the only products on the market which allow a true comparison. You will still find people buying the more expensive and the less expensive because tastes vary.

Senator Molson: Those are agricultural products you are speaking about.

Mrs. Balls: Under the Agricultural Standards Act.

Senator Connolly (Ottawa West): What I am driving at is this: Under certain acts you have regulations with respect packaging, and you tell us now that in respect of the regulations issued by the Department of Agriculture for canned goods that perhaps they are the best available.

The Chairman: The most informative.

Senator Connolly (Ottawa West): The most informative and the most helpful to you.

Mrs. Balls: Yes, and the dairy products.

Senator Carter: The manufacturers or the packagers when they were here and when we questioned them as to why they have this wide range of packaging and weights, said it was done on the basis of market research and there was a demand for different sizes to meet different sized families and requirements. That is the way they explained it and I would like to ask you two questions. Have you analyzed the complaints to see what size of families they come from, and how many different sizes are necessary to meet the different family conditions?

Mrs. Jones: Again, I would refer to our satisfaction with section 12, which demands such research as you mention. I think it would be presumptuous and ridiculous for us to suggest that we could predict for all the products the number of sizes of containers there should be. This is going to be very complicated. You are not going to decide that it takes two sizes for every product. There will have to be consideration given to what the product is.

Senator Carter: Do you think three sizes and three different weights would satisfy a large family, an average family, or a couple living together in old age. If you satisfied these groups do you think that would be sufficient?

Mrs. Jones: I think I can only respond to that by saying I would have to consider the question in relation to the product under discussion. That is why we need general enabling legislation to allow for this.

The Chairman: Well, Mrs. Jones, the different shoppers who go in have different purposes to serve and they have different sizes of pocketbooks. In many instances they want a product like toothpaste, but what they buy is in relation to the money in their pocketbook and the other things they have to buy. They may find based on experience, that is they buy the regular size and they are very careful in its use, they will get longer mileage out of it than if they were to buy the larger size and perhaps the children are rather careless in the use of it.

There is another aspect too, and here I am not testifying for myself, but for travelling you want a small-size article, especially when you are travelling by air. Therefore, the tendency would be to buy the larger size for home use and a smaller size for travelling. These are factors to be considered when you are trying to restrict. Now you have approved section 11, and all that section says is that the Minister may make regulations on standardization of packaging, and that he has to be satisfied that there is undue proliferation as to the weight, measure or numerical count of the prepackaged product, and that that is likely to confuse the consumer. It does not say anything about price. All it says is that the consumer is likely to be confused and misled by the net weight, by the measure or by the numerical count. All you have been telling us here this morning is about arriving at value, so it would appear that this does not help you at all.

Mrs. Balls: Yes, it does. If the quantity is the same, you can compare on the basis of price. The two are completely interrelated and you cannot separate them.

The Chairman: Then you are getting back to the question I asked Mrs. Lister in the beginning, and I understood you had modified your position. I asked, "Do you want a standard size, for instance the 16-ounce one?"

Mrs. Balls: We want standard sizes.

The Chairman: That would make then for simpler arithmetic, would it not? But the moment you add anything else, you say it becomes complicated.

Mrs. Balls: Not necessarily. It depends on the product. You can have three sizes in a product as long as each brand is the same in quantity within each size range.

The Chairman: Then you are restricting the scope and the individuality of the individual manufacturer?

Mrs. Balls: The canned goods people do a great deal with their products even though they have standard sizes.

The Chairman: That is right, but now you have to tell us why that should be extended to every pre-packaged product.

Mrs. Balls: Because the consumer is confused and is telling us that that is what he wants. I am sure the consumer is writing to the department as well as to us, and I am sure he is writing to the companies. If the companies' names and addresses were on the products, they would get many more complaints than they do now.

The Chairman: Well, you can assume that they will be receiving them, because this bill will require that they have their names and addresses on their products.

Mrs. Balls: We are getting reaction from consumers that they do not like this kind of package proliferation.

Mrs. Jones: If I might add to what Mrs. Balls is saying, we have been having this reaction from consumers for ten years. In 1969 we really reviewed our resolutions over the previous ten years in relation to packaging and labelling, and there were over 50 individual resolutions representing a great number of individual complaints. We saw the need in 1969 for some comprehensive legislation in relation to packaging and labelling, and we see Bill C-180 as that kind of legislation, and that is why we are so firm in our support of it. It is answering the needs that we had identified over ten years from consumers across the country. Even in 1970 we still had four national resolutions on packaging and labelling out of the five that we had in relation to food products. I think this is some measure of the consumer concern, and the fact remains that we have not had the opportunity of expressing this concern individually to the manufacturer because we have not known how to locate him, and also because consumers are just learning how to make their voices heard.

Senator Connolly (Ottawa West): In the case of the toothpaste of which you have samples here, there is no question about quality because presumably the quality is the same in each package. What you are complaining about, I take it, is that the consumer or purchaser cannot determine the unit price because of the difficulty in working it out, and that difficulty arises out of the fact that one package contains 8⅜ ounces, the next size has 5⅝ ounces, the next one has 1½ ounces, and the smallest one ⅞ ounce. So the arithmetic to do that is too difficult for the ordinary consumer or purchaser unless she takes a lot of time to do it.

Mrs. Jones: I think the study made in the States a few years ago has already been brought to your attention. That was a study where college-graduate women attempted to make the "best buy" choice in a number of items and only a minority made even a good showing. We really feel we have something more valuable to do with our time than standing in front of a toothpaste counter figuring this out. You can see that this is a task if you are looking at only one brand, but we can see the difficulty that arises when you are looking at a number of different brands. As Mrs. Lister pointed out, units are not even in eighths, they are sometimes in fifths and even in sevenths. To us they seem designed to confuse.

Mrs. Balls: And they will be in grams as well as in ounces.

Senator Connolly (Ottawa West): I think you have made your point very clearly.

Senator Molson: Could I ask Mrs. Jones if she feels satisfied that if the discretion in these matters passes from the manufacturer and the marketer to the Minister and his department, that the consumer is going to be more satisfied and have less cause for complaint? It is a very wide responsibility.

Mrs. Jones: I would question that we say that all responsibility passes to the Minister. I think we see consultation and much responsibility being left. It is within a different framework.

The Chairman: No, there is complete discretion in the Minister.

Senator Molson: There is complete discretion. This was raised before.

Mrs. Jones: Well, I think we have sufficient confidence that we are not transferring that kind of authority and responsibility through this legislation.

The Chairman: I notice that the bill, on page 7, provides for consultation in relation to research and studies to which you have referred a number of times. It says:

> The Minister may, in carrying out any research or studies pursuant to subsection (1), consult with or seek the advice of any department or agency of any government, any dealers or any organization of dealers or any organization in Canada of consumers.

Your manufacturer is not a numeration, Senator Molson. The word "dealer" includes manufacturer.

Mrs. Jones: Section 11 also says that if there is undue proliferation the Governor in Council "may" make regulations. It does not say that he "shall."

The Chairman: It refers to any recommendation of the minister.

Senator Flynn: If we transfer responsibility to officials, then they use their power.

Mrs. Jones: It says that he shall consult with manufacturers and consumers.

Senator Flynn: Once you transfer responsibility to officials of a department, or to technocrats, you are not afraid to go even further.

Mrs. Jones: We take seriously the allowance for consultation with consumers, and we see it as our responsibility to be consulted.

Senator Flynn: And the department will do the same.

Senator White: Are you saying that, as far as the consumer is concerned, it could not be any worse than it is now?

Mrs. Jones: You are so right.

Senator Connolly (Ottawa West): I take it that Canadians would want to have access to imported products. The foreign manufacturer might make up his product in different quantities from the one that is prescribed here. Would you want the foreign manufacturer to be tied down by the regulations?

The Chairman: They are, under the bill.

Mrs. Balls: Yes, we would.

Senator Connolly (Ottawa West): In other words, you would force foreign manufacturers to conform to the requirements?

Mrs. Balls: There is a great deal of work being done by the International Standards Organization in this respect to try to standardize this kind of thing throughout the world.

Senator Connolly (Ottawa West): At our first meeting we had as witnesses representatives of the Grocery Products Association. I refer specifically to section 7(2) (b), on page 4, which reads:

> Any expression, word, figure, depiction or symbol that implies or may reasonably be regarded as implying that a prepackaged product contains any matter not contained in it

They produced for us various examples of Jell-o products. One example represented strawberry, another cherry and another pineapple. They said they had symbols so that people could understand what they were buying. If they saw that it was lemon they would know that it was lemon-flavoured Jell-o. If they saw a cluster of grapes then they would know that it was grape flavoured. They said there was actually no lemon in the product, that it was only a flavouring, that there was no grape in the product, but that it was only a flavouring. They went on to say that some people do not see as readily as others, that they could not read without their glasses, or they did not have sufficient time. Would you say that the reasonably sophisticated buyer would be confused by the fact that on the Jell-o package there was a picture of a lemon but there was no lemon in the product but only lemon flavouring? Would you say that is confusing?

Mrs. Jones: We are concerned about these representations, particularly in relation to fruit. We are particularly concerned that the word "flavour" is often in much smaller print than the symbol of the apple, orange or pineapple. The label is likely to be dominated by the name of the fruit and the picture, and the word "flavour" is often in a colour that does not stand out. This is a matter of concern even to the reasonably sophisticated shopper. We feel that we are responsible for the unsophisticated shopper. The individual should be adequately informed and not misled.

The Chairman: There might be an exception. If you saw a luscious-looking cherry symbol and you saw the word "flavouring" in small print, that might be an exception. Let us assume that equal status is given to the cherry and to the word "flavour," then there would not be any deception.

Senator Connolly (Ottawa West): This clause prohibits this being done. If there is no cherry in the product you cannot use the symbol of the cherry in the Jell-o because it is only a Jell-o flavour. It is a chemical product to give it that taste.

Mrs. Jones: We are aware that this is the situation, that they may not use the natural fruit.

Mrs. Balls: The provision in the bill does not prohibit that particular thing. It is not written into the bill.

Senator Connolly (Ottawa West): It is written in the bill. It refers to any expression or symbol that may be regarded as implying that a prepackaged product contains any matter not contained in it. The matter that is not contained in it is anything from that cherry. That would be eliminated from that label under this clause.

The Chairman: I understand from Mrs. Jones that that is the position of her association. Mrs. Jones, is there anything else that you wish to bring forward?

Mrs. Jones: No. I can respond to any further questions.

The Chairman: Are there any further questions?

Senator Carter: Is it your complaint that it is too difficult to determine price because of the quantity in the various packages? Is this basically your concern, apart altogether from the misleading material that might be contained on the package? Basically, what you are concerned about is the comparison with prices.

Mrs. Jones: And we see standard prices as facilitating that comparison.

Senator Connolly (Ottawa West): You agree that in the market place it is impossible to specify a unit price?

Mrs. Jones: No, we do not see this as being impossible. We have accepted that there is provision for further study and research on unit pricing.

We are studying it ourselves and are looking at the American experience in experiments in unit pricing. We are very interested in the experiment of the Ottawa wholesale grocers here in experimenting with unit pricing, and we had anticipated this voluntary introduction of unit pricing by the large supermarkets because it is obvious from the American experience that they can do it economically, and they are seeing the value of it. We are looking at the problems that unit pricing might pre-

sent to the small storeowner and manager, and this is why we are not pressing that that be included in the provisions at this point. We can see the possibility of rather rapid voluntary introduction by the distributors who can readily introduce this kind of pricing into their operation as it stands now, and that would mean no extra cost to the consumer. This is why we are supporting the gradual introduction.

The Chairman: Well, there is nothing in this bill that suggests any requirement that you state the price.

Mrs. Jones: No.

Senator Connolly (Ottawa West): No, there is not.

The Chairman: So we are not looking at that question. That question might present some problems as against the provinces who have control of property and civil rights. That is an additional question that might have to be resolved. That may be why you do not have any mention of a price.

Mrs. Jones: And we have not been critical that it is not mentioned.

The Chairman: I understood from Mrs. Lister that you were not asking for that.

Senator Carter: On the point that this might come under provincial jurisdiction, Mr. Chairman, if we forget about prices and use the word "value," would that bring it under the federal jurisdiction?

The Chairman: That would bring a multitude of problems. There would be tremendous problems, because who would assess value?

Senator Carter: Value would be determined in terms of the quantity you get for the same price. There are different qualities for the same price. Or if there were two different brands of the same size, then you could compare the difference in quality with the difference in prices. I would define "value" in the bill as what you get for your money.

The Chairman: You mean the market price.

Mrs. Balls: I may feel that I get more for my money with one product than someone else feels she gets for her money with another product. It would depend on my own values.

The Chairman: That is right.

Senator Carter: I mean the per-unit price. I am speaking in terms of weight and volume per unit price.

The Chairman: But Mrs. Balls has been suggesting that she may buy a different brand of toothpaste, for example, and might even pay a little more for the particular brand as against another brand because she feels that it has something in it that gives her more value out of it.

Mrs. Jones: But she wants to know that she is paying more. It is that value that she places on it.

The Chairman: She wants the dealer or the manufacturer to do the arithmetic for her.

Senator Carter: Except where this bill will enable what is being done under the Fruit, Vegetables and Honey Act, or whatever act it was they referred to, to be applied to other products, I do not see that this bill helps them very much.

Mrs. Balls: The Canada Agricultural Products Standards Act does a great deal for consumers.

The Chairman: Do you realize, Mrs. Balls, that when this bill becomes law the labelling and packaging requirements in this bill will override that other bill?

Mrs. Balls: Yes, and we are very happy that it will happen.

The Chairman: But this bill would not appear to give as much in the way of labelling and packaging as these other bills, and on your own statement it does not.

Mrs. Balls: No, I did not say that.

The Chairman: I understood you to say that on canned goods you got information that we are discussing that you now want in this bill, and you do not get it in this bill.

Mrs. Balls: The information we want is in this bill. We were saying that the Canada Agricultural Products Standards Act is one of the acts which give us the information we want.

Mrs. Jones: For those products only.

Mrs. Balls: This will will override it, as you say, and we are happy that that is so, because it is better to have one act than to have many acts.

The Chairman: You are happy with clause 11 and the undue proliferation?

Mrs. Balls: Yes.

The Chairman: As being the great magical wand?

Mrs. Balls: No, we did not say that.

The Chairman: Making everything clear and doing all the arithmetic for you.

Mrs. Balls: We did not say that.

Mrs. Jones: It is only one of the provisions that we support, and we want to have the extension of the protection and information of the existing legislation expanded to the other products. With this umbrella legislation we do not see where there is any reduction of any existing information or protection we have.

The Chairman: How do you know? Have you read the other acts? Have you read the statutes that have been in force, some of them for ten or fifteen years? Have you seen how extensive are the labelling and packaging provisions in them?

Mrs. Jones: In the preparation of this matter much study was given to them, yes.

The Chairman: I have read them, and my own feeling in the matter is that the packaging and labelling provisions in these other acts are very thorough. The provisions in the present law are more thorough than as contemplated in this bill unless the minister says that there is undue proliferation in sizes. That might bring the two closer in line. I am not saying it necessarily brings them together. You have no comment on that?

Mrs. Jones: I do not see any indication that there is going to be any retrograde step taken in passing this bill. I would anticipate that this bill would incorporate the good existing regulations.

The Chairman: I take it that you assume that the minister will exercise his discretion under clause 11, of necessity, and in all these different illustrations you have given he will declare undue proliferation in sizes.

Mrs. Jones: I would anticipate that he would also consult with the other Government departments, as indicated he may do. I think if we are going to be interpreting the word "may" in certain sections in one way, we should interpret that word "may" the same way in all sections.

The Chairman: However we interpret the word "may", ultimately, if there is any conflict, the courts will interpret it.

Mrs. Jones: The courts will, yes.

The Chairman: Are there any other questions? Is there anything more that you wish to say, Mrs. Jones?

Mrs. Jones: We should make one point. We are concerned that there be as few exemptions as possible, and we do hope that the regulations and the provisions will continue to indicate that significant penalties should be considered so that we really do have effective implementation of these provisions.

We are of this enabling legislation helping consumers to have a more equal position in the marketplace. We realize the importance of the regulations continuing to protect our interests.

The Chairman: The only exception from the application of this bill is contained in subparagraph (2) of clause 3, and that is that this bill, when it becomes law, does not apply to any product that is a device or drug within the meaning of the Food and Drugs Act. That is picking out just certain aspects of the Food and Drugs Act. For instance, cosmestics, which are under the Food and Drugs Act, would be subject to this bill.

Mrs. Jones: We hope so. That is a very sensitive area.

The Chairman: It is also a very important area, I would say.

Mrs. Jones: It is a very costly one.

The Chairman: Are there any other questions?

Mrs. Jones: No.

The Chairman: Thank you very much, Mrs. Jones.

Mrs. Jones: Thank you. We appreciate having had this opportunity to be here.

The Chairman: Honourable senators, now we have here representatives from the Department of Consumer and Corporate Affairs. We have no other delegation to be heard in respect to this bill. Mr. Seaborn, Assistant Deputy Minister, Consumer Affairs Bureau, is here. We also have Mr. Lewis, who is the Chief, Commodity Labelling Dvisision, Standards Branch, from the Department of Consumer and Corporate Affairs; and then from the Department of Justice, Miss Lozinsik, Departmental Services Section.

At this stage I suggest that we start with Mr. Seaborn, with regard to the clauses and particular attacks which have been made on certain clauses, and invite his comments.

I have this additional comment to make, that regarding some of the points we might want to hear the minister when he is available next week. We would want to hear him particularly if our state of mind were such that we wanted to make some changes in the application of certain sections. I would think we would want to hear the minister before we went ahead and made the decisions. This is just a personal viewpoint which I am expressing.

Senator Flynn: Unless he would let us know that he would be in agreement with any proposed amendment. You do not suspect he would say "No"?

The Chairman: I was assuming that he would like to see this child given status, as it is given to us.

I should like to deal with some of the points which have been raised in the order in which they appear. In clause 3 we have had something which almost amounts to standards practice; that, is we will not permit proposals in a bill that would permit the amendment of the legislation by regulation. We feel that clause 3(1) does that. Have you any comments to make?

Mr. J. B. Seaborn, Assistant Deputy Minister, Consumer Affairs Bureau, Department of Consumer and Corporate Affairs: Your feeling, as I have understood it from reading the previous testimony, is that this act, if passed, should supersede the provisions of other acts.

The Chairman: Yes.

Senator Connolly (Ottawa West): I think what we are concerned about is not the supersession of other acts, but the supersession of other acts by regulation made under this act. Am I right about that?

The Chairman: That is right.

Mr. Seaborn: I do not think this is the case. The section says that the provisions of the act are applicable to any product notwithstanding any Act of the Parliament of Canada. That states generally this most recent act, which is one of broad application in packaging and labelling and which takes precedence over preceding acts. That, of course, is of the essence of Bill C-180, and one of its principal functions is to act as an umbrella for lawful uniform packaging and labelling and to bring uniformity

into an area where there is at the present time a wide variety of detailed labelling requirements set down for individually categorized products under the authority of a series of other acts, many of which have been referred to here.

It will certainly mean that the regulations passed under this act, in so far as it has prescribed certain details as to how something should be packaged and labelled, will take precedence over comparable details in the regulations passed under the authority of other acts. I am not aware, however, of other acts which deal with packaging and labelling, amongst other things, which prescribe the sort of detail which we will be prescribing here in the act itself. I think, only if there were that sort of detail prescribed in the act itself, would your fears be justified.

The Chairman: We can all read, Mr. Seaborn. Clause 3 (1) says:

> ...the provisions of this Act that by the terms of this Act or the regulations are applicable to any product apply notwithstanding any other Act of the Parliament of Canada.

We have about 18 different statutes of Canada. For instance, I have here the Fertilizers Act. In the Fertilizers Act, which is administered by the Department of Agriculture and which was assented to in 1957, you have extensive provisions in relation to standardization of products—the fertilizers, the guaranteed analysis, information that must be available and also labeling.

The labelling, notwithstanding what you have said, Mr. Seaborn, is, as I read it in Section 16 of the Fertilizers Act, much more inclusive than what we have in this bill. Therefore, it must be intended that we are going to get many of the provisions under this act in the regulations. We have them in the bill and in the Fertilizers Act. Our objection is that you give authority by regulations, under this act, to override the provisions of existing legislation.

Senator Connolly (Ottawa West): Existing statutes.

The Chairman: What we are saying is that if you are going to do that, you should do it by legislation and in that way Parliament would control it. In regulations Parliament does not control it at all.

Mr. Seaborn: Provisions under this act take precedence only to the extent that the present act and its regulations are applicable to a product. That is to say, as the clauses of the bill indicate, there are certain provisions relating to net quantity, to depictions and to the name and address of manufacturers. On those matters the bill gives authority to set forth regulations. Therefore, it is only in respect of those kinds of regulations, which of course cover a much more limited range than the labelling regulations under the authority of the Fertilizers Act, and the present one would take precedence. In fact, there is a very good correspondence between the two. The Fertilizers Act says that labelling shall include the name and address of the manufacturer of the fertilizer. It says further on that it will contain the name. We are considering that that also be included as well as the weight.

The present bill, C-180, does not have anything to say about the registration number of fertilizers, the guaranteed analysis, or the directions for use of a fertilizer pesticide. These are all matters which are of limited but great importance in the field of fertilizers. There is no question, I would say, of Bill C-180 touching or in any way interfering with those labelling provisions of the Fertilizers Act.

The Chairman: Then, I would tell you exactly where that gets you. It gets you at the best position you can take. In other words, you are going to create a split jurisdiction. The provisions in the Fertilizers Act, for instance, which we have been talkng about, are still going to remain in force and will have to be met. To the extent that those provisions in the Fertilizers Act may equal or may be similar to provisions in Bill C-180, then Bill C-180 will override in that regard.

Now, let us apply that for a moment. In the Fertilizers Act, you are supposed to indicate the name of the fertilizer. Well, under Bill C-180 you are required to make that disclosure also. Now you are required under Bill C-180 to give the weight, while under the Fertilizers Act you are also required to give the weight. Therefore, you have Bill C-180 laying down certain disclosure principles, while section 16 of the Fertilizers Act requires not only those disclosures but also additional and very protective disclosures to be made. So at best you have a split jurisdiction. But if, as Mr. Seaborn says, it is not intended to override, we would point out that under section 3 of this bill it is possible by regulations to override the existing law contained in the Fertilizers Act, for instance, and other acts. So this is the point we would like to have your help on.

Senator Cook: What is the state of the law in Canada going to be if you have to go to one statute, and then go to the regulations under another statute to see if that statute is still in effect or if it is overridden? You cannot have law like that.

Mr. Seaborn: Well, I can see that this could lead to exactly the kind of confusion that you are rightly worried about, where there might be one regulation under the Fertilizers Act which says that weight must be declared in one particular way, and then you have a regulation under Bill C-180 saying that it must be declared in another way. That is the sort of conflict that it would be extremely difficult for any manufacturer to meet with. But the point I would like to make is that it is essential—and we have recognized this as officials within the department and the government has recognized it, the Minister having done so publicly—that there be very close consultation between government departments, all of whom are in one way or another involved for their specialized products in matters of labelling. The intention, which has again been stated publicly, is as follows: in drawing up any regulations under this act, we will be in close consultation with other government departments who can potentially be affected, such as the Department of Agriculture which administers this act.

The Chairman: Well, if you will stop right there, that is the heart of the question, and everything you are saying emphasizes the point we are making. Here you have the Department of Agriculture which is charged with the administration of the act I have taken as an example, the Fertilizers Act. They are knowledgeable in that field, and the labelling requirements are much more extensive in the public interest than the disclosures you require under this bill. What you say in those circumstances is that the people who are administering Bill C-180 are going to go to those branches of the Department of Agriculture to be educated and so as to make their regulations more knowledgeable. Why duplicate that kind of work? You have that knowledge now in the Department of Agriculture based on experience that goes back perhaps 15 or 20 years.

Mr. Seaborn: Indeed, we have it insofar as a wide range of products is concerned in which the Department of Agriculture has great competence and great knowledge, but there are many other areas which are quite unregulated insofar as labelling and packaging is concerned.

The Chairman: Let us take one, for example.

Mr. Seaborn: The field of cosmetics is subject to limited regulation, some under the Food and Drugs Act, of course. There are fields such as dried packaged cereals which, to my knowledge, are not regulated under these.

The Chairman: Let us take cosmetics, then. I do not think you should have mentioned cosmetics, and I shall tell you why. The field of cosmetics is made specifically subject to Bill C-180, and the reason for this is that the administration is not as thorough as it should be in that area. So, therefore, we are not going to have the dual or split jurisdiction, and the authority by statute is taken out of those who administer the Food and Drugs Act and is put under this bill for packaging and labelling. This is being done by legislation, and that is exactly the point we are making.

Senator Connolly (Ottawa West): And this is what we like.

Mr. Seaborn: I do not think it is being put specifically under the bill. It has not been exempted from the direct application of this bill. Only two categories have been exempted precisely by legislation, and those are drugs and devices under the Food and Drugs Act.

Senator Flynn: Why is there this exception?

Mr. Seaborn: The reason for that exception is that it was felt that the most important consideration in the packaging and labelling of drugs and of medical devices was the health consideration. That took pre-eminence over the general area of economic considerations and potential economic fraud, which it is the purpose of this bill to prevent. Therefore, we accept the arguments of the Department of National Health and Welfare that it would be wise to exempt these and leave even the packaging and labelling of such goods in the hands of the people who are highly skilled in the matter of protecting the health of Canadians.

Senator Flynn: The frontier of health is not very precise, and this may be true of drugs and devices. But when we come to food, then it becomes a major concern for the health of Canadians. That is why it is under the Food and Drugs Act.

Mr. Seaborn: Could I also add on the question of jurisdiction that there is no intention that the Department of Consumer and Corporate Affairs would take over the administration of acts such as the Canada Agricultural Products Standards Act and the Fertilizers Act. The intention is that over a period of time the departments which have administered such acts would bring their labelling requirements insofar as they did overlap between this bill and their own, into consonance with ours, to make them consistent, to achieve over a period of time that uniformity as to how you declare the net content and how you declare the name of the manufacturer.

The Chairman: I think, Mr. Seaborn, you are missing the point. You are saying that over a period of time the departments presently administering their own packaging and labelling would bring about uniformity as between their administration and that under Bll C-180. This is to say that the requirements under Bill C-180 are not consistent with the requirements in the existing law relating to other products. You talk about making them consistent by bringing the two statutes together. But you can do that by amending the Fertilizers Act, for instance.

Mr. Seaborn: Yes—the regulations.

The Chairman: By amending the regulations or by amending the act itself. You are going to develop a conflict in jurisdiction. You will have a split jurisdiction and split administration.

Senator Casgrain: In what year was the Fertilizers Act passed?

The Chairman: In 1957.

Senator Casgrain: We are now in 1971. Things are progressing, and the consumer is caught between the conflict of jurisdiction. She is the one who suffers.

The Chairman: These regulations have been brought up to date. The last revision was in 1969.

Mr. Seaborn: It is true that it would be possible to propose amendments in Parliament to the variety of acts which do contain some laoelling provisions. But I wonder if this is the most effective way of achieving the result. If it is a question of bringing regulations under the various acts into line with each other, then the simplest way would be to have a general law dealing with the basic principles of packaging and labelling so that we could bring uniformity to the various acts.

The Chairman: Perhaps we need a uniform disclosure act.

Mr. Seaborn: To some extent Bill C-180 is a uniform disclosure act.

The Chairman: No, it is not. It does not go as far as the existing law in relation to other products.

Mr. Seaborn: Yes. The existing law in relation to specific products will continue to go well beyond the requirements of Bill C-180. I certainly anticipate that the Fertilizers Act, which deals not only with labelling but also with many other important matters, will continue to prescribe certain special inclusions on a label necessary to look after fertilizers. But they are not necessary to look after canned fruit and vegetables. Something different again is necessary to look after canned fish, for example. We believe there is a basic minimum of information which should be available to all consumers, and which we try to establish by putting forward these general rules for uniformity of all packaging and labelling, rather than having a variety which is confusing to consumers and manufacturers alike.

The Chairman: Let us take some of the provisions.

Senator Cook: Does that not mean that you can advance the very good argument of expediency in bypassing Parliament? If you can do it with this, cannot you do it with other regulations? You can amend other legislation by regulation.

Mr. Seaborn: I am not sure if there is a provision in any other act which would be nullified by the passage of this bill.

The Chairman: You have told us that the requirements in the Fertiflizers Act, together with the regulations, parallel the requirements under Bill C-180; but Bill C-180 will govern.

Mr. Seaborn: As fixed by regulation under the Fertilizers Act and as fixed by Bill C-180.

The Chairman: If there is a difference between the two, then the regulations under Bill C-180 will govern. Why split it up and try to do it by regulation?

Senator Lang: Why not do it by amendment?

Mr. Seaborn: I know what is going to happen. Even assuming that this law is passed and we are enabled to write regulations for submission in Council, we will not be able to do it all at the same time. We will start to write regulations covering those areas which are not now regulated. My minister foresees the possibility that for a period of time, and where the labelling requirements under existing acts are relatively good, we will agree to remove them from the application of this bill and come to them later in conjunction with, say, the Department of Agriculture.

Senator Flynn: Would you indicate which regulations are not relatively good, the regulations of other departments that you would want changed?

The Chairman: We have had this kind of answer from almost every departmental representative who has appeared before us. Every time we have raised this question, they say, "Oh, this is what we are going to do." We find that things just do not happen after a bill becomes law. I could recite a number of undertakings given in relation to certain legislation. The statement made in connection with one bill was, "Let this go the way it is. We are considering a new act and we will be able to deal with all these things shortly." I have been waiting five or six years for that new act. I made a resolution then that when we are dealing with a problem we will try to deal with it to the full extent. If we have a principle that you are not going to change statutes by regulation, then that is what I am going to follow.

Senator Carter: We know from experience, in this committee and in many other committees, that the argument of consultation which is always put forward does not always take place, or it takes place and then there is a personnel change or personality conflicts come in. On our Science Policy Committee we had numerous examples where different departments were set up to consult on a required basis and they consulted about once or twice a year.

The Chairman: The urgency decreases after the urgency to get the bill passed into law ceases.

Mr. Seaborn: Might I ask Miss Lozinski to speak to this? I do not pretend to have the legal experience that she does. I appreciate that this provision is one that causes you a great deal of concern.

Miss O. C. Lozinski, Departmental Services Section, Department of Justice: I should like to speak to it from a legal point of view. I should like to emphasize clause 3(1) as a rule of construction. When you have two acts which apply to the same products you must apply them both, except when you run into difficulty and you have actual conflict. Where conflict arises, you call upon rules of construction. There are some unwritten rules of construction, but they are contradictory in this case. A written rule in the statute is required. The reason why this particular bill is likely to conflict to some degree with the special acts which have been referred to is that the special acts do not deal with merely the characteristics of the particular products that they deal with. For instance, if you look at the regulation under the Canada Agricultural Products Act, it deals not only with the many characteristics of such products but also with the characteristics that these products have in common with all other products, namely, quantity, the manufactur's name, and so on.

Since the special acts deal with these general aspects of products and this particular bill is intended to deal with general aspects of the prepackaged products, which are in a much wider class of products, some conflict may be anticipated. So on those general aspects this act is to take precedence.

Senator Flynn: Why? Do you not think you should have written the rules the other way, so that this act does not apply to any product which is already covered by another act?

The Chairman: That is right.

Miss Lozinski: It depends on the policy you wish to implement.

Senator Flynn: It is a question of policy, yes, but, in fact, you are admitting that the interpretation of this provision of the act is the one which we suggested.

The Chairman: The words of clause 3, subclause (1, Miss Lozinski, are absolutely clear. It says:

> ...the provisions of this Act that by the terms of this Act or the regulations are applicable to any product...

and "product" is defined as being any product in the bill. They would apply notwithstanding any other act of the Parliament of Canada. Therefore, in the regulations under this act the provisions of any other act dealing with disclosure are negated.

Senator Connolly (Ottawa West): Let us ask the witness the specific question. You have referred to the Fertilizers Act, Mr. Chairman, and you say that in the Fertilizers Act—and I am not familiar with it—there are specific provisions, not in the regulations but in the act itself, with respect to packaging and labelling. Is that so?

Misss Lozinski: Not, it is not so.

Mr. Seaborn: I would say it is.

Senator Connolly (Ottawa West): Is that a fact?

The Chairman: Yes.

Senator Blois: One witness says "Yes" and the other says "No". Which do we take to be correct?

Miss Lozinski: The substantive section of the Fertilizers Act is section 3, which says:

> no person shall sell, or import into Canada, any fertilizer or supplement unless the fertilizer or supplement has been registered as prescribed, conforms to prescribed standards and is packaged and labelled as prescribed.

"Prescribed" in this act means as prescribed in the regulations. They are very general regulations.

Senator Connolly (Ottawa West): Mr. Seaborn, do you have the specific section which illustrates what I am talking about?

Mr. Seaborn: Section 16 of the regulations prescribes the detailing of labels, and that will contain much of the information that we are anticipating will be prescribed also. But these details are in the regulations section of the act; they are not in the act itself.

Senator Connolly (Ottawa West): I had understood that it was the other way, that there were details in the act but not in the regulations, but apparently that is not so.

Senator Flynn: From an administrative point of view, Mr. Seaborn, do you not think that, if you enact regulations that are found to be in conflict with regulations adopted under another act, that would be a good occasion for consulting with and convincing the other departments to modify their regulations in order to make them in accordance with yours? Then you would be sure that there would be consultation and some kind of agreement. Otherwise I am quite sure you would not bother looking up all the other regulations before adopting yours. You would be generally sure of your policy and you would say, "Well, let them follow our own views."

Senator Cook: Surely, the least the taxpayer can expect is that he would not have to go to another act.

The Chairman: It certainly is the least he should expect.

Senator Cook: He should not have to decide that since this is under the Fisheries Act he had better look under another act to see where he stands.

Mr. Seaborn: And that is precisely what will happen, senator.

The Chairman: Where does it say that in the bill?

Mr. Seaborn: I come here not as a lawyer, Mr. Chairman. I have been asked to explain how things will work, and as an administrator I am saying how they will work.

Senator Cook: You mean, how you hope they will work.

The Chairman: You cannot say how they will work.

Mr. Seaborn: I cannot guarantee how they will work, no. I cannot guarantee either how a law will be interpreted by a court, but I can make fair assumptions.

The Chairman: You cannot guarantee what will be in the regulations either.

Mr. Seaborn: I cannot guarantee it, no, but I can give the best explanation of how I see this act coming into operation subsequently.

Senator Lang: Mr. Chairman, as I see it, the problem here has two components. First, there is the inclusion of the words "or the regulations" in clause 3, which inclusion, I would say, is repugnant to our whole legislative process. That should not stand, notwithstanding any sort of policy area. The second component of the problem, as I see it, is the overriding of other acts by the words of this act "notwithstanding any other Act". That, I think, is a question of policy.

The Chairman: But that moves us into the next item we have to consider, namely, subclause (2) of this same clause. In other words, we have to determine whether the exclusions under clause 3 should be greater than they are, and we have to determine whether all the existing law which operates in this field in relation to products should be excluded from the operation of this bill. They have only excluded certain features of the Food and Drugs Act. The representation made to us by delegates who appeared here was that the exclusions should be much broader. The grocery people attached to their brief

to us a list of about 18 different statutes that operate in this field now. I have picked out several of them here, such as the Forestry Act, Fertilizers Act and the Feeds Act.

Senator Cook: And there is the Fisheries Act.

The Chairman: Yes. There is the Fisheries Act, and I should tell you that the Fisheries Council of Canada appeared before the Commons committee asking that a provision be put in this bill to the effect that this act would not apply to any product that is a fish or marine plant product within the meaning of the Fish Inspection Act. The committee did not recognize their request.

Senator Lang: These are matters of policy, I think you will agree, Mr. Chairman, whereas the first point I mentioned is the repugnancy of the amendment by regulation of other acts.

The Chairman: Whether we add further exclusions may basically be a question of policy, but there is also the further question in it because we are creating law. Do we think it is proper in the circumstances to have split jurisdictions in administration, when you have an administration which obviously seems to be working very well in this field in relation to a great many products?

Senator Cook: It is not proper, certainly when it can be avoided. If it cannot be avoided, well...

Senator Flynn: We should certainly not have conflicts between two departments, in any event.

The Chairman: This is one of the things we try to avoid. We try to make the law clear, and when you have split jurisdictions you are really inviting a conflict.

Senator Connolly (Ottawa West): Mr. Seaborn, suppose the words "or the regulations" were removed from subclause (1) of clause 3, would not do all of these things that you suggest you will do anyway?

Mr. Seaborn: I would refer to my legal adviser on that. The bill has come from the Department of Justice. I should not like to say lightly that you can do this or that, because I may not be fully aware of the significance of certain changes.

Miss Lozinski: It would raise serious problems, because you will see that in subclause (1) we are talking about the provisions of the act that are made applicable by the act and by the regulations. Now, the provisions that are made applicable to all products by the act are the quantity marking in clause 4(1) and the location of the marking in clause 4(2). The requirement—I think it is in clause 8 or 9—about the province having made representations, and clause 10(a) and 10(b) (i) and (ii) and (iii) will be made applicable to any class of prepackaged products approved by regulations, because that subparagraph ends with the words "as may be prescribed."

The Chairman: Let us follow that through and take a fertilizer which is packaged. You then have general regulations as to disclosure that must be on the package. Are you proposing that by regulation you could exempt the prepackaged fertilizer product from the application of regulations in Bill C-180?

Miss Lozinski: I am saying that some provisions in this act are made applicable by the act. Others, such as clause 10(b) (iii), are made applicable only by regulation but, it will be made applicable to a class of prepackaged products only by regulation. If no regulation is planned on the subject matter under clause 10(b) (iii), then there will be no requirement.

The Chairman: Where in the bill does it give us an assurance there will be no regulation to deal, for instance, with prepackaged fertilizer products? There is nothing in the bill.

Mr. Seaborn: There is none, sir, because there has not been any specific exemption for fertilizers in the act. As one of the other senators pointed out, this is a policy matter. One of the policy objectives is to have a general act, a uniform act in order to bring greater coherence and greater uniformity to the packaging and labelling of all consumer items and of all prepackaged goods.

Senator Flynn: Cannot you resolve it the way I have suggested, that if this act or the regulations adopted under it come into conflict with any other act or regulations, the other regulations should stand and that it would be up to you or the department to convince the other department to modify the regulations?

Mr. Seaborn: This is exactly the understanding which has been worked out interdepartmentally and agreed to at the cabinet level.

The Chairman: We know nothing about it.

Mr. Seaborn: I cannot answer the question, sir, from this side without telling you about what has been agreed to. The senator has suggested that this is something to be worked out between departments. I have told you what we propose to do. However, I cannot guarantee it. What I understand you to say is that it ought not to be a uniform packaging and labelling act but that, in fact, exceptions should be made from the application of this act and all those acts which at the present, in some form or another, govern the labelling of products.

Senator Flynn: We assume that they have more experience than your department in this particular field. If you come up with a brand new idea, which is very convincing, you will not have any difficulty in having the other department modify its regulations.

Mr. Seaborn: These other departments will continue to administer their acts and their regulations, some of which will be brought into line with the general regulations under this one.

Senator Flynn: If you want it to proceed in this way you do not need section 3. It is the other way round which should be drafted.

Mr. Seaborn: It would remove a basic purpose of this bill. I would have to defer to my minister.

The Chairman: I think we have chased this argument around the stump so many times that we are almost getting to the stage of shaking hands with ourselves.

Senator Connolly (Ottawa West): It seems to me that regulations made under Bill C-180 can override the provisions of a statute that has been passed by Parliament. May I ask the young lady from the Department of Justice if that is a fair statement to make?

Miss Lozinski: On the factual situation of the facts in existence, I think not. Theoretically, yes, but if we look at the acts, I think not. All the special acts are rendered very much like the section I read out of the Fertilizers Act. The regulations under C-180 will be dealing with specific aspects, and so as not to come into conflict with a provision the other provisions must be as specific.

Senator Flynn: I think you are forgetting paragraph (1) when you say regulations are not going to be very specific.

Clause 18 (1) (l) says:

> generally for carrying out the purposes and provisions of this Act.

That has nothing specific about it.

The Chairman: In addition to that, Miss Lozinski made two distinctions. She was talking to the distinctions, as I see it, and not to the question that was posed. The bill does provide for exemption of the application of existing statutes. It is not theory, but a matter of what the bill says. In fact, it has, gathered into that word, actually the same thing which Mr. Seaborn has been saying, "Oh, we would not do that."

Mr. Seaborn: I think Miss Lozinski has an additional point to make.

Senator Cook: As bad as it may be in this bill, once we accept the principle it could be ten times worse in another bill. It is the principle we are talking about and not the application of the particular bill.

The Chairman: We have changed other bills which have come before us. Where they have pleaded extenuating circumstances we have said, "We will give you two years and whatever the status of the law is, which you have established at that time, that is the meaning to be ascribed to these words, and you have no alternative but to change it by legislation."

Senator Connolly (Ottawa West): I thought Miss Lozinski was doing fairly well, and then she was interrupted. I come back again to subclause (1) of clause 3 in Bill C-180. It seems to me that regulations made under Bill C-180 will apply notwithstanding any other act of the Parliament of Canada, which to me means that the regulations can supersede provisions of legislation. I would like to hear your opinion of that.

Miss Lozinski: When I stated theoretically that was possible, what I meant was that if there had been an act which had enough specific provisions, with spelled out requirements and sufficient particularity, a regulation under this act would come into conflict, yes; but the draftsman stated that he examined the statutes and could not find any such specific provision. I personally do not recall seeing such a specific provision in the special statutes which have been mentioned, such as the Fertilizers Act, the Feeds Act, the Food and Drugs Act, et cetera.

Senator Connolly (Ottawa West): What we have to look at is what is in the statute, of course. Suppose we took out the words "or the regulations" and made this act supersede any other legislation that deals with any subject matter covered by Bill C-180, would you not have enough authority to do that, and to get the power that you want here without risking the possibility of regulations made pursuant to C-180 superseding the provisions of another statute?

Miss Lozinski: I touched on this before, but perhaps I did not explain myself very well. In this particular act, and this may be unusual, some of the provisions are applicable under the terms of the act itself, and I referred to those sections. But there is one section in particular which may be made applicable only by regulaton. Since you have this feature that part of the act is applicable only by the operation of the act itself, if you strike out the words "or the regulations", you would have the practical effect of making part of the act subservient to other acts.

The Chairman: Why not?

Miss Lozinski: We would then be in the position where part of the act made applicable by the terms of the act itself would be in a dominant position to other acts, but another part that could only be brought into force by regulation would be subservient, and this could create a number of problems.

The Chairman: You are emphasizing the point we have been making from the beginning, that the scope of this bill is to override any existing act of Parliament that operates in the products field.

Senator Flynn: And it overrides not only existing legislation but also future legislation. We are going rather far when we amend legislation in advance.

The Chairman: On this point I should draw your attention to the authority to make regulations which you will find in section 18. It is true that the Governor in Council does have authority to make regulations exempting, conditionally or unconditionally, any prepackaged products or class of prepackaged products from any or all of the provisions of this act or the regulations, so presumably the scheme of this thing is to take products out of this bill by regulation. But that is in the discretion of the Governor in Council. It is interesting to note that in paragraph (h) of the power to make regulations, which is found on page 14, the Governor in Council may make regulations and then you will notice the words "subject to any other Act of the Parliament of Canada," as a qualification, "extending or applying any provision of this Act to or in respect of any product or class of

product specified in the regulations that is not a prepackaged product..." So it says here that they can make regulations in the field of products other than prepackaged products and they can govern them by regulations under this act, but only subject to the provisions of other existing statutes. If that sort of qualification related to one of the prepackaged products, it would, of course, be dealing with one of the questions we were raising here, and it might—and I am not saying it would—be an alternative to putting a whole list of exemptions in the statutes. If you limit the power of regulations in relation to prepackaged products and make it subject to any other act of the Parliament of Canada, it would mean that the fertilizer provisions and regulations would still occupy their field and that act would still be operative.

Senator Connolly (Ottawa West): Do you agree with what the Chairman says?

Miss Lozinski: I suppose you could look at it in another way. There is conflict because special acts deal not only with the special characteristics of the products to which they apply. For instance, the Fish Act does not deal only with the peculiar characteristics of fish; it also deals with the characteristics common to all these things, namely, packaging, deceptive packaging, quantity marking; and if there is a policy for uniformity on these general aspects which apply right across the board, then section 3 of this act sets out that policy.

Senator Cook: I do not think anybody is quarrelling with the desirability of having a uniform policy, but what we are talking about is how you go about it.

The Chairman: You want knowledgeable uniformity.

I have suggested that we move on to section 11, but it seems to me that there is a later section which we might deal with first. I am referring to section 20 dealing with offences and punishment. Subsection (3) of secion 20 caused serious questions when we had delegations before us. They raised serious questions about this, and unless some explanation can be put forward to counteract what they said, it really presents a problem as to whether it can stand in the form in which it now is. You will notice what it says. It says:

> (3) Where a corporation is guilty of an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence...

The really offending words are the ones that follow:

> ...whether or not the corporation has been prosecuted or convicted.

On the reading of that section, one of the essentials or one of the elements of the offence so far as the prosecution of a director or officer is concerned is that the corporation has been guilty of an offence. There is only one way of being guilty—you have to be prosecuted and convicted. One answer may be put forward, and that is that in the Income Tax Act you will find a wording that is very close to the wording here. That is section 134 of the Income Tax Act. But it is no argument to say that because Parliament approved of that, then that writes the law for all time. If an element of the offence is that the corporation is guilty of an offence, in order that a director may be if he has assented, then to add those words "whether or not the corporation has been prosecuted or convicted" is meaningless.

Senator Cook: Because you are only guilty if convicted. Otherwise you are only charged.

Senator Flynn: Under the Income Tax Act the purpose is to recover the penalty—and that is not a jail term—from the director of the company. It is not so much to make him guilty on the same basis as the corporation but to enable the department to collect the fine and to collect the amount owing to the department by the corporation. It would be more sensible to say that if you are unable to collect the fine from the corporation, it could be collected from any officer, director or agent who directed or authorized.

The Chairman: Under the Income Tax Act they create an offence in language that practically parallels this subsection (3).

Senator Connolly (Ottawa West): I think there is only one word in the Income Tax Act which differs from this subsection.

The Chairman: Perhaps Mr. Seaborn would like to speak to that?

Mr. Seaborn: I am quite ready to admit that this is one that has caused me some difficulty in the understanding of it, particularly as I am not a lawyer. My rather simplistic interpretation of the phrase "where a corporation is guilty" means where a corporation has been found guilty and convicted. It would seem to me to be a little bit strange in view of the terminal phrase in the clause. The intent is that it should be possible to proceed against either the corporation or an officer of the corporation, depending on the circumstances applicable.

I can do no better than quote from testimony which was given before the committee of the House of Commons. A special witness from the Department of Justice said:

> Under this act in the trial of a director, an essential element that has to be proved beyond reasonable doubt, as with every other element, is that the corporation was guilty of the offence. Unless that element, as the other elements, is proved beyond a reasonable doubt, the director is entitled to an acquittal.

He went on to say at a later stage:

> There need be no formal charge against the company; there need be no formal conviction of the company, no formal finding of guilt in proceedings against the company, but as an essential element of the proceedings against the director you have to prove beyond a reasonable doubt that the company was guilty of an offence.

Senator Carter: Prove to whom?

Mr. Seaborn: To the court. He went on to say:

> There is a difference between saying a company was guilty of it and that the company was convicted of it. There is no need to proceed against the company and convict it, but you have to prove that the company was guilty of that offence. The finding is made in the course of the proceedings against the officer, and it does not constitute a conviction against the company although the finding is that the company was guilty.

I was engaged in conversation with the witness on that occasion. If I remember correctly, he said that the phrase "is guilty" has the same meaning as when the corporation has committed an offence.

Senator Connolly: What you are saying, in effect, is that the witness on that occasion said that when an officer, director or agent is charged and the corporation has not been charged or has not been found guilty, in the trial of the officer, director or agent there can be evidence adduced to prove that the corporation was guilty; and the court on that occasion, although there is no charge, would have to find first of all that the corporation was guilty, and it can then proceed to determine whether or not the officer, director or agent is guilty.

The Chairman: Where does that put us? In a trial of a director or an officer, one of the elements under this clause would be to prove that the corporation was guilty of the offence under the act. The corporation is not before the court. You would have a prejudgment on the guilt of the corporation before it was even charged and tried. This is an extraordinary use of our criminal procedures.

Senator Cook: The corporation would not be heard in its own defence.

Senator Connolly: I just wanted to bring that out.

Mr. Seaborn: That is my understanding of what the witness said.

Senator Connolly: The corporation has no opportunity of defending itself in the trial of the officer, director or agent.

Mr. Seaborn: I do not know whether the corporation would have an opportunity.

Senator Connolly: If the corporation were not available or were not represented, there would be nobody to defend the corporation.

The Chairman: What would the Crown do in those circumstances? Would it call someone from the corporation to admit that they had committed an offence?

Senator Lang: The object of the exercise is to get hold of an officer of the company when the company is bankrupt. That is the purpose of the wording.

Mr. Seaborn: There are a number of circumstances in which it would be impossible to proceed against the company, such as bankruptcy.

Senator Connolly: It is an attempt to penetrate the corporate veil.

The Chairman: They can cover it by making a substantive statement. Any officer or director or agent of the company who joined or agreed with it to commit an offence could make a substantive statement, and then it would depend on what he did or what he attempted to do. This is an extraordinary statement of criminal law.

Senator Burchill: Is it necessary for a corporation to be found guilty before you can proceed against a director?

The Chairman: Not under this wording. I do not know how a prosecution can succeed under this wording. One element is that a corporation may have been guilty of an offence under the act and you prosecute an officer for that offence because he participated in it. One of the elements is that the corporation has been guilty.

Senator Connolly: There must be a better way of drafting this clause. Probably the draftsman looked at section 134 of the Income Tax Act and said "This is probably an appropriate section and we will incorporate it in Bill C-180." They did it, perhaps, without regard to the circumstances.

Mr. Seaborn: I can only say that we have discussed this at some length with the Department of Justice before, during and after discussion in the house committee. So far the Department of Justice has not been able to provide us with alternative wording.

The Chairman: Perhaps we may be able to find alternative wording. We have been known to do that before.

Senator Carter: May I come back to the statement that Mr. Seaborn read. If I remember correctly, he said that it would have to be proved to the court that the corporation was guilty. He then went on to assume that having proven to the court that the corporation was guilty, it would not be convicted.

The Chairman: You would have to prove that the corporation was guilty and you would have to prove that the officer participated in or assented to the commission of the offence. But the corporation is not before the court.

Senator Carter: Then how can he prove it to the court if the corporation is not before the court?

Senator Flynn: It is easy to correct the wording if the intention is, once a corporation has been found guilty, to determine whether any officer or director participated. If you do not want to be obliged to sue the corporation and you want the choice of bypassing it, then why not prosecute the director directly?

Senator Cook: What is the advantage in being able to bypass the corporation?

Mr. Seaborn: Where a company has gone bankrupt it would be impossible to proceed against it. You may want to bring a suit against the director of the company, but if this is the intention, you can always sue the corporation

and recover the fine from the director. You could provide that in the case where a corporation has been found guilty of an offence under this act the penalty may be recovered from any officer, director or agent, if that is your intention. If you want to be sure to be able to collect the fine, then that is something else.

Mr. Seaborn: The real intent is to have freedom to proceed as seems appropriate in the circumstances of the case against the company or against one of the officers, directors or agents. Bankruptcy is one possibility.

Senator Flynn: The problem is transition should not enter into it.

The Chairman: It does not enter into it at all. This is a general statement of law.

Mr. Seaborn: I believe one of the other situations which was in the minds of the draftsmen as they proceeded with this, and in the minds of those who gave them instructions, was the case of dummy corporations. One man stands behind several dummy corporations. There is nothing to get hold of there.

The Chairman: Well, there is the corporation itself. All this says is that if the corporation is guilty of the offence then so long as it exists it can be prosecuted.

Senator Flynn: The wording could be "where the corporation is found guilty of an offence under this act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is liable, on conviction of the offence" to the punishment provided for.

The Chairman: And it would end there.

Mr. Seaborn: That would change the intent of the clause rather considerably.

Senator Flynn: Not the intent.

The Chairman: Senator Flynn, if the intent is to give general authority to the Crown to prosecute officials of a company who participate in the doing of something that is an offence and not prosecute the company, the first serious question is whether it is good practice, as a matter of fact, that we should recognize a proceeding of that kind. I mean where you have offenders, surely you do not pick and choose who you are going to prosecute.

Senator Flynn: The difficulty would be that if you can sue a corporation and a director they are not on the same basis because the person can be jailed whereas the corporation can only be fined. There is a blackmailing power there, if you have the choice.

The Chairman: Shall we call it pressure? There is tremendous pressure because the individual can go to jail. The corporation can only be fined. So the greater pressure would be to have a right to prosecute the officer without having to prove the offence and convict the company.

Senator Cook: You could put him in jail without having to convict the company in the first place.

The Chairman: Yes. Shall we move to clause 11? Clause 11 deals with the standardization of containers. We had a number of delegations before us who were critical of this clause. They were critical on two grounds, one being on the wording of the clause and the use of the expression "undue proliferation of sizes likely to mislead or confuse as to the weight, measure or numerical count." There were two questions that they put forward, and I think there are two questions to be considered. One is whether this can be justified as being good criminal law, because the only basis on which you can support the validity of this bill is on the basis that it is criminal law. That is, it prohibits certain things with penal consequences. We went into that when the Manufacturers Association waa before us last week.

The other question is that in the earlier parts of the bill you have full provisions as to disclosure for net quantity. That is, you must disclose the net quantity in terms of numerical count or a unit of measurement. Then also on the label you must add certain other things such as the nature, quality, age, size, material content, composition, geographic origin, performance, use or method of manufacture of production of the prepackaged product.

We must assume that when this bill is being put forward and these requirements are made for disclosure, the conclusion is that if you have these requirements the consumer is not going to be confused or misled, because if notwithstanding those requirements he is likely to be misled, then they have not put in enough requirements. To come along and say we have provided for net quantity in weight or numerical count to be put on the package and then say that if you have an undue proliferation of any packaged product so that the person is going to be confused as to the weight, measure or numerical count, does not add up or make sense, because all you have to do is read what is on the package and it will tell you the numerical count. It will tell you that there are so many paper towels or it will tell you what the weight is. Whether there are ten different sizes or two different sizes does not matter. The innormation as to weight and numerical count must be stated on the package. That is what the law says.

In those circumstances, how can undue proliferation of container sizes mislead the consumer as to the weight or the numerical count? It cannot, in my submission. The evidence we had here this morning from the Consumers' Association was on the question of the consumer being able to determine value.

Senator Connolly (Ottawa West): Or price.

The Chairman: Or price, and what is a good buy and what is not a good buy. But clause 11 does not deal with that.

Senator Connolly (Ottawa West): I think it does, indirectly. I am just wondering, Mr. Chairman, whether we are thinking of clause 11 as being in the wrong place. I do not think it matters whether it is one place or the other, but if it were appended to or read along with the earlier clauses dealing with the requirements as to disclosure and if proliferation of sizes or shapes of containers

which leads to confusion were also a requirement, then I do not think we would be complaining too much.

It does seem to me that what the consumers' groups said to us this morning with reference to proliferation of sizes and shapes in respect of toothpaste—and they produced samples to illustrate their argument—was quite right. I think there is a danger of confusion.

The Chairman: The only way you could deal with that would be by having a requirement for unit price.

Senator Connolly (Ottawa West): I think unit price is a very difficult rule to apply in the market today. In fact, at any time it would be difficult because the unit price that might have to be put on the package would have to be put on by the manufacturer. That product would go through the hands of a distributor, a wholesaler and ultimately through the hands of a retailer who might want to mark it up or down as the case might be.

I think it is virtually impossible, apart from the question of jurisdiction, to provide that a unit price should be displayed on the label of a package, but I do think that there is some sense in what was said as to proliferation of sizes, because the examples given us this morning do make for confusion in respect to price. We asked Mrs. Jones and others specifically whether they were concerned about price and they said, "Yes, this is really the determining thing."

The Chairman: Another question I asked this morning was whether at this time they supported the idea of stating the price and the answer was "No, not in this legislation". The question we are looking at in clause 11, in the form in which it is here, is whether it makes sense.

Senator Flynn: It does not, but I think you can discover the intention if you simply delete the words "weight, measure, or numerical count of a prepackaged product." You could delete these words and say "... there is an undue proliferation of sizes or shapes of containers sold and that the effect of such undue proliferation of sizes or shapes is to confuse or mislead or be likely to confuse or mislead consumers... "You do not have to say in which way it does, because the number of sizes and shapes is itself misleading.

The Chairman: This is our first consideration. In the form in which it is, it does not make sense.

Senator Flynn: You do not have to say "confuses as to weight".

The Chairman: If you make the changes which you have suggested is it a valid exercise of authority?

Senator Flynn: It is sensible. It gives the minister power to limit the size and shape of containers, period.

The Chairman: The question is whether that is a criminal law or a colourful effort to accomplish standardization of containers which ordinarily would belong under the heading of "Property and Civil Rights in the Province".

Senator Flynn: That is something else.

Senator Lang: In your opinion, does section 11(1), as it now stands, fall within the category of civil rights?

The Chairman: As it stands, I do not think it needs anything. Either we have to go back and re-write the earlier provisions on disclosure, but surely we either assume that those disclosure provisions as to the net quantity are adequate or not. If they are not adequate then we should do something about them.

It would appear they are not adequate in the form in which section 11 is drafted. It talks about undue proliferation likely to mislead the consumer as to weight, measure or numerical count. If the weight, measure or numerical count is stated on the package then there cannot be any confusion.

Senator Connolly (Ottawa West): Would your objection be met if the words "weight, measure or numerical count of a prepackaged product" were eliminated from the section?

The Chairman: This is what Senator Flynn suggested as a way of dealing with it. Certainly it removes that argument.

Senator Flynn: As you suggest, we may be facing the problem of invading the field of property and civil rights.

Senator Lang: I take it from what you say, Mr. Chairman, that you think that if on a package the weight, measure or numerical count is clearly stated there can be no confusion?

The Chairman: That is right.

Senator Lang: I would differ with you on that.

The Chairman: That is your privilege.

Senator Lang: I think you could have two ounces of soap in a two-inch box or in a ten-inch box.

The Chairman: If on that big box you had "Net weight, two ounces".

Senator Lang: I have never read a net weight in my life.

The Chairman: Then you are a poor shopper.

Senator Flynn: You are supposed to read them. That is the object of this bill.

Senator Lang: Does size have something to do with quantity?

The Chairman: The bill proposes that you state the net quantity.

Senator Lang: Am I entitled to assume that size has something to do with quantity?

The Chairman: I am not sure that you would be entitled to that qualification. If you have a large box with a label "Net 2 ounces" you would think you would be getting an awful lot.

Senator Lang: It would be on the bottom in very small print.

The Chairman: No, it must be displayed prominently on the label. You cannot work that excuse to support your shopping method.

Senator Lang: I can see this is going to be an area of confusion or deception.

The Chairman: The confusion may result from the inability of many shoppers to correlate quantities and price that the retailer puts on the package. It is a reasonable thing to expect that legislation should recognize inequalities in education, because every person is not a mathematician.

Mrs. Jones or Mrs. Lister spoke about some college professors in the United States who were unable to do a certain arithmetical problem. It may be that in these days of high specialization, mathematics was not one of the subjects they specialized in.

Senator Carter: I gather from what the witnesses said this morning that what they hoped would result from section 11 was that it would achieve something very much similar to the Agricultural Products Standards Act. We are talking about property and civil rights, and jurisdiction. Apparently, the Agricultural Products Standards Act does not trespass upon provincial jurisdiction. They assume the intent of this section is to bring about the same situation as the Agricultural Products Standards Act.

The Chairman: The question is whether you can write a rule which would apply to every product. I would not want to try to do that, because I could not accept the principle that a standard rule should cover the containers that are to be used for all types of products. Also, I would find difficulty in accepting the principle that the manufacturer should have no choice as to how he packages his products; that he can only have two sizes for all products.

Senator Casgrain: Can I respectfully ask why, because you go to the market simply for the consumer. There are quantities of containers, and consumers are confused.

The Chairman: You are telling me then that putting the net weight on the package is of no help?

Senator Casgrain: If you say that the manufacturer would only be obliged to produce a certain number of containers then...

The Chairman: Let us say two types of containers—a small size that may be four or six ounces and a large size with ten, or twelve or sixteen ounces. This is the way they must package their product. The extent to which you can express individuality in making your products attractive is reduced. The question is how far are we going in this field?

Senator Lang: Mr. Chairman, are we not really dealing with deceptive packaging here?

Senator Flynn: It is the number of sizes and shapes.

Senator Lang: But is it not deceptive packaging?

Senator Connolly (Ottawa West): "Confusing or misleading", which is deception?

Senator Lang: What I am suggesting is that the words "undue proliferation" are misplaced in this context. It seems to me that we are dealing with deceptive packaging practices.

Mr. Seaborn: Not in this clause, senator. There is an earlier clause—clause 9—which deals with deceptive packaging and what is referred to in the trade as non-functional slack fill. The sort of thing you mentioned is a large package with a tiny bit of product in it. Clause 11 is meant to deal with "undue proliferation".

Senator Connolly (Ottawa West): I think Senator Lang is right. Certainly you talk about proliferation of sizes and shapes, but when the effect of this proliferation is to confuse or mislead, then it is deception.

Mr. Seaborn: I agree, but it is the very number which is likely to mislead and confuse as set forth in this, whereas in section 9 we refer to the individual package and how it is filled which could give rise to deception. There is the distinction there.

Senator Cook: There is no element of fraud at all contained in section 11. It is just a question of price and the question of too many sizes where the net result is likely to confuse somebody.

The Chairman: The fraud occurs in section 9.

Senator Flynn: It could result from the number and it does not mean that there has to be a conspiracy within the industry.

Senator Connolly (Ottawa West): I am not talking about numbers of conspiracy; I am talking about proliferation leading to confusion and deception.

Senator Lang: There is no objection to proliferation if it does not mislead.

The Chairman: You would take those words out altogether?

Senator Lang: Yes, I would take them out of the section, and change section 9.

Senator Connolly (Ottawa West): Perhaps section 11 is misplaced.

The Chairman: It may well be in the sense that it should not be there at all.

Senator Lang: I think section 9 could be amended to cover the proliferation of packaging that results in deception.

Senator Flynn: In section 9 you have a situation created by one particular dealer whereas in section 11 you have a situation created by many manufacturers or producers.

Mr. Seaborn: Might I be allowed to get a word in here?

The Chairman: You have been struggling for quite a while and everybody has been popping questions at you.

Mr. Seaborn: I think there is a very good case to be made for the contention that the undue proliferation in itself can lead to confusion and deception. I would certainly agree that the earlier clauses in the act which will lead to a clearer declaration of net contents will take us well along the way to more rational consumer shopping, if you want to put it that way, and this is the object of the bill. But I would submit that the choices are made in the market place, not just on something which says 12 ounces or 13 ounces; they are made in part on the appearance of the sizes of the packages you have. If you face the kind of array there is of detergents, for example—and let us put it on a male basis, and your wife has said, "Will you go down and pick up one of the medium sized boxes of detergents?—you have no idea what is meant by "medium sized". You have a whole range of boxes which may go from 11½ ounces, 12 ounces, 12½ ounces, 13 ounces, 16 ounces, 17½ ounces, 32 ounces, 4 pounds, 4½ pounds, 5 pounds—the very number of individual sizes and weights in this particular case is such as to make it extremely difficult to have a mental conception of what it is that is required, or what you are looking for. Let us take a typical standardized size—a pound of butter. We only sell butter by the pound or by the half pound so if somebody mentions a pound of butter, you know what he means. You have a mental concept of it. You can imagine what half a pound is like. But if you have to try to make a choice from a range of 10, 15 or more different sizes, you have no mental concept of what you are getting, particularly if you are faced with very confusing fractional sizes such as those put forward in the case of the toothpaste this morning. I think the very number can make the choice of deciding what you are getting very difficult. This is particularly the case if many of them are in a close range, and you have packages that look almost the same and contain 14 or 14½ ounces, or 12½ or 13 ounces.

The Chairman: I should hate to carry out the instruction that you have given as an illustration. If your wife told you to go to the market and get a medium-sized packet of detergent, I would say the instruction was inadequate. What is "medium"?

Mr. Seaborn: The job of the housewife who has to do this every week is infinitely simplified if she has a small range and she knows that when she reaches quickly for something she has got what she expected to get. At the present time I submit that she thinks she is reaching for the same sized package as she picked last week but it may be smaller or larger by one or two or three ounces. So the very appearance of them has something to do with your concept of size. This is quite apart from what is declared specifically as a declaration of content.

Senator Cook: We are all old enough to remember when the grocer used to weigh up the tea, flour, and sugar in brown packages. But the packaging industry has come a long way since then with cellophane wrappings and coloured boxes and things like that. Now we have a situation under section 11 where the Minister decides that in a certain class of goods there is undue proliferation, and he says: Stop. If somebody comes along with a new package which is more attractive, is he going to be allowed to go ahead with that? Now what happens in that case? Does he have a hearing and does the Minister make a ruling or what happens?

The Chairman: There is no provision for a hearing. You will recall the provisions we put in the Hazardous Products Act, that where the Minister decided to add a product to the schedule of prohibited products or to remove a product that might be sold under another schedule, there was what was called a board of review to which the person who was affected by it had the opportunity to go and make his presentation.

Senator Cook: But that is not in here.

The Chairman: No, it is not here. Some of the briefs submitted did raise that issue. It was mentioned, for example, last Wednesday by some of the people appearing before us who said that they should have some opportunity to be heard. They may demonstrate that economically this is affecting their operation. For instance, if I want a small tube of toothpaste or a small tin of shaving cream, something of that nature that I need when travelling, it would follow that some variation in size should be available. So how do I decide when it is undue?

Mr. Seaborn: You come at it pretty carefully in deciding what is undue. You have provision even in this act for research and study on matters related to packaging, labelling and the rest. You also indicate that you are free to seek the advice of any number of people who will have expert knowledge in the field, from the Consumer Association to the manufacturer of the product, and I think it would be a terribly rash minister or a terribly rash official who would think to go ahead and submit an Order in Council without very careful consultation first.

The Chairman: We are dealing with what the legislation should be and the rights of the people who are affected. They have rights too, you know, just as well as the consumer. So if there is going to be a change or a determination of that kind, there should be an opportunity to be heard. I am not saying that they may be heard, but there should be an opportunity for them to be heard.

Senator Lang: The section to which Mr. Seaborn referred provides that where the Governor in Council is of the opinion that the number, size or shape of containers, et cetera, is designed to confuse or mislead...

Mr. Seaborn: As soon as you say the word "designed" you suggest conspiracy.

Senator Lang: I am searching for the right word. The purpose of the number, shape and size is to mislead.

Senator Flynn: The number is the result of many producers.

Senator Connolly: No, one manufacturer.

Senator Flynn: But that is not the purpose of this clause.

The Chairman: This is to create standard sizes of containers which would apply to everybody.

Senator Connolly: The word "design" is the difficulty. Suppose a manufacturer of toothpaste decides that he will put out seven or eight different sizes with odd numbers or fractional units in the package. There is no conspiracy so far as he is concerned. He is just proliferating, and perhaps this would result in confusion.

The Chairman: Senator Flynn did not suggest that. He said that the word "design", which Senator Lang mentioned might involve that.

Senator Flynn: If the manufacturer had a monopoly of a certain product, even if he produced several sizes, the consumer would become used to it and there could hardly be undue proliferation in those circumstances, because there are so many manufacturers who produce so many sizes and shapes of containers.

Mr. Seaborn: May I say that in our view the clause as it now stands is quite restrictive in the sense that we would have to be very sure in the event of establishing some standardization of a range of sizes for one product that if the regulation were challenged in the court we would be able to prove to the satisfaction of the judge that there had been undue proliferation such as to confuse and mislead. That is a pretty restrictive provision.

The Chairman: Mr. Seaborn, you are not putting the issue at all. All you need here in order to have standardization is for the Governor in Council to say, "In my opinion..."

Senator Flynn: Yes.

The Chairman: That is all that is needed. That is in the recital, and the recommendations by the minister to the Governor in Council on which the regulations are based. You do not have to prove that there is in fact confusion.

Senator Cook: Or to consult anybody.

The Chairman: The Governor in Council has only to say, "In my opinion..."

Mr. Seaborn: The clause provides:

> Where the Governor in Council is of the opinion that there is undue proliferation...

He has to state that the effect of such proliferation is such and such, and then there is a qualifier as to why he comes to that opinion.

The Chairman: He says, "In my opinion there is undue proliferation of sizes or shapes of containers in which the prepackaged product is sold, and in my opinion the effect of that is to confuse or mislead consumers. Therefore this regulation is enacted."

Senator Connolly: It is discretionary.

Mr. Seaborn: I am merely suggesting that one is unlikely to use that discretionary power if you expect that the first challenge will upset it.

The Chairman: So long as the Governor in Council says "In my opinion..." you cannot challenge him. There should be some opportunity at one or two places where the person who is convicted—

Senator Cook: You might have a very large sum of money tied up in a product which is banned.

The Chairman: The person who will be affected by the order should perhaps be heard before the order is made. When the order is made he should have the opportunity to appeal, not to the court but to a board of review.

Mr. Seaborn: Section 11 says that he may seek the advice of dealers of that prepackaged product.

The Chairman: But it does not say that he must take it.

Mr. Seaborn: There is a provision for publishing the proposed regulations in the Canada *Gazette* to allow them to be made public before they become final. There is the repeated declaration that there will be consultation with those affected, with manufacturers, retailers and consumers, at a preliminary stage when one is drafting the regulation. This has been done by other departments and also by my own department. I do not think it is contained in the Agricultural Products Standards Act that there must be consultation before sizes are set, but it has in fact taken place.

The Chairman: We have dealt with the major points that were raised by the people who made submissions. The use of the word "age" on page 6 was mentioned. It says, "respecting the nature, quality, age, size". What does the word "age" mean there? Is it intended to mean the date of manufacture or production?

Mr. Seaborn: It is meant to have a very general meaning, namely, the details to be spelled out in the regulation. It could apply to the date of manufacture, or to the terminal date for use of the product, on its reasonable shelf life.

The Chairman: Whatever it is intended to say, we should spell it out, giving the date of manufacture, so that the consumer can calculate that the product was manufactured six months ago. Some candy manufacturers had a practice of putting on a limit slip where candy was being merchandised through drug stores. They indicated the useful life of the product.

Senator Casgrain: The same applied with the yogurt people.

The Chairman: Age is not enough, because the word has a bad connotation with many people.

Mr. Seaborn: One of the difficulties that we faced in putting in this very general word is that in this area the state of the art has not developed sufficiently. Anyone is able to give a clear and definitive procedure for giving the best protection to consumers in a variety of products. A number of considerations enter in. When the product was packed may be relevant, but with some items they are valid for 150 years.

The Chairman: The really relevant information is the date of manufacture or production.

Mr. Seaborn: I do not think so. Some goods manufactured in June 1971 may still be perfectly useable and edible in January 1975, but any product produced in June may not be edible two months later, depending on the sort of storage and handling it has in the intervening period. If we want to arrive at a kind of protection which ensures that we do not get products of bad quality or products that are no longer edible, we must have a combination of date and storage.

Senator Connolly: What do you visualize in connection with natural products?

Mr. Seaborn: I do not see that this would necessarily apply. We are talking primarily about prepackaged products, senator.

Senator Connolly (Ottawa West): Well, you can buy prepackaged vegetables. You can buy prepackaged potatoes and prepackaged celery.

Mr. Seaborn: Perhaps it would be useful to describe it as the spring or fall crop, 1971. I am not an expert on potatoes.

Senator Connolly (Ottawa West): I am not an expert on vegetable products at all, but I just wondered if this would cover it.

Mr. Seaborn: It could, if we can make regulations.

Senator Connolly (Ottawa West): I am not suggesting your umbrella does cover it; I am simply asking if your umbrella does cover it.

Mr. Seaborn: I think it could cover that. It was meant to be a general wording on the basis of which regulations could be passed which would be relevant to different kinds of products. Perhaps a regulation which would be applicable to potatoes packed in a bag would be not at all applicable to frozen vegetables. There would be other considerations.

Senator Connolly (Ottawa West): I think you have answered my question, but now that you have mentioned frozen foods, is there anything specific in this act in connection with packaged frozen products that would regulate the situation where the frozen food thaws out and is then refrozen and perhaps damaged?

The Chairman: There is nothing specific in this bill, senator.

Mr. Seaborn: Nothing specific.

Senator Connolly (Ottawa West): Is there anything implied?

The Chairman: No.

Mr. Seaborn: There could be under precisely this part dealing with the nature and quality and age of the product. I might say that one device that is being worked on is a symbol which will change colour when frozen foods reach a certain temperature. The technology is far from being perfected. The idea is that frozen food must be kept at a certain temperature in order to sustain long life and, if for any reason, that temperature rises to a much higher degree some time between when it is packaged and sold, there could be an indicator on the package which would warn customers to watch out because the temperature has risen to a high degree and the product is no longer safe for consumption.

Senator Connolly (Ottawa West): I think you would have a real problem there, because without any bad faith on anybody's part frozen goods might be affected by temperature fluctuations owing to faulty refrigeration. If you were to try to regulate that you might have a problem.

Mr. Seaborn: But it would not be simply a question of evil intent, senator.

Senator Connolly (Ottawa West): Well, are you taking authority to deal with a situation of this kind?

Mr. Seaborn: With respect to the marking, perhaps, but I hesitate to go farther. I hesitate partly because the technology of the art has not been that far developed. Moreover, I do not know whether it would fit into this situation. It might, but I would not guarantee it.

The Chairman: Another point of concern, Mr. Seaborn, is the question of being required to mark on labels certain processes which are secret.

Mr. Seaborn: The secret process, yes.

The Chairman: Manufacturers regard the secret process as being personal property, and yet under the language of the disclosure on the label such information is required respecting the method of manufacture or production of the prepackaged product that they are concerned that they will have to disclose their secret processes on the label. They certainly do not wish to give out their special know-how in producing the particular article. Surely there should be some qualification on that. I cannot conceive that this is what was originally intended by this disclosure aspect.

Mr. Seaborn: No, the intention was something much more straightforward, as you can imagine. For example, it should not be labelled "hand-made" if it was turned out by machine.

The Chairman: Can we not have some language that will convey what you want without it being as sweeping as this?

Senator Connolly (Ottawa West): Perhaps Mr. Seaborn can speak to the minister about that.

Mr. Seaborn: I can only reiterate what my minister said to the house committee, and that is that it was not the intention to use this clause to require on a package disclosure of a secret formulation. That is all I can say about it at the moment.

The Chairman: The committee accepts all those statements in good faith, but we think something should be put on paper, Mr. Seaborn, because administrations

change. Ministers change, and when they do the new ministers may have different ideas. There may not be any immediate recollection that a particular representation was made. So where it is possible we should clarify as much as possible right in the bill.

We seem to have covered the points that were raised by the submissions that were made to us. Nevertheless, I for one, as chairman, would like to hear the minister again before we finally conclude how we intend to deal with these particular points. I do not doublt, Mr. Seaborn, that you will be able to tell the minister how our thinking goes.

Mr. Seaborn: Yes, I shall certainly do that.

The Chairman: I suggest we should adjourn further consideration of this bill until next Wednesday. Is that agreeable to the committee?

Hon. Senators: Agreed.

The Chairman: As we have no other business on the agenda today, I suggest we adjourn.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 22

WEDNESDAY, MAY 12, 1971

Second and Final Proceedings on Bill C-215,

intituled:

"An Act to establish the Textile and Clothing Board and to make certain amendments to other Acts in consequence thereof"

REPORT OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

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THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28).

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, April 22, 1971:

"Pursuant to the Order of the day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Aird, for the second reading of the Bill C-215, intituled: "An Act to establish the Textile and Clothing Board and to make amendments to certain other Acts in consequence thereof".

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, May 12, 1971.
(24)

Pursuant to adjournement and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to further consider the following Bill:

Bill C-215 "An Act to establish the Textile and Clothing Board and to make certain amendments to other Acts in consequence thereof".

Present: The Honourable Senators Hayden (Chairman), Beaubien, Benidickson, Blois, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Haig, Hays, Isnor, Lang, Macnaughton, Martin, Molson, Sullivan and Welch—(18).

Present, but not of the Committee: The Honourable Senators Casgrain, Fergusson and Heath—(3).

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

WITNESSES:

Canadian Importers Association Inc.:

Mr. Keith G. Dixon, Executive Vice President;
Mr. Murray E. Corlett, Q.C., Legal Counsel;
Mr. B. Andrei Sulzenko, Administrative Assistant.

Canadian Textiles Institute:

Mr. J. I. Armstrong, President;
Mr. R. H. Perowne, President, Dominion Textile Limited;
Mr. F. D. Brady, General Counsel;
Mr. D. Taran, President, Consolidated Textiles Limited.

Department of Industry, Trade and Commerce:

Mr. B. Howard, Parliamentary Secretary to the Minister of Industry, Trade and Commerce.

Upon motion it was Resolved to report the said Bill without amendment.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, May 12, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-215, intituled: "An Act to establish the Textile and Clothing Board and to make certain amendments to other Acts in consequence thereof", has in obedience to the order of reference of April 22nd, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

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Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, May 12, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-215, to establish the Textile and Clothing Board and to make certain amendments to other acts in consequence thereof, met this day at 9.30 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, the first bill we have before us this morning is Bill C-215. This is the continuation of a hearing we had two weeks ago, at which the minister was present and made a presentation.

This morning we have two groups who wish to make presentations and the department is represented also.

We can consider the bill and decide what we are going to do with it.

The first group we have here is from the Canadian Importers' Association. According to the memorandum I have, they are represented by Mr. Keith G. Dixon, Executive Vice President; Mr. Murray E. Corlett, Q.C., Legal Counsel; and Mr. B. Andrei Sulzenko, Administrative Assistant. I understand Mr. Dixon will make the presentation.

Mr. Keith G. Dixon, Executive Vice-President, Canadian Importers' Association Inc.: Mr. Chairman and honourable senators, on behalf of the Canadian Importers Association Inc.—Association des Importateurs Canadiens Inc.—we should like to record our thanks to you and your honorable colleagues of the Senate Standing Committee on Banking, Trade and Commerce for the opportunity to present our views on Bill C-215 which is now under your consideration.

Bill C-215 proposes "An Act to establish a Textile and Clothing Board and to make certain amendments to other Acts in consequence thereof". As you are undoubtedly aware this bill was first introduced in the House of Commons on January 11th, 1971 and following consideration by the House of Commons Standing Committee on Finance, Trade and Economic Affairs, passed through the Commons on April 6th, 1971. The bill is part of the Government textile policy announced by the Minister of Industry, Trade and Commerce, the Honourable Jean-Luc Pepin, in the House of Commons on May 14th, 1970. Our Association first received a copy of the proposed legislation on January 15th, 1971 and on that date issued a statement setting out the Association's views on the proposed legislation. The statement was widely circulated at that time and subsequently reproduced in the minutes recording our appearance before the House of Commons Standing Committee on Finance, Trade and Economic Affairs on February 16th, 1971. Copies of the statement are available for any honourable senator who may desire a copy. Also available Mr. Chairman, are copies of our brief to the House of Commons committee offered by representatives of the association on February 16th, 1971.

Our association has carefully followed the progress of this legislation through the House of Commons since its introduction on January 11th, 1971 and studied the recorded considerations of the House of Commons Standing Committee on Finance, Trade and Economic Affairs during their deliberations on this proposed legislation. To the best of our knowledge witnesses appearing before the House of Commons Committee, with the exception of our association and the Consumers' Association of Canada, could be considered supporters of the proposed legislation. This legislation is designed to be restrictive but regrettably the extent to which it will restrict is unknown at this time to all interested parties including The Minister of Industry, Trade and Commerce, and it is perhaps for this reason that there has not been more public and commercial concern for the serious implications contained in the bill. In our view the legislation goes far beyond the need of Government to intercede in Canada's international trade, and we submit that the bill, if passed and proclaimed in the form adopted in the House of Commons on April 6th, 1971, will have serious and unfortunate consequences for those concerned with Canada's exports, Canadian consumers of textile products, and indeed the Canadian textile industry. Our review of the proposed legislation prompts the following comments.

(1) The proposed legislation seeks a means to protect a certain segment of Canadian industry at the expense of all other sectors of the Canadian public.

(2) The bill as it now stands offers a means to effect extraordinary powers of Government intrusion into areas of commercial endeavour.

(3) The proposed legislation finds its source in an industry that has failed to remain either creative or competitive and therefore seeks a solution to some very real problems through Government action designed to restrict competition.

(4) The Canadian textile industry has made it clear that it feels a fair proportion of the Canadian textile market should be theirs by right and not as a result of the distillation of normal commercial competition.

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(5) The consequential amendments proposed in the legislation, specifically clauses 26 and 27, appear to seek similar Government interference in normal commercial trade, in areas other than those covered in the body of the bill. It is our view that these consequential amendments need the most careful consideration by you and your Honourable colleagues if we are not to be faced with a series of measures designed to protect various sectors of the Canadian economy alleged to be commercially injured by imports.

It may be useful to review briefly the current protection offered and available to the Canadian textile industry. The Customs Tariff clearly indicates a range of duties which by themselves should be adequate protection for an industry that claims to be well equipped and competitive. Tariffs on cotton textiles range as high as 24 per cent on a most-favoured-nation rate and clothing of varying types is offered protection as high as 32 per cent, also on a most-favoured-nation rate. In addition such textile imports naturally bear their appropriate assessment of federal and provincial sales taxes at various levels of trade. Also the Government presently has (and uses its) authority to impose surcharge duties and to negotiate voluntary restraints on textile products thought to be injuring the Canadian producer. The appropriate Government departments have authority under present statutes to investigate textile and other imports under the provisions of the Anti-Dumping Act and under the Tariff Board. Finally, the new Textile Labelling Act, Bill S-20, passed by Parliament last year, the regulations for which are now in the course of preparation, will act as a deterrent to Canadian textile imports. It may be noted that, while the Textile Labelling Act and its regulations will also apply to Canadian manufacturers, we suggest that this will be an additional advantage to the Canadian industry. While we cannot dispute the merits of this labelling legislation it will, we suggest, be a greater burden to the foreign exporter trading with several markets than to the Canadian manufacturer.

The Canadian textile industry has often been quoted as stating that they can meet the competition from the so-called developed countries but that their difficulties arise with the competition from the developing or low-cost countries. In this connection we should like to submit for your consideration figures taken from the Dominion Bureau of Statistics Trade of Canada, December 1970, which indicate that about one third of Canada's textile imports by dollar value originate in low-cost countries. Please refer to Appendix A. Appendix B sets out domestic production of textiles and clothing for the years 1968 and 1969 drawn from the Canada Year Book and from the Canadian Textiles Institute's figures. Appendix C on the same page notes that the total imports from low-cost countries for 1970 as a proportion of total domestic production in 1969 is a mere 6.9 per cent by dollar value.

Insofar as the Canadian textile importer is concerned the proposed legislation presents a most serious handicap in that the bill anticipates continuing submissions to the Textile and Clothing Board at the request of a wide variety of Canadian textile producers. Inevitably the Bill therefore inhibits all textile imports and this results in an immediate restriction of choice being made available to the Canadian consumer. The minister at a luncheon meeting of our Association in Montreal on January 20th, 1971, indicated that it was his interpretation of the legislation that the only function of the Textile and Clothing Board would be to review submissions received from the Canadian textile industry and recommend to him and his colleagues in the Government an appropriate course of action. While this is a reasonable interpretation of the purpose of the Bill there is sufficient evidence that the legislation provides for prompt restrictive action by the Government following the Textile and Clothing Board's consideration and report. Under the circumstances, therefore, it would appear to our Association that while the restrictive powers will remain in the hands of the Government the report of the Textile and Clothing Board will be a serious consideration in the Government's decision. This in our view grants wide and unnecessary influence to the Textile and Clothing Board which will in fact result in decisions being taken which are not only adverse to the Canadian textile importers' interests but also adverse to other sections of the Canadian textile industry.

In conclusion, Mr. Chairman, we should like to draw your attention again to the possible serious consequences of the amendments proposed in sections 26 and 27. Apparently the Government in introducing this legislation with its consequential amendments felt it necessary first to create the Textile and Clothing Board, and second introduce by this legislation the authority to create or provide for similar boards with similar powers to be concerned with other Canadian industries thought to be or alleged to be commercially injured by imports. We suggest that this authority is unnecessary at the present time and that the consequential amendments would be more appropriate if they were confined to the subject of the legislation, namely textiles. The legislation as a whole and the consequential amendments in particular have been viewed with some concern by Canada's trading partners abroad. Not unnaturally, interested foreign exporters and members of our Association are apprehensive at the inclusion of broad powers to restrict imports included in a Bill whose prime purpose, we are advised, is to attempt to rationalize and make more competitive the Canadian textile industry. We therefore respectfully urge, Mr. Chairman, that you and your honourable colleagues carefully consider those consequential amendments and their possible significant effects not only on Canada's international trade but also on the interests of the Canadian consumer. Thank you, Mr. Chairman.

The Chairman: Mr. Dixon, you refer to clauses 26 and 27 of the bill. Members of the committee will know that those are the two clauses that impart certain amendments to other statutes and really provide the authority or power that carries the minister on from the stage of the board's report or recommendation.

Addressing ourselves to those two clauses for the moment, Mr. Dixon, is it your suggestion to strike them out?

Mr. Dixon: No; to strike out the word "goods", which appears in both clauses, Mr. Chairman.

The Chairman: The wording of clause 26 refers to "textile and clothing goods".

Mr. Dixon: And clause 27?

The Chairman: Clause 27 refers to "goods". What would you propose should replace the word "goods"?

Mr. Dixon: I would ask our counsel, who has assisted us with regard to this particular clause, to comment.

Mr. Murray E. Corlett, Q.C., Legal Counsel, Canadian Importers Association Inc.: Mr. Chairman, with reference to clause 26, the Association has in mind that the proposed section 5(2) of the Export and Import Permits Act be restricted to subparagraph (a), which relates to the functions of the Textile and Clothing Board under Bill C-215 deleting subparagraph (b), which has no bearing at all on textiles.

The Chairman: I am not so sure, Mr. Corlett, that I agree with that. The Anti-Dumping Tribunal was established two years ago mainly to determine damage or injury in relation to goods said to have been dumped. The following year the legislation was amended so as to give power to the tribunal to make determinations of damage or injury without any reference to whether or not the goods were dumped.

Actually, as I put it to the minister the other day, the Anti-Dumping Tribunal could be authorized to perform the function for which the Textile and Clothing Board would be established. Would you object to that?

Mr. Corlett: No; this Association would not object to that procedure, although we had been given to understand that the Government decided that it wanted a special board relating to the subject of textiles.

The Chairman: The explanation we were given for that was that the Anti-Dumping Tribunal did not have authority to initiate its own inquiry. Of course, a simple change in this bill could have accomplished that. However, it is interesting to know that you would not object to the Anti-Dumping Tribunal, but you object to the Textile and Clothing Board. They would be doing the same thing, would they not?

Mr. Corlett: Yes, they would. We recognize that there was an amendment to the Anti-Dumping Act earlier in this session. However, it is the feeling of the Association that if the Anti-Dumping Tribunal considered that there was material injury to a Canadian industry arising from imports from low-cost countries there was already an adequate remedy, namely in the form of the surtax which may be imposed under the authority of section 7 of the Customs Tariff Act.

The textile industry has informed the Government that they need additional assistance in order to carry out its program of rationalization. We want the Government to have the right, after review by the Textile and Clothing Board, to impose a unilateral quota on imports. The Government, as we understand it, has said as a matter of policy this is what they propose to do. However, our concern is that if subparagraph (b) of the consequential amendment provided for in clause 26 appears, the same right will be given to any other industry in Canada as long as the Export and Import Permits Act exists.

These other industries, as far as we know, have not asked for this assistance. If the leather goods industry requires assistance, our view is they should go to the Government and sell the bona fides of their system to the Government in the same manner as that adopted by the textiles industry.

The Chairman: Do you say that subparagraph (b) on page 13 does not relate to the subject matter of this legislation?

Mr. Corlett: That is our view, sir.

The Chairman: Although when it touches on the provisions of the Customs Act, goods is defined in the most broad language in the definition section:

> "goods" means goods, wares and merchandise or movable effects of any kind, including vehicles, horses, cattle and other animals.

I would have thought the objection might be, if the Textile and Clothing Board is intended to function in relation to that industry, why is the authority provided in paragraph (b) on page 13 to deal with anything that comes within the subject matter of goods, and in respect of which the Anti-dumping Tribunal has functioned or may function?

Mr. Dixon: This is basically our argument, Mr. Chairman. The same applies more specifically on clause 27, where the word "goods" is specifically used.

The Chairman: Yes, that is right. I have been doing all the questioning. Have any honourable senators some questions?

Senator Desruisseaux: Since you have certainly made some study of this, and surely made some comparisons with other importing countries of textile goods, how does your association view the Canadian textile importation control and restriction compared with the American?

Mr. Dixon: Basically we feel the Canadian textile industry has similar and, in many cases, more protection and more recourse than in such countries as the United States or Great Britain, or any other countries in Europe. We are satisfied with the customs tariff, the series of voluntary restraints permitted under existing legislation, the authority the Government has to apply a surcharge if serious injury is caused in a particular textile product, such as shirts, or is thought to be injurious, when they apply a surcharge for an unlimited period or a renewable period. In addition, there is recourse, as the chairman has mentioned, the Anti-dumping Tribunal. While the Anti-dumping Tribunal itself cannot, as the chairman rightly pointed out, originate an investigation, matters that are drawn to the attention of the Department of Revenue, who do have the authority to initiate an investigation, quickly received attention from that department. Finally,

of course, there is the Tariff Board, which is a court of last resort, as it were, for both the textile importer and the textile manufacturer. We are satisfied basically by comparison that Canada stands well in protecting its domestic industry.

The Chairman: Mr. Dixon, as I understand your presentation, if clause 26 remains as it is, except that paragraph (b) on page 13 is struck out, that clause would be satisfactory to you?

Mr. Dixon: It would, sir, yes.

The Chairman: In other words, what you are doing is limiting it to the Textile Act, and to deal with textile and clothing goods?

Mr. Dixon: Right, sir.

The Chairman: Your area of operation, of course, and your function, judging by your title, the Canadian Importers' Association, relates to every variety of goods imported.

Mr. Dixon: This is true, sir.

Senator Isnor: You suggested striking out the word "goods". Would you give us a definition of "goods" as it applies to your association?

Mr. Dixon: We feel, as the chairman just mentioned, almost any product you can think of would be covered by that statement.

Senator Isnor: In fact you do away with the bill if you do away with the word "goods".

Mr. Dixon: If we cannot succeed in persuading the Government, or more particularly at this time the senators, to recommend the bill be done away with entirely, we would at least like to confine it entirely to the subject matter on hand, which is textile.

Senator Isnor: What percentage of imports comprise goods by the yardage compared with manufactured goods?

Mr. Dixon: Our best estimates—and they are only estimates, because, as I think you are aware, the textile industry is a very fragmented industry, and there are people in this room who could confirm that fact; there is a lot of selling and buying all along the stages of production—our best estimates are that 60 per cent of goods imported are for further production or manufacture in Canada, for garments and so on.

Senator Isnor: Sixty per cent?

Mr. Dixon: Yes.

Senator Isnor: Yard goods?

Mr. Dixon: Yes, or back from yard goods, by which I mean yarn or raw materials.

Senator Isnor: And 40 per cent manufactured?

Mr. Dixon: Right.

Senator Isnor: What would that include?

Mr. Dixon: The preponderance with which the Canadian textile industry is concerned is the shirt or cheap garment, T-shirt type of product.

Senator Isnor: From one country only?

Mr. Dixon: No, it is from a group of six countries, largely in the Far East. As I mentioned in our presentation, the Textile Institute has often been quoted as saying they can handle what they regard as normal competition, but they find it difficult to meet competition from the Far East low-cost countries, as they call them.

Senator Isnor: Coming back to the 60 per cent, that is yard goods?

Mr. Dixon: Right.

The Chairman: He said yard goods and yarns.

Mr. Dixon: Everything up to yard goods. The remaining 40 per cent is a variety of garments, which includes the most luxurious in the world and also the very cheapest as far as imports are concerned.

Senator Connolly (Ottawa West): May I ask Mr. Corlett a question or two. Under the existing powers the Government can take action to deal with imports that are damaging the Canadian textile industry if it so desires, under the Customs Tariff Act.

Senator Benidickson: We have a new act, the Anti-dumping Act.

Senator Connolly (Ottawa West): That is another matter. I am asking about this one.

Mr. Corlett: You remember when the Anti-dumping Act was implemented there was a consequential amendment to add section 7(1) (a) of the Customs Tariff Act, and where it was shown to the Government that there was injury to the Canadian producer or manufacturer the Government had the right unilaterally to impose a surtax. There was no maximum limit to the surtax at all, and this provision has been resorted to. Now, of course, the determination of material injury has been transferred from the Government or the Executive to the Anti-dumping Tribunal.

Senator Connolly (Ottawa West): The Government has very broad powers to deal with any situation that might be considered damaging to a segment of the industry. What I am concerned about is this. We have come here to discuss this bill. This bill does not give the Government any more powers. What the bill apparently seems to purport to do is to supply the Government with information based on an inquiry, a hearing, at which industries like your own can appear. Is it not better for you to have an opportunity to influence the decision the Government might make by appearing before these boards, whether it is this board or the Anti-dumping Tribunal? Are you not

better off to have these boards available to you than you would be if the Government were simply acting on the best of recommendations made by officials in the department?

Mr. Corlett: That is true, senator, up to a point, as far as we see it. It is this consequential amendment that has been discussed earlier this morning which would go one step further and give the Government another weapon, namely the right to impose a unilateral quota on imports. If you look at section 5 of the Export and Import Permits Act today, you will see that the Government is restricted to certain types of situations where it can impose a unilateral quota.

The Government of Canada has said this is our policy with reference to textiles. Although initially it felt that there were other adequate remedies available to the textile industry the Government has gone along with that, and we will have to accept it, but we are saying that there should be restrictive right to impose a unilateral quota, which can be achieved by this consequential amendment to the Export and Import Permits Act, but restricted to the subject matter of this bill, namely, textiles and clothing products which are defined in section 2.

The Chairman: Senator Connolly, there may be a little confusion because of the fact that there has been included in this bill an amendment to the Export and Import Permits Act—that is section 26—and there may also be some confusion because section 27, purports to amend the Customs Act. Ordinarily you would expect that to be done in bills proposing direct amendments. They have used this as sort of a catch-all for purposes of enlarging the authority under the Export and Import Permits Act and Customs Act to deal with a situation that will occur under this bill.

I think the conclusion that you reached seemed to be the right one, that at the present time, and quite apart from this bill, the Anti-dumping Tribunal, on a reference by the minister, has full authority to deal with any question of damage or injury by reason of imported goods.

Senator Benidickson: Which is a relatively new provision.

The Chairman: Yes, the amendment that provides that power was passed last year.

All that is proposed here is that under the Export and Import Permits Act the minister will have authority to act in relation to reports or recommendations that may be made after this bill becomes law by the Textile and Clothing Board, or by the Anti-dumping Tribunal. So, truly, when this bill becomes law you have two places, at least, to which you can go. You can go to the Anti-dumping Tribunal, or in a more limited sense, you can go to the Textile and Clothing Board.

Senator Connolly (Ottawa West): The Government, I think, as a result of the activities of these boards, is not going to be taking a decision—I do not like to use the word "vacuum", but it is not going to be taking a decision without knowing that all the parties have had an opportunity to present their views.

Mr. Sulzenko: It will not be a unilateral decision.

Senator Connolly (Ottawa West): It will not be a decision that is taken entirely by an official department.

It seems to me that that is helpful to the Canadian Importers' Association's case. They should have this tribunal. I think that all this is doing is giving you. Correct me if I am wrong, but all this is doing is giving you an opportunity to present your case before action is taken by the Government. Is this a more helpful thing to have, than not to have?

Mr. Sulzenko: What you say, Senator Connolly, does seem reasonable. Although no mention has been made specifically in the brief that has been prepared for presentation before this committee, it is the view of this association—and these points were emphasized before the House of Commons committee—that this will be a permanent bill, and we have the assurance of the present Minister of Industry, Trade and Commerce that import interests would be considered by the proposed board. But we feel that we always have to take into consideration the fact that perhaps in 20 years' time there will be different parties involved in government, and as the wording stands in the bill it would be quite possible, it would seem to us, for a government to ignore import interests completely.

Senator Benidickson: The board is a very small one.

Mr. Sulzenko: There are three members, I believe, Senator Benidickson.

Senator Connolly (Ottawa West): What did you say at the end?

Mr. Sulzenko: That the work of the board, in various sections—and I would be glad to point them out—seems to be couched in permissive language. In other words, the board "may receive evidence submitted to it by an interested party". This is section 12 of the bill.

Senator Connolly (Ottawa West): Certainly you have the prerogative right available to you. If the board decided, for example that your association would not be heard and you felt it was essential, I would imagine you could probably go to the court and get an order requiring the board to hear you.

Mr. Sulzenko: It would be just that much more difficult.

Our suggestion was that it should provide that the board shall hear the interested parties.

Senator Connolly (Ottawa West): There may be sense in that, although there may be times, I think, when the board has to have some restrictions. However, you know this bill better than I do.

The Chairman: All we are noting at the present time is the position of this association. We can decide later whether we think it should be 'may' or 'shall'

Senator Cook: Dealing with section 26, when the minister was before us he said:

> I might also say to you that a number of countries which I have been negotiating have said to us, "Why don't you, like all the others, have the possibility of establishing quotas?" I could name countries where I have been told that Canada is the only country that does not have the proper equipment to deal with these problems and they said to us, "Why don't you have a quota system?"

As I understand it, that is the very purpose of Section 26.

Mr. Corlett: May I make a comment, Mr. Chairman?

The Chairman: Yes.

Mr. Corlett: I think we should bear in mind, senator, that Canada is the fifth largest trading country in the world, which for the size of the country is really a stupendous feat and reflects great credit on our exporters and our producers and, indeed, the Department of Industry, Trade and Commerce. I think it is politically unwise, speaking in the universal sense, to empower authority to institute a system of quotas, and I and our association admire the rather statute way by which the Department of Industry, Trade and Commerce carry on their quota regulations at the moment. They are within the law, of course, but they put the onus for control and the onus for agreement on the exporting countries. They are usually referred to as voluntary restraints. However, there is an onus in the agreement—

Senator Connolly (Ottawa West): You think there is an arm twisting?

Mr. Corlett: I would strongly suggest that there is enough evidence to consider that possibility.

However, the fact is, as I say, that we are a leading world trader and our export interests must continually have preference and, for this reason, I admire the Government, and our association admires the Government, for the factual and effective way in which they are able to regulate, as they do now with some nine or ten countries, textile products by quota. Furthermore, they are saved the huge administrative costs. Although they have a checking system of their own here in Canada, the administration of quota systems is carried on in the country of export, and I would suggest to the chairman and the committee that, perhaps, we are acting very effectively in this area.

Senator Cook: He did make one comment—they do not always work.

Mr. Corlett: It is a sound argument for reducing the number of restrictions, senator, to a minimum. Whatever law or restriction is passed, there are people always seeking amendment around it. However, I am confident that the very existence on the voluntary quotas is a deterrent on the majority not to break the rules.

Senator Molson: My question is somewhat similar to that of Senator Cook. Does not section 26 provide a different remedy from any that could apply under the Anti-dumping Act. Just prior to Senator Cook's question, it was being suggested that all the powers were already there under the Anti-dumping Act and that the Anti-dumping Tribunal could do what was necessary; but in fact, they have not all the options provided by section 26, which enables the system of quotas to be imposed. Am I not correct?

The Chairman: Senator Molson, in my view you are right, because, if the Export and Import Permits Act is to be available for this use, there must be some amendment to the Export and Import Permits Act, I think, having regard to the terms of section 5 as they exist at the present ime.

Section 5 reads, in this fashion. I do not wish to belabour the point, but it just illustrates that, if they want to use this control list on imports, which is provided under section 5 of the Export and Import Permits Act, then they must put in some authority, by way of amendment to that act, so that where the Anti-dumping Tribunal makes a report or where the Textile and Clothing Board makes a report, they can correlate the two—the Export and Import Permits Act and the implementing of the report or recommendation of either one of these boards. Section 5 of the Export and Import Permits Act says:

> The Governor in Council may establish a list of goods, to be called an Import Control List, including therein any article the import of which he deems it necessary to control for any of the following purposes, namely:
>
> (a) to ensure, in accordance with the needs of Canada, the best possible supply and distribution of an article that is scarce in world markets or is subject to governmental controls in the countries of origin or to allocation by intergovernmental arrangement;
>
> (b) to implement any action taken under the Agricultural Stabilization Act, the Fisheries Prices Support Act, the Agricultural Products Cooperative Marketing Act, the Agricultural Products Board Act or the Canadian Dairy Commission Act, to support the price of the article or that has the effect of supporting the price of the article;

There is the extent of the purpose for which the Governor in Council can function under section 5. This section 26 purports to add to that, by saying that where you have a recommendation or a report from either one of these groups, then the Governor in Council can use the facilities of the Export and Import Permits Act, in other words, that the control list that is provided for there is available for use to the extent provided here, that is, to limit the importation of such goods to the extent and for the period that, in the opinion of the Governor in Council, is necessary to prevent or remedy the injury.

That is the scope of this amendment, to provide an effective—I was going to say "weapon"—an effective means of giving effect to the report or recommendation of either one of these boards, if the minister is satisfied that it should be done. But, remember, it is discretionary in him. If he does not make the recommendation to the Governor in Council, then you can assume that that further step would not be taken.

I notice in the wording it says that it must be made on the report of the minister. Therefore, he must recommend.

Our law clerk, Mr. Hopkins, and myself were talking earlier about this. The only concern we had was, who is the minister? The minister referred to in this bill is the Minister of Industry, Trade and Commerce; but who is the minister under the Export and Import Permits Act? In this case, we are fortunate that the minister who administers the Export and Import Permits Act is also the Minister of Trade and Commerce, so we are all right on that one. But in the next one, section 27, we may have to make an addition, section 27, we may have to make an addition, because there are two different ministers.

Senator Molson: In view of the breadth and scope of section 5 which you read. Mr. Chairman, it would seem to me that subsection (b) here on page 13 is relevant. I was questioning that with the witness a minute ago, but when you read the breadth of that section, it seemed to me that subsection (b) is in its proper place here.

The Chairman: Quite true.

Mr. Dixon: May I make another comment here. I do not want to question Senator Molson's judgment, especially after last night's victory, which we are all very pleased about.

The Chairman: You might get a much—

Mr. Dixon: Do you not agree, sir, that the point we are after there is to limit it purely to textile goods rather than to a complete wide range?

Senator Molson: This was my original thought. If we are amending this other act, the Export and Import Permits Act, it seemed to me that then this becomes relevant because of the scope of that act is not in any sense limited to anything to do with textiles, which this act is.

Mr. Dixon: No, but I think our counsel would agree that the original intent of the Export and Import Permits Act was really strategic and military and for foreign exchange.

Mr. Corlett: Yes. Senator Molson will remember that the Export and Import Permits Act was a post war statute. If you look at the debates of that time, you will find that Mr. Howe, who was the minister, indicated that the statute would only be in effect for a few years. There was a definite life to the statute. There have been successive renewals. Our thinking is that this is an extraordinary remedy. If an industry, such as the textile industry, as they have been able to do, can convince the Government that they need this extra remedy, that is fine. But then, if another industry comes along, it is our view as importers, that this other Canadian industry, wherever it may be, has the onus on it to satisfy the Government at that time.

The Chairman: You know, Mr. Corlett, when you are talking about the limited purpose for which this Export and Import Permits Act was designed, at the time it was brought in, it reminds me of the fact that I had to review once the whole history of the income tax legislation of Canada. I went back to 1917, when the Income Tax Act was originally introduced. It was called the Income Tax War Revenue Act. Sir Thomas White, when he was presenting the bill in 1917 in the House of Commons, said that this bill was designed to produce revenue to finance the additional responsibility of sending men overseas and would be terminated of course as soon as the war was over.

Senator Beaubien: It is a long war.

The Chairman: Finally, in 1948, I think it was, we got to the stage where we changed the name of the act. In 1949 we introduced a new Income Tax Act. Once a statute gets on the statute books, and if it is capable of an application that was not even thought of at the time it originally got there, you will find amendments, adding powers, rather than introduce another bill. That is, I was going to say the progress in legislation, but I think rather I should say it is the progression in legislation.

Could we come to section 27, because the same point is involved there, except that we do have this problem in section 27 which proposes an amendment by adding a subsection (2a) to section 22, subsection (2), of the Customs Act.

In this case we have a problem, because the Minister of Customs is not the same minister as the minister of Trade and Commerce. Yet the minister who functions under this new section (2a), I take it, is the Minister of Customs, since they are amending an act that he enforces. So we may have to say "either the minister or the Minister of Customs".

On section 22 of the Customs Act, it may be I should read it and you will get the purport of it:

> (1) Unless the goods are to be warehoused in the manner provided by this Act, the importer shall, at the time of entry,
>
> (a) pay or cause to be so paid, all duties upon all goods entered inwards; or
>
> (b) in the case of goods entered in accordance with the terms and conditions prescribed by regulations made under subsection (3), present in respect of the duties upon such goods a bond, note or other document as prescribed by such regulations;
>
> and the collector or other proper officer shall, immediately thereupon, grant his warrant for the unloading of such goods, and grant a permit for the conveyance of such goods further into Canada, if so required by the importer.

The comes subsection (2)—and I remind you that we are proposing a new subsection (2a). Subsection (2) says:

> (2) Notwithstanding subsection (1), goods of which the export or import is prohibited, controlled or regulated by or under any Act of Parliament, may be detained by the collector and shall be dealt with as provided by any law in that behalf.

Then there is subsection (2a), which is felt necessary to provide the authority of the minister in relation to goods intended for import. Clause 27 of the bill provides:

> Notwithstanding subsection (1),...

Which I have read to you and which is contained in the Customs Act, providing that by paying a duty or providing a bond the goods may be released.

> (2a) Notwithstanding subsection (1), where at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that the goods, the export of which from any country is the subject of an arrangement or commitment between the Government of Canada and the government of that country,...

That may refer to voluntary restraints.

> ...are being imported into Canada in a manner that circumvents such arrangement or commitment, the Governor in Council may, by regulation, prohibit or otherwise regulate the entry of goods to which the arrangement or commitment between Canada and that country relates.

That means that the right which an importer has to pay duty or provide a bond and recover his goods is subject in this case in relation to goods, which I take it may be the subject matter of voluntary agreement, if a country shipping the goods to Canada is attempting to evade the obligations which it voluntarily undertook. The minister, in this case the minister of customs, reports to the Governor in Council, who may prohibit or otherwise regulate the entry. The full forces of subclause (1) would not be available to them.

Senator Molson: Why could this not be done under the Export and Import Permits Act?

The Chairman: Then the conflict would arise as to the right under clause 22.(1) when goods are presented. The customs officer refusing might find himself in trouble.

Senator Molson: It is too late in the process, in effect.

The Chairman: That is correct.

Senator Connolly (Ottawa West): You say, Mr. Chairman, that in effect clause 27 is not related to the Textile and Clothing Board?

The Chairman: That is correct.

Senator Connolly (Ottawa West): This is done entirely by order and regulation made by the minister and it is something to do with the Customs Act.

The Chairman: To be exact, it is an order made by the Governor in Council on the recommendation of the minister.

Senator Connolly (Ottawa West): And the minister in turn has received the recommendation from officials of the department.

The Chairman: That is right.

Senator Connolly (Ottawa West): Because the goods are imported in a manner contrary to or at variance at least with the arrangement made between the Government of Canada and that of the exporting country.

The Chairman : That is right.

Senator Connolly (Ottawa West): Therefore we are not referring to the Textile and Clothing Board at all when we consider clause 27.

The Chairman: No, except that these voluntary arrangements may have more particular application to textile importations and therefore it would have a direct bearing on that industry in particular.

Mr. Dixon: At the moment, Mr. Chairman, the only voluntary restraints are in textiles, with the exception of radio receiving tubes from Japan.

The Chairman: Yes, almost the full import of this applies to textile imports. However, conceivably there could be other situations and this is drawn broadly. Anything that is the subject matter of voluntary agreement on restraints or quantities as between Canada and any other country could be affected by this proposed amendment to the Customs Act. At least, that is the view I take at the moment.

Senator Connolly (Ottawa West): Could I ask one of the witnesses, in view of the discussion we have now had relating to clause 27, might they favour the change that the Textile and Clothing Board be authorized to review the subject matter of clause 27? There is no hearing provided for the imposition of the sanction; it is just imposed by order in council on the recommendation of an official.

Would the Canadian Importers Association be better pleased by having an opportunity to present its case before the Textile and Clothing Board in the event of an order in council being contemplated?

Senator Cook: Is it not simply a matter of evidence as to whether a restraint agreement has been broken?

The Chairman: Are you referring to clause 9, Senator Connolly?

Senator Connolly (Ottawa West): No, just clause 27. Perhaps I should look at clause 9.

The Chairman: Yes; clause 9 provides the authority to the Textile Board, which is limited with respect to the importation of any textile and clothing goods. They have authority either to initiate an inquiry themselves or to act on a complaint from a Canadian producer or a written request from the minister.

Senator Cook: Clause 27 applies only if there is in fact an arrangement between the two governments; it depends on the question of evidence whether it has been broken.

The Chairman: At that stage, I take it, if the Government has made a voluntary arrangement in relation to quantities of goods imported we would be beyond the stage of a question of damage or injury by reason of the agreement. It may be by reason of the abuse of the agreement. The new subsection (2a) imposed by clause 27 of this bill would cover the case where there is an abuse or it is believed one exists in relation to the terms of the agreement.

That seems to be a reasonable authority to grant, does it not? Are there any other questions in relation to this point?

We will move on to your other objections, Mr. Dixon. You are of the opinion that the stream of imports should not be interfered with in any way other than by tariff; is that correct?

Mr. Dixon: The largest handicap, Mr. Chairman, in this proposed legislation as far as the Canadian textile importer is concerned is the uncertainty of future action by the Textile and Clothing Board. No Canadian importer and, indeed, no manufacturer in Canada will ever know in advance literally what product will come under examination of the board at the request of a domestic producer. There will obviously be situations in which a domestic producer in difficulties will appeal for assistance. There will be Canadian producers of similar goods who are quite satisfied with existing arrangements. Undoubtedly, also, there will be some conflict of interest within the industry as a whole.

To the Canadian importer, however, the whole possibility and opportunity for restrictive legislation on virtually any textile product, whether it be an expensive cashmere sweater or a cheap shirt from the people's Republic of China, can be the study of a review by the Textile and Clothing Board at any time, with subsequent recommendations or restrictive action. This is itself is our largest objection to the bill. Had the bill not included these consequential amendments, which inclusion indicates that certain serious restrictive action can result from the board's inquiry and recommendation to the Government, we would have been quite satisfied.

We agree in principle that Canada needs and must have a strong textile industry. At the same time we do not wish it to be entirely protected from world competition. We recognize at the moment that there is an imbalance of trade in so far as Canadian textile imports and exports are concerned, although there are areas of Canadian textile production which are not only profitable, but highly successful in the export field. I think immediately of carpets, where Canada has an enviable reputation.

Our most serious objection to the bill, therefore, is the uncertainty of restrictive action against any textile products following review by the Textile and Clothing Board.

The Chairman: Mr. Dixon it appears to me from what you have said that what you would like would be to have the importer added as a person who is entitled to avail himself of the services of the Textile Board.

Mr. Dixon: This is true.

The Chairman: At the present time, under the bill only the Canadian producer of textile goods, or the board itself on its own initiative, or the minister, may get the subject matter before the board. What you are suggesting is that an importer should be given a right to lodge a complaint to the board.

Mr. Dixon: This is one aspect of our view, sir, yes.

The Chairman: Is this one that you are putting forward?

Mr. Dixon: Yes.

The Chairman: Is this heavy artillery?

Mr. Dixon: No, importers never use heavy artillery, sir.

The Chairman: Sometimes the more subtle approach is better.

Mr. Dixon: Seriously, our interests are first in the uncertainty of the future as far as textile imports are concerned. Equally, we are interested in having the opportunity to present our views and to ensure that we are invited as importers to present the views of the importing community when the board is making its consideration.

The Chairman: You do have that now.

Senator Cook: Under clause 12(2)(c) an importer is an interested party.

The Chairman: You are an interested party under clause 12.

Mr. Dixon: Yes, but there again we come back to our "may" or "shall", which I understood from you on the earlier clause you would consider later.

Mr. Corlett: We could agree. Mr. Chairman, the definition of "interested party" does include an importer. Then, as we see it, if you look at subsection (1) of clause 12,

> The Board may...receive evidence...by an interested party

Senator Cook: That is a good point.

Mr. Corlett: In 10 or 20 years time the chairman of the board might not like importers and he might ignore them. It is true that notice has to appear in the *Canada Gazette*, but from a practical point of view I do not think the average importer would read the *Canada Gazette*.

The Chairman: Certainly we do not have problems about putting the word "shall" in relation to some function of the minister; we do not have that problem here. It is simply that the board, you said, shall in any manner receive evidence submitted by an interested party. We are not going to upset by reason of that any of the order of priorities or anything else, on matters of address. It may make sense, because in that same subsection it says:

> The Board may, in the manner specified by its rules, receive evidence.

Then it goes on to say:

> ...shall take such evidence into account in making its report to the Minister.

There is a difference there. The board decides under the "may" that it will not hear an interested party. Yet the subsection says it

> shall take such evidence into account in making its report.

Having refused to hear him, they do not know what his evidence is going to be and therefore they do not pay any attention, or they do not guess. I think the importer is an interested party, and if he is he should have the opportunity of presenting evidence; he should be in the position of making the decision whether he will go or not; it is not for the board to decide whether it will hear him or not.

Senator Cook: I agree. That seems a good point, Mr. Chairman.

The Chairman: Are there any other points, Mr. Dixon? It seems to me, as I read your brief, that you seem to have touched on the pertinent points. Have I missed any?

Mr. Dixon: No.

The Chairman: I thought you were trying to suggest in your brief that there was adequate protection to the textile industry through the tariffs that presently exist, and I thought you were suggesting that therefore nothing more is needed.

Mr. Dixon: This is how we have basically felt all along, that there is more than adequate protection under the existing statutes. However, as our counsel has pointed out to you and your committee, the Government has been prevailed upon by the Canadian textile industry to take a more in depth look at their particular problems, and this legislation has passed the Commons and is now before you. We would anticipate that we cannot hope at the present time to see the bill substantially amended. Consequently, we have concerned ourselves with trying to restrict its restrictive powers to the minimum.

The Chairman: Just stopping you there, Mr. Dixon, when you say that you could not hope, if you look at what we have done in the past in relation to legislation, we have rewritten the whole thing.

Mr. Dixon: I did not mean to presume your opinion, of course.

The Chairman: You might want to revise the language that you used.

Mr. Dixon: Yes. I do not want to presume your committee's decision. I do want to suggest that we have to try to anticipate varying consequences of your consideration and the final bill. Let me put it this way. I can say this I think. The Canadian textile industry is continuing to be vociferous and anxious to have more and more restrictive measures assessed against textile imports, and eventually, of course, we are concerned that by the consequential amendments this trend will continue. This is even now our dominant concern over the textile review board that is being considered.

The Chairman: The whole basis of this bill—and I think you agreed with that, inferentially anyway—is that it is to deal with the question of damage or injury to the domestic market. I thought I understood you to say that you agreed with that in principle, that that was a worthy objective.

Mr. Dixon: It is indeed, sir. It is just the cost to the Canadian consumer and the Canadian importer and exporter that is our concern. We agree with the rationalization program very much indeed.

Senator Molson: Does your association have a large membership? I suppose it must be very large.

Mr. Dixon: Unfortunately, senator, no, it is limited at the moment to about 640 members, of which 60 only are concerned with textiles. We have some beer importers within the membership also.

Senator Molson: I did not bring that up; you did.

Senator Isnor: Getting away from the legal aspect, are you concerned mostly about the imports or the exports of goods by the yard or manufactured?

Mr. Dixon: Undoubtedly there is in the textile industry a conflict within our association membership concerned with textile imports. There are those who import finished garments who maintain, rightly in their view, that any protection offered to the garment industry should be very limited. I and the majority of our importers are concerned with the import of textile piece goods, where there is further Canadian content to be added before the garment or final product reaches the consumer. There is a conflict within our membership. Naturally those who import garments want the duties and restrictions on garments to be the minimum; those who import piece goods, which are subsequently to be processed in Canada, seek, and feel they have a better ground for, more protection in Canada against imported garments and less protection in Canada against the textile piece goods, which they feel would be to Canada's advantage, and I share their view. There is a division within our association.

Senator Isnor: As expressed just now, your motto would be "Imports for Exports".

Mr. Dixon: Exactly.

The Chairman: I take it we have run through your presentation?

Mr. Dixon: Yes, sir. Thank you very much indeed for an excellent hearing.

The Chairman: I use the word "through" and not "over".

Senator Benidickson: Mr. Chairman, I just want to go back for a little. We originally relied on the Customs Act. You have emphasized the importance of relying on tariffs. We had a big inquiry in 1958, presided over, I think by Mr. Justice Turgeon. He came to the conclusion that the protection required for textiles should be perhaps that which would meet imports from America, and he rejected a lot of the wails with respect to the imports of textiles from the so-called undeveloped countries.

We have not had a great deal of what you might call protective legislation for years. Strangely, we have been getting it in the last two or three years. There is the Anti-dumping Act which is supplemental to the use of tariffs, and we have had the act with respect to a

machinery board, and now we get another board in connection with textiles. What are your comments with respect to the import of textiles from the underdeveloped countries, particularly the Pacific rim countries, with whom we are doing a lot of trade these days?

Mr. Dixon: Senator, in matters of international trade—and I said earlier that Canada is the fifth largest trading nation—we share the view that each country should produce what it can produce best, and I have grave doubts that Canada, with a population of 21 million, is able to produce the complete range of textiles for its citizens at competitive prices.

We find it illogical for Canadian manufacturer to produce the type of goods that are available from the so-called Pacific rim countries. We feel they should concentrate their efforts where their potential lies, which is in carpets, blankets and certain fabrics, and Canadian-styled and Canadian-designed clothes. Basically we subscribe to the view that a customer abroad is just as important as a Canadian textile worker, because the customer abroad provides a livelihood for a vast majority of Canadians, directly and indirectly. At the same time we also submit that an importer has the same right as the Canadian producer, in that he contributes to the economy rather heavily in the form of these duties you have referred to.

In addition, we have the facility of opening the Canadian textile industry or any other industry to the wind of world competition, and to the innovation that comes from free interchange of goods.

The Chairman: Thank you, Mr. Dixon and Mr. Corlett.

We have another association here this morning, the Canadian Textiles Institute, represented by Mr. J. I. Armstrong, the President; Mr. R. H. Perowne, who is the President of Dominion Textile Limited; Mr. D. Taran, President of Consolidated Textiles Limited; and Mr. F. P. Brady, who is general counsel for Dominion Textile Limited.

Mr. J. I Armstrong, President, Canadian Textiles Institute: Mr. Chairman, honourable senators, we, too, very much appreciate the opportunity of appearing before you. We, have viewed the progress of Bill C-215 through the house, and through the parliamentary committee, and now through the Senate, with a great deal of interest.

It is not our intention this morning to table a brief or present a case that might more properly be put to the textile and clothing board.

Our interest has been the subject of many studies in depth in recent years by Government departments, by management consultants and by ourselves. We are not sure that we can add very much to the record this morning, but it did seem to us that it would be appropriate if we presented ourselves and endeavoured to answer any questions you might wish to put to us. We are delighted to have had the opportunity of hearing the importers' presentation by Mr. Dixon and Mr. Corlett and their associates. I think we share the same concern about the Canadian economy in broad terms. I am not sure, however, that we always agree on the best way to bring that about and with your permission, Mr. Chairman, I would like to comment on one or two of the points made by Mr. Dixon.

I am delighted that he agrees with us that there should be a viable and strong textile industry in Canada. To that we say amen. Our industry is one of the largest employers of manufacturing labour in Canada. With the clothing industry, we account for 200,000 employees, 60 per cent of whom are in the Province of Quebec, 30 per cent in Ontario and 10 per cent in the other provinces. It is truly a national industry. There is not a province without one of our mills or clothing manufacturers located in it.

However, Mr. Dixon and the Importers' Association have stated in their brief, and they rest, I think, many of their views on this theme, that this legislation is designed to be restrictive. I do not really think so. The legislation proposed in Bill C-215 is nothing more than a framework for policy decisions which will be made at a later time.

It is certainly not restrictive in the way it is written, and certainly when compared to legislation of other countries it is far from restrictive, even if it were interpreted the way we might wish it to be.

One of the senators compared controls in Canada to those of some other countries. I happen to have with me a paper we prepared a couple of years ago in which we endeavoured to tabulate the controls on imports in other countries and with your permission, Mr. Chairman, I will just refer very briefly to some of the wording from these controls.

First of all, the Benelux countries: All imports from Japan are subject to licence. Quantitative restrictions only on the items included in the quota list, of which there is a long list of almost all textile products. France: Quotas against Japanese and other low cost countries. Then most of the European countries have the Noord Wijk agreement which exists between the Benelux contries, Germany, Switzerland, Italy, France and Norway not to re-export to each other cotton and spun gray cloth originating from Japan, China, Hong Kong, India, Pakistan. Italy has quotas on a six-month basis, and textile items not included in the list are free of control. However, when one looks at the list there are very few items not included.

Possibly the best example of quotas and restraints on trade in some of the other countries are those in Switzerland, where imports of textiles from Japan are not permitted if their prices are lower by more than certain margins. The margins are: Woven fabrics of wool, 12 per cent; cotton, 10 per cent; and other textiles, including most fabrics, 20 per cent. There are others here, but certainly, generally speaking, our controls are nothing compared to those in other countries.

I think it was Senator Cook who noted that we do not have the power in Canada to impose quotas unilaterally at the moment. The international long term arrangement on cotton textiles which was signed by some 32 countries in Geneva in 1951, I think, and reviewed again last year, had a separate addendum pointing out that Canada did not have power to impose quotas unilaterally. All other signatories did, indeed, have that power.

Senator Beaubien: What about the United States?

Mr. Armstrong: The United States has the power to impose quotas unilaterally. The only question in the United States seems to be, as it would be the question here, whether or not it is appropriate to impose quotas in certain circumstances?

Senator Molson: Are there any in effect that you know of?

Mr. Armstrong: There are voluntary agreements between the United States and Japan and other countries, the same as there are in Canada.

Senator Molson: There are no imposed quotas that you know of?

Mr. Armstrong: No, not at the moment.

Senator Benidickson: Did the bill we heard so much about just prior to Christmas in the United States referred primarily to textiles?

Mr. Armstrong: The Mills bill? I recall the bill very well. As you say, it became a Christmas tree in the process.

Senator Benidickson: Did it propose to do more than the present voluntary agreement?

Mr. Armstrong: Yes, it did. The Mills bill proposed at that time, as I understand it, to empower the Government to impose quotas unilaterally on certain textile and footwear products from Japan, because apparently the Japanese were unwilling to negotiate voluntary restraints in areas—

Senator Benidickson: The bill died because of the end of the session in December. Has it been re-introduced here now?

Mr. Armstrong: No, not to my knowledge, although it is still a very active subject in Washington, I believe.

I was saying, Mr. Chairman, that our industry is a very large employer of labour. However, in the last five years, we have lost 8,000 employees in the primary textile industries and 1,000 employees in the clothing industry. This is very significant, because in many of the communities in which the textile industry is located, the local textile mill is virtually the only source of manufacturing employment in that community. And there would be no economic life if that mill did not exist. I could cite several cities, like Magog, Cowansville, Valleyfield, Drummondville in Quebec, Cornwall, Arnprior and others in Ontario.

It has been said by the minister, by the National Industrial Conference Board, and others, that the Canadian primary textile industry and the clothing industry are as efficient technologically as that of any other country in the world. Its productivity is of a very high level, because of an investment of over $1 billion in the last ten years.

There is more money waiting for investment in the industry, too, but not under present circumstances where we are being put out of one market after another by imports from these low cost countries.

Mr. Dixon referred in his presentation to the uncertainty faced by his 60 export and import textile importer members. We face that same uncertainty. Many of our mills have gone out of business quickly because of imports from these low cost countries. This is not unique to Canada or to the textile industry.

The current article, the current cover story in *Time* Magazine, refers to Japan's business invasion. Other countries and other industries are facing the same problem.

Our industry is 80 per cent Canadian-owned. It has shown remarkable price stability over the years. In fact, in the past ten years, textile prices have risen by 3.1 per cent, which is less than a third of one per cent a year. That is an exceedingly good record.

Senator Isnor: Would you repeat those figures?

Mr. Armstrong: Prices of textile products in Canada over the past ten years have risen just 3.1 per cent over that whole period, which is about one-third of one per cent per year.

Senator Beaubien: How much would your wages have gone up in that period?

Mr. Armstrong: Perhaps Mr. Brady or Mr. Perowne could answer that.

Mr. J. R. Brady, Canadian Textiles Institute: Our wages in that period have gone up by at least 80 to 100 per cent.

Senator Casgrain: Is that a general increase?

Mr. Brady: No, not in relation to the textile wages everywhere. Actually, we are paying the highest textile wages in the world. If you take wages and the fringe package. Certainly, if you compare the issue of parity with wages in the United States, this is one area where parity has been achieved. Comparing to wage levels in other competitive countries, there is just no comparison on that point. In the areas in which we are located, the wages compare very favourably with manufacturing in general.

Senator Isnor: That is, 90 per cent in Ontario and Quebec?

Mr. Brady: Taking communities, 60 per cent in Quebec and 30 per cent in Ontario.

Senator Isnor: That is, 90 per cent in those two provinces?

Mr. Brady: Yes.

Senator Hays: Mr. Chairman, the witness said that the increase has been only one-third of one per cent a year.

Mr. Armstrong: Yes, it has, on the average over all textiles. Man-made textiles...

Senator Hays: Your tie, for instance, I am sure you could not buy that tie as cheap as you could then?

The Chairman: That is why he suggested, on the average. All ties are not like that tie.

Senator Molson: The average tie.

Mr. R. H. Perowne, president, Dominion Textile Limited, Canadian Textiles Institute: That is one thing that we do not make, incidentally.

Mr. Armstrong: Carpets, which are within our industry and to which Mr. Dixon referred—the price of carpets is less now than it was ten years ago. The price of the man-made textiles in general is about 11 per cent less than it was ten years ago. In other areas, however, prices have gone up 15, 18 per cent, and so on. I have a whole list of them here. But on average it is one-third of one per cent a year. I think it is fair to take an average over all textiles.

Senator Hays: I think you said in the breakdown that there were 200,000 people employed in the textile industry.

Mr. Armstrong: Yes, sir.

Senator Hays: What is the percentage of retail workers? What is the breakdown, compared to those involved in manufacturing?

Mr. Armstrong: I am afraid I cannot answer that. There are no retailers worth speaking of in our industry—this is manufacturing employment and not the service industries.

There are about 100,000 in the primary industry and about 100,000 in the clothing industry, but these are manufacturing workers and do not include retailers or any of the service industries. Of course, there are many studies on the point, and it appears that the multiplier effect in our industry of associated industries directly dependent on our industry is of the order of two. In other words, if our two industries employ 200,000 people, there are about 600,000 people directly relying on the continuation of this industry and its employment.

Senator Desruisseaux: May I ask another question. Relatively speaking, in the last three years, what has been the value of the imports of textile goods, in these last three years?

Mr. Armstrong: I have the figures here. I can give you the figures in thousands of square yards. Would that be satisfactory, rather than in dollars?

Senator Desruisseaux: I think it is the value that would be the more meaningful, approximately.

Mr. Armstrong: In 1969, imports of fabrics and clothing, and clothing converted into yardage, so that it is one figure, totalled 551 million square yards. Canadian production in that year totalled 619 million square yards.

Senator Flynn: And you exported?

Mr. Armstrong: Yes. Our industry exports roughly $75 million worth of primary textile and products a year, to many countries. Mr. Perowne of Dominion Textile and Mr. Taran, both are exporters, and the exports have been growing.

Mr. Perowne: For Dominion Textile, I can say that over the last seven years, and we hope it will happen again this year, in round figures 7 per cent of our total dollar sales are represented by exports. The bulk of those exports are to British Commonwealth countries. This is putting it into dollar figures, in round figures, it is $10 million to $11 million per annum, in export.

Mr. D. Taran, President, Consolidated Textiles Limited, Canadian Textiles Institute: In our case, the figures are slightly higher. It is 15 per cent of our total dollar sales, in exports.

Senator Flynn: Does that mean that it is less than 50 per cent of the Canadian market?

Mr. Armstrong: That is correct. The total apparent market in Canada for textiles, domestic producers have 50 per cent and 50 per cent is controlled by imports.

Senator Desruisseaux: I asked a question previously. What is the increase per year in the last three years, of imports of textile goods, percentagewise or otherwise?

Mr. Armstrong: In 1964, for example, our imports were 438 million square yards; in 1966, 469 million square yards; in 1968, 512 million square yards; and in 1969, 551 million square yards.

We have been concerned with the erosion of our industrial base on which the exports which have been referred to must be based.

Canada imports more per capita from low cost countries, than any other country in the world.

For example, we take $28.43 in United States funds equivalent, from low cost countries, which is double that of the United Kingdom—

Senator Beaubien: Per head, you are talking about now?

Mr. Armstrong: Yes, per head. It is double that of the United Kingdom which takes $15.61, three times that of the United States at $10.40 and four times that of the countries making up the E.E.C. in Europe, which is $6.86. This is what really concerns us and is the problem with which we are faced. We have said many times that we are prepared to compete with the countries of Western Europe, the United States, England and all the developed countries of the world. This is so because we are efficient technologically and we feel that we can do it. This does not apply to imports from countries such as Taiwan and Hong Kong, nor to other industries in other countries.

Mr. Dixon referred to the fact that we should perhaps in Canada do what we can best do and let Taiwan and Hong Kong do what they can best do. I will challenge Mr. Dixon to point to any manufacturing industry in Canada which can compete with these countries.

Senator Cook: Does the witness agree with the following figures? During the year 1964 our imports amounted to $463 million, as against $701 million in 1969, an increase of 51 per cent.

The Chairman: The question being how much of that is increase in price and how much in volume?

Senator Cook: In 1964 our exports amounted to $75 million, as opposed to $147 million in 1969, an increase of 98 per cent in our export trade.

The figures for employment were 192,000 in 1964, as opposed to 198,000 in 1969.

Senator Beaubien: What is the source of the figures?

Senator Cook: The Dominion Bureau of Statistics.

Senator Carter: Does the wage increase and price stability referred to mean that you have been able to afford the increased wages out of productivity, which has kept pace with price increase? Have wages outpaced productivity?

Mr. Armstrong: Our productivity over the last several years have been at a higher rate than that of any other Canadian manufacturing industry, an exceedingly high rate. I believe our ability to maintain prices in this way has certainly been largely due to productivity increases in those years.

Mr. Perowne: So far as Dominion Textile Limited is concerned, over the past ten years we have spent in excess of $100 million in upgrading, keeping ourselves technologically proficient. We have had our company and our industry, as stated by Mr. Armstrong, researched and analysed from stem to gudgeon. We are quite confident that our own industry—again I am referring particularly to Dominion Textile Limited—is capable from a technological point of view. We have good labour, employing approximately 10,000. We have knowledgeable personnel and, we believe, good management. We are familiar with the textile industry and for the kinds of conditions that are imposed on the Canadian textile manufacturer we will put ourselves up against any manufacturer, whether it be in the United States, Japan or anyone else, if in terms of size of market and conditions prevailing in that market they compete against us in Canada.

It might be of interest to reflect for a moment on the amount of United States takeover we have read of in the newspapers during the last few years. If this were such an easy market and we in fact were noncompetitive, unimaginative and not creative, it is somewhat surprising that the J.P. Stevens, the Burlingtons, the Lowensteins, the Cone Mills, the Springs Mills and Cannon Mills of the United States have not come to Canada in search of an easy haven in which to compete in the textile manufacturing field.

Senator Carter: When he was before us the minister made the point that one of the purposes and factors that make this bill necessary is the necessity of the textile industry to re-organize itself. This means that some sections of the industry would be phased out, while others would probably expand.

My point is that in spite of all this productivity, you still feel that in the foreseeable future there is no way of competing within certain sections of the industry.

Mr. Perowne: As far as Dominion Textile Limited and, I believe, other segments of the textile industry are concerned, we have not yet found a way to pay an average wage of $2.75 in Dominion Textile Limited and with all other costs relative to this type of economy in Canada compete against the Taiwans, Koreans, and so on, at the 10, 15 or 18 cents per hour wage level. Really this is the nuts and bolts of the problem with which we are faced.

Dominion Textile Limited has always shown itself to be prepared to spend money and face up to all the normal business risks that may be envisaged. We all know that there are a great many business risks envisaged at the present time. However, so far as competition from Taiwan, Korea, Macao, China, Portugal, India, Pakistan, Colombia, and so on is concerned, we have not as yet been able to find that magic wand.

Senator Carter: What percentage of your total industry will disappear in your phasing out process?

Mr. Perowne: If in fact we in Canada are to face up to the unemployment situations that are about us today and are not to have this situation continue to erode and deteriorate, I would hope that the number of plants and companies that have gone by the wayside will be put to a halt and that we will see new plants come into existence.

In 1953, well before anyone in this country and, indeed, in the forefront of developments in England and the United States, our company was spending money in anticipation of the advent of the blended type fabric with polyester. Dacron, fortrel and terylene are all names of polyester blended with cotton. We built a plant in Long Sault, Ontario, and a very big $20 million plant at Beauharnois, outside Valleyfield, Quebec.

However, as we sit here today there are no quotas on polyester cotton goods. There being no protection whatsoever against polyester cotton, no-iron, easy-care fabric goods from Japan, Taiwan and other low-wage countries, we are just sitting ducks. The increase in fixed overhead that must be borne in our plants prohibits our generating sufficient funds, at 65 or 75 per cent of capacity, to merit Dominion Textile Limited asking its board for approval to erect another new plant.

The Chairman: Mr. Perowne, I think there is general agreement that the provisions of the bill are needed.

Mr. Perowne: Yes sir.

The Chairman: I think you have just underlined this. Since there is general agreement, except for information purposes it is not really relevant to the decision we will come to, whether we will pass the bill as it is or as amended. We are glad for the information, but we do not want to get too far along on that track.

Senator Desruisseaux: The witness mentioned previously that due to uncertainties extensions were being held back. I was curious about the estimated value of

those extensions that were being held back because of the uncertainties that we presently have.

Mr. Armstrong: Perhaps Mr. Taran can comment on that, because I believe he himself has held back an investment.

Mr. Taran: Basically our biggest problem, which relates directly to the bill, is that we do not know what will happen tomorrow. As Mr. Dixon said for the importers, we have had these cases. I will give you a case history from our own company. In 1967 we, being the first in North America to do so, developed the ability to weave textured polyester fabrics. We were able to export these fabrics to the United States because of our technological advancement over them, but we could not compete in our own market against Japan, because unfortunately at the same time the Japanese developed, or were in the throes of developing, this particular type of weaving of textured polyester. We went to the Government, to the Department of Trade and Commerce, and complained.

I will just read out these figures of Japanese imports into Canada: in 1967, 1.67 million square yards; 1968, 3.2 million square yards; 1969, 7.9 million square yards; 1970, 13 million square yards. In other words, they went from 1.6 to 13 million square yards in four years. They have now completely taken over the market. The Canadian producer now controls only 22 per cent of the market; Japan alone controls 45 per cent.

We made a decision at that time because of the apparent market available for this type of product. We took over a mill that was going out of business in Magog. We brought it back into full production and kept it that way until September of last year, when we were forced to close it because at that time the Japanese made a mistake in Osaka; they over-produced, and dropped their prices 30 per cent in September of last year.

No business can plan. It is impossible. Had this review board been in existence three years ago our only avenue at that would have been to go to the review board and present our case. There is no guarantee they would have accepted it, but at least we would have known then the proper business decision to make based on the facts presented. The Japanese had the audacity, and have had until just last week, to tell the Canadian Government that these fabrics were not produced in Canada. I personally had to make a presentation to the Japanese trade delegation to prove to them that we did make them.

We have held back a very large capital expenditure, and our board of directors has decided that we will not invest in any new capital in plants or equipment until such time as we have a better understanding of the ground rules with which we have to work.

Senator Beaubien: Do you still export that sort of thing to the United States?

Mr. Taran: Yes, we do.

Senator Beaubien: Because the Japanese cannot get in there?

Mr. Taran: No, because basically we can export a very small amount on a styled basis, because of our proximity to the American market; we are one hour away from New York and we can go into New York and make a certain pattern for a New York converter who would like to get on the market quickly. What has happened is that the Japanese naturally will get the bulk of the business; we may get 50,000 to 100,000 yards, but the Japanese may get two million yards, because they will knock it off and it will come in two months later. That is really what we are doing.

Senator Desruisseaux: Is that not anti-dumping? Did you avail yourselves of our anti-dumping laws?

Mr. Taran: Unfortunately our experience with anti-dumping has not been too successful. It is very difficult. The Canadian Government has made a lot of investigations in the past, but because of the manner in which business is done in Japan it has been impossible to prove dumping. If you read that *Time* magazine article, you will appreciate that they have trading companies which all the trade goes through. These trading companies deal in a multitude of products. Nobody in the Canadian Government has to this day been able to figure out how they operate, and it is impossible to prove.

Senator Isnor: Where are these trading companies located?

Mr. Taran: They are located in every major city in the world.

Senator Flynn: Do you think this bill will help them make up their minds?

Mr. Taran: The only hope we have is that this bill will enable us to come and present a case. In many cases, when we cannot prove we are viable and competitive over a long term, I am sure the Government will tell us, "We are not interested in protecting you", and we have never asked for that.

The Chairman: Mr. Taran, the added power we gave to the Anti-dumping Tribunal last year is not dependent on establishing dumping. It is only damage or injury to domestic production. It makes a report to the minister and it is up to the minister then to decide whether he will apply surcharges or countervailing duties, or what he will do. We also provide the same kind of power to this textile board, so there is machinery to deal with that situation.

Mr. Taran: There is only one problem. The Anti-dumping Tribunal has the power to apply countervailing duties...

The Chairman: No, the minister has.

Mr. Taran: The minister. Our problem is not duties. Our problem is quantitative quotas really.

The Chairman: That is what is coming in in this bill.

Mr. Taran: That is right.

Senator Cook: That is clause 26.

The Chairman: Have you anything further to add?

Mr. Armstrong: No, Mr. Chairman, unless there are any other questions?

The Chairman: Are there any other questions? I think we have gone through all the merits of this bill rather carefully.

Senator Beaubien: I would like to ask the witness one question. You say a duty is no use. You mean the difference in price is so enormous?

Mr. Taran: Let us put it this way. I cannot understand the Japanese cost system, and I have been to Japan a few times. Their cost or selling price is based really on what the market is. If they decide they want a piece of a market, cost means relatively little. They have a system of spreading it amongst themselves; I do not know what it is. In some areas, the further you go in manufacture the lower the price you get. If we raise the duty, all they would do would be to lower their price if they decided they wanted the market. That is what it really amounts to.

The Chairman: Now we are approaching it from a different angle where that will not work advantageously for them. Thank you very much.

Mr. Armstrong: Thank you, Mr. Chairman.

The Chairman: Honourable senators, that concludes all the requests for a hearing from various organizations. I think we must have become convinced of the merit in this bill and the need for it. Frankly, from my point of view, which is only one person's view, the only place where I could even suggest any change is whether we should change that "may" to "shall". I am not even going to suggest that, and I will tell you why in a minute.

We have the Department of Industry, Trade and Commerce representatives here, but before I call on them I was wondering whether this committee wanted to make a decision whether in the circumstances, following the evidence we have, we need to hear anything more, having heard the minister.

Senator Benidickson: Mr. Chairman, we heard the minister, but I feel very strongly on this question of protection, particularly in textiles, as against the consumer, which has for years been a very important question in this house. I do not think the bill is large enough, and I do not think the board membership is large enough.

The Chairman: Senator Benidickson, may I point this out to you. I think the area you are going into is one that might properly be described as being policy in relation to this subject matter. When the minister was here we could certainly have questioned him on policy. When we have departmental representatives, consistently our view has been that it is not fair to ask such witnesses to discuss questions of policy. Certainly this morning my initial ruling, if you are asking questions on policy of the departmental representatives, would be against you, although the committee could overrule that decision. However, I am wondering, having regard to the scope of the bill, whether it is necessary to question the departmental officials who are here. My own feeling is that there will be repetition of what we have already heard. That is one point.

On the point about changing "may" to "shall", I would hate to report this bill with one amendment that merely changed "may" or "shall". Although clause 12 says the board may in the manner specified by its rules receive evidence, I think the regulations could be drafted so as to say that "in receiving evidence the following is the manner in which it shall be presented". In that way any interested person would have a right to go. He would have to clothe himself in the proper style, according to the rules, but he would have a right to go there. In the interpretation of statutes "may" has often been interpreted as "shall". After all the discussion we have had on "may" and "shall," I think that the Textile Board would be very sensitive about refusing any interested person the opportunity of being heard in accordance with whatever the regulations may be.

Therefore, my feeling—and this is only my own feeling—would be that we should not propose an amendment to the bill if there is only the one amendment, changing a "may" to a "shall".

I do not think that the risk that Mr. Dixon saw in the use of the word "may" is that real, and I am saying this before the departmental representatives.

Senator Beaubien: I was not here when this problem was discussed, but I would agree with your conclusions and I would even agree with section 12 as it now reads, because there has been some discussion in the board whether any evidence that is adduced is relevant or not.

The Chairman: That is why it says here "in the manner specified by the rules." That does not say they shall not receive evidence.

Senator Beaubien: They have to have some discretion in saying, "We do not need this type of evidence." Otherwise, they would be forced to hear something that they did not consider relevant at all.

Senator Connolly (Ottawa West): Reasonable discretion.

The Chairman: In the light of that, does this committee forthwith agree to report the bill without amendment?

Senator Flynn: Mr. Chairman, I wonder if you would ask the officials of the Department of Industry, Trade and Commerce, if they have anything to add.

The Chairman: Mr. Howard, you are parliamentary secretary to the minister. You have heard the discussion, and I think you were here the last time, when the minister was here.

Mr. B. A. T. Howard, M.P., Parliamentary Secretary to the Minister of Industry, Trade and Commerce: Mr. Chairman, I think most of these points have been covered very well this morning. The argument on the question of "may" and "shall" has been discussed at great length in

the Commons Committee and, again, in the house where it was the subject of amendment.

I think all these other points have also been covered, on both sides, very effectively here this morning.

I would be very happy, with the officials present, here, to try to answer any questions you have. There are no additional points that I would wish to put. I think you have covered these points in great detail. Your questions have been similar to points that have troubled others who have examined the bill. You have been concerned about the same points and have given them very close scrutiny.

Unless you have any questions I have nothing further to add.

The Chairman: I feel anything that we might ask at this time would be repetitious.

Thank you, Mr. Howard.

I move that we report the bill without amendment. Is it agreed?

Hon. Senators: Agreed.

Senator Benidickson: On division.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 23

WEDNESDAY, MAY 12, 1971

First Proceedings on Bill S-9,
intituled:
"An Act to amend the Copyright Act"

(Witnesses:—See Minutes of Proceedings)

23839—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28).

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Urquhart, seconded by the Honourable Senator Cook, for the second reading of the Bill S-9, intituled: "An Act to amend the Copyright Act".

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate

23839—1½

Minutes of Proceedings

Wednesday, May 12, 1971.
(25)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce proceeded at 11:30 a.m. to the consideration of the following Bill:

Bill S-9, "An Act to amend the Copyright Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Benidickson, Blois, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Haig, Hays, Isnor, Lang, Macnaughton, Martin, Molson, Sullivan and Welch (18).

Present, but not of the Committee: The Honourable Senators Casgrain, Fergusson and Heath—(3).

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

WITNESSES:

The Canadian Association of Broadcasters:

Mr. Henri Audet, President, CAB, President, Station CKTM-TV, Trois-Rivières, Quebec;

Mr. D. M. E. Hamilton, General Manager, CKLG, Vancouver, B.C. Vice-President, Radio, C.A.B.;

Mr. D. W. G. Martz, Vice-President, Canadian Marconi Company, Montreal, Vice-President, TV, C.A.B.;

Mr. D. Barkman, Managing Director, CHWK/CFVR, Chilliwack, B.C., President, British Columbia Association of Broadcasters;

Mr. Lyman Potts, President, Standard Broadcast Productions Ltd., Toronto, Ontario;

Mr. John D. Richard, Gowling & Henderson, Ottawa;

Mr. T. J. Allard, Executive Vice-President, C.A.B.

At 12:30 p.m. the Committee adjourned.

2:00 p.m.
(26)

At 2:00 p.m. the Committee resumed.

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Benidickson, Blois, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Grosart, Haig, Hays, Isnor, Lang, Molson, Sullivan, Welch and Willis—(18).

Present, but not of the Committee: The Honourable Senators Heath and Methot—(2).

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

WITNESSES:

The Canadian Association of Broadcasters:

(Same witnesses as morning session)

Canadian Labour Congress:

Mr. William Dodge, Secretary-Treasurer;

Mr. John Simonds, Director, International Affairs Department;

Mr. Alan Wood, American Federation of Musicians;

Miss Margaret Collier, Association of Canadian Television and Radio Artists;

Mme Jeanne Sauvé, Fédération des Auteurs et des Artistes du Canada;

Mr. Burnard Chadwick, Actors' Equity Association;

Mr. Hamish Robertson, Actors' Equity Association.

Canadian Broadcasting Corporation;

Mr. Jacques R. Alleyn, General Counsel.

At 3:30 p.m. the Honourable Senator Desruisseaux assumed the Chairmanship.

At 4:30 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, May 12, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-9, to amend the Copyright Act, met this day at 11.30 a.m. to give consideration to the bill.

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

The Chairman: We have three groups who wish to be heard today on Bill S-9, and the point in the bill has to do with the right to collect a royalty in connection with the performing right on records.

The three groups this morning are: the Canadian Association of Broadcasters; the Canadian Council of Performing Arts Union, who are affiliates of the C.L.C.; and the Canadian Broadcasting Corporation.

I suggest that we hear them in the order in which they requested to be heard, so we will hear the Canadian Association of Broadcasters first.

Before we hear them, there is a comment the chairman would like to make. It is that in connection with any bill that attracts public interest "Rumour Alley" starts operating. It has been operating a little more in relation to this bill than previous ones, except perhaps when we were considering the Bank Act.

This time "Rumour Alley" seems to have as its main target the chairman of the committee. He has been a target so many times that, except to get the facts straight, it does not upset him.

Senator Beaubien: What are some of the juicy statements?

The Chairman: This time it is that the chairman has clients who are interested in opposing this bill, and that one of the clients is the company that is going to appear here as a witness at a later date and which appeared before the Copyright Appeal Board in presenting a tariff—that is, the SRL organization, which manufactures records. I am supposed to be the solicitor and counsel for SRL. Nothing could be further from the truth. I have no retainers of any kind from SRL.

Then more vabuely, it has been suggested that I have clients who are interested in opposing the bill. If I have, there has been a singular lack of communication with me. I know nothing about it, if I have.

In this area of copyrights, of course, any firm that is a big firm and provides the facilities has certain copyright work, but the field of copyright is very broad. I am talking about the field that is represented here; that is, the performing right that is represented in records.

I am under no restraint by virtue of retainer, by virtue of representing anybody. I should say for SRL that they are not even clients of my office.

I do not expect that this will clarify the situation. I do not expect it will stop "Rumour Alley" from still generating these things. At any rate, I have stated what my position is and I challenge anybody to establish a different position for me.

Senator Beaubien: Hear, hear

The Chairman: I have made this statement generally, but if I were put to it to indicate sources from which this information came to me, I could do it. I could put labels on it.

Honourable senators, we begin with the Canadian Association of Broadcasters, and we have representing them: Mr. D. M. E. Hamilton, the general manager of Station CKLG in Vancouver and a vice-president of CAB radio; Mr. D. W. G. Martz, a vice-president of Canadian Marconi Company and vice-president, Television, CAB; Mr. Barkman, the managing director of CHWK/CFVR Chilliwack, British Columbia, and president of the British Columbia Association of Broadcasters; Mr. J. Lyman Potts, president, Standard Broadcast Productions Limited, Toronto; Mr. John D. Richard, legal counsel; and, sitting immediately on my right and who is going to make the opening remarks, is Mr. Henri Audet, of Trois Rivières, president of the Canadian Association of Broadcasters.

Mr. Henri Audet, President, Canadian Association of Broadcasters, and President, Station CKTM-TV, Trois Rivières, Québec: Thank you, Mr. Chairman. Honourable senators, with your permission, I would like to make an opening statement, in reduced form, which sums up our brief. Then I would like to ask some of my colleagues to supplement my remarks.

The Chairman: Honourable senators, before Mr. Audet continues, I should indicate that I doubt if we will hear this morning the three groups we have committed ourselves to hearing today. Fortunately, we have time in the afternoon to continue, if we do not finish by the morning adjournment time. I suggest that we resume at 2 o'clock. Having given dates to these people, it has been our policy that we hear them sometime during the day, since we have told them that they will be heard.

Senator Beaubien: Can we adjourn at 12.30?

The Chairman: Yes, if we are going to resume at 2, I think 12.30 would be a good time.

Senator Molson: We have to deal with Bill C-180.

The Chairman: Yes, but we are not going ahead with Bill C-180 today. If you remember, we fully considered it the last time we met. There were certain points that developed and we said we wanted to hear the minister on those. I was in touch with the minister and got a message from him today that he would not be available this afternoon. Therefore, we have offered him a firm date as No. 1 next Wednesday morning. I think that is when we will be hearing him.

Senator Molson: Thank you.

The Chairman: Now, Mr. Audet.

Mr. Audet: Mr. Chairman and honourable senators, I should like first to express to you our thanks for your courtesy in receiving us today.

[*Translation*]

Mr. Chairman, we wish to state how happy we are to have this opportunity to express our full support for Bill S-9, which seems to us an excellent means of extending to authors, composers and publishers the privileges to which they are entitled, while at the same time avoiding the possible imposition of an additional burden on the Canadian broadcasting system.

[*Text*]

Bill S-9 is of vast importance to the broadcasting industry of Canada—and consequently, to Canada itself.

We are here on behalf of the private broadcasting industry of Canada to make it clear that it supports and endorses Bill S-9.

Since its inception, broadcasting in this country has been a chosen instrument of public policy, a major weapon in the never ending struggle to maintain a distinctive Canadian identity.

Broadcasting is a business in which people are the single most important asset. Salaries, benefits and various talent and performing fees account for over 55 per cent of the broadcasters total operating expenses. Amongst the other charges made against station gross, is that for the public performing right held by the author or composer of original works. As noted in Appendix "D" to our brief, these payments in 1969 approximated $4,558,280. The Canadian Broadcasting Corporation paid an additional $1,082,000.

As noted in the same Appendix, we estimate that since 1952 the privately owned stations and the CBC have paid out copyright fees in the order of approximately $45,687,974.

The amounts payable to the Copyright Societies are based on gross income; regardless of station's financial position and regardless of amounts of music used, this tariff is imposed.

The Chairman: This amount of $45 million is in relation to payments to the author or composer of an original work?

Mr. Audet: Yes, or editor.

The Chairman: And it does not bear on the question of the performing right in records, is that right?

Mr. Audet: I would like to elaborate on that a little later.

Mr. John D. Richard, Legal Counsel, Canadian Association of Broadcasters: The figure, Mr. Chairman, is $4½ million, not $45 million. These are payments to the composer and his publisher for the performance of his original musical work on radio or television.

The Chairman: On radio or television?

Mr. Richard: Yes.

The Chairman: And it does not include any element for the record manufacturer or the so-called performing right in the record?

Mr. Richard: No, it does not, sir.

Senator Beaubien: Mr. Richard, is that for one year?

Mr. Audet: No, it is $4,600,000 per year, and it has been $46 million since 1952.

Mr. Richard: I just want to make sure that there is no confusion that the yearly figure is $4½ million and the total over the years is $45 million.

Mr. Audet: As nearly as we can estimate, somewhere between 75 and 80 per cent of these dollars must be exported out of Canada. We make this statement in no spirit of adverse criticism. It is no one's fault that, thus far, the majority of authors and composers or their assignees, live in countries which have much larger populations than Canada, very much longer established cultural traditions and consequently a greater supply of material.

Application has now been made by another group known as Sound Recording Licences (SRL) Ltd. for a further percentage of *gross* revenue.

This organization asks for a payment of 2.6 per cent of gross revenue from privately owned radio broadcasting stations, 0.5 per cent of gross revenue from privately owned television stations and 4 cents per capita from the Canadian Broadcasting Corporation.

As nearly as we can estimate, this would mean *additional* annual payments from privately owned radio broadcasting stations of $2,747,661., privately owned television broadcasting stations of $469,659., and payments by the Canadian Broadcasting Corporation of $842,440.

What impact would this have on the private sector of Canada's telecommunications industry? We asked DBS to give us an answer in total terms, without identifying stations, of course, which it cannot do. It reported as follows:

> In response to your request of March 16, I am pleased to present the following information which has been compiled from the individual reports of the privately-owned radio stations for the 1969 reporting year.

The table appears as Appendix C of our brief but I would like to quote the final paragraph of the DBS letter.

> It is interesting to note that the combined total of 74 radio stations operating at a loss of 22 radio stations operating at a profit but *whose profit would become a loss if 2.6 per cent of total operating revenue were deducted,* represents *29.2 per cent of the privately-owned radio* stations in operation during 1969.

This application for a public performing right tariff is based upon the assumption that the existing section 4(3) of the Copyright Act creates a public performing right in addition to protection against unauthorized copying—a position never before asserted.

Senator Connolly (Ottawa West): Would you please elaborate on that?

Mr. Richard: Section 4(3) of the Copyright Act has existed since 1921, being the last major revision to the act. The sound recording companies represented here by SRL have never asserted a right, since 1929 until recently, to payment of a fee to them for the so-called performance of their record on radio or television. They have never sought to limit use of their records by stations completely, in time or frequency of use. They have only recently asserted a right to a public performance fee in a record. By "recently" I mean 1968.

They have, of course, asserted the other rights which they have, which would be preserved by Bill S-9, which prevent copying their record by transposing it to another. However, the further right which they allege they have, of a public performance, of which Bill S-9 would deprive them, they have never asserted against the broadcasters.

Senator Flynn: Do you suggest that this right does not exist, or do you agree that the bill would delete an existing right? It has been asserted that the right does not exist.

Mr. Richard: You are correct, Senator Flynn; some have argued that the right does not exist, but it is an academic question at the moment. SRL has asserted that this right exists. They have taken no actions before the courts of this land to test the right. Therefore there is no decision of any court of competent jurisdiction determining whether they have the right. However, before the Copyright Appeal Board, they rely on the Carrawdine case of Great Britain, which would seem to indicate that such a right exists.

Senator Flynn: I understand that such rights exist in other countries.

Mr. Richard: Yes, but not in the United States.

Senator Molson: What is the situation with regard to sheet music?

Mr. Richard: This has nothing to do with sheet music.

Senator Molson: I understand that, but what is the situation when sheet music is used in a performance?

Mr. Richard: There is no performing right in sheet music.

Senator Connolly (Ottawa West): In other words, the thrust of the paragraph at the end of page 3 is to point out the difference between copying and performing?

Mr. Richard: Yes.

Senator Beaubien: A fee is paid in England.

Mr. Richard: Yes, but there is subsequent legislation. Their statute was revised in 1956, so we are not dealing with exactly similar legislation. However, it must be borne in mind that in Great Britain, except the Isle of Man which is a very small island inhabited by approximately 45,000, all radio is owned and operated by the state. All examples of countries where performing right fees for sound recordings are collected are those with having private, commercial radio.

In the country most similar to Canada with respect to broadcasting, i.e. the United States, there is no such performing right. As we shall illustrate a little later, most of these record companies have parents in the US and most of them receive master tapes from the parent. Therefore there is the incongruous situation in which the parent companies and those holding the master tapes in the US are attempting to assert in Canada a right which they do not have in the United States.

Senator Flynn: Was this point argued before the Copyright Appeal Board?

Mr. Richard: Yes, we must understand the function of the board. The point argued before it was, first of all, whether SRL had a performing right in a musical work. The Copyright Appeal Board's jurisdiction can only be invoked when there is a performing right in the musical work. Speaking on behalf of the broadcasters, we alleged that whatever right they had was not a performing right in a musical work, but in a record. This put SRL in the position of arguing that a record is a musical work.

Senator Flynn: The board would not be able to decide on the fees SRL could collect without deciding first that this performing right exists under the present law.

The Chairman: I understand they did reserve and decided preliminary to going into the question of tariffs that they had the jurisdiction.

Mr. Richard: Yes, they proceeded on that basis. However, it is not a matter to be resolved by the Copyright Appeal Board. The important fact of the matter is that if the board said it did not have jurisdiction, they would still not resolve the matter, because the record companies could then assert that they do have a performing right in the record, as opposed to a musical work and therefore did not need approval of their tariff by their Copyright Appeal Board. They could then sue users of their records for infringement and damages.

So the problem is still with us, regardless of what the Copyright Appeal Board decided.

The Chairman: If we can proceed at all to consider this bill, we must assume that there is a law in existence which this bill proposes to amend.

Mr. Richard: May I make the position of the broadcasters before the Copyright Appeal Board clear? We said that whatever right SRL does hold by assignment from various sound recording companies, it is not a right in a musical work and therefore the Copyright Appeal Board has no jurisdiction. We did not argue before the board that the sound recording companies had no performing right under section 4(3), so we are being consistent. At the very least there is an ambiguity that should be cleared up and at the very worst they do have a performing right in a sound recording under section 4(3). We argue that this right should be removed by legislation and that is the reason for our support of Bill S-9.

Senator Beaubien: Does Bill S-9 then remove that right?

Mr. Richard: It reserves other rights to them, but removes that particular one which, as I say, has never been asserted by them.

The Chairman: Until 1968, you said.

Mr. Richard: Until 1968, sir.

Mr. Audet: May I point out that we support the bill because we feel that it brings the law into line with a practice which has been long standing, for probably 60 years or more.

Senator Cook: If this bill does not become law and they were right in asserting their rights, the fees would go to the manufacturers, would they?

Mr. Richard: They would go to the manufacturers of records, yes.

Senator Cook: Like the fees would go to the printers of a book?

Mr. Richard: Yes, sir.

Senator Cook: If every fellow who read a book had to pay a fee it would have to go to the printer and not the author?

Mr. Richard: That is right, sir, not the author. This bill does not disturb any rights of the author or composer. It deals only with the rights of the manufacturer of a physical piece of goods, i.e. a record, in respect of which we allege he gets his reward from the sale of the record.

Senator Cook: Does the manufacturer pay anything for the free advertising obtained when the records are played over the air?

Mr. Richard: No, sir, and that was another point made before the Copyright Appeal Board. They acknowledged this, that the favoured and, in some cases, only means of promoting records is through radio and television broadcasting. Of course, we do not suggest there is any "payola". Therefore we do not suggest there is any payment for those performances. Indeed, there was very strong evidence before the Copyright Appeal Board—I just mention it to you, because I am sure you do not want me to go into it in great detail, though I can—statements from representatives of the industry itself, in which they recognized that the promotion of records on radio and television is necessary for the sale of records.

The Chairman: Senator Cook, you understand the wording of the provision in the law now is that the copyright subsists in the performing right in records just as if much contrivances were musical, literary or dramatic work. What this bill proposes is to take that away. It is not taking away, as I understand it, the performing right, if any, that they may assert for the use of it. I take it it is not dealing at all with a situation if the record manufacturers attempted a division of their sales as between sales for private use and for public performance. That question is not, as I understand it, in issue here. Is that right, Mr. Richard?

Mr. Richard: They would not be entitled to collect a fee for the performance of their record on radio or television.

The Chairman: No. I was raising the other question. If the record company sold their records in two classifications, one would be for private use only; in other words, you would have to get something more in a contract than simply buying a record, because they impose terms on the sale of a record for private use only. All I am asking you is, is that an issue here?

Mr. Richard: It does not affect contractual rights; it just affects copyright.

The Chairman: So whatever contractual rights they could achieve apart from the question of copyright, this bill does not deal with that?

Mr. Richard: It does not deal with contractual rights, with agreements made between manufacturers and purchasers of the records that could be enforced contractually as opposed to enforced through copyright.

Senator Beaubien: If this bill were to go through, from January 1, 1971, they could not sue you for having played a record?

Mr. Richard: That is right.

Senator Beaubien: Could they still sue you for having played a record before?

Mr. Richard: No, no.

The Chairman: Why not?

Mr. Richard: That is a very interesting question. I say "No, no", because I am relying on the fact that they have never asserted the right against us. There is a limitation period of three years.

Senator Beaubien: If they go back to 1921...

Mr. Richard: No, there is a limitation period of three years in the statute. That is a point well taken. We would be satisfied to see the bill go through in its present form.

The Chairman: You would be willing to pay for the three years.

Mr. Richard: No, we would be willing to take our chances.

Senator Flynn: Maybe you will take the hint from Senator Beaubien.

Mr. Richard: That is a very, very good point.

Senator Carter: Bill S-9 does not solve the fundamental problem, which goes back to 1921, whether a record is a musical work. The problem is one of definition, is it not?

Mr. Richard: No, it is not, sir. The problem is that they assert a performing right. That is our problem. I do not want to confound the problem we had before the Copyright Appeal Board. The Copyright Appeal Board has jurisdiction to entertain tariffs only in respect of performing rights in musical works as opposed to performing rights in other things. The point there was: was a record a musical work?

The Chairman: So the statute solved the question for the Copyright Appeal Board by saying you could treat it as if it were a musical work?

Mr. Richard: Yes. That is what SLR argued, and they said they have a performing right in musical works. My point is whether it is in a musical work or in a record. Still, section 4(3) gives them a performing right in something, and this performing right by Bill S-9 should be withdrawn.

Senator Carter: If you define a record as not a musical work, does that solve the problem?

Mr. Richard: No, it does not, sir.

The Chairman: No. It only solves the problem of the Copyright Appeal Board being able to fix a tariff.

Mr. Richard: Yes.

The Chairman: Unless you enlarge the scope of authority of the Copyright Appeal Board.

Mr. Richard: That is right.

The Chairman: And that is not in issue here.

Mr. Richard: That is right.

Senator Desruisseaux: Would the same tariff apply to educational records?

Mr. Audet: It is to all records of which music forms a part.

The Chairman: I am sorry, would you go ahead, Mr. Armstrong.

Mr. Audet: Originally copyright obviously had a very simple purpose. It was to ensure that an individual whose intellect or emotions produced an original work, such as a book, a painting, a song or a speech, had some form of legally enforceable right preventing others from copying his work without his authorization, or passing it off as their own, or gaining financial benefit from it without benefit to the original creator. We agree that such a legal and enforceable right should exist, and it exists now.

It happens that copyright "works"—that is to say the songs or speeches or music or plays—are in today's world, frequently encapsulated within some form of mechanical reproduction such as a tape, a film or various forms of records in order to give them wider distribution.

The Chairman: Mr. Audet, I hope you do not mind being interrupted, but we are looking to be informed as to what is at issue. If we stop right there and then we look at the amendment proposed in a new subsection (4) of clause 4, what they declare as to the nature of the copyright in this record is that the producer of that record would have:

> the sole right to reproduce any such contrivance or any substantial part thereof in any material form.

I take it that would apply if you played a record and taped it and then used the tape to publish it to the public through a station, a radio or TV station; the copyright and the sole right of the man who had produced that record would persist. That is not being taken away?

Mr. Audet: No.

Mr. Richard: That is right.

The Chairman: "To reproduce any such contrivance." What is embodied, other than what I have said, in the word "reproduce".

Mr. Audet: I believe we want to make a distinction. There is the time when a record is originally produced; you have, say, a musical ensemble whose sounds are recorded on a record, and the right, that was originally and by tradition protected, of the author not to see his work stolen by somebody else. We feel there is a distinction to draw between that and where someone just presses recordings of the original work. We feel this second person does not have a right to ask for payment each time the record is played. We feel the original author and editor are entitled to their rights, but a person whose job is only to reproduce things should not have a copyright. Am I right?

Mr. Richard: He should not have the performing rights. As the Chairman pointed out, he should have the right to prevent reproduction of that record.

The Chairman: I think your statement is too broad.

Mr. Audet: I see your point.

The Chairman: Because there is some kind of copyright preserved.

Senator Beaubien: In other words, if you buy a record you have the right to play it?

Mr. Richard: Yes.

Senator Beaubien: That is what you bought it for.

Mr. Richard: Yes.

Mr. Audet: That is what it is there for.

Senator Cook: You can replay it but you cannot reproduce it.

Mr. Richard: That is right.

Mr. Audet: That is it.

The Chairman: That is why I asked Mr. Audet the question.

Mr. Audet: This is a rather difficult frontier to establish. If you register a record and you play it, it is very difficult to find out whether you are playing an original record or a copy.

As far as the TV or radio station is concerned, you could register any record and you could play it. You could play the reproduction very easily.

Senator Flynn: It would be interesting to know the procedures from the time the radio station acquires a record to play at their station. What are the procedures and what is done in relation to that record in order that the public may hear it over that wavelength?

Mr. Richard: The evidence before the Copyright Appeal Board was, first of all, that the record companies promote their records by giving them to the radio and television stations. Also they were giving the albums free and, sometimes, at a discount. They take the record and put it on a turntable.

The Chairman: Is that all that is involved? The record does not have to be prepared?

Mr. Richard: A record can be physically used the same way it is received.

The Chairman: You just pick it up and set it down on a turntable?

Mr. Richard: Yes.

Senator Hays: Why do we not go back to where it is composed, and as to who gets a cut, and so on? Somebody composes a song and puts it on a record.

Mr. Richard: Could I just make one clarification, Mr. Chairman? The records could include literary and dramatic works as well as musical works, but it is only before the Copyright Appeal Board that they can deal with music.

To answer the question of Senator Hays, what happens, first of all, is that a composer or a group of composers get together and compose an original musical work. They usually assign their copyright in that musical work to a publisher, who is the person who, in effect, acts as their business agent in publishing the music in sheet form and getting it recorded.

They go to a record producer, who need not be a record manufacturer. In other words, the producer of the record is not necessarily the one who actually physically presses the record. There are two terms here: record producer and record manufacturer. They will go to a record producer who will agree, on whatever terms, to produce the record.

Senator Carter: A master copy?

Mr. Richard: A master copy. We are talking here of a master tape and the original contrivance, if you are looking at the Copyright Act. The producer may then either have the record manufactured or may just, for payment, turn over the master to the group, who will then go and have their record manufactured themselves.

Senator Macnaughton: Distributed?

Mr. Richard: No, manufactured first. Then it is distributed. It is distributed at the distributor level and retail sales level and they receive payment for the sales of the records.

Now let us look at what payments are received. First of all, the composer receives performing right fees for the performance of his musical work. Whenever his work is played in public, he or she gets a payment through the publisher who has assigned the rights, in turn, to these two large collection agencies in Canada, BMI and CAPAC.

Now the musician, what does he get? We have had the evidence of Mr. Wood, who I notice is with us today, and is international vice-president of the FSM. The musician, of course, receives the rate that has been negotiated by the union with the record manufacturer or producer—the labour rates for the time he spends in the recording.

Senator Flynn: The same thing for the artists?

Mr. Richard: The same thing for the artists. The artists did not give evidence before the Copyright Appeal Board.

In the case of the musicians it is quite clear that they receive a negotiated rate for their services. In addition, for each record sold, there is a payment made to a trust fund, administered in the United States. Since this is an international union between Canada and the United States, payments are made from Canada to the United States and are received from the United States in Canada. This trust fund is to pay musicians for live performances of works at band concerts or whatever.

There is also a special fund—and these are terms they use—which I would describe as providing bonuses to the side men; that is to say, the musicians, as I understand it, apart from the leader of the group, who have contributed to the performance. They receive bonuses through a special fund.

Then, where negotiated, the musicians and artists also receive royalties from the sales of records. A group such as the Beatles would probably negotiate a contract with the producer of a record whereby, in addition, they would receive a royalty based on a certain number of sales of records. The record manufacturer gets his money from the sale of the records.

Let me, at this juncture, Mr. Chairman, draw your attention to some revealing figures. This is not an unprofitable business, such as was suggested by the previous witnesses from the textile industry. This is an industry

that is very healthy. These are figures taken from the Dominion Bureau of Statistics.

The first figures I have are for the production of phonograph records in Canada. From 1958 to 1970 the production of records in Canada has increased from 19.8 million to 42.8 million. Even more revealing are the sales figures of records in Canada. The total of retail sales for all goods in Canada in 1961 was $16 billion and in 1969 $27 billion. That is a 70 per cent increase in retail sales from the year 1961 to the year 1969.

Senator Flynn: Not in Canada.

Mr. Richard: That is in Canada, sir.

Senator Flynn: That is in billions?

Mr. Richard: It is all goods. I am comparing the sales of all goods in Canada with record sales, and the sale of all goods, 1961 to 1969, increased by 70 per cent.

Senator Carter: When you say "record sales," are you including cassettes, tapes, everything?

Mr. Richard: Just phonograph records alone, not tapes.

Senator Connolly (Ottawa West): Excuse me, Mr. Chairman, there is confusion. Mr. Richard is giving us the sale of all consumer goods, regardless of whether they are records, clothing, shoes, or whatever they are.

Mr. Richard: Yes. Now I am giving you the total sales of records in Canada. The total sales of all goods in Canada, as Senator Connolly pointed out, increased in the period 1961 to 1969 by 70 per cent. The sales of phonograph records, only, during the same period increased by 142 per cent. That is double the rate at which retail sales generally in Canada increased.

Senator Connolly (Ottawa West): From what to what?

Mr. Richard: From $18½ million to $44½ million. These are distributor prices. The evidence was that you would multiply that figure by at least two to see what the total retail sales in Canada of phonograph records have been in the past year.

Senator Connolly (Ottawa West): Multiply both by two.

Mr. Richard: One of the witnesses suggested that it would be a $100 million industry, at the retail level.

The Chairman: Have you a breakdown of that as between what would represent domestic production and what would represent the imports?

Mr. Richard: Yes, I have a breakdown. To come back to the question by Senator Hays, you must understand that the master tape is imported into Canada 90 per cent of the time and records are pressed from that master tape in Canada 90 per cent of the time. That is to say, the performance which gives rise to the record took place in a foreign country 90 per cent of the time, and this is by volume of sales.

The other 10 per cent is accounted for by importation, direct importation of the record itself, as opposed to the master tape coming in to make the record, and records produced in Canada. What I mean by "records produced in Canada" is where the performance actually took place in Canada, where the master was produced in Canada, where the record was pressed in Canada. On the evidence given before the Copyright Appeal Board, that accounts for about 5 to 7 per cent of the total volume of records made in Canada. So, 90 per cent of the records which you buy in Canada, and which may have been pressed in Canada, originate from tapes made outside of Canada. The musicians and the artists got together at a session outside Canada, made the tape outside Canada and shipped the tape to Canada. I assure you that the duty paid on that tape is minimal, because it does not include the value of the performance, but only the value of the physical tape. From that tape they press records in Canada. The other 10 per cent is accounted for by records which are physically imported into Canada and records where the master tape was made in Canada.

The Chairman: Mr. Richard, am I right in concluding that what you are telling us is that there is no domestic industry for the production of records in Canada where they start with the artistic and musical performance and carry out the whole operation here?

Senator Beaubien: It is 6 per cent.

Mr. Richard: There is, Mr. Chairman. On the evidence of SRL, by volume it accounts for less than 10 per cent of the total production.

The Chairman: I understand that some of the radio stations, not all, for instance, do produce some of their own records?

Mr. Richard: Yes, we have the MacLean talent library, with Mr. Lyman Potts here, which do produce.

The Chairman: And you have CFRB here.

Mr. Richard: The broadcasting industry pays artists and musicians for live performances—particularly, the Canadian Broadcasting Corporation, and Mr. Alleyn is here to represent them.

The Chairman: I was trying to get at the scale of the domestic industry, if you can give it to me. That is, eliminating the importation of tapes or records from abroad, how much would it be?

Mr. Richard: 5 to 7 per cent of the records pressed in Canada are from masters originally produced in Canada. That is the evidence of SRL.

Senator Hays: You started at the composer. I want to know what these other people you are complaining about are receiving under Bill S-9.

The Chairman: They are not receiving anything.

Senator Hays: But what will they receive?

Mr. Richard: What the record company is seeking to collect from the broadcasters is, from the private broadcasting sector, $3½ million per year and, from the Canadian Broadcasting Corporation, $800,000 a year,— let us say $1 million dollars—so that makes $4½ million a

year, which is what they are seeking to collect from the broadcasting industry in Canada.

Senator Connolly (Ottawa West): And they can play those records on radio and television?

Mr. Richard: They can play those records on radio and television which they have given us for nothing. They have beaten paths to the doors of our librarians and music directors. We produced in evidence a circular to all stations from Polydor Records of Canada Limited, which is owned by German and Dutch interests. It was accompanied by a cheque and by a record, and said: "We send you a buck just to audition this record". They used the radio and television stations, but primarily the radio stations, to promote and sell the records, at no expense to them.

Senator Flynn: It is the same for the composer, the musician and the artist. The rights that you are now paying the musicians, the artists and the composers for are based on the use of the record, and they are interested in having you play their music. They are interested in the same way as would be the record manufacturer.

Mr. Richard: It is based on the use of their musical work which is embodied in the record.

Senator Flynn: It is only natural.

Mr. Richard: That is the only payment they receive, Senator Flynn; that is the way they receive payment. The record manufacturers receive payment from the sale of records. I have tried to show how substantial their sales have been. The record manufacturers also have publishing firms which receive part of the royalties that are going to the composers and authors. As I said to you earlier, the composer in 99.9 per cent of the cases has assigned his right to a publisher, and the usual division of fees between composer and publisher is 50-50. The record companies have set up publishing firms, so they are getting 50 per cent of the composers' fees, as well as the money they are getting for selling the records.

Senator Flynn: I am interested in the question of the division of fees between the composer and the artist or musician. The right of the author disappears after 50 years, for instance?

Mr. Richard: Yes, life plus 50 years.

Senator Flynn: When there are no more composer's rights, you pay less to CAPAC and BMI?

Mr. Richard: The broadcasting industry pays to BMI and CAPAC on the following formula. It is a percentage of gross revenue for the use of any or all of its repertoire.

Senator Flynn: Whether there is a composer's right on the music or not?

Mr. Richard: We know that there is a composer's right.

Senator Flynn: I am speaking of items like "Carmen," for instance, composed a hundred years ago. There is no longer a composer's right on this work.

Mr. Richard: That is right.

Senator Flynn: You pay the same amount as if there was a composer's right?

Mr. Richard: Yes, you do, you pay on the gross revenue for any or all records. But if you wanted to play a single selection which was in the public domain, you would not have to pay performing rights for that particular selection.

Let me talk about artists, musicians and performers. There is nothing in the present Copyright Act which grants to performers, musicians or artists any right to copyright. Section 4(3) does not disturb any right that performers, artists or musicians may have, because they have none under the present Copyright Act. That is why I will be very interested to hear what the second group may have to say.

Senator Connolly (Ottawa West): You say that that group, performers, artists and musicians, are paid by those who hire them to perform.

Mr. Richard: That is right; they are paid for a service. The Copyright Act as presently constituted does not recognize any copyright in the performer, artist or musician. Therefore, this is not taking away anything that that group may have, because they do not have it in any event.

Senator Flynn: Who determines the fees payable?

Mr. Richard: These rates are negotiated.

Senator Flynn: On behalf of whom do BMI act?

Mr. Richard: Only on behalf of the composer and publisher; they do not act on behalf of the artist, musician or performer.

Senator Connolly (Ottawa West): To take a concrete case, Rogers and Hammerstein write both music and lyrics. They have a publisher or manufacturer of records produce a recording of, for instance, "The King and I." They make a deal, in which they have copyright fees in the work. Subsequently, the manufacturer may hire a name band and a name singer, who have no copyright but are paid to reproduce that work on another record.

Mr. Richard: Yes, plus the fact that they may have an additional contractual arrangement to receive royalties.

Senator Beaubien: It is just the record, not the number of times it is played.

Mr. Richard: In the case of musicians there are also two funds, one trust and one special. The funds receive moneys, which are distributed to the musicians, from the sale of records.

Senator Connolly (Ottawa West): Is that over and above their service charge?

Mr. Richard: Yes.

Senator Molson: Do those payments to the trust funds include all the copyright fee?

Mr. Richard: It has nothing to do with copyright fee.

Senator Molson: I mean all the performer's fees?

Mr. Richard: I want to be sure that I understand your question.

The Chairman: Do the funds for this trust fund come from performers' earnings?

Mr. Richard: No, from the sale of records.

The Chairman: Is it a percentage of the sale price?

Mr. Richard: Yes, it is.

Senator Molson: Does all that percentage of the sale price go to the trust fund, or does any of it rub off on the performers?

Mr. Richard: The trust fund and the special fund were explained to us in relation to musicians, and I am not in a position to state whether payments from it are made to performers or artists.

Senator Molson: You have still not answered my question: do the musicians retain any of this, or does their share go to the trust fund?

The Chairman: The musician has already been paid.

Mr. J. Lyman Potts, President, Standard Broadcast Productions Limited: This agreement is negoated in New York by the major companies. They decide in negotiation with the AF of M how much is to be paid to the trust fund in respect of the recording sessions. Others who wish to make records have to agree to those terms, which are almost dictated by these large groups in New York.

When a musician is hired to make a phonograph record, not a transcription, he is paid $90 for three hours' work. During this time no more than 15 minutes can be recorded. Therefore, the minimum requirement for a long-playing record is two three-hour sessions at a cost of $180. The producer pays 8 per cent of this into the pension fund; the musician pays nothing.

The Chairman: That 8 per cent is on everything that has been paid, as well as the sale price?

Mr. Potts: No, sir, it is only on the musician's wages. A recording session might cost $6,000 or $7,000; 8 per cent of that goes to the pension fund administered by the union.

The Chairman: Mr. Richard told us earlier that it was calculated on the sale price.

Mr. Potts: No, there are two funds. The first was established in 1948. Since that time whenever a record is sold some money goes to the trust fund, which has collected $100 million since 1948 on this particular assessment. I believe that Mr. Wood will tell you that approximately $5 million of that money has returned to Canada and been distributed. This enables part-time musicians, who normally are not engaged in recording sessions, to produce concerts in such places as parks, where no admission is charged.

The second fund is an equivalent assessment and goes to the personnel in the studio. If we employ Moe Koffman in a studio he receives his share in that total fund, which is collected all over the world and transmitted to the AF of M, proportionate to his participation with other musicians in that session. So, as a result of the recording activity in Canada, some of our better Canadian musicians now receive sizable cheques from that union in addition to employment.

However, nothing is received by this fund as a result of records made outside Canada. No contributions are made as a result of records made in Germany, Great Britain, France and other places in the world. As Mr. Richard has pointed out, this represents at least 90 per cent of the records sold in Canada, if we count only those manufactured in Canada and perhaps up to 4 or 5 per cent of the records brought in physically and distributed here.

Mr. Wood and I are very close on this matter and I think I have adequately described it. I might say that Mr. Wood has some of the finest musicians in the world working for him. We have great talent in this country and are doing our level best to ensure that it is heard around the world and in our own country, but it is so hard to be a Canadian sometimes.

Senator Flynn: At page 2 of your submission it is mentioned that the Canadian Broadcasters pay $4½ million and the Canadian Broadcasting Corporation $1 million in performing rights held by the author or composer of original works.

Mr. Richard: Yes sir.

Senator Flynn: My inderstanding is that in many cases there are no composer's rights, only performer's rights in this amount. Speaking of my example of "Carmen", that has no composer's right, only the performing right. Did I understand you to say that the performing right does not exist under the present legislation?

Mr. Richard: No, I said that an artist or musician has no performing right under the Copyright Act.

Senator Flynn: So there is no composer's right?

Mr. Richard: There is no intervening right.

Senator Flynn: Why do you pay this amount to musicians and performers when no rights exist?

Mr. Richard: First of all, Senator Flynn, the broadcasters play very little public domain music. Secondly, the way the fees have been approved by the Copyright Appeal Board for composers and authors vis-à-vis broadcasting stations is as a percentage of gross revenue for the right to use any or all of the repertoire in current use.

Senator Flynn: Wheter there is a right attached to any particular piece of music?

Mr. Richard: Yes, but it is for the works which are in current use.

Senator Flynn: I know.

Mr. Richard: There would be very little public domain in current use. In any event, it is a blanket licence, as they describe it. If we wanted to take out a per occasion or per performance licence—in other words we pay...

Senator Beaubien: Who is we? The broadcasters?

Mr. Richard: Yes, the broadcasters. If we wanted to pay BMI or CAPAC, representing the publishers, on each record, on each musical work we perform over our airwaves, then we could do so. We would then only pay for those musical works on which there is copyright subsisting. But the cost of administering such a scheme, which would require us to keep continuous logs of each musical work performed on the airwaves, is outweighed by the risk of paying in some cases for musical works which may be in the public domain. Let me make just one more point.

The Chairman: If this is a breaking point, maybe it is a good time to adjourn. Is there something new you would like to develop?

Mr. Richard: Yes, sir.

The Chairman: Then let us mark it down. You make a note of it for two o'clock and we will pick it up. Is it agreed that we adjourn until two o'clock?

Hon. Senators: Agreed.

The committee adjourned until 2 p.m.

Upon resuming at 2 p.m.

The Chairman: Gentlemen, we have a quorum so we shall resume our hearing.

Now, Mr. Richard, you were going to jump into a new point. We have been searching and asking questions. Let us see if we can acquire the answers.

Mr. Richard: I will be brief. I would just like to draw your attention to another figure. This is evidence given to us by Mr. Wood on American Federation of Musicians, and it puts things in some perspective.

He told us before the Copyright Appeal Board that of $45 million earned by musicians in Canada, only about $1 million comes from all recordings in Canada. That includes the Canadian Talent Library, of which Mr. Lyman Potts has spoken about earlier, and which is administered by Standard Broadcasting which, in turn, has radio stations CFRB and CJAT. The record companies in Canada are spending less than $1 million in employing musicians in Canada to produce records in Canada.

The Chairman: Where does that lead to?

Mr. Richard: It just supports the point, Mr. Chairman, I was asked earlier about how many records were produced in Canada. I gave you the figure of 5 or 6 per cent.

The Chairman: I thought you were talking about a correlation of some moneys that were paid musicians, and what went into this fund.

Mr. Richard: The correlation I want to make is that very little money is paid by the record companies to musicians in Canada—less than $1 million out of $45 million. A substantially larger amount is paid to musicians in Canada by private radio and TV, and by the Canadian Broadcasting Corporation. That is the point I wanted to make.

The Chairman: Do you mean paid directly?

Mr. Richard: Directly for live performances.

Senator Connolly (Ottawa West): This is for services rendered?

Mr. Richard: Yes, for live performances.

The Chairman: They have not figured out a way go get that free.

Mr. Richard: No. Mr. Audet would like to continue now.

The Chairman: I was wondering about your brief, Mr. Audet. We have all read it, and there is not very much left. If there are some high points perhaps you would mention them, but I do not want you to feel that we are closing you out on anything.

Mr. Richard: I would just like to briefly describe SRL SRL is a privately incorporated company, limited to shareholders. There are at the present time eight shareholders. SRL describes itself as being the big eight: MCA, RCA, Warner Brothers, London, Columbia, Polydor, Capitol, and Quality. All of these companies are foreign-owned and controlled: 6 from the United States, one from Great Britain and one from Germany.

The Chairman: Execpt as a fact that we have this information, in what direction and to what extent, if at all, should we make use of it?

Mr. Richard: We are already making payments to the composers' societies of some $4½ million each year, every year. What SRL requests before the Copyright Appeal Board amounts to a further payment of $3½ million yearly in perpetuity in addition to what we are paying to BMI and CAPAC. In our submission, this is an additional drain on broadcasters, and it means additional funds going out of this country.

The Chairman: I can understand the first part, the additional drain on broadcasters, but your calculation is based on the tariff that was submitted on which there has been no decision.

Mr. Richard: That is right.

The Chairman: Would you assume, having regard to the reception, that the tariff which is settled will be substantially less than what they ask for?

Mr. Richard: I hope so. This is in the hands of the Copyright Appeal Board.

The Chairman: You appeared in the matter?

Mr. Richard: Yes I did.

The Chairman: With your usual ability and agility, I would expect that you have formed a pretty good judgment on that.

Mr. Richard: I would not try to prejudge the decision of the Copyright Appeal Board, which I know is meeting right now to make its recommendations.

The Chairman: We may have the answer to that. It may be a lot less dollars, and I want to see to what extent you are leaning on the dollars you arrived at by using that tariff as a calculation.

Senator Connolly (Ottawa West): I wonder if I could ask a couple of questions here.

The Chairman: Yes.

Senator Connolly (Ottawa West): I notice that we have listed in our agenda other witnesses, such as the Canadian Labour Congress and Canadian Broadcasting Corporation. Do we know whether their interest is the same as the interest of the present witnesses?

The Chairman: I would assume the CBC have the same interests. I have no way of knowing whether the CLC is supporting or opposing the bill.

Senator Molson: In their brief they are opposing it.

Senator Connolly (Ottawa West): They have an opposite interest. We will find that out when they come before us.

Mr. Richard or Mr. Audet, as I understand it, you are supporting this bill and what you say is that the addition of subparagraph (4) to section 4 of the Copyright Act will have the effect of not recognizing copyrights in performing rights. Is that so?

Mr. Richard: Yes, sir.

The Chairman: In records?

Mr. Richard: In records.

Senator Connolly (Ottawa West): Now, it is the use of records that you are talking about. It is not the record itself.

Mr. Richard: That is right, sir.

Senator Connolly (Ottawa West): So it is the performance of the work by the medium of a record?

Mr. Richard: No, it is the performance of the record itself. We are not seeking to take away the performing right of the composer or publisher in the work, but we are seeking to support the principle of this bill, which would draw the performing right in the record, the mechanical contrivance, itself.

Senator Connolly (Ottawa West): What you say, in effect, is this: If payment is to be made for a performing right, it would be made to the manufacturer of the record.

Mr. Richard: Yes.

Senator Connolly (Ottawa West): And what you say, in effect, is, apart from the fact that it is going to be much more costly to the radio and television industry in Canada, that these manufacturers of records, as a result of the publicity that is given to their productions through the media, television and radio, will have their sales to the public at large increased.

Mr. Richard: Yes, sir.

Senator Connolly (Ottawa West): I find a little problem here in my mind, and perhaps you can clear it up readily. You tell us that these record manufacturers at all times give the stations the records and sometimes even pay you a small amount to use them. Now do I understand you to say that there is pressure? I find it difficult to find where this pressure is coming from. I find it difficult to find where your opponents are because they may not be represented here; but there is pressure from them to get a performing right on something that they give you free?

Mr. Richard: Yes, sir.

Senator Isnor: It is like church, everything to sell and nothing to buy.

Senator Desruisseaux: Mr. Chairman, I believe from the experience I have had that they receive records from some companies—the records that they want to promote. They cannot get free access to all other records.

Mr. Richard: Yes. There was evidence before the Copyright Appeal Board of stations writing to the record companies for further copies of a record which had been broken, and the evidence was that in all cases the record companies were quite happy to provide them with additional copies of the record.

In conclusion, Mr. Chairman, I would say that Bill S-9 implements the recommendations of the Ilsley Commission, and of the Economic Council report of as recent date as January 1971.

The Chairman: You are urging our due consideration to the report of the Economic Council.

Mr. Richard: Yes, sir.

The Chairman: Even if they prefaced their remarks by saying they did not know very much about copyrights, and then went on to express their opinion on this.

Mr. Richard: Yes, sir, and on many other things.

The Chairman: Yes, that is right, on many other things—with the same experience. Now, Mr. Audet?

Mr. Audet: As Mr. Richard was saying, there was a sentence in the Royal Commission report which I should quote: It is given on page 5 of our brief. It is from the Ilsley Report of 1957, page 77:

> The act restricted by the copyright in a sound recording should be the making of a record enbodying the recording. At the present time it would appear that an unauthorized public performance of a recording embodied in a record is an infringement of the copyright in the record. Probably the broadcasting of a recording embodied in the record is also an infringement. We recommend the abolition of a record manufacturers performing right and the broadcasting right in records or in the recording embodied in the record.

We also have on page 5 a quotation from the Economic Council of Canada more recent report on Intellectual and Industrial Property, page 158. You will note it also recommends the abolition of this performing right. You will notice that on page 159 of that Economic Council report the Council also recommends that there not be a proliferation of neighbouring rights and that therefore performing artists who do not now have the right, not be given the right in the future. They suggest that moneys which could be received by performing artists through a performing right fee, could best be done through the Government of Canada through such agencies as the Canada Council or the Canadian Film Development Corporation.

As one last matter, I would like to draw your attention to this. SRL has assignments from 28 record producers in Canada, eight of whom constitute the Big 8 and who only eight of whom are the only shareholders. The important thing is that SRL has admitted that it has no agreement with those who have made assignments to it, regarding the division of any funds that it may receive from the broadcasters. Although there has been a suggestion by SRL, that they may make some of the funds which they may collect available to musicians and artists in Canada, the evidence is also quite clear that there is no agreement between SRL and musicians and artists and performing artists in Canada. We take the position, as the Economic Council did, that if the performing artists are to receive additional encouragement for their creative talents, this should be done in another way.

Senator Connolly (Ottawa West): As far as this committee is concerned, of course, that evidence is hearsay.

Mr. Richard: Yes, it is hearsay, and I suggest it is not relevant because you are not dealing with the performing artists company right here.

Senator Cook: We have first to decide whether there should or should not be a copyright and all we have to decide afterwards is consequential. If there is no copyright, it is none of our business.

The Chairman: The question may go a little further, Senator Cook. The basic question, in any strict analysis is, should there or should there not be a copyright. However, you know that public policy is expressed in statutes sometimes becomes a matter of what it is expedient to do. You see that in legislation. It is what someone has said is the "art of the possible".

It could be that if we decided that this is something where there should be a copyright, yet we thought there should be some recognition of the recording or records people, we could still go ahead with what might be suggested would be expedient. Now, I do not want to be misinterpreted. I do not want rumour alley to become full again, because I have raised this as a possible consideration, that I am thinking in those terms. This is to provoke a realization of the problem.

Senator Connolly (Ottawa West): Following up what you say, it seems to me that if the record companies—I have regard for them because I think they are an important part of the industry and the industry we have with us here today—if the record companies were upset about the bill or about the presentation that is being made by the broadcasters, they would be here to complain.

The Chairman: They are. We have briefs filed and we have given them an appointment to hear them. We are hearing the SRL on the 26th, I think.

Senator Connolly (Ottawa West): Thank you. I am sorry, I did not realize that.

The Chairman: There are seven or eight more hearings after today. So the first ones who reply would be the first ones who get the appointments. There is a question I had here for either Mr. Richard or Mr. Audet. On page 9 of your brief you talk about the reasoning behind, I take it, the conclusion which was supported by the Ilsley Royal Commission. You have referred to that and then you say:

> It is supported after detailed study by the Economic Council of Canada, it is supported by the Parliament of Canada in the Broadcasting Act.

Would you please develop that and explain it to me?

Mr. Audet: Yes. I think what we mean here—and I would like Mr. Richard to enlarge on that if he feels that it would be appropriate—is this. We have been very often requested, and properly so, to be a national instrument for furthering Canadian culture and Canadian identity. We are proud to have that function. We feel that if funds are drained out of Canada through certain requests that may be made in the future, or which the previous act permitted, that it would be only detrimental to the furthering of the Canadian aims and objectives through broadcasting.

Senator Flynn: Then the bill does not go far enough. If this argument is valid, the bill does not go far enough. As we are told this morning, something like 90 per cent of the amount that you are bound to pay every year goes out of the country. So we should do away with the composers' rights or the performers' rights.

Mr. Audet: May I take a very pragmatic approach?

Senator Flynn: I think this is the approach you should have taken from the beginning.

Mr. Audet: In that sense, there is now a modus vivendi which has been accepted by all parties over the years. We are speaking now of over 50 years. There is a loop-

hole in the law and, if I am right, and I wish my legal adviser would confirm this at some point. This law is a remnant of some old British law which the British themselves have amended since that time. But since it happened to be and have been carried into Canadian law and stayed there, no one took notice of it until someone, using a little part of what appeared to be a permissive wording, has suggested that the rights should be in effect double.

Senator Flynn: You are dealing with the principle, but when you say that one reason is the fact that most of these funds would go out of the country, it is true of the rights that you are now paying to CAPAC and BMI. So I say that if we are to pursue your argument, the bill does not go far enough.

Mr. Audet: We could ask for all sorts of things but it appears to us that this bill which is now before you does plug the hole. And I think this is good.

Senator Flynn: It is the best we can do.

Senator Beaubien: At the present time. We could not buy the records anywhere else anyway. It has to go out of the country.

Senator Flynn: I am just dealing with the principle. We would get the records all the same, do not worry.

The Chairman: Senator Flynn's point is that if the argument is that we should approve this bill so as to prevent some money from leaving Canada, let us go the whole hog and prevent all the money going out.

Senator Beaubien: Where would you get the records? Would we make them all here?

The Chairman: Some are made here; the broadcasting companies make some.

Senator Beaubien: Yes, 6 per cent.

Senator Flynn: Six per cent are composed here, but over 90 per cent are manufactured here.

Senator Beaubien: You are not referring to the manufacturing; you pay outside the country anyway.

Senator Flynn: An editor in another country would sell the basic tape to any recording company here.

The Chairman: Senator Flynn's point, Senator Beaubien, is that the money involved is not a good argument for supporting or opposing the bill.

Senator Beaubien: I will bow to the greater wisdom of the lawyers.

Senator Desruisseaux: But, after all, Mr. Chairman, all moneys collected for fees go first to the United States, as I understand it, and only a part comes back.

Senator Beaubien: Senator Flynn would like to eliminate that, but I do not see how it can be done.

The Chairman: Any argument based on that does not go to the principle, but down a parallel line. I take it you say it is supported by the Parliament of Canada in the Broadcasting Act; that is the opinion expressed by Ilsley and the Economic Council. I just wish to know where it appears in the act?

Mr. Audet: These are three different things. The act says that broadcasting should be an instrument furthering the Canadian identity and the Canadian culture and, as I was telling you, we are very proud of that. I will read from section 3, subparagraphs (b), (d) and (g) of the Broadcasting Act:

> (b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;...
> (d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide...

I am not sure that the rest is relevant:

> (g) the national broadcasting service should...
> (iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity.

Senator Cook: Those are flower clauses.

The Chairman: Those are flowers, yes.

Mr. Audet: They are costly flowers, sir, I submit.

Senator Flynn: This is the same argument; to favour Canadian identity we should never import music and words composed elsewhere and pay for the rights. That is exactly what you are doing, paying out 90 per cent of the $500 million.

Mr. Audet: There is a practical aspect to this, sir; there are no other products available.

Senator Flynn: Why not come back to the pragmatic aspect of the problem, that you and the Canadian Broadcasting Corporation do not wish to pay more than at present? That is the only valid argument in favour of the bill.

The Chairman: Mr. Audet, the fallacy of your statement, as far as bearing directly on the question, is that while you wish to continue dealing with the manufacturers of your records you do not wish them to be in a position to collect a royalty. Which route do you intend to take?

Quoting the concept of the Broadcasting Act to develop the culture of Canada will not make any change. It will only provide an assurance by statute that the performing right in terms of royalty will not have to be paid in order to use the records. That argument falls flat against the wall; it is splattered all over the place.

Mr. Audet: I am not sure if I am permitted to make a comment after the Chairman has spoken.

The Chairman: You certainly are; I am just a member of the committee.

Mr. Audet: We are not initiating this bill; we are just coming to tell you that what you seem about to do is in our opinion a good thing and we wish to support it wholeheartedly.

Senator Flynn: It is helping you financially.

Mr. Audet: Well, this is, of course, an important part of it.

Senator Flynn: I think it is the only part.

Mr. Audet: It helps all Canadians by attempting to find a way to keep our money in the country. If what you are doing at the present time happens to keep within Canada $4½ million per year in perpetuity, we feel it is a good thing.

Senator Flynn: That is based on the hypothesis that the Copyright Appeal Board would grant in its entirety the application of SLR, which is doubtful.

Mr. Richard: Mr. Audet referred to a *modus vivendi* which has existed for over 50 years. It is important to note that both of these industries have grown and developed on the basis that one would not charge the other for the use of air time or records. Mr. Audet really says that they are now coming in with a substantial tariff claim, $3½ million or whatever it may be, and that this will impose additional strains on the Canadian Broadcasting System at a time when Parliament expects it to perform in the field of cultural activities in national unity.

Senator Beaubien: You should raise your price.

Senator Flynn: If the Copyright Appeal Board should grant only 10 per cent of what is asked by SLR, it would not have the same meaning at all.

Mr. Richard: They could always come back to the Copyright Appeal Board the next year for more money.

Senator Flynn: But they would have to justify it.

Mr. Richard: Yes, sir.

The Chairman: Mr. Richard, to urge the approach of the public interest of Canada to keep these moneys in the country I think is wrong. This then should apply in all directions in which money is paid out and your organization pays out money itself.

Mr. Richard: We are not urging it, but explaining the facts so that when you make your decision you will know what its implications are.

Senator Cook: They have this copyright; it is the fact that the money goes out of Canada.

The Chairman: Is it a reasonable approach that there should be a copyright? All these other things end up on a detour.

Mr. Richard: I agree that that is the nub of the argument.

Senator Desruisseaux: I would like to know, if we did grant the sound recording organization the right to obtain a fee on the gross revenues, how would that affect CAPAC and the other organizations? That is what I would like to know. Would it affect them at all?

Mr. Richard: It could affect them because of what the Copyright Appeal Board may say when they were granting money to SRL. They may take something away from CAPAC and BMI. But what is the effect of this? The effect of this is to reduce the value of the composer's work. The law is quite clear, that the primary performing right belongs to the author or composer, because it is his work that is being performed. If by reason of SRL getting some money the fee payable to the composer or author is reduced, that may be unfair to the composer or author, because his work still has the same value. By reason of the performing right being given to somebody else, i.e. a recording company, he will receive less for his toil, for his work.

Senator Flynn: I think as far as the composer's right is concerned, it is more a matter of bargaining on his part than anything else.

Mr. Richard: No, it is not, sir.

Senator Flynn: Oh, gee whiz! If I compose something that is very popular I am going to ask for more.

Mr. Richard: That is not the point.

Senator Flynn: Certainly.

Senator Cook: You do not know if it is going to be popular until afterwards.

Senator Beaubien: It is too late when it is popular.

Senator Flynn: Maybe the first work, but the second will certainly be worth more.

Mr. Richard: I think we have to be conscious of the provisions of the Copyright Act when we make these sorts of statements. I draw your attention to section 19 of the Copyright Act.

Senator Flynn: That is right, but that is something else.

Mr. Richard: I beg to disagree with you. I do not want to enter into a debate with you, because I know I am a witness.

Senator Flynn: You can enter into a debate with me.

Mr. Richard: Thank you. Section 19 of the Copyright Act says that once an author or composer has allowed his musical work to be recorded once, anybody else can record that music for two cents per side.

Senator Flynn: Two cents, I know that.

Mr. Richard: That is all he gets.

Senator Flynn: I was not arguing against that. I was saying that a very popular composer is in a position to ask for more than someone who is unknown.

Mr. Richard: All he would be entitled to receive after he has given permission is two cents.

Senator Flynn: After it has been given, but on what conditions?

Mr. Richard: No conditions.

Senator Flynn: Oh!

Mr. Richard: The conditions are two cents per side.

Senator Flynn: No. If I sell my author's right I can ask more if I am more popular or better known.

Senator Cook: He gets a greater number of two cents.

The Chairman: The factor you are multiplying by two cents would be much greater.

Senator Cook: Yes.

Senator Flynn: I am just meeting the argument that if it were included in the amounts paid to CAPAC and BMI it would not necessarily take away from the composer.

Mr. Richard: It necessarily has to take away from the composer.

Senator Flynn: No, not necessarily.

Mr. Richard: Because he will be receiving less money than he is receiving now. His right is quite distinct from the right the recording companies are asserting.

Senator Hays: Did I understand that earlier this morning you said that the American broadcaster does not have to pay?

Mr. Richard: That is right.

Senator Hays: So there is not complete parity; Canada would have to pay United States broadcasters.

Mr. Richard: That is right.

Senator Hays: Would not this be a much better argument than dealing with the philosophy of a political party or political parties?

Mr. Richard: You see, we have probably cast our net very wide today and introduced all the factors we thought you should know. The important ones are the ones we discussed earlier—whether there should be a copyright or not, and the fact that where the majority of these recordings originate, i.e. the United States, the broadcasters in that country do not pay any performing right to their sound recording manufacturers.

Senator Connolly (Ottawa West): Do broadcasters in any country pay?

Mr. Richard: Yes.

Senator Beaubien: England.

Mr. Richard: As I said, the examples given to us of broadcasters who pay in other countries are of state-owned industries, state-owned broadcasters: England except for the Isle of Man, Sweden, Norway, Germany, Holland, France and Australia. Australia has a mixed system, private and commercial. There was no evidence introduced as to any payments being made by the commercial broadcasters in Australia; the only evidence introduced was in respect of payments being made by the state-owned broadcasting system.

The Chairman: The whole thing then was on the basis of contract?

Mr. Richard: Yes.

The Chairman: In other words, if you want to use some of my records we make a deal.

Mr. Richard: But the Copyright Act in those countries also provided for copyright for a sound recording company.

Senator Hays: You have to pass it on, so Canadians will be paying more than Americans.

Mr. Richard: That is right.

Mr. Audet: For something they are not willing to pay at home.

Senator Hays: And the reason they are doing this is because they found a loophole, they think, in the act passed in 1921?

Mr. Richard: Yes, sir.

The Chairman: Senator, I may agree with what you are saying, but when you use the word "loophole" I think that is a distortion, because it is an obvious right that is in the section of the act, it is not a case of the discovery of a loophole, it is right there. All you have to do is to read it and see that there is a performing right.

Senator Hays: But that is what Bill S-9 is all about; it is like the income tax and plugging a hole.

Senator Desruisseaux: These broadcasters are already paying fees to two different organizations. If they have another, they have to pay a third. How does that compare with the United States situation?

Mr. Richard: There are two associations in the United States as well.

Senator Desruisseaux: The sound recording people have not got this...

Mr. Richard: No, they do not have a right to claim such fees.

Senator Desruisseaux: How would this affect us in Canada if we had a different set-up from that in the United States? Would it affect you really?

Mr. Richard: Certainly it will affect us. That is what I have been trying to say. We would have to obtain a licence from SRL to use their records on our radio and TV stations, and would have to pay them whatever fees the Copyright Appeal Board approved.

Senator Flynn: Would not that force you to use more Canadian composers' works?

Mr. Richard: I just suggested to you that 90 per cent of what is being produced in Canada comes from abroad in any event.

Senator Flynn: You might use more Canadian music.

Mr. Richard: Let me make this point. We have spoken of the Canadian Talent Library, and the broadcasters themselves have recently started a recording company of their own to record musical works in Canada.

Senator Connolly (Ottawa West): If your argument holds and the Government gets this bill, do you think you will still have all the access you want to foreign produced records?

Mr. Richard: I see no reason why not.

Senator Connolly (Ottawa West): Would they agree to sell to you even though they cannot collect a performing right?

Mr. Richard: They would not sell to us, they would give to us; they would go out of business if we did not play their records because there would be no other way of promoting their records at comparable cost.

Senator Connolly (Ottawa West): So they cannot afford not to supply?

Mr. Richard: That is right.

Senator Connolly (Ottawa West): In other words, so far as they are concerned you feel you are sitting in the driver's seat?

Mr. Richard: Except that section 4(3) puts us in the position that if we accept their records and pay them, we have to pay them substantial fees.

Senator Connolly (Ottawa West): But section 4(4) would eliminate that, the need for that payment.

Mr. Richard: It would handle that situation, that is right.

The Chairman: Do you not need these records?

Mr. Richard: I am not denying the fact that we need records, no.

The Chairman: I ask that question in view of Senator Connolly saying you were in the driver's seat. Maybe to the extent that you need them they are in the driver's seat too?

Mr. Richard: I think we are both in the driver's seat. That is what I said, both industries have grown up relying on one another, and I think that situation remains unchanged.

Senator Molson: The proportion of Canadian records of the total in North America must be very small. They could surely get on without you, the American industry?

Mr. Richard: Yes, but to sell records in Canada they have to be heard in Canada.

Senator Molson: In Canada, yes, but I am speaking of the total. You say you are in the driver's seat. You are in the driver's seat in Canada, but you are not going to put those companies out of business by quarrelling with the American producers of records.

Mr. Richard: But it is a $100 million industry, just in records. They are not going to give that money up very easily.

Senator Molson: I do not think so. It is a question of degree. Would you answer my question: what is the proportion of the Canadian market of the total?

Senator Beaubien: Six per cent.

Mr. J. Lyman Potts, President, Standard Broadcast Productions Limited: Canadian produced records?

Senator Molson: No, no, of the North American market, the volume. Is it 10 per cent of the total?

Mr. Richard: The total records consumed in Canada?

Senator Molson: What is the percentage of the total records consumed in Canada of the North American volume? Is it 10 per cent of the total?

Mr. Potts: I doubt it.

Senator Beaubien: That is 6 per cent produced in Canada. Now he is asking what is the Canadian market as a whole.

Mr. Audet: We know the American market is about ten times larger than the Canadian to start with.

Senator Beaubien: What reason, if any, is there for the inclusion of this section in the act of 1921?

Mr. Richard: It was copied from the British Act, that is all I can say. It occurred in section 19(1) of the British Act.

The Chairman: If there is anything that you have not developed, or feel you would like to add, now is the time to do it.

Mr. Audet: Mr. Chairman, if I could make one remark, it would be to the effect that we are very grateful to you for a sympathetic hearing. We enjoyed speaking to you, and we are at your disposal if we can supply any additional information.

The Chairman: The fact that we have argued with you does not give any indication of our intentions. After all, you are presenting your support for this bill.

Senator Desruisseaux: I have one question. Do you represent all private stations, AM, FM and TV—every one of them?

Mr. Audet: Just about.

Senator Desruisseaux: Is there unanimity amongst you on this?

Mr. Richard: Yes.

The Chairman: We shall now hear from the CBC. Representing the CBC is Mr. Jacques Alleyn, General Counsel.

Mr. Alleyn, you have had the opportunity to hear the presentation by the CAB. Am I right in assuming that regardless of the means by which you come to your conclusions, you support the bill?

Mr. Jacques R. Alleyn, General Counsel, Canadian Broadcasting Corporation: Mr. Chairman, and honourable senators, I would like to say that Mr. Davidson wanted to attend this session of your committee, but he has to be in Vancouver to be present at the laying of a cornerstone by Princess Anne. He asked me to do my best to put forward the corporation's view.

We have prepared and filed with your committee a brief. I do not intend to cover the ground which was covered by the CAB. However, I think the position the CBC has taken in the course of the SRL hearings is slightly different because I suppose we have to be different from the private sector.

We have submitted that the Copyright Act, though it may be ambiguous in so far as Section 4(3) is concerned, should be clearly interpreted that it does not provide this kind of right to the manufacturers. The reason for this is that although Canada is not bound to give protection to records of foreign manufacturers it is, however, internationally bound by agreement to protect the works of composers of music. Schedule 3 of our act, which happens to be the Rome revision of the Berne Convention—which must not be confused with the Rome Convention—provides explicitly that members of the Berne Union at the Rome level, 1928, must provide to foreign authors of musical compositions a certain level of protection. This is section 15 of Schedule 3 of our act, and it basically states that composers of musical compositions shall have the exclusive sole right to authorize the making of mechanical contrivances by means of which musical compositions can be performed. There is also the exclusive right to authorize the public performance of their work by means of these instruments.

So my understanding of the act, so far as Section 4(3) is concerned, is that it cannot be read as providing copyright to manufacturers of records; that this is a right that must be under the exclusive control of the composers of musical compositions as a matter of international commitment.

If I may I would just like to discuss a previous question, not put to me but to others. I think one distinction that can be made between musical compositions and works and records, so far as this possible imbalance between foreign and Canadian interests is concerned, is that Canada is internationally committed to provide protection to musical works, but is not committed to provide protection to manufacturers. I think this appears to be a very important consideration.

I would say if we are providing this to other countries that do not provide it to us—perhaps this is in the area of politics, and I should stop there, but I do not think we will have much to bargain with if we ever try to get this right for our own manufacturers because it will all have been given away, and nothing will be left to give in consideration of their recognition of manufacturers' rights. There may not be very many Canadian manufacturers, but whatever their number is they would probably like to have the same treatment elsewhere.

I submit that the matter of interpreting the act should be clarified. I think Bill S-9 has this effect of clarifying the act, so far as it may need clarification. If it is adopted, I think that Canada will be responding to its international commitment from the point of view of the Berne Union.

The Chairman: Are you suggesting, Mr. Alleyn, that at the present time we are in default in our international obligations and commitments?

Mr. Alleyn: That may be a question that you should ask a lawyer rather than a delegate of the CBC, but my private view is, that if this right is recognized and maintained, and you have to secure the authorization of only the composer of the music to perform by means of these instruments, then possibly the letter, at least, of the Berne Convention will not be lived up to.

The Chairman: I have difficulty in following that because the Berne convention was in 1928, and this section of the act goes back to 1921 or 1922. At the time they were talking at Berne and making all their settlements, they knew what our law provided.

Mr. Alleyn: I would say that there was a change, Mr. Chairman, that was brought about to introduce, I think, the Copyright Appeal Board's functions. There was also this matter of compulsory licencing which was really an exception to that right in section 13 of the Berne Convention.

Section 13 of the Berne Convention, Revision of Rome, provided in paragraph 2 that conditions and limitations may be imposed by national legislation to these provisions, the rights we have mentioned earlier, but that this can only be done by countries which have put them into effect—that is the expression used in the convention. I do not know what exactly "put them into effect" means. I get the impression that nothing much with regard to the government's efforts has been put into effect until very recently. This is my submission on that point.

The Chairman: This may be a question you may not want to answer, and if you do not I will understand, but would you agree that, quite apart from talking about the Berne Convention and the understanding among various nations by reason of that as to what the obligations were, the real question to decide here is: Is there a performing right of some kind in what the record maker does that should be entitled to copyright protection? Is not that the point?

Mr. Alleyn: I will try to answer that.

The Chairman: All the other things are just going down detours and sideroads.

Mr. Alleyn: I think there is one right that still remains and would remain even if Bill S-9 were adopted, that is

the right to prohibit copying of records. The only other one that would clearly not exist is the performing right in a record. I have, in the course of this hearing, tried all kinds of intellectual gymnastics to find what the "performance of the record" might be, as distinct from what the "performance of the work" means. The only understanding of it that I could to, and after this I have my own limitations, was that actually what they were talking about was really the performance of the work contained, be it in the public domain or be it protected, and which took place. I could not really see that the performance of anything was taking place because you were using a record. It would be possible, I suppose, to conceive of a silent record, containing no sound at all, as being a proof that the studio was absolutely sound proof. But if you put on sound and you have a performance, then if a musical work is embedded in the record I think the performance that takes place is basically a musical work. The record is just an instrument, and the instrument does a certain amount of performance. That is my submission.

The Chairman: In the act, as it stands now, Parliament relieved you from all that rationalization by saying that you should look upon a performing right in like manner as if it were a musical work. So you do not have to improvise or do anything else. You just say that Parliament has said "that is a musical work it is to be treated in the same way as a musical work."

Mr. Alleyn: In like manner.

The Chairman: Yes, in like manner.

Mr. Alleyn: Mr. Chairman, I was told in law school, when talking of constitutional law in England, that Parliament can do most everything but not call a man a woman—well, it can do that.

Senator Flynn: Yes, it could.

Mr. Alleyn: Yes, so that it quite possible; anything can be inscribed in legislation, in an act. There is no limit to that. But, in my humble submission, if some meaning is to be given to section 4(3), I think it should be related to what is possible with the record, and that is to perform—it is an instrument to perform a work.

The Chairman: You want us to conclude that there is not that right existing at the present time in the law?

Mr. Alleyn: I would like to make sure, Mr. Chairman, that my interpretation is the correct one.

The Chairman: This is not any part of our job, as I see it, to interpret what an existing law is. How could we fly in the face of the Government department that administers this law, when they present a bill asking us to amend on the basis of taking this right away? That is where we have got to start.

Mr. Alleyn: The only excuse for what I have said in this matter is my own personal incompetence and lack of knowledge, and I apologize for that.

The Chairman: Now that we have eliminated the side issues, let us get down to the main issue.

Senator Connolly (Ottawa West): Is the main issue not this, Mr. Chairman? We are talking about performing rights and I think what the previous witnesses have said, and perhaps this witness is saying, too, is that there is no property in a performing right. I have no doubt that people who will come here later to represent the record companies will say, "We have a property right, and we ought to get paid for it". I can understand the reluctance of the broadcasters to say, "You have other benefits and you really do not need it; you will hurt the broadcasting industry." But I think what we have to find out, first of all, is where there is a valid property right in these people that produce these records, and whether that right should be recognized. I think you have to approach that with an open mind.

The Chairman: If we start on the basis that the law now is that there is a performing right, then what we have to decide is whether that should continue. Is there a reasonable or logical basis in the national interest for saying that should be continued. It seems to me that as long as we stay right on that line we are being very safe and not being influenced by all these other side issues about national culture, and sending a lot of money out to the United States. If we do not send this money to the United States it may be we will send at least as much in other directions. So these are not the sound arguments.

Senator Flynn: I suggest that if the Copyright Appeal Board, instead of authorizing the tariff that has been proposed by SRL, would grant them only 10 per cent of what they are asking, then those supporting the bill might not support it as strongly as they do. For instance, instead of the $840,000 which is estimated to be paid by the Canadian Broadcasting Corporation on the basis of the tariff now before the Copyright Appeal Board they would have to pay only $80,000 a year, they probably would never have asked the department or anyone to present this bill.

Senator Cook: Is there an analogy here? If this does not go through and the law stays as it is now, and we feel that these manufacturers have some copyright, as it is called—something for which they should be reimbursed over and above getting paid for the article itself, as they do every time they sell it would not the situation be the same as when a book is lent by a public library, and should not the publisher get paid every time a person takes a book out?

Senator Flynn: That is the argument in the report of the Economic Council. But if you go on television and read a book, and identify the edition of the book, then that might be something then other than the private reading of a book.

Senator Cook: To carry through the analogy further, the public library does little or nothing for the author or producer. As is said here on page 8 of the brief:

> The evidence adduced before the Copyright Appeal Board in the course of the SRL hearing indicates

that record manufacturers rely very heavily, if not exclusively, on the broadcasting of records to create and develop the market for the sale of their records; the use in broadcasting of these records creates a benefit in favour of the manufacturers and contributes to their economic success in the sale of records to the public.

The Chairman: That is good argument for making the tariff substantially less. It is only a quantum argument.

Senator Flynn: It is against recognizing the performing rights of the singer or musician, because the more often his work is performed on television or radio, the more he gets.

The Chairman: I would like to get the discussion back on the main highway.

Mr. Alleyn: This is what I had in mind. I have heard Senator Flynn talk about the performing right of the artist, the musician and the performer. I had the impression that this is not what really section 4(3) dealt with. That actually dealt with the record manufacturers and the performance in the physical record itself. If that were legislation to provide performers and artists with remuneration of some kind, I would have thought it would have to be found somewhere else than in the Copyright Act. I submit that there is no work created; they will be marvellous, unique renditions of authors and performers, but they do not create works per se as defined in the Copyright Act. So that would be strictly an offshoot of providing manufacturers with something, but not a statutory link between the manufacturers and the performers and artists.

Senator Flynn: I agree with that, but in the submission of the Association they raised as an argument the amount that they paid to the performers, which is over $5½ million. That is why I wanted to be clear this morning between what they are paying as a composer's copyright and what they are paying under their contractual obligations.

Senator Beaubien: I am not a lawyer but, as I look at it, it seems to me that the whole thing is rather simple. We passed a law in 1921, copied from the English statute, which had nothing to do with recording manufacturers' rights. It was on the statute books until a few years ago when some other smart lawyer, reading what the first lawyer had written so that anything might be construed out of it, came up with the idea that he would get $5 million from recording manufacturers simply because the law of 1921 was not very explicit.

The Chairman: It does not say $5 million.

Senator Beaubien: Well, whatever it is; it does not matter what the amount is. All the record manufacturers, by going back to a statute and reading it in their own way, think they will get some money out of it. Is that not what we are considering? So the Government decides that it never was the intention of that law passed in 1921 to give the record manufacturers a commission. For that reason Bill S-9 is introduced, making a law of 1921 stand up and be sensible.

The Chairman: No, the purpose of this bill is to cancel or repeal the earlier law.

Senator Beaubien: Well, whatever it is, that is what the Government thinks is the sensible thing to do. Is that not what we want?

Senator Flynn: Your argument is correct that they have never used the right before. But just think of the performing rights of the musicians and artists; they are not even in the law and they have been successful in obtaining them.

Senator Beaubien: That does not change the facts in this case.

The Chairman: We have heard the points of view of Senators Beaubien and Flynn. Maybe I can now get Mr. Alleyn back on the subject. Is there any way in which you can help us in saying that there should not be a copyright? Can you rationalize why there should not be a copyright or a performing right in a record? How would we go about breaking it down to decide whether it contains an element worthy of copyright?

Mr. Alleyn: The only point at time in which a performing right can be considered, in my very conservative approach, is that there should be a bona fide copyright work, in the sense that there is no original creation of something in the copyright law generally. Up to now these theories of works have not included performances of artists, musicians and I think that generally they have not included the process of the manufacture of records as producing a work. Therefore I would just say that I do not think that there is any originality in a record per se. Its only originality is derived from the relative merit in the musical composition which it embodies or of which it is the material support.

Unless we could conceive that there is a creation of a work by a performer, artist or musician, we could go further. No performance or work in the sense of copyright for performance by artists, performers or musicians and no work in the sense of a copyright for the manufacturer who produces a physical thing. The only thing remaining is the work of a musical composition, so that is where it should reside.

The Chairman: Maybe we should take a different approach to the elements in a copyright. You say the author writes something, therefore he has a copyright in it. If that is something to be performed, maybe the definition of a copyright could be broad enough to include all the elements that go to make that viable? Maybe the performing right is inherent in the author's right, because that is the way in which it becomes viable and is used for producing money.

Mr. Alleyn: It is quite true that many physical operations take place before a copyright work can be put to use. We ourselves use antenna systems to perform works.

We have not filed tariffs for antennae yet, but there are many physical operations put in motion to eventually make the work available to the public. However, most of the time these do not create works themselves; it is the original work which is moved through a variety of mechanical or technical means and ends up by being viable to the public.

Senator Cook: And which is copied; the record is only played over and over again and is not copied.

Mr. Alleyn: We have no quarrel with the fact that records should not be copied; we admit that.

Senator Flynn: As Senator Beaubien mentioned, the law was written in 1921, under conditions which were totally different from those of today. Maybe we should revise the whole act as far as this problem is concerned. However, it seems to me that we are just attempting to plug a hole of some kind. I will not say a loophole, because I do not think it is one, but a hole of some kind. When we touch it we find that the problem is much wider than is envisaged by the bill. That is why I am reluctant to deal with this one very narrow aspect of the whole problem.

The Chairman: But, Senator Flynn, the position and importance of records in 1921 could not be compared with what it is today.

Senator Flynn: That is right; there was no radio or television.

The Chairman: In the light of all the developments that have taken place and since we are in an entirely different concept that is what I have been trying to obtain from Mr. Alleyn.

Mr. Alleyn: Mr. Chairman, I cannot give you what I do not possess.

Senator Carter: Can we not go a little further? Fifty years have passed; should we not look ahead another 10 or 20 years, by which time the changes may be even more profound?

The Chairman: We should be updating if the circumstances are so entirely different, but I cannot get any help.

Senator Beaubien: In the meantime it clarifies one point.

The Chairman: Of course, Senator Flynn says there are many similar points in the copyright and I agree with him. We have been told that it is being revised, but it has not yet been presented.

Senator Lang: The record business is on a great decline. I assume it is on a decline because instead of buying a record it is simple to hook a tape recorder into a radio. Therefore the record manufacturer is paid nothing. It would be the same thing if all records were free. Then the manufacturer in order to receive some remuneration would have to obtain something like a copyright so that he could be paid on the basis of the use of his product.

Senator Cook: If he is not paid he will not make the records.

The Chairman: Mr. Alleyn, when a record is played by a broadcasting station or on the television, is that known as a performance, a production, or something else?

Mr. Alleyn: I would say that if we put a record on a turntable, pick up the impulses, transmit them and eventually by the effect achieved the receiver vibrates in the same way and reproduces what is happening at the other end, we have a good, bad or marvellous performance of that musical composition. If the record or equipment is bad or the antenna not in good condition, there may be very bad reception. If everything is at the maximum and the musicians have rendered at 100 per cent what Beethoven had in mind, then I suppose what we get is a marvellous rendition of Beethoven's Ninth Symphony.

The Chairman: It would not be an improper use or misuse of words to call what occurs there a performance or a production?

Mr. Alleyn: We have the CAPAC and BMI tariffs, on which we pay substantial sums for the public performance of these musical compositions. I think we have always been quite ready to pay them, and there is no problem there at the moment

Senator Flynn: Because of the habit.

Mr. Alleyn: No. I have recently joined the corporation and I do not have any bad habits yet!

The Chairman: You are not suggesting that time will have that inevitable result?

Mr. Alleyn: I would improve with time.

Senator Flynn: I would suggest to the witness that if Bill S-9 gave the Canadian Broadcasting Corporation and the other private organizations the right to dispense with payments to BMI and CAPAC, they would support it.

Senator Beaubien: I hope the CBC would; they are losing enough money now.

The Chairman: Are there any other questions?

Senator Grosart: I should like to make a comment, if I may. First of all I should declare an interest.

Senator Beaubien: Do you have a radio?

Senator Grosart: It so happens that in my office, where we do a good deal of publishing, we publish a magazine called *Canadian Composer*, so to that extent I have an interest on the side of the composers. As part of its operation that magazine, has discussed this whole question over a period of some five years. I would just like to draw the attention of the committee to one or two things that may not have been brought to its attention to date.

First, you asked, Mr. Chairman, quite properly, what is the nature of the special right that the composer has that

others might not have in the whole line of production and performance. I am now playing back to some extent what has been said at international conferences around the world, particularly at the very extensive hearings on the subject before the committee of the United States House of Representatives and the Senate, where there has been discussion of the whole question of copyright act revision in which this very problem has been included. It has been going on now for about five years. The reason why the copyright acts, our Copyright Act and others, have tended to limit the performing right to the composer-author is that he is in a different position from all the other people along the line, in that the performing right is almost entirely his only source of income. The record manufacturer is in the business of recording, making and selling records.

The Chairman: On that point, you understand that there is no contest here. This amendment does not deal with the composer's rights at all.

Senator Grosart: Of course it does.

The Chairman: No.

Senator Grosart: With respect, Mr. Chairman, the suggestion has been made in the hearings before the Copyright Appeal Board and elsewhere that if this tariff was granted—and this submission has been made officially—that whatever amount was granted should come out of the composer's share.

The Chairman: You mean the suggestion was made that it should?

Senator Grosart: Yes.

The Chairman: But where is there anything to do with that in this bill?

Senator Grosart: This is obviously one of the results this bill is intended to prevent.

The Chairman: Well, it is not obvious.

Senator Grosart: With respect, it is obvious to me, Mr. Chairman. It may not be obvious to you, but it is obvious to me and that is why I am speaking about it.

The Chairman: You go ahead and develop the subject as much as you like. All I am pointing out is that it is not the subject of the amendment.

Senator Grosart: With respect, Mr. Chairman, you yourself brought up the very subject, and I am answering the question you raised: why is the composer's interest in the copywright in the performance a special thing?

The Chairman: No. I think what I said was that the definition of "copyright" is broader than just the element of the composer.

Senator Grosart: That is exactly the point I am making. I am suggesting the element is narrower, which is a direct response to your suggestion, if I may say so.

The Chairman: All right, go ahead.

Senator Grosart: That is the main reason the composer has insisted, as he has over the years, that this should be an exclusive right, the performing right, because it is his one source of income; it is in a very different category from the additional income that some other party to the manufacture and performance might have. That is the first point.

The second point is that the whole history of copyright lays stress on originality, original creativity. No matter what the method and mechanics, of the performance are, the assumption in copyright has been from the beginning, from Queen Elizabeth's time, that it was the original, the first creation that was protected. In the music field this consists of the words and the music of a song, popular or otherwise, or a composition in the field of serious music. That is the second reason, and the second answer I would give to the question asked.

The suggestion has been made that record sales are going down. I think the facts are that the record of the last few years is the very opposite: record sales have been going up and up. The performance is so important to the record companies that, quite naturally, they go to great lengths to persuade disc jockeys and others to perform their records. The purpose in doing that is, of course, to extend the popularity of the song and the record, and therefore to sell more records. I therefore suggest to you that there is much more to this than merely thinking in terms of how many people are getting into the spectrum of performance.

As the counsel for the CBC has pointed out, if you keep on extending it it means that you might bring in all the instrumentalists, and the many technicians who would be involved in the making of the record and the performance of the record over a radio station. You could quite possibly go beyond that and extend the number of people who might be said to have an interest in the performing right that subsists in the original work to thousands of people. You would therefore have to fragment any payments, if you were to carry that logic to its extreme, among thousands of people. Again I say there has to be a limit somewhere, and the suggestion of the composers is that the limitation should be at the point of original creativity, and only the original creator of the work should be entitled to special copyright protection, particularly in the matter of performances.

Senator Flynn: You mean we should go further. The performing right is not presently included in the act. Do you mean we should clarify the act so as to enable the dispensation of payments of performing rights?

Senator Grosart: No, the act is very clear.

Senator Flynn: No, not on this score.

Senator Grosart: I may have misunderstood you. The act is very clear, of course, about the fact that a performing right subsists in relation to the original author.

Senator Flynn: The author, yes, but it is not a performing right: It is perhaps a performing right, but not by a performer.

Senator Grosart: Well, it is a performing right that subsists in the original author and in no one else, unless the interpretation is placed upon the act that has been placed upon it, by some, that a secondary performing right subsists in the record itself. I think the general consensus is that a copyright does subsist in the record.

I would draw this to the attention of the committee, which is perhaps the most important single element in this whole discussion. That right is taken away for some records under section 19; that is, for those made under a compulsory licence, because the compulsory licensing section introduces a completely new concept into copyright; it restricts.

A fact that I do not think has been brought before the committee yet is that the right that subsists concerns probably only a handful of records made in Canada. The vast majority of those records are made under the compulsory licence, and I think almost any reading of the act will indicate that section 19 completely withdraws the performing right from a record made under the compulsory licensing section.

The Chairman: Are there any other questions? Thank you very much Mr. Alleyn.

Mr. Alleyn: Thank you, Mr. Chairman, and I wish to thank the honourable senators.

The Chairman: Honourable senators, we now have the Canadian Council of Performing Arts' Union. Mr. William Dodge, the secretary treasurer of the Canadian Labour Congress, is going to make the opening statement. He has his panel here, which he will introduce to you, and any member of the panel may answer your questions.

I will have to go very shortly, and Senator Desruisseaux will carry on, if you approve of that.

Mr. William Dodge, Secretary-Treasurer, Canadian Labour Congress: Honourable senators, on my right is Mr. John Simonds, who is secretary of the Council of Performing Arts' Union; Mr. Alan Wood vice-president of the American Federation of Musicians; Miss Margaret Collier, of the Association of Canadian Television and Radio Artists; Mr. Hamish Robertson of Actors' Equity Association; Mme Jeanne Sauvé, representing both the Federation des Auteurs et des Artistes du Canada and the Union des Artistes of Montreal; and Mr. Bernard Chadwick, president of Actors' Equity Association.

I am going to make a very brief statement which I will read. I do not consider myself to be an expert in this exceedingly complicated field. If there are any questions of fact or concerning statistics and mechanics of the industry, I shall have to refer to one of my expert companions.

I can state our position on Bill S-9, which is one of opposition, in a few simple sentences.

It is based entirely upon the matter of recognition of rights. As many as four different elements may contribute to the production of a recording of a musical or dramatic performance. These elements are the author, the composer, the performing artists, the manufacturer or producer.

Senator Paul Desruisseaux (*Acting Chairman*) in the Chair.

Senator Connolly (Ottawa West): What is the distinction between the author and the composer?

Mr. Dodge: The author may write the lyrics or a play. The composer is generally referred to as the person who makes a musical composition.

Each of these four contributing elements receive a return in the form of a royalty when a record is made or sold to individual customers. Some of these individual customers are broadcasters and the purchase of a very small number of records enables them to deliver thousands of performances to the public. They do not do this as a contribution to culture or entertainment, or even to Canadian unity. It is just the principal means by which broadcasters sell commercial advertising which, in turn, is the source of their profit—assuming that they make profits.

When records are played on the air, the author and the composer receive royalties or fees by virtue of a right given to them by the Copyright Act. The rights of two of the elements in recording production are thus legally protected and effectively rewarded.

The right of the third element, the producer and/or manufacturer has also been heretofore protected under the Copyright Act. Although they have never, until recently, invoked their right as a means of obtaining a recompense for the use of their product by the broadcasting media, in fact it is this recent attempt to invoke it which has precipitated Bill S-9, because Bill S-9 has only one purpose: the removal of the right of manufacturers or producers from the Copyright Act.

The right of the fourth element, the performing artist, has never been recognized in the Copyright Act, although in every sense it is equal in merit to the rights of authors, composers and manufacturers.

Senator Connolly (Ottawa West): It is a different category. I think you may weaken the case by saying it is equal.

Mr. Dodge: Perhaps it has greater merit, I do not know.

Senator Connolly (Ottawa West): Who can tell? That is right.

Mr. Dodge: I will strike out the word "equal", if you like, and say "merit of the same sort".

Senator Connolly (Ottawa West): It is high in order.

Mr. Dodge: Yes.

Senator Grosart: You may also wish to strike out the word 'every'.

Senator Connolly (Ottawa West): I would submit the artist performing may make a very original interpretation.

Senator Grosart: There is a special creative element in the original composition that is recognized in the act and,

in fact, the special word creative contribution is recognized in the recent study by the Economic Council of Canada.

Senator Connolly (Ottawa West): Does it help you to say that probably a lot of the work done by the manufacturer is under patent; and, therefore, at least at one time, was original.

Mr. Dodge: I think that is a fair statement. I think in any case..

Senator Connolly (Ottawa West): We are all interrupting you.

Mr. Dodge: What happens when a recording is made—some of my fellow-delegates can perhaps enlarge on this later—is that the job of bringing together the elements in the studio which is going to produce a record of one kind or another, you can take any one of a dozen versions of a particular musical composition, a full orchestra, a vocalist, a quartet, you can have all kinds of things. Who decides the quality of the musicians put together is somewhat analogous to a producer of a dramatic show on the Canadian Broadcasting Corporation producing the show. I think, in that sense, there is a creative element in the putting together of the elements which will make a particular recording.

Senator Grosart: Would you agree, Mr. Dodge, that all those are paid for at a negotiated rate?

Mr. Dodge: The artists are, as has been testified to already. Again, Mr. Wood, for instance, could give you some details as to how that is provided for, but the manufacturer is not paid at that point. He is paid when the records are put out for sale.

Senator Grosart: Yes, or when he sells it.

Mr. Dodge: Our position is that the rights of these four elements are clear and justifiable.

Senator Connolly (Ottawa West): Property rights?

Mr. Dodge: Indeed, the denial of any of these rights in order to protect the right of exploitation of the broadcasting industry, in our opinion, is unjust and indefensible. Bill S-9 has that purpose.

The principle underlining this proposal is, in our opinion, clearly discriminatory. We support the right of the manufacturers to the recompense they are seeking because it is evident to us that if the rights of others are applicated, this applies to the composers as well, Senator Grosart.

If the rights of others are abrogated by the adoption of measures such as Bill S-9, then the attainment of a primary objective of this performing arts council of ours, the statutory recognition of the rights of performing artists will be a difficult, if not impossible, task to achieve.

Therefore, we respectfully ask the Government to withdraw this bill or, failing that action, the honourable senators defeat it when it is up for third reading.

I have heard some argument about this being a right which sort of accidentally got into the Copyright Act and we are now just tidying it up by taking it out. "Plugging a loophole," I think, was the expression used at one point.

I think it ought to be known that this is a right which, in advance, is universally recognized. It is discussed in the Economic Council's report and, incidentally, the recommendation of the Economic Council that this section of the act be deleted is the first recommendation ever, coming out of the Economic Council on which there was not unanimity on the part of the members of the council and the dissenting views are specifically referred to in the preface of the report.

The fact is that in a particular Rome convention, the one in this document, which was the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, known as the Rome Convention. It was adopted on October 26, 1961 and is a registered convention of the United Nations.

Senator Connolly (Ottawa West): Has Canada recognized it?

Mr. Dodge: Canadian representatives participated in this conference, but Canada has not endorsed the convention. I will read you Article 12, it is only a few lines and very explicit:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law, may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

Artists, such as those represented by the organizations present here, participated in the discussions leading to the adoption of this convention and fully subscribe to the theory that a manufacturer or producer has a creative input in the production of records and is entitled to recompense when those records are played over the broadcasting media.

They also, of course, strongly contend—and they have a much more important private interest in this—that a similar right ought to be recognized for performing artists. No such right is at present in the Copyright Act. We think this is a very serious gap in the act.

The Acting Chairman: Mr. Dodge, if it is so that these rights are there, why have they not been asserted until now?

Mr. Dodge: So far as the manufacturers are concerned, I have no idea, senator. I am afraid you will have to ask them.

An hon. Senator: In the United States manufacturers are apparently not paying this tariff, so the Canadian consumer will be paying more than the American consumer, if you are correct, to the extent of $4 to $5½ million. How do you rationalize this?

Mr. Dodge: I think it ought to be expressed in the first place, that the application as I understand it, is for a

tariff of that amount, that would recover for the manufacturers that amount. Someone emphasized this morning that that is a sort of bargaining figure. Presumably the appeals board can make the decision which goes all the way from not granting the application at all to granting it in some modified form. So I do not think we could take it for granted that that round sum is what is going to be recouped by the manufacturers. In the long run, what the ministry responsible for the administration of the act is concerned about is if the broadcasters have to pay out more to performing artists in the form of royalties of tariffs, or to producers and manufacturers or in royalties and tariffs, that this somehow will seep down into advertising bills for commercial advertising that are submitted to advertisers on radio and television, and that they in turn will pass that on to the consumers of the products that are purchased by the consumer. Really, I think this is going to be spread so thinly over all the products advertised on radio that it will not amount to a hill of beans. I have no way of figuring out how that will work but I am sure it will be a very insignificant effect upon the total cost to consumers.

The Acting Chairman: Why has this convention not been ratified by Canada? It has not been, but why not? Would you know the reason?

Mr. Dodge: I guess it is a sort of problem there of opposing pressures that work out. Before we started on this discussion here, we had two groups of people interested in the trade business and textiles and, as we saw, two diametrically opposed opinions were expressed here on this issue. It appears to me that the reason why it has not been adopted is because the pressure against its adoption has been greater than the pressure for it. This is probably our fault to some extent, that we have not generated enough pressure for it and enough public opinion for our point of view.

Senator Hays: You do not agree with the figure of $4½ million to $5 million?

Mr. Dodge: I think that if the tariff which has been applied for were granted in full, that is the figure it would come out to.

Senator Hays: So the Canadian consumer would be paying $5 million more than the American, or 25 per cent per person more?

Mr. Dodge: Unless a substantial portion of it were absorbed by the broadcasters, and I think that is quite possible. It is quite possible that they could or should do that. I think it is an extremely specious argument to talk in terms of how much money is going to go to the United States. This is something they should have thought of a little earlier in the piece, the kind of distribution of revenue that occurs now, it is surely the result of the excessive use of non-Canadian recordings in the past. To invoke this as an argument today in favour of the adoption of Bill S-9 seems to me to be quite irrelevant.

Senator Connolly (Ottawa West): Suppose we followed your argument and acted on it, is there any assurance whatever that this additional money for performing rights, or tapes, that the benefit would go perhaps some to the composer, some to the author, perhaps some to the performing artists who perform the work, perhaps some to the technicians who make it possible to have the recording? How would there be any assurance that these additional moneys would benefit these various people?

Mr. Dodge: You mean, if the tariff were granted by the Copyright Appeals Board?

Senator Connolly (Ottawa West): Yes, if this bill were not proceeded with. That is another way of saying it.

Mr. Dodge: Of course, the composers and authors get theirs by virtue of their own right, through BMI and CAPAC.

Senator Connolly (Ottawa West): In other words, they make the best deal they can with the publisher of their work, so they are out of it once they have made their deal.

Mr. Dodge: You are asking if the artist would have a means, through a tariff of this kind, of obtaining a share. I think the answer has to be yes.

Senator Connolly (Ottawa West): What I am asking you really is, what are the mechanics for the money which, under the tariff, would be paid to the producers of the record, the manufacturers of the record? How would that money be channelled back to the artists who performed the work for the manufacturer, and to the technicians who make it possible for the equipment to be used so that you get a good production?

Mr. Dodge: There is every possibility of such a sharing of the proceeds being arrived at by mutual agreement between the unions represented here and the manufacturers and/or producers of records.

Senator Hays: It was my understanding that the manufacturer is going to get this, period.

Senator Connolly (Ottawa West): That is what I say, and what I wanted to know is this. How does it get back to the performers—I mean the violinists, the pianists, the 'cellists and all the others who actually go into the studio and play the music that results in this work being put on to a plate. And, further than that, to the technicians who work in the studio and ensure that the work of these performing artists is properly recorded so that it will be a satisfactory record.

Mr. Dodge: May I pass the question to Mr. Wood, who is from the musicians union?

Mr. Alan Wood, American Federation of Musicians, Canadian Labour Congress: Senator, if I may I will answer that question in two ways. First of all, we are here representing just the performing arts group. This is our function. We represent musicians, singers, actors and this is our only function. So I feel quite sure that we cannot answer your question so far as technicians are concerned. We basically have nothing to do with technicians as such.

Senator Connolly (Ottawa West): Mr. Dodge was speaking about technicians and argued their case for them. That is why I included it.

Mr. Wood: Talking about the performing artists, it is possible, and it should be possible, obviously, for the reason we are here, that there is not only a possibility but there are in fact negotiations with the producers at this particular time to share the moneys that are collected according to law.

Senator Connolly (Ottawa West): This is, Mr. Wood, over and above any wage scale that they have reached by collective bargaining for the work that they do?

Mr. Wood: Yes sir.

Senator Cook: On page 7 of your brief, you say:

> In conclusion, we support the retention of the right of the manufacturers in the Copyright Act because we consider it to be fair and reasonable and because we do not wish its removal to serve as a basis for future government opposition to the recognition of the rights of artists.

Do I gather from that that you in due course want to go a step further and have another copyright tariff?

Mr. Wood: Yes, sir, very definitely.

Senator Cook: Which would go to the artists, over and above the tariff which now goes to the composers, and the tariff will then go to the manufacturers. There will be still another one?

Mr. Dodge: We think that the rights of each of these elements stand by themselves.

Senator Cook: Therefore one of your reasons for opposing the bill is because if it is passed now any hope of achieving recognition of the rights of the performing artists is pushed that much further away?

Mr. Dodge: Precisely.

Mme Jeanne Sauvé, Fédération des Auteurs et des Artistes du Canada: It must be remembered that the law does not recognize the rights of the performers.

Senator Grosart: Mr. Wood, do I understand you to say that you are actually negotiating for a share of the fees manufacturers might obtain? I emphasize "might obtain" because of section 19.

Mr. Wood: That is correct.

Senator Grosart: Are you concerned that you are negotiating for something which you do not have, and are not even asking the right to have?

Mr. Wood: No sir.

Senator Grosart: You are quite prepared to say that if the manufacturer receives his money you will find some way to make him share it, in spite of the fact that under the Copyright Act at the moment you have no right. You are asking for money from the performance of the original work in which the performing right subsists.

Mr. Dodge: We think we have a right; it just is not recognized.

Senator Grosart: I am sure, Mr. Dodge, that you have read the discussion of the Economic Council in this regard. They make the point, with which I am not sure I am in full agreement, that no property right exists in anything. It buttresses that argument by saying no one has a property right unless he has it in law. Therefore it would seem an extraordinary position to take to say that you have a right when at the same time you admit you do not have it in law.

Senator Cook: They have the moral right.

Senator Grosart: We all have many moral rights.

Mr. Dodge: If you are referring to lapses in the law, we think the real lapse is not having put into the statute the right of performing artists; it is not an error to have put in the rights of manufacturers. That I think was certainly a sound proposition.

Senator Grosart: I emphasize the fact that you are attempting to carve up the proceeds of a right which you do not have. May I say this, of which I am sure you are well aware: there is a discussion on the extension of copyright, not only in our own act, but in acts in other countries. This whole question of whether it should be extended to performers is a very live one and under proper circumstances I am not too sure that the majority of composers would object too strongly to it.

Mr. Dodge: It would be rather inconsistent for them to do so.

Senator Grosart: There is nothing inconsistent about it. A composer is in a much closer relationship to a performer than is a manufacturer, who is producing something to sell. Composers, of whose views generally I have some knowledge, have sympathy with the feeling of the performer that he is also creative and making a creative input in the sense of the Copyright Act and its conventions, in all of which the term "intellectual property" is used.

We sometimes forget that the essence of international copyright, as it has existed since 1880, is the intellectual property right. I put "property" in quotation marks because of the remarks in the Economic Council's Report. So I do not think you should give the impression that composers generally are not sympathetic to the general and broad basis of the act. I am not briefed by them in any way, shape or form. I have lived with composers; I attended the Convention of the Canadian Guild of Composers in Victoria this year, so I am familiar with their views. They are not unsympathetic to the possible extension, under proper circumstances which I will not detail, to a recognition of other creative intellectual inputs.

Please do not think that I am speaking for any performing rights society or any group of composers. I am giving a personal view of this whole problem.

Have you considered the possible effect of section 19?

Mr. Dodge: What is referred to in section 19?

Senator Grosart: I am sorry I have not the act before me, but section 19 in effect cancels the section which gives a performing right in a record under compulsary licence. The reason for that, and I think the committee should be aware of this, is that with respect to the original intellectual creative right, for various reasons through history, largely in the UK, but also in Canada and other countries, it was decided by the legislators in their wisdom that the right of a composer to complete control of the recording should be prescribed. So the law provided that under certain circumstances it would insist on any member of the general public having the right to make a record of an original composition. If recording company "A" is licensed to make a record, then anyone can tender a statutory fee, which is not subject to bargaining but laid down by the act, and make records. Therefore there would be no control over the proliferation of record-making of the composer's composition. Section 19 provides that in that circumstance the performing right in the record is null and void.

The facts of the matter are that the vast majority, probably 95 or 98 per cent, of all records made in Canada are made under a compulsory licence. The effect of this is that the original author, from whose right all other rights stem, could insist that when he gave the record company "A" the right to make a record be excluded the performing right in the record. If he does this he has given a licence to record company "A" from which he has withdrawn the performing right; he has not assigned the performing right, but has deliberately withdrawn any such right that might subsist in that record. This would be subject to some legal controversy, but I would suggest if that happened the subsequent records made under compulsory licence would also have withdrawn from them the performing right in the records per se.

Senator Flynn: If you are right this bill will achieve very little. It would be useless.

Senator Grosart: This is probably so. It is entirely possible that the effect of this bill would be practically nil.

Mr. Dodge: I do not know whether I am following your explanation here, Senator Grosart. It is rather a complicated legal matter.

Senator Grosart: It is.

Mr. Dodge: It appears to me that if, as Senator Flynn says, it would make Bill S-9 unnecessary and useless, it means the right of one artist is subordinated to that of another.

Senator Grosart: This is unquestionably so. It always has been so. There must be an assignment from the original author.

Mr. Dodge: I think we must stand on the position that we take, that there are rights morally held by the various people—the composer, the artist, the performer and the producer.

Senator Grosart: Would you advocate a technician's performing right?

Mr. Dodge: I know the technician is a contributor to the work at the producer level, and he is therefore involved in the creative process, such as it is at that level.

Senator Grosart: Would you include the switchboard girl? I think that is a proper question.

Mr. Dodge: I think she is included in the right given to the manufacturer; she is included to some extent in the right given to the composer.

Senator Grosart: Then would you agree she should get a share in that?

Mr. Dodge: The administering apparatus of the rights of composers and artists is a very substantial organization. BMI and CAPAC maintain offices and machinery for the logging of time of performances. I remember a story of Bernard Shaw receiving a personal note from a lady in the United States who said how much they had enjoyed putting on one of his plays at the church ladies' society. He replied and said, "I will have to check with my agents to see whether they collected the royalty on the performance." These apparatuses are very extensive, and no doubt also have a switchboard operator who is paid, and if the composers have an association that has a switchboard operator, then her right is dependent upon the exercise of the right by the composers.

Senator Grosart: That is rather different, because I think what you are forgetting is that any performing rights society is the assignee of the composer.

Mr. Dodge: Sure.

Senator Grosart: He is the assignee in the legal sense, because the performing rights society cannot operate unless it has an assignment at least of performing rights.

Mr. Dodge: Perhaps I might just pick up a point raised earlier which has not been dealt with yet. It is the position taken by the Economic Council. In our brief we say on page 6:

> Our Congress takes the position that intellectual properties cannot be lumped with industrial properties and studied in the same context without losing sight of the significant differences inherent in such properties.

As you will see, we quote the Chairman of the Economic Council, who said that further study in the light of this issue might have produced a different conclusion than the one contained in the report.

Senator Hays: As I understand Bill S-9, it says that the manufacturer will not get a royalty on records. What you are saying, Mr. Dodge, is that your people feel he should get a royalty on records. The reason you feel this way is because you feel you will get a part of it, or all of it, from the manufacturer for the performing artist.

Mr. Dodge: I said it is a distinct possibility that that could be done.

Senator Hays: But that is your reason.

Senator Cook: No. An even more important reason is because you want to advance your own rights.

Mr. Dodge: That is right. It is not our reason for it. Our reason is that we believe our own right as performing artists ought to be recognized, and the removal of the manufacturer's right will make it impossible for our right to be subsequently recognized. Theirs will go, and we think this is a point at which this warning can be sounded to Senator Grosart; we feel his may go too.

Senator Hays: You feel that the bill did not go far enough, but this bill just says the manufacturer will not receive a royalty, and if nothing is done he has, within the law now, the right to receive a royalty to a certain extent, and earlier witnesses have said 90 per cent of it will go to the United States. You are saying the manufacturer will turn some of this back.

Mr. Dodge: These people will be appearing before you and I think it is a valid question to ask them, just how much of the money will be going to the United States.

Senator Hays: If I may be a little realistic, they will put every bit of it in their pockets.

Mr. Dodge: May I say that the point here really is that at least in confrontation with the manufacturers we have somebody with whom we can negotiate. In the case of the broadcasting industry there is no such possibility.

Senator Lang: Theoretically do you think it is fair or consistent that a person should receive a fee for service and a royalty for the same act?

Mr. Dodge: A fee for service?

Senator Lang: A fee for service and a royalty for performing the same thing.

Mr. Dodge: If you are talking about a performer I certainly do. I just happened to make a note while listening to previous submissions. We have a very popular singer in Canada today, Miss Anne Murray.

Senator Isnor: She has sold a million records.

Mr. Dodge: Anne Murray makes a recording and gets a royalty for each of her records sold to individual consumers in the record shops. Her voice is probably heard 1,000 times a week on the radio, but she does not get one red cent for that.

Senator Cook: But it helps sell her records though.

Mr. Dodge: That is a moot point.

Senator Connolly (Ottawa West): This was the whole point made by earlier witnesses we heard, that the record makers are concerned, the manufacturers, get their bag out of the popularity the record achieves as a result of being broadcast, and they sell records as a result of that popularity; that is how their money comes in.

Mr. Dodge: There is a certain amount of truth in that, but let me not answer that one; I am not a singer.

Senator Connolly (Ottawa West): You are not a record maker either.

Mme Sauvé: For the performer it is a case of diminishing returns as well. It is true that if a person becomes popular through the playing of records on the radio it will help that person to sell more records. However, it also makes the lifespan of an artist much shorter, because he gets great over-exposure on the air through the device of the record, and his artistic life is diminished.

Senator Connolly (Ottawa West): I think this over-exposure argument is a valid one.

Mme Sauvé: There are new stars every week. As you know, artists pay their income tax. No matter what happens to them, they pay the income tax on one year; it is never spread out over ten years. In the year they are popular they can make a lot of money, but the next year they can go broke.

Senator Cook: How will this bill cure that?

Mme Sauvé: How?

Senator Cook: How will what you are seeking cure that situation of overexposure?

Mme Sauvé: At least for the overexposure she will get some return; she will get some recompense for the overexposure.

Senator Flynn: If you look at it from the viewpoint of the profit the performer derives from the number of times the record is played you have to be realistic too. Broadcasting stations sell time, and it is with the performances that they are able to sell time. They have to make a popular presentation. Everybody is interested from the profit viewpoint, even if the Canadian Broadcasting Corporation is not too interested apparently.

Senator Grosart: May I make two comments on the very good points made by Mme Sauvé. The first is, I have had a good deal do with artists and performers for many years, and I have yet to hear of an artist who asks a radio station not to play a recording in spite of the over-exposure problem.

The second, of course, comes back to the point I made earlier, that all of these people are being paid for whatever they are doing—for whatever input they are doing they are being paid. The composer only has one source of income. At one time you sold sheet music when there was a piano in every home. Many composers had a substantial income from that. The fact of the matter today is that there is no other possible source of income to the person who created the work that everyone else is using and making money on. He has no other source of income except performing rights.

Mr. Dodge: Except that he sold his rights entirely for a lump sum.

Senator Grosart: That does not happen very much any more. It is true that Billy Munro sold "When my Baby Smiles at Me" for $300 and it was 28 years later, under the American system of renewal rights, before he ever started to get any money again. I am happy to say I had something to do with that.

But this does not happen any more, largely because of the operation of performing rights societies, who discourage, in fact, will not permit, the member to sell his performing right outright because the minute he becomes a member of the performing rights society he immediately assigns all of his performing rights to that society as trustee. So what Senator Flynn is talking about cannot happen any more to an original author and I use the word in the widest sense.

Senator Flynn: In practice; not as a matter of law.

Senator Grosart: In practice; not as a matter of law. In law he could still alienate his right if he was not a member of a performing rights society.

Mr. Dodge: Could I ask Mr. Wood to discuss this question?

Senator Cook: We are really dealing with the manufacturers and you are dealing with another subject that is not covered by the bill itself.

The Acting Chairman: I think that is quite right.

Senator Flynn: The argument here is by restricting the field of a copyright you jeopardize the present system whereby performers can.

Senator Cook: It is set out very clearly on page 7 of the brief.

Senator Grosart: I would say, Mr. Chairman, our witness has quite properly, from this point of view, made a very good "foot in the door" argument.

Mr. Wood: I suggest, Mr. Chairman, in answer to the senator, that nearly every record contain musicians and 90 per cent of the records that are used in broadcasting today contain nothing else but musicians. The original intention of making a record, sir, was to make it and receive payment for the sales to the public for home use only. Never was it intended as a recording to be used in the broadcasting medium.

I suggest that on the label on that record it is clearly stated "For home use only and not to be broadcast". I further suggest that this could still be placed on the label and quite legally sold, according to some of the legal counsel we have obtained for this purpose. Therefore, the original payment was only made to the musician for the sale of that record, and not for the broadcast use of that record.

If we can negotiate, which we have successfully been able to do, on royalties on the sale of the record, then it is our opinion that we can successfully negotiate for further use of that record which was not intended in the first place.

The same thing happens in all aspects of our industry. We call it a residual in many, many cases, which I am sure you are well acquainted with. Musicians do not like to have their product used 24 hours a day without receiving any pay whatsoever.

Senator Grosart: I think you are weakening your argument. Mr. Dodge told us the reason they want in on the manufacturer's share, if he gets it, is that they have been unable to negotiate with the broadcasters. You are raising the very point I might have raised. You are already doing it. Your rights are the result of negotiations with broadcasters, of course, so I wonder why Mr. Dodge says they have been unable to negotiate.

The statement you made about the label is quite true. I can tell you the company was Decca. No one paid a bit of attention to it. They tried and tried to enforce it, and it had no effect whatsoever, as I am sure you would agree.

Mr. Wood: I suggest to you, if I may, that it is on existing records today.

Senator Grosart: Yes, but no one is paying any attention.

Mr. Wood: I am afraid they are, sir. It is on existing records and on existing jackets.

The Acting Chairman: Why has not the United States adopted this?

Mr. Wood: I cannot answer for my counterpart in the United States. I do know, however, at the present time they have a bill in before Congress for practically the same right as we have today.

The Acting Chairman: Would it be wise for us to go ahead and do something they have not yet done over there?

Mr. Wood: I would prefer we always go ahead and do something they have not done over there.

The Acting Chairman: You represent the Federation of Musicians.

Mr. Wood: I represent the Canadian membership.

Mr. John Simonds, Director, International Affairs Department, Canadian Labour Congress: Mr. Chairman, honourable senators, I think the same parallel can be drawn with respect to the question of the recognition of these rights in the United States and in Canada along with the question of the ratification of the Rome Convention.

There was quite a bit of comment made this morning by some of the other presentations about the fact that the United States has not ratified the Rome Convention and neither has Canada. I think that they also said that the countries where the Rome Convention has been ratified are primarily those countries where they have a large national broadcasting system. I think the answer is quite simply that in the United States and in Canada where we have a very large commercial radio operation that they have been able to mount a tremendously powerful lobby in the United States and in Canada to prevent the ratification of the Rome Convention, or the recognition of the payment of these for public performances. We are saying, first of all, of course that we would prefer to see Canada ratify the Rome Convention, which would grant and recognize in their own rights, both the authors and composers, the manufacturers and producers, and the interpreters. Quite simply, this is what we are saying in the

brief. But we want to protect our individual rights. But we also recognize that these rights exist for others.

We have also said in our presentation that we would certainly have preferred that the Economic Council of Canada have examined the question of intellectual properties, separate and apart and in a much more detailed fashion, than they were able to do when they lumped it in with their consideration of industrial and intellectual properties. We are sure that had they done this, the report would have reflected far more in our favor than it does at the present t ime.

Mr. E. Russell Hopkins, Parliamentary Counsel: If Canada had adopted the Rome Convention, then our act would have to be made to conform to that convention.

Mr. Simonds: That is correct, sir, and by saying that you would recognize, collectively or individually, the individual rights of both the manufacturers, the interpreters—that is, performers—and the authors and composers, which is the only just and fair system that could possibly be used.

The Acting Chairman: Do you have any other points you would like to make?

Mr. Dodge: I would just like to make it clear that, in reply to something that Senator Grosart said, we simply believe it is within the realm of possibility to negotiate in agreement with the manufacturers of records, and within the realm of possibility that we could do it with the other people, too. But the one has tremendous advantages over the other in terms of just meeting and discussing them. If you had to do it with the broadcasters, you would have to do it with each individual radio station from coast to coast and I see no way of handling a problem of that magnitude. I say that this is the theory behind it but I do not want any misunderstanding on the point that we are talking about rights. Basically, we are talking about the rights of these various elements that go to make up a record. We think each of the rights stands by itself. We believe the rights of performing artists should be recognized and we find it a very retrograde step that a right that the manufacturer already recognizes should be taken away from them.

The Acting Chairman: But once you assume that the rights can be negotiated, as I understood you to say, the manufacturers have these rights?

Mr. Dodge: I am simply saying that if they have a right, they invoke it, and they are successful in obtaining "X" amount of money as a result, there is a possibility that some of the money could be channelled to desirable uses in so far as we are concerned.

Senator Cook: But in addition to that you have got your own rights, which you want to see recognized.

Mr. Dodge: That is exactly the point. In fact, much has been made of the fact that a lot of this money may go to the United States. I do not know what the answer to that is. Presumably, you will ask them that. But clearly, it need not go to the United States and whether it does or not is a matter for decision by them or perhaps decision by the Government of Canada. There are lots of ways of preventing it from going to the United States without taking the right away from them in the act.

Senator Carter: I wonder if Mr. Dodge could clarify one point for me. I cannot understand the rationality of the manufacturer's having a right. How he can have a right? On what basis does he acquire a right simply by making something to which everybody else has contributed. If there is not any author, composer, or group of musicians, he would have nothing to record. When all these have done their work, all he does then is make a device by which other people can enjoy it. How does that give him any inherent right? I do not quite understand that.

Mr. Dodge: I have used a term which I do not like, "manufacturer and/or producer", because there is an involvement of producing, in the putting together of the inputs for the production of a recording.

Senator Carter: Take one person who is going to sing a song—take Anne Murray, if you like. She is going to sing a song and the technician is going to set up the apparatus and the turntable is going to go around and her voice is going to be reproduced on this master copy. In doing that, how does the person who produces the master copy acquire any inherent vested right?

Mr. Dodge: They are part of the varying amounts of input. Even the simple choice of whether or not she would just sing it with a pianist, or whether she would sing it backed up by a full orchestra, or whether she would sing it under other circumstances, is a critical and creative decision. It is the difference between putting on a national ballet on a full-scale performance on television, or having Dinah Christie read a poem on television. And yet each of them has its creative aspect. You cannot say that one is creative and the other is not. There may be differences of degree, but the extent that the manufacturer has the responsibility for the production and the decision-making, about how it is staged and put together, in this sense there is a creative influence.

Senator Carter: Yes, but are you not just talking there about what we are calling the master copy?

Mr. Dodge: Yes.

Senator Carter: That is fine, but when other people buy this master copy and then go out and reproduce records from that master copy, how do these people, who are the manufacturers, acquire a vested right in them?

Mme Sauvé: They cannot copy.

Mr. Dodge: Of course, it comes back to the original.

Senator Flynn: It is the same as getting a film.

Senator Carter: It is not copying, they are reproducing from the masters.

Mr. Dodge: The company makes the master copy.

Senator Carter: But all of this creative business that you have been describing takes place when the master copy is made. That is all done. All that is done after that is to reproduce this.

Senator Flynn: You would destroy the patent right—in your argument—because once you have invented the first thing with a patent, all the others are merely copies. They are manufactured in chain production.

Senator Carter: Yes, I know that.

Mr. Dodge: Every record has a master, to begin with, and from that the production goes on. I guess it is really a question you should put to the people who make them. I do not know how they are made. All I know is that they get these big vats of plastic or something and they stamp them out. My idea of it is that the master is made from the performance in the studio, which may be located in London, England, or New York, or Toronto.

Senator Carter: I can understand there might be some creative work there.

Mr. Dodge: Once the master is made, the inputs and the production are the same. All that goes on from then is that they stamp as many records as they think they can sell.

Senator Carter: Another person might buy that master copy. These master copies can be sold, can they not?

Mme Sauvé: I think you are right. The master copy is often copied and you have a proliferation of small record manufacturers who copy from an original production, manufacturing of one record. This does happen and there has been in Paris last month a small meeting dealing with what they call piratry.

Senator Grosart: It is quite illegal.

Mme Sauvé: As to the creative right of record manufacturers, which we have just been discussing, I think you have to take into consideration also that there is what I would call a commercial right. The original object that was manufactured was destined for a private person, and instead of going to a private person that same thing is taken and put on the air and diffused to many other persons.

Senator Grosart: At the instance, almost invariably, of the manufacturer of the record.

Mme Sauvé: That is irrelevant.

Senator Grosart: Who keeps a large staff to make sure that the radio stations play the record, because he knows the benefit he will derive.

Mme Sauvé: They are in the driver's seat.

Senator Grosart: Are you aware of the fact, and I think it is a fact, that the majority of recording companies, that is the manufacturers of records, are also either "publishing" companies themselves or own "publishing" companies and as a result are already in receipt of 50 per cent of the original performing right that would otherwise accrue to the composer?

Mr. Dodge: I am not aware of it but I am not surprised to hear it. However, it does not make any difference to our position.

Senator Grosart: It makes a very great deal of difference, I suggest, because the manufacturer is already in receipt of 50 per cent of the fees that accrue from the right of the original creator.

Senator Flynn: By negotiation.

Mr. Dodge: Who gets the other 50 per cent?

Senator Grosart: The composer. Perhaps I should explain it for the benefit of the committee. The historic picture is that originally the interest of a composer was in having his original work published, because there was a market for sheet music. So under the normal performing rights society contract, 50 per cent of the total fees collected by the society go to the composer, and 50 per cent to the publisher. This was a highly equitable arrangement, because the publisher not only went to the expense of publishig sheet music, but also did the job of exploiting the song. He went to the radio stations and promoted the use of that composition. The publisher in that sense does not exist any more. Therefore in a quite good business sense the record manufacturers have moved in and decided they would become the publishers of what they record. In some cases the first recording of a song is by a record company which has also made a deal with the composer to obtain half the fee. I put that on the record as something I believe, because I have been around the business for a long time, although I am not in it any more.

Mr. Dodge: I am not in a position to dispute it; I do not know whether any of our colleagues might care to.

Mr. Wood: That is a negotiable situation with recording companies.

Senator Grosart: Would you agree, Mr. Wood, that that is roughly the situation today?

Mr. Wood: In certain instances; it all depends. It is all done through negotiation with the performer, composer or whoever it may be. In this day and age publishing does not mean what it used to mean. Sixty per cent of the recordings made at the present time are not published works. Most of it is up here with the musicians and if you ask them to write it down they could not do it anyway.

Senator Grosart: But this does not mean that there is not someone who says he is the publisher, and that "someone" is the recording company.

Mr. Wood: If he negotiates with the performer, you are right.

Senator Grosart: From your knowledge is that not the normal situation in the business today?

Mr. Wood: Yes.

The Acting Chairman: I want to thank you, Mr. Dodge and your colleagues, for coming before us and giving us your views, which will be taken into consideration.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 24

WEDNESDAY, MAY 19, 1971

Fourth Proceedings on Bill C-180,

intituled:

"An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products"

(Witnesses:—See Minutes of Proceedings)

23939—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28).

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Heath, seconded by the Honourable Senator Kickham, for the second reading of the Bill C-180, intituled: "An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products."

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

The Bill was read the second time.

The Honourable Senator McDonald moved, seconded by the Honourable Senator Kickham, that the Bill be referred to the Standing Senate Committee on Banking, trade and Commerce.

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, May 19, 1971.
(27)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to *further* consider the following Bill:

Bill C-180, "Consumer Packaging and Labelling Act".

Present: The Honourable Senators Hayden (*Chairman*), Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Croll, Desruisseaux, Flynn, Grosart, Haig, Isnor, Lang, Martin, Molson, Welch and White—(17).

Present, but not of the Committee: The Honourable Senators Casgrain, Inman and Urquhart—(3).

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

WITNESSES:

Department of Consumer and Corporate Affairs:

The Honourable Ron Basford, Minister;

Mr. J. B. Seaborn, Assistant Deputy Minister, Consumer Affairs Bureau;

Mr. G. R. Lewis, Chief, Commodity Labelling Division, Standards Branch.

The Honourable Mr. Basford submitted two proposed amendments to the above Bill respecting Clauses 3 and 11, for the consideration of the Committee, as follows:

Clause 3, *Page 2:* Strike out lines 31 and 32 and substitute therefor the following:

"provisions of this Act that are applicable".

Clause 11, *Page 6:* Strike out lines 27 to 33, inclusive, and substitute therefor the following:

"product, the Minister shall seek the advice of at least one organization in Canada of consumers and one organization of dealers in that prepackaged product or class of prepackaged product and may seek the advice of the Standards Council of Canada or any organization in Canada engaged in standards formulation".

Department of Justice:

Mr. J. W. Ryan, Director, Legislation Section;

Mr. D. Beseau, Legislation Section;

Mr. J. A. Scollin, Director, Criminal Law Section.

At 11:30 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, May 19, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-180, respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products, met this day at 9.30 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, I call the meeting to order. Our first item of business this morning is to consider a number of points in Bill C-180 which we stood last time in order to get the views of the minister. I am referring to clauses 3, 11 and 20(3) of the bill.

Certain things have been done in the interval. With our law clerk we prepared what we thought would express the view of the committee in relation to the complicated changes in clauses 3 and 20(3). Those were submitted to the departmental representatives for their consideration, and I expect they are prepared to deal with them today.

Mr. Minister, if you have not any special order, could we start with clause 3?

The Honourable Ron Basford, Minister of Consumer and Corporate Affairs: Mr. Chairman and honourable senators, I do not have an opening statement. I have looked at the record and have read the reports of your meetings and I know the concerns that you have. I think it would be best if I just answered questions honourable senators have.

I may say that this bill results from a large number of recommendations from the Consumers Association and the Batten Royal Commission, as well as from a joint committee of both houses of Parliament. The bill is an attempt to solve those consumer problems, and I am sure, Mr. Chairman, that the committee in looking at the various clauses of the bill, and in its deliberations on the bill, will have foremost in its mind the question of how we are going to pass legislation which will solve these consumer problems and concerns.

There are, I recognize from the record, problems and concerns in the committee and among senators, but I am sure that uppermost in their minds will be the desire to help alleviate the problems in packaging and labelling that have been brought to light by these various inquiries and by the Consumers Association.

That really is the spirit in which we should look at the bill and direct our attention to it.

With that brief comment I would be happy to answer any questions honourable senators have.

The Chairman: Mr. Minister, the first clause we stood in order to have your views on it is clause 3.

Hon. Mr. Basford: Yes.

The Chairman: I think you know the history of the conferences we had yesterday. The draft was prepared by the law clerk and the Chairman of this committee and was submitted to your representatives. I understand the official reaction was that clause 3 appeared to go too far. The amendment proposed appeared to be too restrictive. At the end of the conference your representatives were going to attempt to draft something that might give us the best of both worlds.

Are we now ready for that this morning?

Hon. Mr. Basford: Well, I am happy with clause 3 as it stands, Mr. Chairman. It was debated very carefully in the other place and I see it has been examined carefully here. The purpose of clause 3 is to make this most recent statute clearly the predominant one, so that in respect of products covered by this or other acts there will be, for the benefit of consumers, processors and manufacturers, a clear indication of which regulation or which rule prevails. I reiterate what my officials said in the committee the other day, that one of the main purposes and principal foundations of this legislation is to bring to the packaging and labelling regime co-ordination and uniformity that does not exist now. That is a complaint that consumers make to me. They urge me to get uniformity in packaging and labelling, and that is a complaint that concerned manufacturing groups also make to me. We are told that we have a confusing picture in Canada, federally and provincially and within the same Government between different departments, and that the whole thing should be co-ordinated. It can only be co-ordinated and made uniform if there is one principal act that is clearly the predominant act.

I might say, Mr. Chairman, that at another hearing of this committee you quoted to me at great length, in objection to a statement that I was making, a learned professor from Osgoode Hall, Professor Ziegel, when we were discussing the Corporations Act. I would refer you to his evidence on this act in which he said that clause 3 was in no way an unusual provision and should not be regarded with the alarm that some people had regarded it with. So I should like to quote your own authority to you, Mr. Chairman.

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The Chairman: Our own authority? You mean your authority.

Hon. Mr. Basford: No, your authority.

The Chairman: No. I do not adopt him, and I have not adopted him. He went before your committee. He has not appeared here. But let us put the thing in focus, Mr. Minister. As to the principle of the bill we have heard your view, but let me state or recall to the committee what the points of objection to clause 3 were. They were these: Firstly, that clause 3 proposed by regulation to permit the superseding of existing legislation in this field. Secondly, that the regulations made under this bill would therefore, unless there was some qualification, supersede regulations under the existing acts which deal with a variety of products. For example, regulations deal with agricultural products and provide for standards, for labelling, and so on. And we said that there should be some way of resolving this; in other words, of involving the know-how and knowledge in connection with, for instance, the Fertilizers Act, the Inspection and Sale of Articles Act, which covers flax fibres and binder twine, and the Forest Products Act, where you have, and have had, both administration and regulations going on for a very substantial period of years. But this clause 3 would enable regulations under this bill to cut across those regulations; so we said there should be some co-ordination.

Now, we made a proposal, but apparently we are not going to hear anything from the department this morning in relation to that proposal, because the minister appears to be ready to fight for the section, as is, without any change. We proposed that when it came to making regulations under this bill—and those regulations were in relation to products already covered by other existing legislation—the recommendations leading to regulations under this bill should be joint recommendations; they should not be only from the minister who is administering this act but also from the minister who is administering the other act where you already have a plan of regulations, et cetera.

Yesterday this was described as being too restrictive. We had expected that we might receive some suggestion of the department's position, but I gather from the minister's attitude now that they are going to stand or fall by clause 3. Is that a correct interpretation, Mr. Minister?

Hon. Mr. Basford: I understand there were discussions last night, to which I was not a party, Mr. Chairman, with the draftsman of the bill and that a suggestion from the law clerk was discussed. I think, with respect, the suggestion would destroy the principal purpose of the legislative program that is envisaged here. It does not appreciate the need here and what is endeavoured to be done by this piece of legislation and the regulations that would be passed under the legislation. At any rate, the draftsman, subsequent to your discussions with him, has suggested one alternative wording that would get round the difficulty that some honourable senators are having with clause 3. It is here, Mr. Chairman, which would leave clause 3 reading, as I understand it, as follows:

> Subject to subsection (2) and any regulations made under section 18, the provisions of this Act that are applicable to any product apply notwithstanding any other Act of the Parliament of Canada.

Senator Connolly (Ottawa West): Do you think that would be a satisfactory wording for the section, Mr. Minister?

Hon. Mr. Basford: Yes, from the point of view of what is the policy decision of this act.

Senator Connolly (Ottawa West): In effect, what you suggest is ruling out the words in lines 31 and 32, "by the terms of this Act or the regulations".

Hon. Mr. Basford: Yes.

Senator Connolly (Ottawa West): I think this committee, Mr. Minister, is very impressed with the value of this legislation. We have had a great many witnesses here who have indicated that the general purport of the legislation is very good from the point of view of the consumer, and it is your statutory responsibility, as you have said many times, to protect the consumer. We have had, however, expressions of concern from certain people, and you as a lawyer will understand the concern, who have said that to amend or change other acts of Parliament by regulations made pursuant to this act would be a very far departure from what we normally like to see in legislation. Indeed the legislation that the Government has given us in respect to statutory instruments seems designed to prevent the administration from changing acts of Parliament simply by the regulatory process.

Having said that, nobody has yet come to us to say that the words "or the regulations" do not mean precisely that. I listened very carefully to your opening statement in which you said that this act should be a co-ordinating act, that it should have a supervisory role in the general field of labelling and packaging, and I do not think that anybody would quarrel with that. But there may be a legal explanation for the use of that phrase that is now proposed to be eliminated, but no one has come here who seems to put a different interpretation on it than the one I have put on it here just now. I think it would go a long way towards helping the effect of this act if it was made crystal-clear that this act is a predominant act, but it should also be made equally clear that the regulations under this would not have the effect at any time of amending sections of other pieces of legislation.

The Chairman: Senator Connolly, I may say that reading this proposed change, it would appear that it eliminates one of the two objections we had.

Senator Connolly (Ottawa West): I am only concerned with this one.

The Chairman: It eliminates the one in connection with a regulation superseding an existing act of Parliament. But it does not deal with the other one, that is that in the administration of this act you can override the administration of an existing act of Parliament on the subject matter of labelling and standards, etcetera, in relation to a product.

Senator Connolly (Ottawa West): Frankly, Mr. Chairman, I do not see a difficulty there, certainly not one as great as the one I have mentioned. In fact, I doubt if I see a difficulty at all in that because I think the administration under one act must in effect co-operate with the administrators under another act. And while in effect this act is paramount because it is broader and there are new statutory responsibilities placed upon the Minister's shoulders as Minister of Consumer and Corporate Affairs, think that having passed that other act where the establishment is important, there is something to be said for making the responsibility in this field and in this act the paramount one. I am not purporting to express the opinion of the committee, but that is my own view. On the other point, I think it would be helpful to the administration and it would make for better legislation to remove those words. They seem to me to be the crux of the matter.

Senator Cook: Does that not go a very long way to meet our objections, Mr. Chairman? I thought our principle objection was that you did not want the law of the land amended by the civil servants without coming to Parliament.

The Chairman: There were two things, if I may answer your question. If you go back and read the report of the committee of last week, you will see that there were two points; one was directed to the possibility that by regulation this could supersede an existing act of Parliament. Now this would appear to deal with that situation. The other was that you have existing acts of Parliament in this field in relation to paricular products and I referred to some of them like binder twine and flax fibres and an infinite variety of things which are justified under Agriculture and the Minister of Agriculture administers many of them. Now those regulations and labelling requirements in those particular acts require a considerable number of things to be done in connection with labelling, and some of those provisions appear in this bill as part of the substantive law proposed by this bill. What we were saying was that with that know-how that has been acquired in the administration of those statutes, under this bill they should not be able to regulate independently in relation to those other products.

Hon. Mr. Basford: Could I answer that? I appreciate the concern, and if one could speak about what goes on in one's own office when things are being drafted, I share your concern about regulation-making powers. I have endeavoured and the draftsmen have endeavoured to allay the fear here that the passing of some regulation, by the Governor in Council, or the executive, could upset something that had been approved in another act by Parliament. We have tried to deal with that.

On the question of administration, maybe I am not grasping the point of concern. We have a great many acts relating to packaging and labelling, some of which are already administered by this department and under this act more will be. But in the co-ordination of administration, I think my officials have tried to make clear that in this particular case, there is a Cabinet directive to make sure that the administration is co-ordinated. There is also an interdepartmental committee, and I think I should speak about how the regulations are made, because it is important. There is first an Interdepartmental Committee on Consumer Affairs which is a permanent interdepartmental committee within the Government, and representatives on it are officials of all departments who have some concern about consumer matters, Food and Drug, Health and Welfare, Department of Agriculture, Trade and Commerce, etcetera, etcetera, that is, all departments who may be affected by regulations passed under this act. If there is some interdepartmental concern as to what we are doing or proposing to do under this legislation, that is dealt with in that interdepartmental committee and each committee and the officials representative of various interests and various administrations have a chance to put their point of view and iron out the problems. The regulations are then drafted by the Department of Justice and have to be approved by them. They are cognizant of all the other regulations and watch for the fact that there are no competing regulations or duplication of regulations.

Senator Connolly (Ottawa West): Or conflict.

Hon. Mr. Basford: Or conflict. And if they see a conflict, they come to the Department and point it out and straighten it out and resolve the conflict. Then if the regulations involve a matter of policy, it has to go to Cabinet to be dealt with there in the Cabinet Committee on Government Operations or the Cabinet Committee on Economic Policy at which, of course, every minister or every official of the Government has notice and an opportunity to have an input to resolve any conflict or lack of co-ordination or duplication. If it is purely a matter of implementing some policy by way of regulation, it goes to a special committee of Cabinet which deals with Orders in Council. But again if there is any interdepartmental conflict or duplication, it is resolved and sorted out in that committee. That is just what happens within the Government, long before anything sees the light of day. Before something sees the light of day people outside of Government, in the private sect are consulted and talked to as to what are practicable regulations and as to what is workable. Surely, that is where areas of conflict would develop.

Lastly, Mr. Chairman, I would like to make a point I think has been overlooked in this bill, and it is section 19 which I regard as extremely important. I think it was overlooked in the House Committee; it has been overlooked in this committee, and it has been overlooked in the submissions that both Committees have had. This is rather a novel provision in this bill by which the proposed regulations must be published as proposed regulations, and anyone has a chance to comment on them before they become effective. There is only one other act of Parliament in which I know that kind of provision exists, and that is in the Motor Vehicle Safety Act which was passed a year ago.

The Chairman: Mr. Minister, I think we should give you marks for this.

Hon. Mr. Basford: All right. Surely, where the proposed regulations are published in the *Gazette*, if the

fertilizer industry or the farm implement industry or the binder twine industry see that these regulations are not practicable for them, or create difficulties, they see it here and bring it to the attention of Government, bring it to my attention and particularly to the attention of the department which represents their sort of interest. Again, that is resolved.

Senator Connolly (Ottawa West): Just before you go on, you do us a slight injustice, because we had a discussion on this particular item with some witnesses here.

Hon. Mr. Basford: I think it is an important one.

Senator Connolly (Ottawa West): It surely is.

Hon. Mr. Basford: It is an initiative of this department. I wanted it in there. People say we are not interested in consulting, which is untrue, and I wanted to put in this statutory right which people have.

Senator Connolly (Ottawa West): The only objection they had was that they do not read the *Canada Gazette*. Maybe sales will go up.

Hon. Mr. Basford: Maybe.

I make one final point, on eliminating lack of co-ordination or duplication that you are concerned about, Mr. Chairman, and it is that there would be a last and final kick at the cat under the Statutory Instruments Act—which is before the Senate now?

The Chairman: No, it has been passed.

Hon. Mr. Basford: Which has been passed—which again provides a whole range of remedies and solutions to deal with the regulatory-making power of Government, to make sure that the regulations are not improper.

I think the second point you raised surely is answered by all that I have said, in the administration of the act and of the various acts, and is answered by section 19 and by the Statutory Instruments Act. With all due respect, I submit that very seriously.

Senator Molson: I think the minister has explained most of the matters that concerned me, but does he foresee that a manufacturer, dealer or importer is going to find himself subject to such a series of acts or regulations that, in fact, he may have considerable difficulty in operating in a normal way? This superseding other acts where appropriate, for example, does that mean his life is going to be complicated unduly or simplified?

Hon. Mr. Basford: I do not think so. There are those who say that any regulations complicate life and, of course, that is true, because they have to know the regulations and the fact that there are regulations under the Canada Agricultural Products Standards Act, and so on. So that complicates their life. Undoubtedly they do. It would be easier to have no regulations, if one is in the producing business.

I do not see that it is going to make their problems any more difficult, and as the program of packaging and labelling reviewing is put in place and improved I would hope and foresee that it simplifies matters.

I could table some of the conflicts between the existing regulations which you have under the various acts administered by different departments, different regimes that have developed. If you are in the making of pork and beans you fall within one category as to how you put your net weight on the label, but if you are in the business of making beans with pork you fall literally under a different regime and put your net quantity in a different way. It seems to me that that kind of thing should be eliminated from the producers' point of view. It has an incidental benefit to the consumer, in that if you have a uniform regime he knows where to look for net quantity and how it is expressed. But if there could be one regime for the declaration of net quantity, that seems to me to assist the manufacturer and not make his life more complicated. We are getting into federal and provincial regulations here, but there are over 20 different regulations relating to the labelling of margarine, which is surely quite wrong.

Senator Connolly (Ottawa West): What do you mean by "20 different regulations"?

Hon. Mr. Basford: Provincially, if you are packing for one province you have to pack one way and for another you have to pack a different way. If I were a manufacturer I would object to that, as they do, quite rightly, and as the Minister of Consumer and Corporate Affairs I object to that because it is confusing to the consumer and is cost inducing.

Senator Connolly (Ottawa West): But by this act you are not able to remedy that.

Hon. Mr. Basford: I would like as a department to try to engender uniformity and co-ordination, not only between departments within the same Government but provincially also. I think that uniformity and co-ordination have benefits not only to the consumer, which must be my prime statutory responsibility, but also to the manufacturer and processor also, and I think that makes his life easier and not harder.

Senator Lang: As I understand it, this section 3, as it now stands, applies to any product, not to any prepackaged product. In other words, it extends to any article that is or may be the subject of trade or commerce.

The Chairman: Yes.

Senator Lang: It is a very sweeping inclusion. It would seem to me very questionable to put the power in the hands of a regulatory authority to deal with any article that is or may be the subject of trade or commerce, that may otherwise be dealt with by other legislation, such as the Motor Vehicle Act to which the minister has referred.

The Chairman: Except, senator, if the object of this bill, as the minister has stated, is to achieve uniformity in packaging and labelling requirements, of course, the packaging and labelling refers to products, so you would have to go back and get authority from the beginning, that is from the product stage. You are thinking alternatively that this should be limited to prepackaged goods.

Hon. Mr. Basford: I would like to answer Senator Lang, if I may. If one looks at section 18, the regulatory section, one sees that every subdivision of that applies to prepackaged products, except subsection (h), which is made subject to other acts of Parliament. So the regulating power under section 18(1)(a) to (g) and (i) to (l) relates to prepackaged goods; (h) is the one that relates to products and it is subject to any other act of the Parliament of Canada.

Senator Connolly: It refers mainly to bulk goods.

Hon. Mr. Basford: You will notice that section 4, the substantive section, relates to the prepackaged product. Section 5 says "prepackaged product". I am reading as I go along here. Sections 6 and 7 also refer to prepackaged. So the substantive sections relate principally to prepackaged goods.

Senator Flynn: Did you say "principally" or "exclusively"?

Hon. Mr. Basford: Principally. Subsection (h) of section 18(1) is drawn subject to other acts of Parliament.

The Chairman: And (1) is a general clause for making regulations, and generally for carrying out the purposes and provisions of the act.

Hon. Mr. Basford: The purposes of the act are expressed in section 4, which relates to prepackaged goods.

Senator Flynn: "Purposes", to me, has always been a rather subjective term. I do not see why it should be included, as you say, for carrying out the provisions of this act. If you have explained your purposes they should be found in the terms of the act and not otherwise. "Purposes", to me, would enable someone to go beyond the wording of the act.

Senator Connolly: I do not think that regulations which go beyond the scope of the act would have very much effect.

Senator Flynn: You could say that the purpose of the act is to protect the consumer.

Hon. Mr. Basford: The act has very specific requirements relative to consumer packaging and labelling requirements.

Senator Flynn: One would argue that this is the purpose of the act.

Hon. Mr. Basford: You have to pass any regulations within the powers given within the substantive sections of the act, and if they go beyond that power they would be *ultra vires*. That is what Senator Connolly is saying.

Senator Connolly: Yes; that is sound.

The Chairman: Somewhere you have to get back to basics, and the basics would be the products.

Hon Mr. Basford: "Products" must be defined in the definitions section. "Prepackaged" is defined, so you have to define "products".

The Chairman: At some stage you have to have some authority relating to products. Are there any other questions?

Senator Croll: Broadly, it seems to me that what the minister is saying, in effect, is that the Department of Consumer Affairs is breaking new ground. We have to be tolerant in this respect. When we speak of the Fertilizers Act, the Forest Products Act and various other acts, those acts and regulations were of another day. This act deals with packaging and labelling in the modern sense, as we see it at the present time.

The minister is also saying, and rightly so, that, by virtue of the number of acts that have come before us from the department, they are specialists in that particular line and for this reason...

Senator Flynn: You mean the Consumer Affairs Department?

Senator Croll: Yes.

Senator Flynn: By comparison with departments that have had experience for years?

Senator Croll: With other products, but not in the field of packaging and labelling that is required here compared with what it was at another day.

The Chairman: If you look at these regulations in the different acts you will find that they have been updated. Some acts were revised in 1969.

Senator Croll: But this is, of course, 1971. What we are now trying to do is reach some uniformity. Here is an act in connection with which we can say on the basis of uniformity that we can start from here. The minister has already indicated to the committee that this matter has been widely discussed and considered, and there have been no objections from the other departments. The other departments will even look to the Department of Consumer Affairs for guidance. So there will be meaning in relation to all products rather than on specialized consumer products that we ordinarily come into contact with.

We must be somewhat tolerant in that respect and give them the opportunity to see how it works out, since there are safeguards in here. I do not know who reads the *Canada Gazette*, but I imagine that the people involved do read it and will know what is contained therein.

Another thing that impresses me considerably is the fact that the bill came to us from the other place and was unanimously endorsed by that house. They are in touch with the situation—no more, perhaps, than we are, but they have discussed it and have come to a conclusion on this particular item.

Senator Flynn: There was argument on this point.

Senator Croll: Yes, there was argument on this point. It was not overlooked. But in toto they decided that it gave the Department of Consumer Affairs an opportunity to clear up the situation once and for all, or to attempt to do so, and it seems to me that this is the time to give them that opportunity. It is a new concept. It is hard to see what it will bring about, but it is a good beginning. There may be some difficulties later on, but we will be here to correct the difficulties if they arise.

The Chairman: I should like to make only one comment. I am surprised to find you putting that forward in support of this bill, Senator Croll, saying that there was unanimity in the Commons in respect to the bill. This may be a factor, but we exercise our own judgment here, and I cannot think of a senator who holds that view more strongly than you yourself.

Senator Croll: I said that I was impressed by what had come about. In addition, the various ministers who are touched by these various regulations have all endorsed it. They have seen it and are prepared to go along with it. From their departmental point of view they are not complaining.

Senator Flynn: The best point against your argument is that all the other ministers are in agreement, that with their experience they should be willing to amend regulations and make them conform to the desires of the new and inexperienced department. It would be much better to proceed in this way, rather than legislate without knowing what you are legislating about. You are going to amend legislation without knowing why you are doing so.

Senator Croll: Except that the people who are concerned will know and will have an opportunity of making a presentation.

The Chairman: Are there any other questions?

Senator Connolly (Ottawa West): Senator Croll referred to the need to be tolerant about this act. Actually, we go further than that, and think we should because we passed the bill here. We set up the Department of Consumer and Corporate Affairs. We imposed upon the minister certain responsibilities. In the discharge of those responsibilities he brings in this legislation and, except for a few minor points, one of which I have already referred to, this is good legislation. I think we all think it is good legislation. But it is more than simply a question of tolerance. The minister is trying to discharge a responsibility. He puts it before Parliament and we have to view it in the light of the act we passed which established his department. So it is more than tolerance. It is an exercise of the discharge of his responsibility.

Senator Cook: Mr. Chairman, we all love the minister, but we are dealing here with legislation and not with the minister.

Senator Connolly (Ottawa West): Sure, that is right.

Senator Cook: And we give him all the support we can.

Hon. Mr. Basford: That is very kind of you, senator.

The Chairman: That is right. Despite all the garlands we are throwing around, we still have to look at the bill. If there are no other questions on this section, I suggest we pass on to clause 20. The minister has only limited time here this morning. I would suggest that after he has left we could deal with the representations on Bill S-9 and then, later this morning, come back to Bill C-180 and review the various clauses again.

If it does not throw your plan of presentation out, Mr. Minister, I would suggest that we deal with clause 20(3).

First, may I just recall to the attention of honourable senators the point made in connection with clause 20(3). The language of the clause reads as follows:

> Where a corporation is guilty of an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

There is a lot of opposition to this on the basis that one of the formalities or elements of proof is that the corporation is guilty, then that should be guilty by legal process. But then we find that this clause, pretty much in the form in which it is, occurs in many other acts of Parliament. For instance, I think this same wording appears in section 134 of the Income Tax Act. The same section appears in acts which predate the present Income Tax Act, going back perhaps to 1925 or thereabouts. You find this language being used. You will find it in the Unemployment Insurance Commission Act, the Weights and Measures Act and the Bankruptcy Act. But the strange thing is that there is practically no jurisprudence on it. The only thing I have been able to find is two cases. In both of those cases the corporation had been convicted. But there are statements made by the judge in the first instance.

Senator Connolly (Ottawa West): Do you know whether a committee ever thought about the point before, Mr. Chairman, when dealing with some of these other acts?

The Chairman: No. It is difficult to get *Hansard* going back that far. The question was certainly debated at great length in the committee in the House of Commons when it was dealing with this bill. Mr. Scollin, the head of the Criminal Law Section of the Department of Justice, appeared before the Commons committee. He argued, apparently successfully, against the objections, and the section remained in the form in which it was presented in the bill.

What your Chairman and the law clerk had attempted to do in order to meet what we thought were objections of this committee was to make a draft of a revised section. We did this because in the Commons committee the question was put to Mr. Scollin, or perhaps it was Mr. Seaborn or some other witness: "Why do you want the power to prosecute a director without prosecuting the corporation?" The explanation that was given was that at

the time when you may be contemplating prosecuting the corporation the corporation might have surrendered its charter or it might have made a voluntary assignment or it might have been declared bankrupt under the Bankruptcy Act.

So taking that as the cue, the draft that we submitted to the minister's departmental officers and to the justice people divided that section in two. In the first part it said, "Where a corporation is convicted of an offence under the act, then any director or officer or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is a party to and may be prosecuted." We then went on and provided in the second subsection that, "Where a corporation is guilty"—using the language here, where you do not have to convict the corporation first—"Where a corporation is guilty of an offence and the corporation at the time of contemplated proceedings has surrendered its charter or has made a voluntary assignment or has become bankrupt, then the director or officer who participated in the commission of the offence may be prosecuted without the necessity of prosecuting the corporation."

We thought we had met both sides, but we were turned down so far as any consideration of it was concerned on the basis that the department felt that there was some deterrent value in having this sort of threat hanging over corporations who might be subject to this act.

I can see a difference in the deterrent effect as between the administration of section 134 of the Income Tax Act and the administration of this act in connection with labelling. It may well be that you need more deterrents in the Income Tax Act or in the Bankruptcy Act or in the Weights and Measures Act than you do in this act. I do not know. But I am just throwing this idea out now. Mr. Scollin is here today and can deal with it. I believe the minister would like to say something first, however.

Hon. Mr. Basford: I should like to say something, Mr. Chairman, if I may. Then I will have to rely on Mr. Scollin as the legal expert. I should like to discuss briefly the policy as I see it behind this section and correct first the statement that you made. The suggestion that was made by your law clerk was considered very carefully. I wish that I could oblige you by agreeing to it right now. However, I do not think that it solves the policy problem. I think one of the difficulties that senators have, and some of your witnesses have had, is that you look at the kind of companies you are familiar with, acting for them as lawyers or as members, or looking at the well-known national companies that everybody is familiar with, and you think, "What conceivable good is it having a section allowing a charge to be laid against a director of Heinz, or Libby's or Procter and Gamble?" And so on. Well, frankly, there is none. Those companies, to start with, will bend over backward to make sure they live within this act or any other act and that they are not in difficulty in the courts. If you want some deterrent value, a charge against the company is quite sufficient for any deterrent because the publicity associated with any charge is really quite catastrophic.

I appreciate all this, but I think honourable senators have to bear in mind that there are some companies operating that are beyond your knowledge, experience and familiarity, and these are the real fly-by-nighters, the real high-binders who are out there, unfortunately and sadly, and they will organize themselves in such a way that it is impossible to get at them through their corporations because they will have a whole string of companies so that it will be impossible to find out who is doing what, and yet it will be one man. I think it is essential, as it was in the Weights and Measures Act, which was passed only a few weeks ago and had this section in it, that for proper law enforcement and proper protection of the marketplace, we should be entitled to take that type of high-binder to court and charge him if he has been a party to this offence. This is why we need this section; that is the policy behind it. I could come in here with my Operations Branch and bring a filing cabinet full of cases that support what I have said.

One type of case was very familiar in years gone by—it has now died down a bit but it is familiar to you all—of people who sell freezer plans where you buy a whole steer cut up for your freezer. There were cases in my own province where the advertisements were for a steer of such-and-such a size, quality and grade. The inspectors finally bought one of these and put it together and found it was not one steer at all but was bits and pieces of eight different steers and all the worst parts of the eight steers. When we went to charge the individual responsible, he quietly nipped across the border to the United States and the poor Americans have to deal with him now. But that is not the Heinzes, or the Libbys or the Campbells, because they are not what we are concerned about here. We are concerned about the real crooks. Unfortunately, there are a few out there who are preying on the consumer, and on the marketplace, and in my view they are destroying the credibility of the marketplace, and I think they go a long way towards destroying the credibility of the free enterprise system. So I think it is essential that we write laws that allow us to reach those people. That is the policy behind this section, and that is why we need it. I state this with the strongest of pleas because there is that small, totally undesirable minority, that needs to be dealt with.

I know that this committee, just as the House committee, has had difficulty with the words "where a corporation is guilty", and I hand you to Mr. Scollin to deal with that wording. But I think the policy and principle is that where a director in certain instances has authorized, or participated in or assented to the commission of an offence, there should be a remedy within the law allowing for proper enforcement and protection and that the authorities, subject to a judicial hearing and a trial and all of the protection of civil liberties involved in a trial, should be entitled to get at that person. I think it is essential.

The Chairman: Mr. Minister I think that I should tell you that when we were considering amendments to the Bankruptcy Act, a number of years ago, this very point

that you make on the question of policy was emphasized most strongly by the Minister and by the Registrar in Bankruptcy as to the types of companies and the manoeuvres in this field of bankruptcy law that they had to try to work against, and certainly the presentation at that time was strong enough that we did not insist on any change in the provision. So there is a lot in what you say, but if Mr. Scollin has anything to add on the legal aspects, we will hear him now. On the general principle, Mr. Scollin, as to where a corporation is guilty, it is quite obvious on the two decided cases—one was *Anisman*, and I have forgotten the name of the other—that if you went into court and charged a director and did not charge the company, one of the elements you would have to prove was that the corporation was guilty. The *Anisman* case was a case where the corporation had been found guilty and when they prosecuted the chief officer, the Crown attempted to produce a Certificate of Conviction, and the judge in that instance said, "No, you must prove by affirmative evidence in this proceeding that the corporation was guilty."

Senator Connolly (Ottawa West): A trial within a trial?

The Chairman: No, it was one of the elements of proof. You adduce evidence the same as you would establish any other element of the offence. So as to procedure, that is the way you would have to do it. There are no assumptions. So under the present state of the law, I do not think there is any question, where a corporation is guilty of an offence under this act and what follows under subsection (3), that there is any doubt as to the manner in which you would have to proceed legally. I do not know whether you are going to address yourself to the form or whether the Minister has already addressed himself to that. That is a question of policy. But if you have anything to add, we will listen.

Mr. J. A. Scollin, Director, Criminal Law Section, Department of Justice: I think, Mr. Chairman, unless you or any of the members of the committee are left in any doubt as to the advisability of passing it in the legal form in which it appears, then it would be idle of me to say anything, but I would be happy to answer any questions.

The Chairman: I think that is how we can get at it. If there are any questions to ask of the Minister on policy, or of Mr. Scollin on the legal aspect, let us have them.

Senator Burchill: As I understand it, before you can proceed against a director, you have to prove that the corporation is guilty.

The Chairman: Not before you proceed, but in the proceedings.

Senator Burchill: But you cannot proceed until the corporation is found guilty?

The Chairman: You can under this section, and a judge who is trying the director must have it established in evidence before him that the corporation was guilty and such evidence must be adduced from which he can conclude that the corporation was guilty.

Senator Lang: That is based on the findings in one case.

Senator Flynn: But your objection, Mr. Chairman, is that if you proceed in this way, you establish an offence by a party who is not accused and who is not on trial, and this is a problem.

The Chairman: What I said, senator, was that somebody's face would be awfully red later on if subsequent to the trial and conviction of a director, the corporation by any chance was put on trial and fund not guilty.

Senator Flynn: I would imagine they would not try them then. But from a strict level of principle, it seems strange that you should prove an offence by one who is not a party to the proceedings.

The Chairman: Well, what I felt and expressed the last day, as you will recall, was that if there were situations of the kind that the Minister has spoken about and the policy which they have evolved in relation to the use of this section which you find in other acts, that those situations are the ones in respect to which we shall give this much broader power, and that is what we attempted to do in the draft prepared by the law clerk and myself.

Senator Flynn: But you would try to summon the corporation?

The Chairman: It is conceivable, Senator Flynn, that a corporation might be charged and found guilty, and then a director might be charged and found not guilty on the basis that it has not been established in that second trial that he was guilty.

Senator Flynn: I understand, but as far as the question of regulating the fine imposed on the corporation when the company becomes insolvent or disappear—I can understand that—you could achieve this with another process other than the one here.

The Chairman: I think perhaps I should ask Mr. Scollin if he would address himself to the suggested amendment which was presented to his departmental associates yesterday and to make some comment on it.

Mr. Scollin: Mr. Chairman, firstly, I am not sure of the object of the amendment, but could I just say that its general effect seems to be that in the case of a going concern there is no way that the director could be criminally liable under this section, unless the corporation has actually been convicted of an offence.

Perhaps you might wish to consider that there will be situations in which, technically speaking, a corporation might be guilty and perhaps a conviction could be obtained, but where it would be quite unfair because the primary responsibility is really that of the individual officer of the company.

I might just point out a comment that was made by the court in the *Somers* case, which you may recall was 13 years ago, in 1958, in British Columbia, where it was proved that some acts were done by an accused or directed by him as agent for the company, and it was held that he was personally responsible, and the court observed:

> Where a man does wrongful acts he is responsible for them. If he does them as a duly authorized agent his principal may also be liable, but the primary responsibility is that of the agent.

Harking back to the general principle that is contained in the criminal law, in particular in the Code, dealing with parties to an offence in section 21 there may well be situations where the Crown would, in fairness, wish to say that it would be inequitable, unfair and unreasonable to prosecute the company and convict it where the primary evil, the real wrong, has been done by an officer using the company simply as a tool.

In the first place, so far as the draft is concerned, to that extent I would suggest, with respect, it goes too far, in making it a condition precedent in the case of a going company that the company should have been convicted before an officer can be prosecuted or convicted.

As to paragraph (b) of the draft, which is the alternative, where you have not a going concern, where it has been declared bankrupt or has made an assignment under the Bankruptcy Act or has forfeited its charter, and so on, where I mentioned these instances before the other committee they were just instances. There can be situations in which you could not get the responsible individual at all under this draft—for example, a company that has ceased to carry on business in Canada, or that does not in fact carry on business properly in Canada but does have officers here acting for it. In the major things it would be quite impossible to convit a non-resident company, although it may very well be quite proper in those circumstances to go off to the one who actually did the authorization. So, in that respect, I think it is dangerous in paragraph (b) to try to select these things, because the very case that is going to arise and look absurd is the very case you have forgotten about, so that to be as specific as this, I think, is dangerous.

In a way also it perhaps looks rather odd to legislate in this particular way, as suggested in the draft, because it does look as if it is discriminatory against the individual businessman. He himself may be doing something exactly the same as an officer of a company, yet he is directly liable to be dragged into court because he is, say, a small businessman, an individual who has not the fees to go to a lawyer and become incorporated, and so on, and he is immediately and directly responsible. Then it looks almost as if you are into what we might call, "The dance of the corporate veils," where until you get the company you cannot get the individual who is an officer. In that respect it may appear to be discriminatory to legislate in this way.

The Chairman: Except, Mr. Scollin, what the bill does in section 3 is that very thing. That is, you are saying that if you cannot get the corporation, then you cannot get the officer. But here the nature of the offence that is created is one where you must establish in evidence that the corporation has been guilty before you can nail the director or officer or agent of the corporation, so you are making them inter-dependent.

Mr. Scollin: Perhaps I ought to indicate this, that I am not satisfied that this excludes the operation of the ordinary law where, in fact, the individual who happens to be an officer is responsible for an infraction of the act, but not *qua* officer. It may be the fact that he is individually responsible in any event.

The Chairman: The same thing occurred to me, and I was wondering why you did not create the offences separately.

Mr. Scollin: Again, perhaps because of the traditional use of this form. I know that there are very few reported cases, but in fact sections of this sort have been used in practice in the courts without questions arising, so that you have behind you a series of cases where the courts have in fact acted on a section of this sort.

Senator Croll: Mr. Scollin, "traditional use of this form" is your term.

Mr. Scollin: Yes.

Senator Croll: Just name a few.

The Chairman: I did.

Mr. Scollin: Well, the Income Tax Act, for one, section 134; the Bankruptcy Act with a comparable provision, though not quite the same but similar in principle.

The Chairman: Weights and measures.

Mr. Scollin: Yes, weights and measures.

The Chairman: Unemployment Insurance?

Mr. Scollin: Unemployment Insurance, the union and labour information. These are some. I would suspect that if you searched through the statutes you would probably find there are more, but these are ones that come to mind.

I would suggest that there is some sense to staying with an established form so that at least the jurisprudence would be consistent.

The Chairman: You mean travelling the known way?

Mr. Scollin: Yes.

Senator Connolly (Ottawa West): Without going into legal technicalities, is the situation this that you have a product marketed in a manner contrary to regulations made pursuant to this act, and the proof of a company's guilt lies in the production of the exhibit which demonstrates the fact that there has been a violation of the regulation. That, I take it, in your view, is sufficient evidence of guilt of the company, and then you go to the individual and say, "You have this, that and the other thing to do with this infringement, therefore you are guilty." Is that the practical effect?

Mr. Scollin: Generally speaking, that would be the practical effect, but there might be situations in which because of the nature of the way the thing came on to the market you would have to show it was a knowing act of the company and not an individual act of a director outside his authority.

Senator Connolly (Ottawa West): Would not the court be expected to presume that if it came out on a label which bore the company's name, had the company's trademark and standard type of container, and that sort of thing, that it was the company's product?

Mr. Scollin: Yes. There are certain express provisions in the bill itself—sections 21 and 22. Section 21 is the converse case, sufficient proof of the offence to show that it was commited by an agent or employee. Then in section 22:

> In any prosecution for an offence under this Act, evidence that a label applied to a product bore identification purporting to identify...

—and so on, would be adequate as a practical matter, but it would be subject to contradiction.

Senator Flynn: It is sort of *mens rea.*

Senator Connolly (Ottawa West): You mean if the company were there. The company may not be there. That is the basic thing with us. It was modified a little this morning by the statements that have been made.

Senator Flynn: Section 21 would make that an offence. In a way you could prove *mens rea* on the part of the corporation.

Mr. Scollin: Section 21 is a standard halfway house of the absolute liability offence or no offence, and is a case where the Crown has to prove complete knowledge and participation. This is the halfway house, and it gives the company an out if it can show that due diligence was exercised.

Senator Flynn: That is why you would require discretion in not prosecuting a corporation, but rather in choosing an officer or director. Is that it?

Mr. Scollin: In the ordinary operation of the criminal law there are cases where the responsibility is so minimal that it would be unfair to prosecute the company when the obvious primary blame is on the individual.

The Chairman: In the prosecution of a director or officer of the company under section 20(3) *mens rea* is an essential element.

Mr. Scollin: Yes, in the sense that he was a conscious party to the act, but the offence itself might not involve proof of knowledge or intent; it may be just conscious participation.

The Chairman: This is a use of words which may not distinguish very much between the idea I was trying to put forward and what you are saying, namely, conscious participation.

Mr. Scollin: It is a voluntary act.

The Chairman: But you cannot have a voluntary act unless you know what you are doing.

Senator Cook: He might be acting contrary to the duties of the company.

Mr. Scollin: He may be acting contrary to the laid-down policy of the company.

Senator Flynn: Would it be sufficient for the accused to say that he was not aware of the regulations?

Mr. Scollin: No.

Senator Flynn: Nor of the effect of section 3 which amends the other regulations?

Mr. Scollin: No.

The Chairman: In other words, he must know what he is doing. Are there any other questions?

We pass now to the third item, which is section 11, the proliferation section. Mr. Minister, since there are elements of policy contained in this, perhaps you will open the discussion.

Hon. Mr. Basford: I do not agree with your position, Mr. Chairman, that the section is unnecessary. I am quite happy, if there is to be an amendment to other sections, to have an amendment under this one to make it clear that in the preparation of these standards I consult with consumer and producer groups. I take the position that that is already provided for in the operation of Government and that it is made mandatory under section 19 since any standardization would be by way of regulation. Anyone has that statutory right already. It is a mandatory right. I take that position quite strongly. If honourable senators want to amend it, I will be happy with an amendment that makes it clear in subsection (2) that we seek the advice of consumer groups or dealer groups in connection with that product or that product line.

The Chairman: Instead of "may" we would say "shall".

Hon. Mr. Basford: A little more than that. I would not want it mandatory that one must seek the advice of the Standards Council or a standards-setting body. I say this without any reflection on them. The Standards Council is just being formed. It will be a long time before it is in a position to deal with anything of this nature. It really is a co-ordinating body. I included it in case there was a specific case or if it were desirable. The Canadian Standards Association is up to its ears in work. If it were mandatory that those bodies be used, it could take years to do anything under this.

I am quite happy because I would in any event seek the advice of consumer groups and particular dealers in that product. I take the position that that is required under the appropriate section. I have a wording here that the minister shall seek the advice of at least one organization of consumers in Canada and of dealers in a prepackaged product, and may seek the advice of the Standards Council, et cetera. In fairness to myself, there have been all sorts of allegations in the financial press that this section is arbitrary and authoritarian. I take the position that it is mandatory to consult under section 19 and that under certain circumstances it is the practice of the department to seek advice and to consult people. I dispute some of the allegations that have been made.

The Chairman: Would you deal with some of the other points? The point put forward in committee was that under earlier sections in the bill the label should contain a clear statement of net weight or numerical count. The point raised was that under section 11 the undue proliferation of sizes of containers, and any action that the minister might take or the Governor in Council might take, is based on the fact that the Governor in Council is of the opinion that the effect of undue proliferation of sizes is to confuse or mislead or is likely to confuse or mislead the consumer as to the weight measure or numerical count of the prepackaged product.

The position as represented by the views expressed here was that if net weight or numerical count appears on the package, any person who buys a package of any size is not deceived as to what the net weight is if it is correctly stated.

Senator Lang: If they are literate.

The Chairman: If they can read. On the basis that the net weight or numerical count appears on the package, you could say that the consumer is likely to be confused or misled. We had Consumers Affairs here, and a women's organization.

Hon. Mr. Basford: It is an organization of consumers.

The Chairman: But they were represented by women. They did an excellent job. They suggested that because of the net weight appearing on one package—it might be 8¼ ounces and another package might state 6⅞ ounces—it was difficult, and a woman buyer could not do the arithmetic to relate the weight to prices in order to determine which one would give her better value. I then asked them whether they were in favour of a unit price, and they said, "no, not at this time." I concluded that they must have read the minister's statement before the Commons Committee, or the Seaborn statement, stating that unit prices might be stepping on very delicate or sensitive ground in relation to federal-provincial relations and authority. Therefore unit prices were not included in this bill.

Hon. Mr. Basford: With the greatest respect, I dispute your suggestion that even if the weight is declared on the package, in accordance with earlier sections, there can therefore be no confusion. The whole purpose of this section and the whole purpose of the standardization is to make products within the same product line comparable as to value. I think that even when the weight is stated there can be, through the proliferation of sizes or shapes, considerable confusion or considerable difficulty in arriving at comparability and the ability to compare one article with another.

I suggest with the greatest respect, Mr. Chairman, that I could send you down to the local supermarket and ask you to run in with a dollar to buy toothpaste and be back out in two minutes, and you could not do it. I would defy you to do that.

The Chairman: But I may not be the best shopper.

Hon. Mr. Basford: Well, you are a very smart man, and even you could not do that.

The Chairman: I would not expect you to legislate only for me.

Hon. Mr. Basford: You are a matter of great concern to the Department of Consumer and Corporate Affairs.

The Chairman: Really?

Hon. Mr. Basford: If you could not do that, what about poor people like me? It takes me a long time to figure these things out.

The Chairman: I thought you were the master of this.

Hon. Mr. Basford: No, I am not. That is why we need some legislation to deal with it. I think that the product lines or areas where this section has application are quite limited; that is, the places where it could be used are limited. But I think there are areas where it applies and should be used. One of the favourite examples, perhaps I should say "favourite whipping boys", is in the line of toothpaste. Perhaps it is not important whether people can compare or not, but that is one line in which there is a great deal of confusion.

Senator Connolly (Ottawa West): We had pretty good evidence on toothpaste.

Hon. Mr. Basford: I am not saying that we are legislating to deal simply with toothpaste, but it is a classic example of where they are all declared very carefully as to the weight and quantity and yet you cannot compare one with the other.

Senator Connolly (Ottawa West): You could if you had a computer with you, in the cases that were shown to us here.

Mr. Minister, on the subject of confusion, it was suggested that one pickle producer might use a 6½-ounce bottle, a 9⅝-ounce bottle and a 14⅜-ounce bottle. That is confusing enough. But another producer of the same product might use a 4¼-ounce bottle, an 8¼-ounce bottle and a 16½-ounce bottle. The confusion within products put out by one manufacturer is bad enough, but the confusion resulting from the various products of various manufacturers is almost impossible for consumers to deal with. From that point of view your legislation is good.

The Chairman: From what point of view, senator?

Senator Connolly (Ottawa West): From the point of view of trying to eliminate various sizes of containers and of content, which I think inevitably lead to confusion.

The Chairman: Do you mean you would be in favour of standardization to the extent that, no matter who made the toothpaste, it would all come out in the same sizes and the same kinds of packaging?

Senator Connolly (Ottawa West): I suppose there is room for some latitude there. Life would be pretty unin-

teresting if everything was put out the way it is put out in the Soviet Union, for example.

The Chairman: That is exactly what I was thinking.

Senator Connolly (Ottawa West): There is a practical problem as well. That is, manufacturers usually have their stocks of containers ordered well in advance. In many cases they also have forms of containers which bear trademarks.

The Chairman: And they have machinery to produce them.

Senator Connolly (Ottawa West): They do not always manufacture their own containers, but no matter who manufactures them there is a considerable investment in that kind of thing. Would the minister care to say something about what might be done in the way of softening the blow that would result from having to change from one size container to another. There could be very costly capital expenditures if all at once all the containers were to be required to be standardized regardless of the stocks available and so on. It might very well increase the price of the product.

Hon. Mr. Basford: I appreciate that position. The record of this department indicates that we have endeavoured to deal with the question of the implementation of regulations and the implementation of changes. We recognize the implications of writing regulations and putting an effective date on them. We have to allow time for the "pipeline" to be cleared and for people to make the changes in an orderly fashion and in the least costly manner possible. We have done that under the Hazardous Products Act, for example, and we are doing it presently under the Textile Labelling Act. Every set of regulations we have passed has a time limit that has been discussed with industry.

Senator Connolly (Ottawa West): The urgency to regulate under the Hazardous Products Act, for instance, Mr. Chairman, would be much stronger because that is a matter of life or death in many cases.

Hon. Mr. Basford: Yes.

The Chairman: I would expect your hand would be heavier there.

Hon. Mr. Basford: But even there we have time lags and working-in periods.

Senator Cook: What has worried some of us, Mr. Chairman, is the possibility of needless interference by government in industry, but that is softened by virtue of clause 19 which states that a reasonable opportunity shall be afforded to consumers, dealers and other interested persons to make representations in respect of each regulation or amendment to a regulation that the Governor in Council proposes to make. They can come forward and be heard if they think they are likely to be hurt by legislation that may be well-intentioned but is unnecessary in a particular instance.

The Chairman: Senator Cook, have you any comment on the language with respect to where the authority rests in the minister and what he may deal with? You will notice that it says "any prepackaged product or class of prepackaged product". So that if it were limited to a class of prepackaged product where you would be getting a uniform treatment across the whole industry that was dealing with this particular product, that would be one thing, but to think that you could single out any prepackaged product and deal with it where the effect might be upon just one person in the industry or one prepackaged product in a line—that is quite another thing. Why are the words "any prepackaged product" in there? For example, in the case of toothpaste that is a class of prepackaged product, surely. Do you disagree with that interpretation?

Hon. Mr. Basford: Well, your interpretation catches me a little by surprise. I never for a moment conceived that this wording would allow such an interpretation, that there could be a situation where we would be dealing with, for example, Colgate toothpaste and no other toothpaste.

The Chairman: Well, there is the authority there, in my opinion.

Senator Croll: Is one product to be overlooked because it happens to be one product rather than a class of products? If the abuse is there it must be dealt with. Should they not deal with it whether it is in a class or not?

The Chairman: That is the question I have raised, senator.

Hon. Mr. Basford: Surely toothpaste, to use your example, would be a product. It would not just be Colgate toothpaste but "toothpaste". Dry cereals would be another product.

The Chairman: You can only deal with products, Mr. Minister. Any example you are going to give here is going to be a product.

Hon. Mr. Basford: I thought you were implying that the wording means that we could deal with Colgate toothpaste and not Procter and Gamble toothpaste.

The Chairman: You could deal with any prepackaged product or class of products.

Senator Carter: Mr. Chairman, we are all sympathetic with that this section wants to do, but one of the problems is that the way it is worded now it does not accomplish what the intent of the section is. Was not the problem this, that the way it is worded now does not accomplish the intent of the section because the real problem is that you cannot mislead as to weight if the weight is already printed, no matter what size the package is. So, the problem is not one of misleading, but that of comparing the different weights to the different size packages. The way this is worded now does not remedy that problem.

Hon. Mr. Basford: Believe me, senator, I wish it could be worded differently, but I am advised by the advisers to the Government that it cannot be worded in the way which I suspect you and I would like to word it, for constitutional reasons.

The Chairman: Could we have the viewpoint of your advisers on this point, and as to why you have not included the question of unit price?

Hon. Mr. Basford: Mr. Chairman, if the Senate wants to put unit price in, I certainly urge you to do so.

Senator Connolly (Ottawa West): We immediately infringe upon jurisdiction. It is impracticable, Mr. Minister, for this reason: if it is to be put on the package, it has to be done by the manufacturer, and nobody knows what the retailer is going to sell it for after it goes to him.

Hon. Mr. Basford: Well, it cannot be put on by the manufacturer because that would be resale price maintenance, but there are experiments being conducted in Canada and far more extensively in the United States where the unit price is put on by the retailer. We have gone as far on this legislation as I am advised we can go.

Senator Connolly (Ottawa West): I think the real problem with the consumers who were before us the other day was in this field, but I do not think we could help them on that point.

Senator Carter: If you were to cut out this "likely to confuse or mislead consumers as to weight, measure or numerical count," because that has already been taken care of, and put in there something to cover confusing consumers in making comparisons—because it is in the making of comparisons that the problem arises and that is where they are likely to be confused—would that wording also be unconstitutional?

Hon. Mr. Basford: I am advised that this is the safest wording.

Senator Flynn: Constitutionally?

Hon. Mr. Basford: Constitutionally.

The Chairman: I gather you are aware of the law they have in the United States under which there is a provision or power to negotiate voluntary agreements in relation to sizes and things like that. Have you authority to do something similar under this bill do you think?

Hon. Mr. Basford: No, because I do not think you would need legislative authority to negotiate any kind of voluntary agreement.

The Chairman: Except there, as I understand it, there is a little bit of a sanction. That little bit of a sanction is that there is a report made to the Department of Commerce in Washington and also to Congress on those who do not fall in line with the voluntary restraint, and I think there is a bit of intimidation in that. It is more or less to say "If you do not get in line, on a voluntary basis, you are going to be reported." Then there may be legislation.

Hon. Mr. Basford: I think our section 11 goes way beyond what you find in United States legislation, in the whole regime of the Food and Drugs Act, the Canada Agricultural Products Standards Act, taken together with this act. It is a far more enforcible regime than in the United States, where the existing provisions you mention are under very severe attack by consumer groups in the United States as having proved almost ineffective.

Senator Connolly (Ottawa West): Is there anything in this legislation which makes it mandatory to display prices?

Hon. Mr. Basford: No.

Senator Connolly (Ottawa West): Because people go into some of these huge supermarkets and first of all there will be a plaque up there where the prices are normally displayed, but there will be nothing on it, and then when you pick up a package, you find that the ink has not taken too well and you cannot read the price. Several times since this legislation has come before us, I have gone shopping with my wife—and I have had my glasses on—and I have examined packages of every possible shape and size and have come across several cases where I did not know what the price was and I was buying simply because I like it. That is performance.

The Chairman: I am sure the Minister would like to help you if he could.

Hon. Mr. Basford: There is no requirement under the act that prices shall be shown.

Senator Connolly (Ottawa West): Do you think you should have one?

The Chairman: I do not see any constitutional violation there.

Mr. J. W. Ryan, Director, Legislation Section, Department of Justice: I think, Mr. Chairman, when you are in a store purchasing an article, you are there to enter into a contract of sale with the proprieter of the store. Obviously by our customs they display their price for their convenience so that you know what the offer is that they are making for the particular product they wish you to buy. If you go into another type of store, a smaller store—and there may be still some in the country—you can barter about the price or negotiate the price on a small article. For instance, if you tell a grocery store proprieter that his competitor down the street is selling a particular article for a cent or two less, he may come down in his price. But to require that in their offer of sale they specify the price, is getting away somewhat from the basis on which this bill was prepared which is in the area of criminal law and weights and measures.

Senator Lang: But why are we pushed into section 92 of the BNA Act by this unit price? Is that not still under Weights and Measures?

Mr. Ryan: That has been discussed at great length by the draftsmen and the consultants we used in the Department of Justice, and we are of the opinion that you are getting into an area of provincial rights.

Senator Connolly (Ottawa West): We thought that too. But there is this other gap, and we do not want to give the Minister any more power than he is seeking.

Senator Croll: I did not think we were trying very hard this morning.

Senator Connolly (Ottawa West): I think this is good legislation, but you may be back for an amendment on this.

Hon. Mr. Basford: The only matter relating to that is in section 12, where it was felt that you could put in things relating to research. I appreciate the problem you have raised about price marking, and it would certainly be constitutional to say something about not showing the price in such a manner as to be deceiving.

Senator Connolly (Ottawa West): I do not think it is a matter of deception. But there is one other thing which I think is probably only my own personal problem. I notice on page 4, section 7(2)(b), referring particularly to the word "symbol", and there it is prohibited to use a symbol that implies or may reasonably be regarded as implying that a prepackaged product contains any matter not contained in it.

Perhaps I am repeating in my old age, but we had the grocery products people here who produced some packages of Jell-o. These packages had various symbols on them. If it was a lemon flavour, they would show a lemon, but there was no natural lemon in the product. If it was an orange flavour, they would use a picture of an orange, and so on. It was urged that the use of that symbol was in fact not misleading but was helpful to the consumer, to the shopper. They said that on the package the words "lemon flavour" or "orange flavour" were included, but the fact that the depiction of the fruit itself was there would appear to be completely prohibited by this. The argument made was that people in a hurry going to shop are helped a great deal when shopping, say, for Jell-o products and they want to get lemon or lime Jell-o, if they see a picture of the fruit on the package.

The Chairman: Should they not know that it is synthetic flavouring?

Senator Connolly (Ottawa West): I think it is marked on the package.

Senator Carter: Mr. Chairman, I think Senator Connolly is wrong there. I think the word "flavour" is left off the package. This picture indicates it is a natural product.

Senator Connolly (Ottawa West): All right, let us say that it is left off and that the regulations require it to be put on; that is fine. But it still remains, even if that wording is there, that that symbol cannot be used because of the wording of subsection (2)(b) of section 7.

Senator Flynn: Unless you write right on the lemon "Artificial flavour." It would not be misleading then.

Senator Connolly (Ottawa West): The symbol is not there for the purpose of misleading, and I do not think anybody is misled in that case. There may be other cases where you do use the symbol and where it would be misleading, but in this case I do not think it is, but there is no discretion.

Hon. Mr. Basford: It has to be read in connection with section 18(1)(g) which allows us to prescribe regulations in this area. This is an unresolved area, the whole question of vignettes and symbols for natural foods and synthetic flavouring. As a result of some of the practices that industries have engaged in, they have ended up getting an act passed in British Columbia which allows the Government to rule off the market any food they want. They have no one to blame but themselves because a few of them put out totally artificial foods and put fruit symbols on the front and did not say a word about their being artificial or manufactured.

You say that the industry says it is handy to have a lemon on a lemon flavoured thing and the housewife can go into the store and quickly grab the one she wants but, as the Chairman said, you are also entitled to know that it is artificial rather than real flavour. That is the dilemma. Sure, use the lemon symbol, but also make it clear to the consumer that it is artificial lemon flavour. That is what this act is all about.

The Chairman: You have the power by regulation to deal with that, in any event.

Hon. Mr. Basford: Yes.

Senator Desruisseaux: How does that conflict with the Food and Drugs Act?

Hon. Mr. Basford: In this particular area it does not, but there are other products not covered by the Food and Drugs Act. There are regulations relating to symbols under the Food and Drugs Act, but there are other products where the symbol is used that are not food.

Senator Connolly (Ottawa West): I take it that the provisions of section 7(2)(b) are considerably watered down in the department's view by the provisions of section 18(1)(g). In other words, there is a shifting of the onus there, and if it can be shown there is nothing misleading, then the absolute prohibition in section 7(2)(b) is avoided.

Hon. Mr. Basford: That is right, and I think we could say that where people are using symbols they will have to use the word "artificial" in relation thereto, and then that will be fine and permitted.

Senator Connolly (Ottawa West): Even if in small print, you do not think the use of the lemon would be misleading?

Hon. Mr. Basford: The Food and Drugs Regulations require a certain size of print in relation to the nature of the product.

Senator Flynn: There is one other question that I and my colleague on my right, Senator Casgrain, wanted to raise on that. It is in relation to section 18(1)(f) concerning the languages in which any information or representation is required.

Some criticism has been levelled as to the wording because it does not indicate necessarily it would be both in French and English at least. Along with Senator Casgrain, I was wondering why, and we would like to find this out from the minister.

Senator Casgrain: Because if the minister is sympathetic now it is only in the regulations, and why is it not included as a principle that it be bilingual? We have had criticism all over about that.

Hon. Mr. Basford: Because I do not think you can have within the statute a blanket provision that would apply to every product, regardless of its nature or origin. I think there are going to have to be exemptions and, therefore, it has to be dealt with under the regulations.

For example, there are certain exotic items that come into this country that I would expect to be exempted for one reason or another. Coming from the city I do, or in any city you see products—and I hesitate to name products . . .

Senator Connolly (Ottawa West): Well good Italian wine.

Hon. Mr. Basford: I hesitate to think that escargôts from France would be labelled in English. Most of them are not and there is no confusion. And lichee nuts from China which are big sellers in my city come in labelled in Chinese only. Anyone who wants lichee nuts knows where to go to buy them.

To have such a blanket statutory provision will create difficulties, both in French and in English, and will create difficulties both in Quebec and outside Quebec.

Some people in Quebec, such as the little cigar maker in Chicoutimi—and this was one of the examples put to me—he does not want to put his labels in English. I stated in the house last December a firm policy of the Government to require on a national basis bilingual labelling, subject to certain exemptions which are going to have to be worked out with industry. I put a deadline on it under the acts which I administer. Under the Hazardous Products Act, for example, every regulation passed, right from the beginning of the passage of regulations, requires mandatory French and English labels. The Food and Drug Directorate are working on making that the case, or making changes in the food and drug regulations so that they are bilingual. The Department of Agriculture is looking at its agriculture regulations to bring them into line with the policy that I initiated with the Government last December. To put in here a substantive provision that is statutory, that does not allow for exemption, will create difficulties on both sides of the language question.

Senator Casgrain: Kellogg's and Kraft, the two big food companies, have bilingual labels in Quebec. In western Canada they are subject to competition by those companies who do not use bilingual labels.

Hon. Mr. Basford: I do not think that is really true. I know that some manufacturers claim that it is so. They may have done surveys that I have never done. I think the country is ready for national bilingual labelling. Some marketers disagree with me. I was brought up in Winnipeg and in Vancouver, and I never noticed that the sale of Kellogg's was hurt in western Canada by the fact that it had bilingual labelling, which it has always had since I was a boy. That is where a lot of westerners learned French. I have not noticed in western Canada that the sales of Kellogg's over the years have been hurt because they had bilingual labels. For people to claim they are put at a competitive disadvantage in western Canada by reason of having to have bilingual labelling is rather misleading.

The policy I announced would require national bilingual labelling for a product such as you mentioned. I see this as a saving. The people who will object will be the small regional marketing people. National firms think it is a cost-saving. If they are required by regulation to do this, they will have a one-production run rather than two, and one label design rather than two.

Senator Casgrain: That has been one of the big criticisms. They say it is a regulation that can be abolished later on.

Senator Flynn: May I respectfully suggest that your argument as to the exemption does not stand because you had this power in subsection (a) of 18. Even if you have a provision in the act that would state that all labelling should be bilingual you could still use this to exempt certain products.

Hon. Mr. Basford: But then it does not accomplish what is requred by those who have come to me and said, "We want something in the act." They want something not subject to exemption.

The Chairman: Are there any other questions?

Senator Connolly: The plain fact would be that the smart merchandiser would accommodate himself to the market. So many of them are using bilingual labelling now.

Senator Lang: I presume the minister has considered immediately exercising his powers to exempt farmers' wives who bottle pickles and preserves and all the things that are sold in the market places in so many towns in Ontario and elsewhere.

The Chairman: Under regulation 18(a) he could do that. I wish to thank the minister for coming here this morning.

Hon. Mr. Basford: I appreciate the committee's hearing me this morning, and I appreciate your adjusting to my timetable. I have now to go to Vancouver, to introduce Ralph Nader. I will report that the Senate is deeply concerned with consumer problems and is writing a consumer bill which is far superior to anything in the United States.

Senator Croll: While this is fresh in our minds, should we not deal with it at the moment rather than with something else?

The Chairman: The minister was going to be available only this morning for a period of time. Although we had given a date and a time for representations on Bill S-9 this morning, we postponed this in order to hear the minister. I do not want to postpone this any longer. We can come back to this. We will not forget it.

Senator Croll: There are other committee meetings, although perhaps not of equal importance. I would like to be here, and at the same time have an opportunity of attending the other meetings.

The Chairman: We all have this problem of trying to subdivide ourselves.

The committee then proceeded to the next order of business.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 25

WEDNESDAY, MAY 19, 1971

Second Proceedings on Bill S-9,

intituled:

"An Act to amend the Copyright Act"

(Witnesses:—See Minutes of Proceedings)

23941—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28).

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Urquhart, seconded by the Honourable Senator Cook, for the second reading of the Bill S-9, intituled: "An Act to amend the Copyright Act".

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

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, May 19, 1971.
(28)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce proceeded at 11:30 a.m. to *further* consider the following Bill:

Bill S-9 An Act to amend the Copyright Act".

Present: The Honourable Senators Hayden (*Chairman*), Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Croll, Desruisseaux, Flynn, Grosart, Haig, Isnor, Lang, Martin, Molson, Welch and White—(17).

Present, but not of the committee: The Honourable Senators Casgrain, Inman and Urquhart—(3).

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

WITNESSES:

Department of Consumer and Corporate Affairs:

The Honourable Ron Basford, Minister.

Baton Broadcasting Limited:

Mr. E. A. Goodman, Q.C., Director;

Mr. L. M. Nichols, Vice-President, Finance and Administration.

At 12:40 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, May 19, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-9, to amend the Copyright Act, met this day at 11.30 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, we shall now proceed to Bill S-9, and this morning we intend to hear from Baton Broadcasting Limited. Mr. E. A. Goodman, Q.C., a director of that company, is appearing as spokesman. With him is Mr. L. M. Nichols, Vice-President, Finance and Administration.

The Honourable Ron Basford, Minister of Consumer and Corporate Affairs: Mr. Chairman, before I leave may I deal with something in connection with Bill S-9?

The Chairman: Yes, although we are reserving a special date for hearing you on this bill.

Hon. Mr. Basford: I should like to read this letter into the record. I think it bears materially on what the witnesses appearing before the committee will say. It is addressed to you, Mr. Chairman, and bears today's date. It is signed by myself.

The Chairman: Does this concern the award by the Copyright Appeal Board, or the tariffs for which the SRL applied?

Hon. Mr. Basford: This is the award of the Copyright Appeal Board. The letter reads as follows:

> I have just received from the Copyright Appeal Board its report concerning the tariffs requested by Sound Recording Licences (SRL) Limited for the performance of its records. In accordance with the Copyright Act I am having the tariffs, as determined by the Copyright Appeal Board, published in the Canada Gazette as early as is practicable.
>
> In the meantime, since Bill S-9 is before you, I thought I should provide you immediately with the following summary of the tariffs the Copyright Appeal Board has awarded to Sound Recording Licences (SRL) Limited:
>
> (a) All subject to the tariffs pay only a nominal fee of $1.00 for the public performance of sound recordings from January 1, 1971 to June 30 next;
>
> (b) Television stations pay only a nominal fee of $1.00 for 1971;
>
> (c) Radio stations have been cut from a requested tariff of 2.6 per cent of gross revenue to 0.15 per cent of gross revenue, and this is applicable only to stations whose gross revenue is more than $100,000. (In effect this means that the radio stations will pay approximately $90,000 in 1971 instead of the $3,000,000 or more which would have been received if SRL's claim to 2.6 per cent of gross revenue had been approved for the entire year.);
>
> (d) CBC will pay only $15,000 for the next six months rather than the SRL request which would have amounted to almost $900,000 for the entire year;
>
> (e) Theatres using recordings will only be required to pay a nominal tariff of $1.00 for 1971.
>
> In order to ensure that all parties interested in Bill S-9 have this information, I would have no objection if you wished to make this letter part of the record of the Committee's proceedings.

The Chairman: Thank you. Would you proceed, Mr. Goodman?

Mr. E. A. Goodman, Q.C., Director, Baton Broadcasting Limited: Mr. Chairman, honourable senators, as the Chairman has informed you, I counsel for Baton Broadcasting Limited. That company operates station CFTO, which is a television station in Toronto. It also operates in partnership with the CBC a television station in Windsor, and, as well, it operates a radio station in Windsor.

I understand that you have already received a lengthy brief from the Canadian Association of Broadcasters. It is not my intention to repeat that, thereby making this a rather tedious exercise. I would only like to deal very briefly with one or two aspects of the problem.

I was counsel for the same interests at the hearing of the Copyright Appeal Board. As such, I was present for almost four weeks at that hearing. While I am pleased to hear of the considerable changes that have been made on the application of SRL, I think there is still a principle involved which should be dealt with, and is being dealt with, in the bill. Of course, I am here supporting the bill.

I would respectfully point out to honourable senators that what starts out in Year One as a very low award, in the period of 10 or 15 years manages to grow considerably. What may be now one-fiftieth of what they asked for can reach the original figure very quickly.

Senator Cook: That applies to all taxes.

Mr. Goodman: That is right, it does.

The Chairman: Mr. Goodman, one of the submissions you make concerning the amount of money involved is contained in your item No. 2, where you say that more than $17 million is paid annually in respect of these records to foreign parent companies. Has that figure changed at all?

Mr. Goodman: No. I was going to explain that figure, Mr. Chairman. That is the figure that is paid at the present time. The evidence adduced established certain facts. First of all, it established the fact that the only shareholders in SRL are the major record distributors in the country, all of whom are wholly-owned subsidiaries of foreign companies. There are no Canadian shareholders in SRL at all. I might point out that Exhibit 3 of that hearing sets forth just who are the shareholders of SRL.

The situation is that during the course of evidence by leading officers of the various manufacturing corporations or distributing corporations, they said that there was a royalty of approximately 60 cents per record paid to the parent companies. Bear in mind that evidence also adduced showed that between 85 and 90 per cent—a minimum of 85 per cent—of the records sold in Canada are ones which are originally produced in other jurisdictions. Of course, the record industry is international in character and a great majority of records come from abroad—primarily from the United States, but also from England and Germany and, to some extent, from France.

The evidence disclosed that 90 per cent of the 11-inch records sold in Canada bear a royalty of 60 cents per record, which goes to the parent company that has licensed the Canadian subsidiary.

Exhibit 114 of that hearing consisted of some DBS figures for the number of records that that covers. Those figures show approximately 23,700,000, plus another 700,000 of monaural, for a total of 24,400,000 11-inch records. In respect of those, there was a royalty of 60 cents per record paid to the foreign parent. In addition to that, a larger royalty was paid on cartridges, of which there were 3,600,000 sold. So that means that there was a total, roughly, of 28 million records and cartridges on which a 60-cent royalty was sent abroad. That means that there was $16,800,000 on those alone.

In addition to that there was the total of over 15 million 7-inch discs, the 45 rpm's, on which a royalty of between 15 and 20 per cent was paid, which is another $3 million. So the evidence adduced by the record manufacturers themselves disclosed that there was in the neighbourhood of $19 million of royalties being paid that went abroad.

Senator Flynn: That royalty is part of the price paid by anybody who buys a record.

Mr. Goodman: Right.

Senator Connolly (Ottawa West): That is just on the sale of the record.

Mr. Goodman: On the sale of the record alone, yes.

Senator Connolly (Ottawa West): Performance is not involved; it is just the sale.

Mr. Goodman: Up to now there have been no performing rights paid at all.

All I am saying is that there is an outflow entirely apart from the profits that are made in Canada, which are much less than the outflow. Quite apart from the profits there is this outflow of between 85 and 90 per cent of $19 million which goes out of the country to the foreign parents.

The Chairman: I take it you urge that as a reason for supporting this bill. At least, Mr. Goodman, you say that CAB—and you joined in their brief, as I understand you to say—urged very strongly that the bill should be supported in order to keep money from going out.

Mr. Goodman: That is right.

The Chairman: But it would not keep this $19 million from going out.

Mr. Goodman: No, not at all. I just wanted to get the facts straight, and then I will present my argument on those facts.

Senator Connolly (Ottawa West): There is a property right that these record manufacturers have. You do not dispute that?

Mr. Goodman: Not at all.

Senator Connolly (Ottawa West): The question might arise whether or not that royalty is too high. You have not said anything about that.

Mr. Goodman: I am not arguing about the royalty at all.

Senator Connolly (Ottawa West): You were just stating the facts. Is this royalty in fact on the sale of the records at the level that prevails in the trade generally in the world?

Mr. Goodman: There was no evidence on that. I would have to presume that is the case. I am in no position to say that it is not the case, and I would not ask, therefore, that anybody infer otherwise.

Senator Cook: They are getting jolly well paid now.

Mr. Goodman: I am coming to the relationship of that $19 million when I show you what the result of imposing a performing right fee on them will be.

What I have said was just the first step that I was making before coming to the second fact that I want to put before you. The second fact established by the evidence was that they put in the contracts after some discussion under which the SRL shareholders got their rights. Those contracts provided that 50 per cent—I say "those contracts," but there are one or two that did not so provide, but the great majority provided that 50 per cent of any performing rights these companies received was to be paid to the parent company either in the United States, in Germany or in England.

The reason I brought my first figure out was to show you that by imposing any further performing fee or by allowing any other performing fee you are only going to

be feeding the company, the foreign company, which already, I think, is receiving a very considerable amount of money .It is not my business or the business of anybody else at this stage to interfere in a free-trade arrangement made between the foreign parent and the Canadian subsidiary. That is something for Mr. Gray to decide at some subsequent time—or the Committee for an Independent Canada, and I am not here for the Committee for an Independent Canada—and I say that seriously. Under the present laws that is a perfectly proper business transaction. But I say it would be ridiculous for us to feed that perfectly proper business transaction with any more money and, right off the bat, 50 per cent of that performing fee that they would get from broadcasting, theatres or anybody else would have to be paid under their existing contracts to their parent companies. The reason I brought the large sum out in the first place is to show that it is not necessary for them to be treated in that manner. My submission is that to take money from the broadcasting industry to give it to the recording industry, 50 per cent of which would go abroad, in my respectful submission is not in the best interests of the people of Canada.

The second submission I would like to make is that there was the evidence, which was absolutely clear, that there does not exist any arrangement between the record manufacturer and the performers to pay to the performers any money whatsoever. Some hopes were expressed. Mr. Wood appeared for the musicians and he expressed the hope that he would eventually manage to get his hands on some of this money, but he frankly admitted that he had no arrangements, no contracts and at the present time there exists no obligation whatsoever on behalf of SRL to use any of these moneys to assist any Canadian performers. Not only that, but, first of all, they lose half the money, and, secondly, the money is in respect of records which are not made by Canadian performers because the evidence was that there were very few records manufactured in Canada, and most of those records are made by independent producers. In Quebec there are a few independent record producers making Canadian records, but other than that most of them are done by independent producers who will then sell their rights to the larger companies for distribution purposes. Therefore, I say that if we are to allow any performing rights in records, it is going to be of little significant benefit, if of any benefit, to Canadian performers.

Up until now Canada has not been a signatory to, nor has it ratified, the 1961 Rome Treaty in regard to copyright matters which allows or provides for this type of copyright. But even in the Rome Treaty they linked the record player's rights with those of the performers and we have seen absolutely no plan for that in Canada. So Canada has not subscribed to this theory and the present situation in Canada is such that there is no benefit to Canadians.

The Chairman: Where would you expect to find any such provisions, by contracts or by statute?

Mr. Goodman: By contract, at least.

The Chairman: I would like a better answer. Certainly if there were contracts, it would be good, but it would be more certain if it were by statute.

Mr. Goodman: May I make a pont on that?

The Chairman: In England it is by statute.

Mr. Goodman: In most countries it is by statute. My understanding is that in some countries the Performing Rights Society is a combination of performers and record players. In Canada it does not even include the Canadian-based record manufacturers; it only includes the record manufacturers who are subsidiaries of foreign parents and my submission therefore is that this does not achieve what is the real principle of copyright. Copyright is to protect or to help the creative aspect of man. Stamping some records is not a creative aspect of man. The argument can be made that when you put the microphone a little closer and you get a certain type of performer and a certain type of arrangement, there is something creative about that, but my submission is that the real creativity is in the person who wrote the music or the song in the first place, and we have to get a licence from CAPAC or BMI to perform that work. A great majority of countries in the world today do not recognize copyright of this mechanical type. The evidence is that while some countries such as England and France, are included here—I think there are about eight out of all the countries in the world—the fact remains that to a large extent our industry is geared to the United States, and there is no copyright in record producing in the United States. Furthermore, our submission as broadcasters is that when Canadian broadcasters are in competition with American broadcasters and American programmers and they have obligations for Canadian content that do not exist in the United States, to impose this obligation upon Canadian broadcasters would not be in the best interests of the broadcasters or of the performers who are doing much better out of broadcasting then anywhere else.

My further submission to this committee is that no matter how low they keep it, it still does exist as a drain, it is a drain that can continue, and it is in the best interests of Canada to protect the broadcasting industry, which is a native industry under native control, rather than to weaken it at the expense of a foreign-controlled industry such as the record manufacturing industry.

Senator Cook: When you speak of a mechanical reproduction, are you saying that you can have a good mechanical reproduction or a bad one, but it is not creative?

Mr. Goodman: Yes, that is right. I say that there is no doubt that what is protected under section 4(3) is the actual physical reproduction from the plates, the making of the record from the original tape, master tape or master disc. I say that is a mechanical act.

Senator Connolly: And it is a skill rather than being creative.

Mr. Goodman: That is right. As a matter of fact, nowadays it is a pretty commonplace skill at that. The

evidence was that there is no differentiation, for example, between the way they make them. The evidence was that they can make records sometimes from just an ordinary record, and there is no distinction between the benefits that are derived from the type of record that is made.

Senator Connolly: Did you read the evidence of Mr. William Dodge of the CLC, who was here last week?

Mr. Goodman: No, I did not.

Senator Flynn: He was saying that the production of the record—and not just the stamping of the record—sometimes requires some creativity.

The Chairman: Do you know of companies like Phonodisc, Ahed, Quality Records, and Nimbus Productions Limited?

Mr. Goodman: Yes.

The Chairman: They have all made submissions to us and I shall have their statements Xeroxed and distributed.

Senator Croll: We have those already. I think you had better put them on record.

The Chairman: They say:

> The performing rights now recognized by Canadian Copyright law provide a primary incentive, for this or any other company, to finance on a highly speculative basis the creative endeavours of those engaged in the performing arts.

They continue:

> Without this right to control public performance and at least the opportunity to seek legal payment from those who wish to use our product for profit for public performance, the speculative nature of our enterprise would become financially unbearable.

Do you agree with their representation?

Mr. Goodman: I certainly do not agree.

The Chairman: They are opposed to this bill, I take it?

Mr. Goodman: Do not misunderstand me. I would say that those people manufacturing slightly over 90 per cent of the records are in favour of the bill. I am not suggesting for a moment that those independents are not in favour of the bill.

The Chairman: Do you say manufacturers of the records are in favour of the bill?

Mr. Goodman: I am sorry, are in favour of the right of having performing rights. I am not suggesting for a moment, when I say that SRL happens to have eight shareholders, that the small group of struggling Canadians do not support their position as well. What I am saying is that the evidence is clear that the performing society that would be getting these monies does not include any of these people. All they have is a pious hope that somehow or other in the future some of it might rub off on them. That is all they have.

My submission is that the evidence is clear that it is only a pious hope and that from the very contractual obligations of those persons who make the records they are obligated to send 50 per cent of this money out of the country, to begin with, and that they made their application for a tariff without making provision for any of the people—and representatives of those people appeared in front of the Copyright Appeal Board and admitted that there was no arrangement whatsoever to assist them and that there was no way they would necessarily get any money at all.

Furthermore, I say that those are only manufacturers. They are not helping the performers at all. Once again the performers feel, "Well, let us get some money out of the broadcasters. Maybe some of it will rub off on us," but my submission is that they also admitted there was no evidence at all that a single, solitary nickel would necessarily come to their aid or benefit.

Senator Carter: I was going to follow on from Senator Flynn. We have the same question. Our problem, I think, is to find a principle. You mention the iniquitous principle. In searching for a principle, would you draw a distinction between the creation or the manufacture of the master tape and the use of that tape after it has been made to manufacture records? Are these two distinct operations?

Mr. Goodman: Yes, certainly they are.

The Chairman: They are separate operations, but you want to take that question further, do you not?

Senator Carter: Yes. What is the essential difference between them? Is there any creative ability in the former? Is one creative and the other purely mechanical?

Mr. Goodman: The argument is made that there is some creativity in producing the original master tape. The argument is made that you have to know how to handle the sound equipment. The argument is made that you have to make certain types of arrangement for the usage.

Senator Flynn: Choose the artists or musicians?

Mr. Goodman: Yes.

The Chairman: And the set-up in which they perform, there may be something creative in that—they would have a director; there would be a layout.

Mr. Goodman: It is sound; there is certainly no visual layout. I said the relationship to the microphone and their relationship to their position, I concede that.

The Chairman: And there is creative ability in the development of the proper reproduction of sound.

Senator Connolly (Ottawa West): You have a producer, a director, an executive director, a sound man, a tape man, a light man.

Mr. Goodman: No light man, because there is no visual. I conceded at the outset this argument had been made, and I do not want to mislead the honourable

senators, but my position is that that type of creativity is of minimal benefit and is minimal creativity. It is a matter of choosing the artist. Of course, there is some creativity in all of that, but it is not really the type of creativity one connects with copyright. You think of people who write music and dramatic and literary works. Those, of course, are all protected, and broadcasters do pay to that type of person, through CAPAC or BMI. There is no doubt that the ability to sing is a creative, artistic capacity, and the artist himself has creativity.

My submission to you is, however, that the performing of a song which has been written by someone else does not come within the concept of copyright. You are paid for that particular performance on that occasion, and the whole industrial system that SRL is asking to have accepted is a system whereby the person who makes and manufactures the record gets the benefits of everyone else's creativity.

That is my position, that this type of legislation has only been accepted in very few countries in the world, and in Canada, from her whole position of entertainment—if one wants to look at entertainment as one industry—it would be a great mistake to take money from broadcasting and put it into the record manufacturers' pockets so that the record manufacturers of the United States and England could be reimbursed in this way. As a matter of public policy, I advance it to you.

Senator Flynn: This bill does not go far enough then, because up to now it will keep in Canada only a minimal amount. If you consider all the performing rights that you are already paying and that are already going outside Canada, the real problem is not in the record manufacturers' performing right, but it is in the performing rights you are paying to CAPAC and BMI. That is where the big problem is today.

Mr. Goodman: My clients pay in excess of a quarter of a million dollars in performing rights to other bodies. That is my client alone. You accept a system that has already grown up, but you fight ones that appear to be coming over the horizon, especially where in one case it is part of the real basic concept of copyright whereas, in our submission, this one is at the best on the outer fringes of copyright.

I have one last point to make, gentlemen, and that is all. In so far as the mutual benefits are concerned, my client, of course, is primarily in television.The minister did not read what they did on television, so I do not know. They only asked for a tariff for television of one-fifth of the radio tariff. The evidence was—and this is why we get such injustices—that when they monitored the use of records on television there was nothing except on a test pattern. So they did not need to produce any evidence of usage except of a test pattern and occasionally for lip singing. That is when somebody plays a record while somebody else pretends that he is singing. They could not produce any evidence that we play some records in the morning when they have their test pattern on before the programming starts. Their own evidence was that on that basis there would be less than an hour a week of record playing. So far as television was concerned their tariff was outrageous. Furthermore, they admitted that broadcasting helps them by giving their artists an opportunity to appear. My submission is that broadcasting does a lot more for record manufacturers than record manufacturers do for broadcasting.

That is open to argument in so far as radio is concerned. They argue back and forth about this on radio. But so far as television is concerned there cannot be any argument, and they did not even try to argue television. For them to be able to take money out of television, which assists them far more than they assist television, would be iniquitous. There is none of this whatsoever in the United States.

Senator Flynn: When a TV station produces a program, nobody is allowed to copy that record and give public repetition of such a program. Is it in the Copyright Act that you are protected?

Mr. Goodman: Yes, I would think so. This act does not take that protection away from records either.

Senator Flynn: I know it does not. You sometimes sell a program that you have produced, do you not?

Mr. Goodman: Right.

Senator Flynn: Even if we pass this bill, do you think a record manufacturer could have stated on the record that it must not be performed in public? I recognize that there would be a problem of enforcement. Contractually could this situation continue despite the passage of this bill?

Mr. Goodman: Even though they have no performing rights, could they sell to you under a condition that you could not perform?

Senator Flynn: Unless you pay them a royalty of some kind.

The Chairman: It would be a matter of contract.

Mr. Goodman: I am inclined to believe that you could probably sell a record under any lawful condition you wanted to sell it, unless it could be held that the condition was against public policy. You could impose any condition you wished. You would have to hold that the condition was against public policy in order to hold that it was improper.

Senator Flynn: In some instances there is an indication that there must be no reproduction without permission. There is nothing creative in connection with the TV station.

Mr. Goodman: There is creativity in making a record and there is some creativity in making a television program plus sight.

Senator Flynn: I am pursuing the argument of a contractual right to exact payment for the public performance of a record or film.

Mr. Goodman: In fairness to the record players, unless they have performing rights they would never be able to achieve that.

Senator Flynn: Enforcement would be difficult.

Mr. Goodman: Not so much enforcement. They need radio stations to air their records. If this bill is passed, much as I would like to say they can do it that way, as a matter of practical fact they would find it impossible to achieve that type of sale. In fact, they give their records away to the stations now. The evidence was that they pleaded with the stations to play their records.

Senator Connolly (Ottawa West): Some people who were before the committee last week said they even paid stations on occasion to use records.

Mr. Goodman: I do not think the record manufacturer would be able to make it stick, because one or a couple would break the line and they would never be able to do it by contract.

Senator Cook: Supposing I bought a record and passed it on to you, there is no contract between the broadcasting station and the manufacturer.

The Chairman: The suggestion was that when records are sold there should be a condition of sale, "For private use only," or, "for public performance." If you buy it on that basis and you violate . . .

Senator Cook: I would be the one violating it.

The Chairman: It has been sold to you on the basis that it is for private use only.

Senator Connolly (Ottawa West): There would be a claim on the part of the manufacturer against the radio station in performing it without paying a fee.

Mr. Goodman: There is no fee. It would have to be a contractual arrangement.

Senator Connolly (Ottawa West): It is a violation of the Copyright Act.

Mr. Goodman: Yes, at the present time, but not if this new section is put in.

The Chairman: Let us assume that somebody got into a record place and stole some records which contained these labels and conditions, one "For private use" and the other "For public performance," and they bootlegged them to stations. Do you suggest that in those circumstances there would not be some enforceable right by the owner of the records?

Mr. Goodman: If this act is passed?

The Chairman: Yes.

Mr. Goodman: Yes, because there would be no such thing as performing rights. Everything would have to arise as a result of a contract. The original question, as I understood it, was that they could do this by means of a contract, and I said "Fine." I agree that if it is not against public policy they could do it by contract, but if there is no contract—it is not like a privity of the state in regard to land—all you would be doing is buying a chattel from a third party. Whatever was stamped on it it would only be a stamp indicating the original contract between the manufacturer and the person you were buying it from. While he may be in breach of contract to the person he bought it from, nevertheless I do not think that would impose any liability on the person that is purchasing. In a purchase of chattels I do not know of any theory of law that would entitle the first vendor to impose a condition upon a subsequent purchaser down the line. I do not know of any theory at all.

Senator Connolly: As I read subsection 3, there is copyright in the record. If that record is performed without authority by the purchaser of the record in public, by a radio station, it seems to me, according to subsection 3, that if the radio station has not paid for the right, it is infringing that right.

Mr. Goodman: Subsection 4 limits the copyright. It says:

> Notwithstanding subsection (1) of section 3, for the purposes of this Act "copyright" means, in respect of any record, perforated roll or other contrivance by means of which sounds may be mechanically reproduced, the sole right to reproduce any such contrivance or any substantial part thereof in any material form.

Senator Connolly (Ottawa West): If I read that correctly, it means that the owner of a radio station cannot take one of these records and make another record of it, or a perforated roll, or any one of these other contrivances. Moreover, if the radio station operator plays the record he is infringing a copyright because of subsection 3.

Mr. Goodman: No, that is not correct, with respect, senator. That is what the whole argument is about. If this act is passed, the only right the record manufacturers will have will be to prevent anybody else from making the same record. But once they sell their record to anybody else they have no further rights whatsoever with regard to what happens to that record, provided it is not reproduced. That is the clear meaning of the act.

The Chairman: It depends on what the word "reproduce" means. It says that you cannot reproduce any such contrivance or any substantial part thereof in any material form.

Mr. Goodman: The important words are "in any material form". That means that you cannot make another record or tape or anything of that nature. It is not meant to give them any performing rights, however.

The Chairman: From the practical point of view, could I just take a record and put it on the turntable for radio broadcasting purposes and play it without having to make some adjustment or other?

Mr. Goodman: Yes. Radio stations just take the record and play it.

Senator Connolly (Ottawa West): In reading the explanatory note, I see that I was wrong, Mr. Chairman, because it bears out what Mr. Goodman has just said. The purpose of the amendment is to confine copyright to the reproduction of such contrivances.

Mr. Goodman: Senator, I am absolutely certain that what the department means is to limit the rights of the record manufacturers to that one thing. The reason we are supporting the measure is that it takes away any performing rights in records in the manufacturer.

Senator Connolly (Ottawa West): Under the present law the manufacturers have a performing right?

Mr. Goodman: That is right. Well, it is being debated.

Senator Connolly (Ottawa West): In fact, you say they do not exercise the right.

Mr. Goodman: They are trying to do so now. There are those who argue that they do not have a performing right, and that argument was made by counsel. I do not want to confuse this issue, but there are a series of cases and there are two groups of thought as to whether they do or do not have a performing right. I am not prepared to give an opinion on this, but the record manufacturers say they have a performing right, whereas certain broadcasters say they do not. This act says that if they did have a performing right they no longer have one.

The Chairman: Your opinion on the question is not strong enough that you would suggest that the bill be withdrawn and you stand on your legal rights?

Mr. Goodman: I did not argue that at the hearing, Mr. Chairman. I did not take that position at the hearing.

Senator Connolly (Ottawa West): Mr. Goodman, you say that the argument is made by the record manufacturers that they have a performing right and can assess a tariff. You further say that this bill takes away that right.

Mr. Goodman: Yes, sir.

Senator Connolly (Ottawa West): Where?

Mr. Goodman: In subsection 4. The definition of "copyright" in section 3 of the Copyright Act gives all of the rights that flow with copyright. It is a very long section. The existing subsection 3 of section 4 then says that "copyright shall subsist for the term hereinafter mentioned in records, perforated rolls, and other contrivances by means of which sound may be mechanically preproduced, in like manner as if such contrivances were musical, literary or dramatic works." What the new act does in subsection 4 is to change slightly the wording of subsection 3 of section 4, and it adds the new section which gives the nature of copyright in records and takes the rights of records out of the existing section 3 of the Copyright Act. Do I make myself clear?

Senator Connolly (Ottawa West): You do not to me. I may be thick-headed this morning.

Mr. Goodman: At the present time, senator, the section says that records have copyright as if they were musical works or literary works. Then, in order to find what right books or musical works have, you turn to section 3—not subsection 3 but section 3 of the act which defines "copyright". It goes on for over a page telling all the rights that go to copyright, and one of them is the right to control performances.

Senator Connolly (Ottawa West): Yes.

Mr. Goodman: Now Bill S-9, by virtue of section 4, which has a black mark on the line here of section 3, says that the sole right of copyright in records is not to allow anybody else to reproduce them, to make the same records. That is the only copyright that will flow from records if this act is passed. Therefore, all the other benefits of copyright which the record manufacturers allege they have, as outlined in section 3, will be taken away from them, other than for the rights in section 4.

Senator Connolly (Ottawa West): In other words, there is a restrictive definition for the word "copyright" given by subsection 4.

Mr. Goodman: That is right.

Senator Connolly (Ottawa West): Let me take an example. If I am writing a book that is to be published and I decide to cite something from another published work—say, an opinion of an historian or philosopher or scientist—I must get the permission of the copyright owner before I can use that extract. In other words, he has a subsisting right in his artistic production and he has a copyright in it. Do you say that this amendment is taking that right away from him?

Mr. Goodman: No. This amendment only takes rights away from record manufacturers. It takes rights away from nobody but record manufacturers.

Senator Connolly (Ottawa West): So you are excluding the literary production, the scientific production and the dramatic production.

Mr. Goodman: I am not a legislative counsel, so I cannot really say why they have done what they have done, but in the past they said that records had copyright and they were musical productions, but this time what they have done is to say that again, but they have said, however, that the only copyright is the right to prevent reproduction. I might have done it differently. I would have said that the copyright shall exist in records so that they shall not be reproduced. Period! I do not know why they go back and use the words again, but that is a matter of draftsmanship.

It is abundantly clear that this act provides what I believe is the proper situation, namely, that you cannot copy anybody else's record. You can play it when you buy it, and that is what it was made for, but you cannot copy it. You may think it is a record and music you like, but you cannot go ahead and put it on a tape and use it.

I may point out that the record manufacturers have been given considerable privileges themselves in so far as making records is concerned. Normally, you cannot play any particular music or song without getting a licence from the owner of the copyright. If I write a song and some record manufacturer wants to use it, then under the normal law of copyright he would not be able to use it without my consent, that is, the consent of the owner of the copyright in the song.

Now, what has happened in Canada—and the situation in most other countries is similar—is that the record manufacturer, by virtue of section 19 of the Copyright Act, has been given a special statutory copyright to use any particular new piece of music by paying a royalty of two cents per side for any piece of music, for each record, that is used.

Senator Connolly (Ottawa West): In that case you, as the composer of the song, would get two cents per side every time it is produced?

Mr. Goodman: That is right. Every time they stamp if off, I get two cents. But what usually happens is that most composers assign their rights to a publisher and they keep track of how many records they make. If they make 10,000 records, they whip off to the owner of that copyright, who is the publisher, 10,000 times two cents.

Senator Connolly (Ottawa West): Four cents.

Mr. Goodman: No, because it would only be one piece if they have it on two sides.

Senator Connolly (Ottawa West): But you are a prolific fellow and you would have both sides.

Mr. Goodman: Not being as prolific as you are, senator, I only wrote one side.

The Chairman: We are getting mixed up with undue proliferation.

Mr. Goodman: I point that out because the record manufacturer has been given privileges which allow him to use these records for a minimum payment. It is not as though he was paying a common tariff or anything of that nature.

Senator Connolly (Ottawa West): He gets his copyright there.

Mr. Goodman: That is right, and he gets not the copyright, but the right to use it, and he takes that right which is given to him by the statute and gets a particular performer to perform the music or a particular orchestra to play it.

Senator Connolly (Ottawa West): He has the copyright in that contrivance.

Mr. Goodman: That is right.

The Chairman: What is it I get from the writer of a musical work, or whatever it is that I want to put on a record? What is it that I get that I can compulsorily satisfy any royalty obligation I owe for a copyright in that by paying this two cents for each side? Now as the record manufacturer, what do I get? Certainly, the composer cannot come at me for anything more than two cents for each side, no matter how many times that record may be used.

Mr. Goodman: That is right.

The Chairman: But is there something inherent in the record maker by virtue of the enjoyment of the right to use that composer's work that he passes on when he passes on the record?

Mr. Goodman: This is the interesting part, senator. For example, if I play the record of a composer's work which you have used, you cannot pass on to me the right to play or to perform that record. I still have to pay the composer. If you did a record of *Abie's Irish Rose*, and I wanted to play that record, I would still have to get a licence from the composer of *Abie's Irish Rose* before I could play your record. That is in public performance. Of course, this is the basis of the case I made to the Copyright Appeal Board, that they could not give me a clear licence. They cannot give the broadcaster a clear licence to play that record; he still has to be licensed by the composer of the song or the musical piece. When he gets that licence, he can play the record, and my submission was that—and this was before the Copyright Appeal Board—the act was not intended to give anybody any rights under section 48 that is outside the scope of this discussion.

Senator Connolly (Ottawa West): Then, going back to the composer, in the case that he has composed *Abie's Irish Rose* and has sold it to the record manufacturer for two cents a side, all the record manufacturer gets is the right to make records and sell them for private consumption. You are telling us now that if you as a radio station operator wanted to perform that record, you would have to go back to the owner of the copyright, in this case the composer of *Ahie's Irish Rose*, and get from him a performing right and pay him.

Mr. Goodman: That is right, and that is what we do through BMI and CAPAC. You see, any record manufacturer can use *Abie's Irish Rose*—and usually there are seven or eight manufacturers who will make their particular record of a popular song that is written—and pay their two cents to the owner of the copyright in that particular popular song.

The Chairman: But, Mr. Goodman, if you took eight or nine records of *Abie's Irish Rose* manufactured by eight or nine different recording companies, would there be differences, creative differences in the production?

Mr. Goodman: The answer is, "Yes."

The Chairman: And who has put that in?

Senator Cook: I suppose if you have *Abie's Irish Rose* sung by Caruso, you will sell quite a number of records, but if you have it sung by Eric Cook, you will sell few.

Mr. Goodman: Ninety per cent of that creative input happens to be the capacity of the person that is singing it. If there is any creative aspect, senator, almost all of it, but not all of it, because there is certainly something to the way you get your sound out...

Senator Connolly (Ottawa West): But those are technical skills.

Mr. Goodman: The great creative output has to come from the performer, because you are using the New York Symphony or something of that nature, and our submission is that under the legislation as it exists at the present time there is no protection for those, nor does the

SRL propose any protection to the Copyright Appeal Board.

The Chairman: There is no creation and there is no art in the selection of the components that are put into the production of a record.

Mr. Goodman: I would not go that far. I have been cross-examined before, and I would not go that far. My submission is that there is some but it is not a major aspect and it is not a large factor in it. That is all I am saying. I certainly do think that arrangements mean something.

The Chairman: But if there is some creative aspect, this bill would take it away.

Mr. Goodman: No, not at all. What this bill does is take away the right to get performing rights, the creative thing and the benefits you get from that creative aspect from selling your records. That is where you get the benefit. I say that record manufacturers are very well recompensed by the benefits of selling their records, and that they are helped considerably by broadcasters to sell their records, and to give them additional money from the broadcasters would be a mistake. I do not have to say that there is no creativity, and I refuse to be put in that position.

The Chairman: England, of course, is a great example of where they maintain this performing right. We were given some information the other day, which I have checked, and I do not think the statement that was made was a correct one—that is, that while there had been a performing right in records, that had been changed by subsequent changes in the law.

I have before me the original state of the law in 1911 and the changes that were made in 1956, and certainly even today that performing right, subject to certain restrictions or limitations, still exists in England.

Mr. Goodman: That is right, Mr. Chairman, but it is also tied to the performer.

The Chairman: Yes, but it is a performing right in the record which the record maker enjoys.

Mr. Goodman: But under which he is obligated to the performer, which is not the situation as it exists in Canada. That same situation applies in France. I think there are eight countries where it applies, but there are 80 others where it does not. This includes the United States, which has the most effect on our markets. I am only here for the broadcasters and my own clients in broadcasting, and my submission is that insofar as broadcasting is concerned, there are more benefits flowing to the record makers than flow to them, and they should not have any performing rights insofar as broadcasters are concerned; that the creative aspect is at a minimum, and that the present system in Canada allows no benefit to flow to Canada. Therefore, I support this bill as being in the public interest.

Senator Connolly (Ottawa West): I ask you to comment on this position that was put before us in earlier hearings. We had representatives of the performing artists with us. They said that the performing artists made a cultural, innovative input into the production of a given musical composition which is put on the record, and that that performing artist therefore had some copyright in that artistic input which resulted from his own interpretation and his own performance. It was put to the witness that when that performing artist was lured into the studio to make this recording, that artist was given a certain fee and that fee would cover any artistic input. Therefore, there should be no copyright in the performance by that particular artist of that particular musical production. Have you any comment on that?

Mr. Goodman: My position is that historically the way I sang a song was not something we recognized copyright in, and I was entitled to be paid for my particular performance and, therefore, having performed I received my fee. I accept that position.

What the record manufacturer is now trying to do is to work backwards. Having been given copyright as a result of their reproducing these particular things, they are now saying they are artistic because there is this performer who performs in them.

My respectful submission is that the benefits that the performers get, from having their works broadcast and appear on television, and from having the sale of their records increased, more than compensate them for the use by broadcasters of their performance.

Senator Connolly (Ottawa West): In addition to the fee they get for the actual work in making the record.

Mr. Goodman: Yes.

Senator Cook: The Canadian Council for the Performing Arts contend that not only should this bill not be passed not only should the record manufacturer get a royalty, but that they should also get a royalty in addition.

Mr. Goodman: And, of course the argument could be made that the arranger should get a royalty as well because he has arranged the music. My position would be that what will happen will be that it will destroy the industry which still promotes all these people and does the most good for them, and that is broadcasting.

Senator Connolly (Ottawa West): And you might make the product prohibitive in price.

Senator Carter: Let us take the case of the making of a master tape in which there may be a little creativity but it is on the fringe and is not significant. A manufacturer makes the master tape and runs off, let us say, 100,000 copies. Does it happen, to your knowledge, that he may sell the master tape to another record company who will run off more copies and sell them at a cheaper rate?

Mr. Goodman: No, with respect, what usually happens is that most of the records that we play in Canada are made from a master tape made in the United States. Then they make a series of other tapes from that master tape.

First of all, some private producer will make it and will go to one of the large record companies and he will sell the tape to the large record company, to MCA, Columbia or somebody of that nature, but he will sell it exclusively. None of the large record companies will take a tape that is going to be used by any other record company. Then they will take his tape, make copies of it, send it around the world to their various subsidiaries or, in some countries where they do not have subsidiaries, to their distributors who will manufacture records from it in that particular country. Then they will pay them so much royalty, and if in that particular country they have performing rights they will also pay them part of the performing rights. Then they will go back to the parent company in the United States.

Sometimes the parent company makes their own tapes and sometimes they use independent producers to make them and to buy them. It varies, and that is the general procedure, but I would suspect it is very rarely that any major company would buy the rights to a tape and not buy them exclusively.

Senator Carter: But if somebody else created the tape, an independent made the master tape and then sold it to one of these record companies, when they stamp records off if they have not any claim to any creativity that existed.

Mr. Goodman: They get an assignment of it. In most cases they get an assignment of all the rights, whatever exist, from country to country. If I make a tape and I go the MCA, because they are a large company, and they like my tape and they buy it, I may get it on a percentage basis or I may not, but they will buy whatever rights go with that tape. All the copyright that happens to exist, if it does exist in any particular country, will go to them. But in Canada—and this is the last point I will make—we have to get an assignment of the original copyright because it is the original tape under our act that counts, which means the original tape made in the United States. So in Canada what is really happening is that they are asking for performing rights in Canada from a tape made in the United States, which in the United States they are not entitled to any performing rights for. So we are paying performing rights in Canada on American creativity, if such exists; but in the United States, where it was originally made, they do not recognize the creativity as having any performing rights.

Senator Cook: In addition to some $17 million that are taken from the general public anyhow.

The Chairman: I thought that last week we got away from the dollars and cents angle.

Senator Cook: I am just saying that $17 million is enough money.

The Chairman: If you are going to accept a dollar-value argument, then you are going to look in all directions in relation to the monies going out. I am just recalling the evidence. In the evidence, when we asked the witnesses last week why they continued paying this money, they said, "Because the other people are in the driver's seat." Then we said to them, "You are resisting here and are attempting to curtail the performing rights. Is it because you feel you are in the driver's seat here?" I think the acknowledgement was, "Yes."

To be logical, and I thought we resolved this last week, the real thing we have to look at is: Can it be said, as a matter of common sense or scientific knowledge or study of intellectual contribution to the making of a record, that it is possible to justify a performing right in a record? And let us stay away from the dollars. That is where we headed to last time. Maybe we can reverse the field.

Senator Cook: No, I agree 100 per cent. I do not care whether it comes in or goes out, but I am merely saying that $17 million is enough to pay for the service, whether it is in Canada, England or elsewhere.

The Chairman: I would have thought, judging by the tariff that the Copyright Appeal Board came down with the other day, that they must have been influenced actually by amounts which have already been paid. The tremendous gap between what was asked for and what was granted is such that they must have looked at factors like that.

Senator Connolly (Ottawa West): Would it hold the committee up if I asked Mr. Goodman one more question? I do not want a long answer.

You said that you had not seen the television tariff but that you had heard something of the radio tariff, and the amounts that were approved were much less than those requested. You also said that in subsequent years they would reach very much higher levels.

The Chairman: He said they might.

Senator Connolly: Why?

Mr. Goodman: Because, firstly, that has been the history. Secondly, they are based on percentages and percentages will grow in themselves. My objection is to the principle. I hope I made that clear. I am arguing this on the basis of principle. The principle, I suggest, is that they cannot give a licence. I understand, from what the minister said, that the Copyright Appeal Board made it clear that they were not ruling on whether they had any entitlement under the act. The minister said that while they recommended the tariff they were not taking the position as to whether they had any entitlement. The argument was made that they could not issue the licence because they cannot give you the right to play *Abie's Irish Rose*. You would still have to get another licence. If they cannot give you a licence to perform, then they are not entitled to any moneys. That was the principle that I argue. They cannot give you a clear licence to perform and, therefore, they are not entitled to any money.

The Chairman: Mr. Goodman has inserted one word too many in his answer, when he spoke about "clear" licence. They do have a performing right at the present time, whether it is clear or unclear, or anything else. What the Copyright Appeal Board determined in that

hearing, as I understand it, was that they were told they had no jurisdiction, and they reserved and made a decision that they would go ahead. They issued a tariff. That is the value they put on the performing right that existed at that time.

Mr. Goodman: I have not read the decision yet, but I understood from what the minister said that they had taken no position on their own jurisdiction.

Senator Connolly: My question was directed solely to the problem of escalation.

Mr. Goodman: My basic position is that in principle I do not think they are entitled. The history of all these licences is that they have increased throughout the years, and we object in principle to what we believe should not be given to record manufacturers when there is clearly no evidence whatsoever that it helps performers.

The Chairman: Do you have something more to say?

Mr. Goodman: Thank you very much for a courteous and interesting hearing.

The Chairman: We do not have time to revert to Bill C-180. In view of the fact that we have other committee meetings and some members of this committee are interested in this bill and wish to be here when we are dealing with it, perhaps next Wednesday morning, as the first item of business, we will consider Bill C-180, decide on how we are going to report it, and then go into our consideration of Bill S-9. We have four delegations to be heard next week on Bill S-9 and this may take time. It may be that we will have to run into the afternoon to get through them all.

Senator Cook: With regard to Bill C-180, could we have a note of the suggested amendments?

The Chairman: I will circulate what we have suggested to the department and what they have come back with.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 26

WEDNESDAY, MAY 26, 1971

Fifth and Final Proceedings on Bill C-180,

intituled:

"An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products"

REPORT OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

23943—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28).

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Heath, seconded by the Honourable Senator Kickham, for the second reading of the Bill C-180, intituled: "An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products."

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

The Bill was read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, May 26, 1971.
(29)

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

Bill C-180, "Consumer Packaging and Labelling Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Benidickson, Burchill, Carter, Connolly (*Ottawa-West*), Cook, Croll, Desruisseaux, Haig, Hays, Isnor, Lang, Molson, Welch and White. (16)

Present but not of the Committee: The Honourable Senators Lafond and Method. (2)

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

WITNESSES:

Department of Consumer and Corporate Affairs;

Mr. J. B. Seaborn, Assistant Deputy Minister, Consumer Affairs Bureau;
Mr. G. R. Lewis, Chief, Commodity Labelling Division, Standards Branch.

Department of Justice:

Mr. J. W. Ryan, Director, Legislation Section;
Mr. D. Beseau, Legislation Section.

Upon Motions, it was *Resolved* to adopt the following amendments:

Page 2, Clause 3: Strike out lines 31 and 32 and substitute therefor the following:

"provisions of this Act that are applicable".

Page 6, Clause 11: Strike out lines 27 to 33, inclusive, and substitute therefor the following:

"product, the Minister shall seek the advice of at least one organization in Canada of consumers and one organization of dealers in that prepackaged product or class of prepackaged product and may seek the advice of the Standards Council of Canada or any organization in Canada engaged in standards formulation".

Upon Motion, it was *Resolved* to report the said Bill as amended.

At 10.30 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, May 26, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-180, intituled: "An Act respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products", has in obedience to the order of reference of March 30, 1971, examined the said Bill and now reports the same with the following amendments:

1. *Page 2:* Strike out lines 31 and 32 and substitute therefor the following:

"provisions of this Act that are applicable".

2. *Page 6:* Strike out lines 27 to 33, inclusive, and substitute therefor the following:

"product, the Minister shall seek the advice of at least one organization in Canada of consumers and one organization of dealers in that prepackaged product or class of prepackaged product and may seek the advice of the Standards Council of Canada or any organization in Canada engaged in standards formulation."

Respectfully submitted.

Salter A. Hayden,
Chairman.

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Report of the Committee

Wednesday, May 26, 1971.

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Respectfully submitted.

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, May 26, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-180, respecting the packaging, labelling, sale, importation and advertising of prepackaged and certain other products, met this day at 9.30 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, we have Bill C-180 before us this morning, and it is proposed that we run through the clause. There were indications of several amendments. Mr. Seaborn, the Assistant Deputy Minister, is present in case we run into factual or descriptive difficulties, and so is Mr. Ryan who can express an opinion on the legal side.

The first clause to which there is an amendment proposed, on which you will recall a draft was submitted by the minister last Wednesday, is clause 3. That clause raised the problem that you had authority there where in our view you could by regulation legislate, and we were not going to permit that. It was proposed that we strike out lines 31 and 32 and put in place of them this one line, "provisions of this Act that are applicable". Subsection (1) would then read:

> Subject to subsection (2) and any regulations made under section 18, the provisions of this Act that are applicable to any product apply notwithstanding any other Act of the Parliament of Canada.

The offending word taken out is "regulations". Is there any discussion or any questions you wish to ask on that?

Senator Connolly (Ottawa West): Speaking as a lawyer, I think we were concerned about the possibility that the omitted words would allow the regulating authority to change not only this bill but another one that follows. There may be an argument on either side, but it seems to me that the deletion of these words—what anybody may say may change my mind—is a very beneficial kind of amendment. I am not quite sure, but did the minister indicate last week that he was in favour of this?

The Chairman: What I read to you is his draft. It is entitled, "Proposed amendments to Bill C-180, submitted by the minister".

Senator Connolly (Ottawa West): He then sees the virtue of the arguments we made.

The Chairman: That is right.

Senator Connolly (Ottawa West): I think this is very good.

Senator Cook: I agree, Mr. Chairman. I move we adopt the clause as amended.

The Chairman: Is it agreed?

Hon. Senators: Agreed.

The Chairman: The next amendment discussed, and in respect of which the minister submitted a draft, is to clause 11. This is the standardization clause. Some of the submissions we received, and some of the discussions we heard, centered on the question that the manufacturer of containers, or whoever is packaging or prepackaging food in containers, when he is going to be subjected to some order or direction reducing the number of container sizes, should have a right to be heard before the decision is made. The request was that subsection (2) be mandatory; instead of saying the minister may seek, it should say he must seek. That involves some rearrangement of subsection (2). The proposal is that we strike out lines 27 to 33. I will read the whole subsection as it would be with the amendment:

> For the purpose of establishing packaging requirements for any prepackaged product or class of prepackaged product, the Minister shall seek the advice of—

And what follows is new.

> the Minister shall seek the advice of at least one organization in Canada of consumers and one organization of dealers in that prepackaged product or class of prepackaged product and may seek the advice of the Standards Council of Canada or any organization in Canada engaged in standards formulation.

The differentiation there between "shall" and "may", if you recall from last week, was that the minister felt the Standards Council of Canada had not been organized to the extent that it was likely to be able to contribute very much in the short run. Therefore, if he decides they are in a position to contribute something then he may consult, but the "shall" was not to apply to that organization. The "shall" does require the Minister to consult with at least one of the dealers. This would appear to meet the points that were raised by the various people who made representations here.

Senator Beaubien: I move that we adopt the amendment.

Senator Connolly (Ottawa West): Mr. Chairman, as a practical matter, I suppose there will always be a consumers' organization and a dealers' organization in respect of whatever class of products are to be dealt with. These are voluntary organizations. Suppose they go out of existence and there are none to consult? I am not trying to make it difficult for the draftsmen, but from a practical point of view are we imposing an onus upon the Department that it would find it difficult to discharge? I just raise that question.

The Chairman: I do not think so, senator, because it would be easy, I would think, to develop one if there was not one existing at the moment.

Senator Connolly (Ottawa West): That is not the Department's business. It is expected that this would be an extra-governmental organization. Perhaps some of the members of the committee who have practical experience with this kind of thing would like to speak.

The Chairman: I do not think this is intended to be a government organization, but intended an organization of dealers.

Senator Connolly (Ottawa West): Yes, an extra-governmental organization.

Senator Molson: If I do think there is any doubt about there being an organization of dealers, having regard to the definition of "dealer", Mr. Chairman. Whether there will always be a consumers organization is perhaps a question, but I would very much doubt that one consumer's organization will not exist at any time in history.

The Chairman: You will remember that we saw some evidences here the last time of some very active and alert consumers' organization. The definition of "dealer" includes a person who is a retailer, manufacturer, processor or producer of a product, or a person who is engaged in the business of importing, packaging or selling any product.

Is it agreed that subsection (2) of section 11 be amended in the manner I read to you.

Hon. Senators: Agreed.

The Chairman: We had considerable discussion on subsection (3) of section 20. That is the famous subsection that reads:

> Where a corporation is guilty of an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

When Mr. Scollin was here the last time we tried out certain variations of this which the law clerk and myself had drafted. We asked the departmental representatives what was the purpose and what were the circumstances under which they would wish to prosecute the director and not prosecute the corporation. The explanations that were given in the committee of the House of Commons were that by the time they got around to this the corporation might have surrendered its charter, and therefore there would be no corporation to proceed against, or the corporation might have made a voluntary assignment, or it might have been adjudged bankrupt, the Bankruptcy Act.

Mr. Scollin said that he did not want to tie himself down to that enumeration as being complete. He said quite frankly that since a section in substantially this form occurs in the Income Tax Act, the Bankruptcy Act, the Weights and Measures Act, and a few others, and had been recognized as a known way of proceeding, he would prefer to travel the known route than to suggest any change.

It still bothers me—but I am only one member of the committee—as to what we are doing with this language. When I asked the Minister last time, "What have you to be fearful of and to provide against in this bill?", he immediately said that the top dealers, manufacturers, and producers—he named some of them—would willingly conform at any time to any request. He said there would be some little people around who would be difficult to handle, and this would be a big stick to deal with them. Certainly, it appears to me that this provision in the form in which it occurs in this bill might be justified much more readily in the Bankruptcy Act than in this act. You are dealing mainly with a difficult category of people.

The question is: How far do we want to take this? The law clerk, as a result of our further negotiations, has come up with a suggestion, which perhaps I should read so that you can decide whether or not you wish to go any further on it:

> (3) Where a corporation
>
> (a) has been convicted of an offence under this Act, or
>
> (b) has been declared bankrupt or has made an assignment in bankruptcy under the *Bankruptcy Act*, or has forfeited its charter, or in the opinion of the court is not in fact the principal offender, and, again in the opinion of the court, the corporation has been guilty of an offence under this Act,

Senator Connolly (Ottawa West): You state certain factual situations with respect to the company—whether it is bankrupt, or has made an assignment in bankruptcy under the Bankruptcy Act, or has forfeited its charter, or in the opinion of the court is not in fact the principal offender. Does not that really come down to what you now have in the clause, that you must have a trial within the trial to determine whether or not the corporation is in fact the principal offender?

The Chairman: Under the section as it stands, the corporation must be established in the trial of the director as being the offender, and as being guilty of the offence.

Senator Connolly (Ottawa West): As it stands, that seems to be a backward step in so describing it in the draft. It forces the court to express an opinion as to extending the guilt of a corporation.

The Chairman: That is right. The question is whether this is leading to confusion in interpretation and administration. It may be that, in our effort to cover the situation as we think it should be covered, we are adding as many problems as we started out with.

Senator Connolly (Ottawa West): What we want to do is improve the legislation.

Senator Molson: What would happen if the opening phrase were omitted, and the paragraph commenced:

> Any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is a party to and guilty ..?

The Chairman: You would be creating a separate offence in relation to those persons, which would be a perfectly proper thing to do. Mr. Ryan, have you any comment on that?

Mr. J. W. Ryan, Director, Legislation Section, Department of Justice: On the last question, Mr. Chairman?

The Chairman: Yes, Senator Molson's question. If we struck out the phrase starting with "where", and the last phrase starting with "whether", what would be your comment?

Senator Molson: No, not necessarily the last clause.

The Chairman: You would leave the last one in?

Senator Molson: Yes. I am suggesting we delete "Where a corporation is guilty..." and start with "Any officer...", and insert "an offence under this Act" in line 31 or 32. What would be the effect in law of that?

Mr. Ryan: I assume, Mr. Chairman, it would continue to read "...is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted"?

The Chairman: That is right.

Mr. Ryan: I am speaking now without having studied it in full detail. I am a little afraid of it, inasmuch as it may change the requirements of proving the offence by the corporation in the first instance.

The Chairman: Proving it where?

Mr. Ryan: In the trial within the trial.

The Chairman: There will not be a trial within the trial.

Mr. Ryan: You would have, "Any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of an offence under this Act .." Is that correct?

Senator Molson: That is right.

Mr. Ryan: "...is liable on conviction to the punishment provided for the offence whether or not..." You have to make a change here because we have not referred to a corporation in the wording.

Senator Molson: You have said "Any officer, director or agent of the corporation..."

Mr. Ryan: Whether or not the corporation has been convicted. I am reacting rather hurriedly to it, so I do not want to be held too closely to what I say. I am afraid that you might remove the requirement that, within the trial of the officer, it be established that the corporation has been guilty of the offence.

Senator Flynn: Otherwise there would be no offence.

The Chairman: Suppose they did, would not there be a proof required somewhere?

Mr. Ryan: I do not know which side I should be on, in that case.

Mr. Beaubien: Are we not going into the Corporations Act now?

The Chairman: No.

Mr. Beaubien: Is it the Companies Act or...

The Chairman: It is the Canadian Corporations Act.

Mr. Beaubien: Is it not covered here?

Mr. Ryan: To some extent this is already covered in the Criminal Code, as I understand from Mr. Scollin.

The Chairman: Mr. Scollin remarked on the last day, when he was here, that you can make it an offence for a director to assist or join in the commission of an offence under this act.

Senator Connolly (Ottawa West): Is it not our purpose in this section to ignore the corporation, on the basis that the minister suggested last week, and to say we are not going to worry about the corporation. What we want to get at is the offending person, and he may very well be a director, officer or agent of the corporation; he is the man who administers it. It is this fly-by-night fellow that we need to cover in some kind of wording similar to that. He is the man we want to get at. Why clutter it up by talking about the corporation? I think Senator Molson may not have the exact wording here, but his idea is a sound one.

Would Mr. Ryan like to have a look at that, and come back and tell us. I think we are helping the minister here to accomplish the purpose that he described when he said he wanted to get at the man who was responsible for having the offence committed, whether the corporation is proved guilty or not.

The Chairman: Yes. Is there any other comment?

Mr. J. B. Seaborn, Assistant Deputy Minister, Department of Consumer and Corporate Affairs: Perhaps I should not be speaking, as I am not a lawyer, but I think I remember Mr. Scollin saying that there is an advantage—you mentioned this this morning, Mr. Chairman—in using existing wording, wording which has been tested before, in order to assist the court cases and the jurisprudence on it. I think he had some concern about that.

Senator Connolly (Ottawa West): Also if there is no jurisprudence.

The Chairman: As a matter of fact, I can tell you there are only two cases. One is under section 134 of the Income Tax Act and the other is under the Excise Tax Act. In both cases the corporation had been convicted first, and then the director was proceeded against. What these cases really laid down was the manner of proof that the corporation was guilty. So to the extent that anything more might have been said, it would just be obiter.

Senator Connolly (Ottawa West): There is no decision on the point.

Mr. Seaborn: It is not an exact parallel.

Senator Connolly (Ottawa West): It might be helpful if Mr. Ryan considered the use of words like "whether the corporation has been found guilty of an offence under the act or not", followed by Senator Molson's suggestion.

Senator Flynn: I doubt if that would change anything. I am wondering if we were to delete the paragraph altogether whether we would change the provision of section 20 at all?

The Chairman: If you take out subsection (3) completely, there would still be an offence under the Criminal Code?

Senator Flynn: That is so. That is why I am not so sure that subsection (3) adds or subtracts anything.

The Chairman: Senator Cook, have you any comment?

Senator Cook: No, I rather agree with Senator Flynn. It seems to me that if you are guilty, then this is only stating what the law is.

Senator Connolly (Ottawa West): There is virtue in legislation of this kind. Even if it is in the Criminal Code in exactly this form, I think it adds strength if you have it in this act.

Senator Flynn: The phrase, "Every person who contravenes any provision of this Act" would include the corporation, or any person.

Senator Connolly (Ottawa West): If you had a section like that...

Senator Flynn: It is here. Subsection (2) commences with those words.

The Chairman: Senator Cook, your point is that the offence is covered in the Criminal Code, although not in this language exactly. Therefore, if this provision were not in the bill a basis could still be found for proceeding on proper evidence.

Senator Connolly (Ottawa West): Yes, against directors.

The Chairman: Perhaps in those circumstances there is some value, since the situation would not be made worse for a person by inserting it specifically in the bill.

Mr. Ryan: The point made that the Criminal Code to some extent covers the same offence is accurate so far as parties to an offence, attempts, and other matters are concerned. One could proceed against the officers, directors and agents of the corporation as parties to the offence. However, I do not think that would apply so much to the acquiescing, assenting or participating. That is the only difference between being a party to an offence and committing an offence under clause 20(3).

However, I would suggest for your consideration, sir, that you should not alter this so that we cannot depend upon, not the jurisprudence, of which there is very little, but the practice and the use of this by the courts in the past. I understand from Mr. Scollin that there has been provision for this in the past. It might be better to rely on the Criminal Code rather than another provision which would differ essentially from that upon which we are modelling ourselves.

Senator Connolly (Ottawa West): You are suggesting from a practical point of view that we eliminate clause 20(3).

Mr. Ryan: Rather than altering it in the manner suggested.

Senator Cook: Perhaps we could leave it as it is pending a revision of the provision in all acts.

The Chairman: On occasion, for some reason or other, you do not care for certain wording in a bill, but are persuaded to approve it. Later the bill returns and the first thing of which you are reminded is that this has been done before and should be done again. At some stage we must dig our feet in and say no.

Senator Molson: We are told the provision is contained in other legislation such as the Income Tax Act, and therefore it is fine here.

The Chairman: That is right and Mr. Ryan says that rather than make changes in clause 20(3), it would be clearer to delete it and simply leave the provisions of the Criminal Code applicable.

Senator Flynn: I would support that move, Mr. Chairman. I do not like the suggestion in the subclause to the officers in charge of the enforcement of the act to use it as a tool to force payment of a fine. A director is liable to jail whereas a corporation is not. There is certainly a very powerful suggestion in the clause to the enforcement officers to proceed against the directors in order to exact the fine that they are unable to collect from the corporation. It could probably be done otherwise, but I suggest that by leaving the text there it is an invitation.

The Chairman: That deterrent exists at the present time under the Criminal Code.

Senator Flynn: I know, but if it is there it may be suggestive.

The Chairman: The question would appear to be, and it is up to the committee to decide: Do we observe the comment which Mr. Ryan has made, and rather than amend clause 20(3), strike it out?

Senator Burchill: If we delete the subclause and depend on the Criminal Code, would it be necessary to prove the corporation guilty?

The Chairman: No.

Senator Burchill: You can proceed against an officer or director without that?

The Chairman: That is right.

Senator Connolly (Ottawa West): If we remove it and rely on the Criminal Code, would there be a problem for a charged person, because the provision of the Code is overlooked?

The Chairman: The provision has been there ever since the Code came into being; it has been used very, very often. There is no doubt about that.

Mr. Ryan: There may be a point of consideration as to whether it is more onerous to be charged under the Criminal Code as a party to the commission of an offence or an attempt to commit an offence. Would it be less onerous in the long run, with respect to reputation or otherwise, to have been charged under the Consumer Packaging and Labelling Act?

The Chairman: Whether it is under the Criminal Code or not, this is a criminal offence.

Mr. Ryan: Yes.

The Chairman: What is the penalty under the Criminal Code?

Mr. Ryan: I am looking that up now, sir. It would relate to the offence, and it would be the offences already set out here.

The Chairman: I take it from what Mr. Ryan has said that the penalty provided in clause 20(2) on summary conviction or on indictment would be the same whether proceeding under the Code or under this subclause.

Senator Flynn: Subclause (2)?

The Chairman: Yes.

Senator Flynn: Perhaps under the Code or under subclause (2) a charge could not be laid against a director who merely acquiesced in, because the acquiescence may be just having known, without having participated. However, I think it would be an improvement.

The Chairman: In acquiescing in an offence, yes.

Mr. Seaborn: I have a little uneasiness with respect to this point. I do not know how relevant it is to the deliberations of the committee today. A clause identical to this was very recently approved in the Weights and Measures Act, which is an act parallel with this. They fit well together as a pair. The public or, indeed, the courts may ask why a distinction is made in the writing of the two acts between the inclusion of this subclause in one and its omission from the other. It might be asked whether there was a quite different intent in the minds of those who passed the legislation, whereas, I believe we are agreed that the intent is not different at all.

The Chairman: I am not sure we are agreed on that.

Mr. Seaborn: As between the Weights and Measures Act and the Consumer Packaging and Labelling Act?

The Chairman: Yes.

Mr. Seaborn: I thought that was so.

The Chairman: I am not sure that the quality of the offence is the same.

Mr. Ryan: One other difference is that the time limit on page 16 of the bill is 12 months after the time when the subject matter of the proceedings arose. Generally, under the Criminal Code the time limit with respect to a criminal offence is six months.

The Chairman: Do you mean that under this bill more time could be taken before laying a charge?

Mr. Ryan: Twelve months is proposed in the bill; it is six months under the Criminal Code.

Senator Flynn: Why?

The Chairman: Because it is in the bill.

Mr. Ryan: It is a matter of policy, Mr. Chairman.

The Chairman: Mr. Seaborn, have you something more to say?

Mr. Seaborn: No.

The Chairman: The only thing that occurs to me is that if we are going to make a change, possibly we should give the minister a chance to say whatever he may have to say in respect of it.

Senator Burchill: I agree.

The Chairman: Let me find out first what the view of the committee is. Senator Flynn, I think your suggestion is that we strike out subsection (3) and let the provisions of the Criminal Code apply. Would those who would favour that please indicate? Would those to the contrary please indicate? That suggestion is not accepted.

The view of the committee, therefore, is that subsection (3) in some form should remain in the bill. The next question is whether it is to remain in the form it which it is, or should we follow Senator Molson's suggestion?

Senator Flynn: I doubt if we could improve the provisions of the subsection very much by changing it in that way.

Senator Cook: I agree with Senator Flynn. I am not persuaded of the merits of the subsection as it is now, but neither am I persuaded of the merits of the amendment; that it will make it any better. I should just leave it.

The Chairman: As I understand Senator Molson's suggestion, it is that we create in subsection (3) simply an offence in relation to any director or officer, whether the corporation was proceeded against or not.

Senator Flynn: That is what is in the wording now.

Senator Connolly (Ottawa West): No.

Senator Molson: No, Mr. Chairman, with respect, may I disagree. In our earlier meetings there was a great deal of discussion on the opening phrase, "Where a corporation is guilty", and how this applied in any hearing. We heard a great deal about this, and I gathered it presented difficulties. This was my understanding.

Senator Flynn: I know that was the first reaction but, come to think of it, even if you do not mention that the corporation is guilty, the director will have to be guilty.

Senator Cook: We are still talking about an offence of the corporation.

Senator Flynn: There would have to be guilt somewhere.

Senator Connolly (Ottawa West): As I understand it, what was complained about was whether you would have to have a trial within a trial of the officer, director or agent to establish the guilt of the corporation.

Senator Flynn: No, you would have a set of facts which would prove an offence has been committed.

Senator Cook: The starting point is that there must be an offence.

Senator Connolly (Ottawa West): By the corporation.

Senator Cook: By the corporation. In subsection (3) that is right.

Senator Connolly (Ottawa West): It has to be proved.

Senator Flynn: The question would be whether you can prosecute a director when the corporation has not committed an offence. Is that possible? Can you imagine this?

Senator Cook: There has been an offence.

Senator Connolly (Ottawa West): He has already been found guilty.

Senator Flynn: I cannot imagine a case where the offence could not be attributed to the corporation.

Senator Connolly (Ottawa West): I can see the difficulty. I think this was the original problem, in spite of what Senator Flynn says, and it still bothers me, and perhaps it may still bother Senator Molson.

Senator Cook: Without an offence by the corporation there is no point in it at all.

The Chairman: Another suggestion has now been made to me. Would it be acceptable to the committee if the opening words were changed to: "Where a corporation has committed an offence"? I know the words are different, but to say "Where a corporation is guilty of an offence" involves adducing evidence from which the judge trying the director can decide that the corporation has committed the offence. We are using different words, but I think the procedures to prove it would be just the same.

Senator Flynn: If that is the only point we are going to make, I do not think it is worth making an amendment.

The Chairman: I do not think so either. The merit in Senator Molson's suggestion lies in the fact that you could proceed against a director without bringing in the corporation at all.

Senator Molson: That is right.

Senator Flynn: When the corporation is guilty you have to prove it. The only point is whether evidence adduced against the director would create, let us say, a presumption that the corporation has been found guilty at the same time. What we were worried about was prosecuting someone who is not a party to the proceeding. I think it is a good point but, legally speaking, I doubt that once a director has been found guilty that verdict could be used against the corporation. They would have to start all over again, and the corporation could certainly offer a defence.

The Chairman: That is right, and vice versa—if the corporation has been found guilty and you then proceed against the director. One of the cases we referred to is in point. You had to adduce evidence to show that the corporation was guilty, and you could not simply file a certificate of guilt of the corporation; it had to be proved.

Well, we have run the whole way around the mulberry bush on this, and we seem to be coming back to where we started. Senator Molson, have you anything more you want to add?

Senator Molson: Mr. Chairman, I made the suggestion, and I did so realizing that my legal training was not perhaps of the highest order. I am very happy to leave it to the legal brains of our committee to sort out.

Senator Connolly (Ottawa West): If you could get them to agree.

Senator Molson: Yes, if we could get them to agree. I should have said that.

The Chairman: I thought by the process of elimination we were getting very close to it. Are we now in agreement that subsection (3) of clause 20 should stand; in other words, we approve specifically of subsection (3) of clause 20?

Hon. Senators: Agreed.

The Chairman: There is one clause about which we talked last week, to which I would like to call your attention. It is clause 18, dealing with regulations. The opening words are: "The Governor in Council may make regulations".

When I go over to page 14 and refer to paragraph (h), I frankly have trouble in figuring out exactly what is intended in this regulating-making power. Mr. Seaborn or Mr. Ryan, are you ready to give an explanation?

Mr. Seaborn: I can attempt one. Mr. Ryan can perhaps be more precise.

Mr. Ryan: Mr. Beseau had more to do with the discussion than I did. Do you have a specific question, Mr. Chairman?

The Chairman: I would like you to give an illustration of how it would apply.

Mr. Seaborn: I think I could give an illustration of that. The main thrust of the bill, of course, has to do with prepackaged consumer products. It seemed to us, as we were preparing instructions for drafting, that we should take into account the fact that there are other consumer products that are not prepackaged. I am thinking of such things as rugs, carpets and pieces of furniture sold for use in the home which are not prepackaged and therefore do not come under a number of the clauses of the bill, but which none the less tend to be sold with some sort of tag giving information about them. The purpose of clause 18(i)(h) was to make it possible to require on the labels that went with this kind of product the inclusion of certain information that seemed relevant to a consumer purchase. I am thinking particularly of the enumerations in clause 10 as to the nature, quality, size and material content and so on, of the item. To give an example, the tag on a piece of furniture should be required to specify what type of wood was used in its construction, or alternatively a tag on a carpet might specify whether it is hand-made or machine-made. We felt that to leave completely outside the ambit of this bill any consumer product that was not prepackaged really did leave a gap in the field of consumer protection.

Senator Flynn: When you say "subject to any other act of the Parliament of Canada", do you mean that if it is already covered by another act you would not use this power?

Mr. Seaborn: In this particular case this is so, senator. For example, there may be requirements passed under the Motor Vehicles Act unless they start to sell cars in cellophane.

The Chairman: They start off by dealing with prepackaged products. They make one sweep with the back of their hand and take the power to make regulations with respect to every kind of consumer product. The only limitation on it is that if it is dealt with in another act they are then of course, restricted from doing this.

Senator Flynn: We have already section 3, Mr. Chairman, which says:

> (1) Subject to subsection (2) and any regulations made under section 18, the provisions of this Act that by the terms of this Act or the regulations are applicable to any product apply notwithstanding any other Act of the Parliament of Canada.

The Chairman: There are some words we have taken out of that subsection. You read the section as it appears in the bill. We have amended section 3 by taking out certain words.

Senator Flynn: You passed the amendment before I came in?

The Chairman: I am sorry.

Senator Flynn: That is all right, but my argument is still valid as far as the bill was drafted originally.

Mr. Seaborn: It is primarily for prepackaged goods but this is a packaging and labelling bill, of which I am sure you are aware.

The Chairman: I wonder what you call, for instance, a typewriter which is a consumer product. How would you say that is packaged?

Mr. Seaborn: I do not think it is packaged. Regulations as to giving relevant information about a typewriter, would have to be made under Section 18(1)(h), and that would be in the form of a label.

The Chairman: My purpose in raising this for discussion is to make the committee fully aware that under this regulation section we move into the area of consumer products other than prepackaged products, with only one restriction on the power of the minister. If there are other existing acts then this power to regulate does not apply.

Senator Connolly (Ottawa West): I think probably there is something to be said for the manufacturer who is required under this act to state what is put into a package, and who then complains that another manufacturer who does not put his product into a package but who still labels it is not subject to the act. Just taking Mr. Seaborn's example, I think there should be a labelling requirement with respect to a piece of furniture. If you are getting birch when you should in fact be getting oak then you should have a protection—

The Chairman: You are talking about honesty in labelling. Of course, the Criminal Code has a provision which would deal with labelling of the kind you are talking about. It would be a fraudulent transaction.

Senator Connolly (Ottawa West): As a matter of fact, now that you raise it, you wonder sometimes why you need a specific act when you have in the Criminal Code so many provisions about this very kind of thing—misleading, confusing and deceptive advertising.

The Chairman: I think the answer to that, Senator Connolly, is that when you have these remedies in a particular act the administration seems to become easier. Many of the charges under the Criminal Code are generated by the police investigation.

Senator Connolly (Ottawa West): It is done by administrative means rather than by means of a police investigation. It also multiplies the number of administrators.

The Chairman: Having called attention to this, are there any comments from the committee? These are the points that have been raised. We have amended this morning subsection (1) of section 3, and subsection (2) of section 11. No other amendments have been proposed.

Senator Molson: Mr. Chairman, in regard to section 18, there is nobody to consult in regard to making these regulations, is there?

The Chairman: Under section 19 the proposed regulations must be advertised in the *Canada Gazette*. The purpose of that is to give persons an opportunity to make submissions.

Are you ready for the question? Shall I report the bill as amended? This means that we are approving all sections other than subsection (1) of section 3 and subsection (2) of section 11.

Hon. Senators: Agreed.

Senator Flynn: With some reluctance.

The Committee then proceeded to the next order of business.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 27

WEDNESDAY, MAY 26, 1971

Third Proceedings on Bill S-9,
intituled:
"An Act to amend the Copyright Act"

(Witnesses:—See Minutes of Proceedings)

23970—1

THE STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Isnor
Burchill	Kinley
Carter	Lang
Choquette	Macnaughton
Connolly (*Ottawa West*)	Molson
Cook	Sullivan
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis—(28).
Giguère	
Grosart	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

«Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Urquhart, seconded by the Honourable Senator Cook, for the second reading of the Bill S-9, intituled: "An Act to amend the Copyright Act".

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, May 26, 1971.
(30)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10.30 a.m. to *further* consider the following bill:
Bill S-9, "An Act to amend the Copyright Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Benidickson, Burchill, Carter, Connolly (*Ottawa West*), Cook, Croll, Desruisseaux, Haig, Hays, Isnor, Lang, Molson, Welch and White. (16)

Present but not of the Committee: The Honourable Senators Lafond and Méthot. (2)

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

WITNESSES:

International Federation of the Phonograph Industry:

Mr. Stephen Stewart, Director General,
London, England.

Mr. J. A. L. Sterling, Deputy Director General,
London, England.

At 12.00 noon the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, May 26, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-9, to amend the Copyright Act, met this day at 10.30 a.m. to give further consideration to the bill.

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

The Chairman We have with us, this morning in connection with Bill S-9 some representatives of the International Federation of the Phonographic Industry. Mr. Stephen Stewart, the Director General, and Mr. J. A. L. Sterling, the Deputy Director General are here from London, England. I suggest that Mr. Stewart start off by telling us what the industry is, what it does, and what relevance it has to this bill.

Mr. Stephen Stewart, Director General, International Federation of the Phonographic Industry: Thank you, Mr. Chairman.

Honourable senators, first of all, may I thank you for the courtesy of hearing me, a non-Canadian and member of the English Bar, and my friend, Mr. Sterling, who is an Australian, from the English Bar. The International Federation, of which I am Director General, is an organization of record companies the world over, located in practically all countries where there is a record industry, and it deals predominantly with legal matters, such as copyrights and rights for records.

If I understand correctly, Mr. Chairman and honourable senators, you have so kindly asked me to come here to deal with the position outside Canada, rather than that in Canada. I have read the record of the previous hearings with some care. I find that you asked many questions about what happens in other countries. You have the brief which has been presented and, if I may, Mr. Chairman, I think I can best repay your courtesy in calling me by sticking to what you, Mr. Chairman, called the main stream—the main stream being, whether there should or should not be a performing right given to the record producer.

There are several points I would like to make with regard to the history of this right. The first one is this. Although in some countries this right had an early origin—in Canada in 1921, yours being one of the first countries to grant that right—most of the legislation is much more recent and, in fact, most of it has been enacted over the last 15 years.

Clearly, the reason for that is that when the first body of copyright legislation was passed, in Europe, the United States and other countries, the so-called mass media were either not known or were in their infancy, before and immediately after the first world war; whereas when copyright legislation got under way after the second world war, broacasting, television, records and films came to play the important role they play today. There has been an accelerating tempo of legislation over the last 15 years. If I may give you just a few examples: in the United Kingdom in 1956, in Mexico, India, Norway and Pakistan, in the same year, 1956; in the Scandinavian countries—Finland, Norway, Sweden, Denmark—in 1960 and 1961; then, New Zealand in 1962; Ireland in 1963; Germany in 1965; Czechoslovakia in 1966; Australia in 1968 and Japan in 1970.

So you will see that it is over the last 10 to 15 years that these pieces of legislation have been enacted. All those I have named, in the last 15 years, have given this right that you are debating here, the performing right in the record, to the record producer. Some of them also give it to the performer, or they say that the record producer has to pay some of the money he gets to the performer.

May I make a point here again, Mr. Chairman, taking into account what was said before the committee? The word "performer" has a strict meaning. It is defined in the various acts of Parliament and in the international convention which is known as the Rome Convention. It is defined as "a person who performs literary or artistic works"; that is to say, an actor or a singer or a musician. So you were not really accurately informed when there was talk at one of the hearings about, I believe it was a telephone operator or sound technician in the studio having a right. That is not so. A performer is an artist, an actor, a singer, and so on.

Senator Connolly: Is the assumption behind that restriction that a technician in the studio is paid for his services, and that should cover it; that he has no property right in the production?

Mr. Stewart: I think that is so.

Senator Connolly (Ottawa West): He has the right to his wage for the work he does, but he has no copyright?

Mr. Stewart: I think that is the sort of thing. This is why you will find that the unions which have appeared before you are artists' unions, musicians' unions, and so on.

Senator Connolly (Ottawa West): I am not sure, but perhaps you can help us on that. It seemed to me that the

union people who were here one afternoon some weeks ago were also speaking on behalf of the technician.

Senator Flynn: Do you mean, Mr. Dodge?

Senator Connolly (Ottawa West): Mr. Dodge.

Senator Flynn: He was speaking only on behalf of the musicians, the artists, the singers.

Senator Haig: Mr. Wood.

Senator Connolly (Ottawa West): It seems there was a discussion. Mr. Stewart has already referred to the telephone operator.

Senator Cook: They said "We are appearing on behalf of the Canadian Council of Performing Arts Unions".

Senator Connolly (Ottawa West): But that did not include technicians?

The Chairman: No.

Mr. Stewart: That is exactly the point I had in mind.

There is one other point I would like to make. It is that this tendency to give the artist a share in this right was started by the record industry. It was in an agreement, which has been filed before you, with the International Federation of Musicians, in 1954. The agreement, which is purely contractual, simply states that where the record industry receives a remuneration for the performance of its records, it will pay a quarter, 25 per cent, to the musicians, to the artists, usually in the form of payment to the unions, but not necessarily so. I say that because, again, reading the transcript, I see that some of the witnesses have doubted the sincerity of the Canadian industry in saying that they will do just that, if they receive payments.

I think you will have the industry before you, and they will repeat this. All I am saying is that, if they say they will do it, they will do it because it is in line with the tradition of the industry in other countries, in fact, in most other countries.

There is one other trend to which I would like to draw your attention. Recent legislation very often appoints a tribunal to adjudicate between the right owner, in this case the record producer, and the user, the consumer. In other words, the idea is that if the right owner and the consumer cannot agree on the tariff, let a judicial body, usually presided over by a senior judge, adjudicate on how much it should be.

This, Mr. Chairman, was invented in Canada, in 1936, in the form of the Copyright Appeal Board, which existed long before anybody else had thought of it. If I may respectfully say so, it struck me as an eminently sensible idea. It has been adopted by others. You have not claimed the copyright, but you have been copied in the United Kingdom, Germany, Ireland, Australia and, last year, Japan. That has been done in different forms but with the same idea: Let an independent tribunal adjudicate between the right owner, in this case the record producer, and the radio station, the juke box owner, the cafe owner, whoever they are—the people who use the right.

The tribunal—in Canada's case, the Copyright Appeal Board—however, becomes the watchdog of the consumer; and this is the idea in all the legislation. And it works. Judging by the award a few weeks ago, honourable senators may agree that it works.

Mr. Chairman, next I should like to deal with the exceptions, the countries which have not yet given this right. It has been said before you, and wrongly—and I want to say that without any disrespect, but wrongly, factually wrongly—that it is in only a few countries that this right has been granted. Let me state the exceptions, the countries where it is not granted. First of all, in Western Europe there are France, Belgium and Holland. In each of those three countries the matter is under consideration by an interdepartmental committee. However, legislation takes a long time in this matter simply, I believe, because to the general public it is not a burning issue. It usually starts in the upper chamber—this again may interest you—such as the Senate in the United States, the House of Lords in the United Kingdom. This is perhaps because it is thought that more mature deliberation would be given in the upper chamber. Perhaps it is because the cynics say that it offers no votes for the lower, elected chamber.

The Chairman: Mr. Stewart, I would like to call to the attention of the committee that last week, when Mr. Goodman appeared representing Baton Broadcasting Limited, he stated in the course of his submission, and the statement appears in their brief, that—the United States does not recognize a copyright in the making of a record, nor does most of the rest of the world. It is fortunate that we have some knowledgeable people appearing also. Mr. Richard gave evidence on the first day that in most of the countries of the world this right is not recognized. I think someone was drawing a distinction between the developed and underdeveloped countries.

Senator Cook: I am glad you stopped after the word "record".

Mr. Stewart: I am grateful to you, Mr. Chairman, because I may now seek to defend a colleague at the Bar. I would point out that if numbers are counted his statement was justified. I suppose there are 120 members of the United Nations, and these rights are recognized in 25 or 30 countries. Therefore I suppose it can be said, counting heads, that the large majority does not recognize them.

With the exceptions I am about to give you, all the developed countries, those in a position, if I may say so, similar to Canada, having a culture...

Senator Connolly (Ottawa West): OECD countries generally?

Mr. Stewart: Yes, and some that are not; India, for instance. With respect to the exceptions, France, Belgium and Holland, there are interdepartmental committees, but no legislation yet.

In those countries in Western Europe, such as France, Belgium and Holland, where the performing right to the record producer is not recognized in the law, the broadcasters do pay, if you wish to term it so, voluntarily. Why do they pay? I think they pay—in fact, some of them have gone on record as saying so—because they recognize that this is a right that exists, if not in law then morally. They feel that obligation, and in France, for instance, pay quite substantial sums.

One other point made before you which, with great respect, is not quite right, is that all the countries where this right exists and where the broadcasters pay remuneration are countries where the broadcasting is state-owned. I think the British or Australian Broadcasting Corporations would be rather cross if termed "state-owned." However, they are non-profitmaking corporations, public corporations, which I think is what the witness meant. It is not right either, because in Australia, New Zealand and Japan, the last three countries which have granted this right, only in the last three or four years, broadcasting is rather similar to that in Canada. It is in the hands of private, commercial companies. So it is not correct to say that only the non-commercial public corporations pay.

However, with regard to the public corporation, I would like to suggest to you that perhaps there is a moral here. What does "public corporation broadcasting" mean abroad? It means that the money for the broadcasting comes from the taxpayer, from the public, either by way of licences, because everyone with a television set or radio set pays an annual licence fee, or by way of Government subsidiary, if the licence fee does not cover it. In other words, the remuneration paid for this right comes out of the purse of the public. Now, would it not be right to say that if in many countries where the money for the broadcasters comes out of the purse of the public it is fair, right and proper to say, as we lawyers say, *a fortiori,* even more so it would be right if the broadcasting were done for profit—in other words, if the broadcasters use their records and make a profit in so using them by selling advertising?

Having dealt with the European exception, let me say at once that I would like to deal separately with the most often quoted exception, the United States of America. Why is this right not in the law of the United States of America? The answer is very simple: because the Copyright Act at present in force in the United States dates from 1911. Records in those times were few; broadcasting and television did not exist; the film was in its infancy. Therefore, all those rights were not necessary.

When the great upsurge of legislation started for the second world war, the United States had a difficulty in this field. It is not an unusual difficulty. It is because of the fact that they have a Constitution which gives a copyright that says that it is in writing. The question which the lawyers debated right through the length and breath of the United States was whether a record could be a "writing". That was the legal problem. It was not until 1965 that a governmental commission pronounced for the first time, officially, that they considered a record to be a "writing" in the constitutional sense of the United States and, therefore, federal legislation could deal with copyrights in records.

May I make the point quite clear? There was a difficulty in giving a right, not only a performing right such as you are considering, but they could not even give, until this constitutional point was cleared up, an ordinary right against copy. In other words, if some one just pinched, if I may use the word, some one else's recording, and pressed it, they could only be proceeded against under state legislation. There was, and still is, no federal legislation.

Senator Connolly (Ottawa West): Was that a decision of the Supreme Court, or a declaration by Congress?

Mr. Stewart: It was neither, really; it was the prevalent opinion of most lawyers, but was never tested. In other words, they said that Congress could not do it until certain cases were decided in other spheres. One case related to migratory birds which fly from one state to another. There the Supreme Cturt held that there could be legislation. That was one precedent.

There is in your brief the statement of the Registrar of the United States in 1965 which is, I think, the first authoritative pronouncement on the matter. I would like to draw your attention to it, because here is an official speaking who is not in any way a partisan. He says, on page 8 of the brief:

> Let me say plainly, there is no doubt in my mind that recorded performances represent the 'writings' of an author in the Constitutional sense and are as fully creative and worthy of copyright protection as translations, arrangements or any other class of derivative works. I also believe that the contributions of the record producer to a great many sound recordings also represent true 'authorship' and are just as entitled to protection as motion pictures and photographs... It is hardly surprising that you have heard tesitmony from performers and record companies urging recognition of a performing right in sound recordings. There is much to be said for this point of view, and it is possible that this right will eventually be recognized in the copyright laws of the United States as it is now in other countries.

That was the first breakthrough.

Last year, five years later, the bill which was presented to the United States Senate included the performing right to the record producer and the performer. I do not want to weary you with the details. If you want to have detail, the copy of this relevant extract is in the brief, among the appendices. The gist of it is that every time a record is publicly performed or broadcast a performing right is given to the record producer and to the performing artists or performers. Then certain things are said about rates, and there is a separate clause dealing with the rate for juke boxes, and so on.

This, incidentally, is a matter on which legislation varies, but in some legislation there is a rate. However, they are very few; most pieces of legislation have accepted your principle of a tribunal, like a copyright appeal board.

I think the right to say about the United States is that they are late, that they still have a copyright law from 1911, which is 60 years out of date. I am reminded by Mr. Sterling that it was 1909, so it is 62 years out of date. It is miles out of date, and they are having great difficulty in getting through a bill which is at present before the Senate and the House of Representatives because of time difficulties, and controversial matters in the bill, nothing to do with the performing right in records, but things like CATV, for instance, which is an enormous problem in the United States, where interestingly enough the broadcasters are the ones who are asking for a right against the community antennae television on the ground that CATV could use their product.

Senator Desruisseaux: Could not the same thing happen here too?

Mr. Stewart: You are in a better position, sir, than I am to say that. I should have thought, quite possibly. You will then have the broadcasters before you in the position in which I believe I now am.

Senator Connolly (Ottawa West): What you are saying, Mr. Stewart, is that the broadcasters, in the example you gave, say they have a property right in the production of their program, and the CATV people who just pick them up and distribute them for profit are exploiting that property?

Mr. Stewart: That is so. I am grateful to you, because there is something I should have mentioned which I did not.

When I spoke about national legislation I should also have told you that there was in 1961 an international convention on the matter, known as the Rome Convention. Perhaps this acceleration of national legislation is something to do with the passing of the Rome Convention in 1961, because 40 countries signed that convention. Each one still has to ratify it, but they signed it. That, of course, gives an impetus to national legislation to conform.

This convention is for the protection of record producers, performers and broadcasters. Again, this is an aspect that I think has been put before you. In many contexts it is the broadcasters who are asking, quite rightly if I may say so, for some kind of copyright in the broadcasts. Satellite broadcasting, for instance, not today but in the next five or seven years, I am told will be a burning problem. When you broadcast by satellite, apparently anybody with a powerful transmitter can fish your broadcast out of the air and then transmit it. The broadcasters say, "You must protect us against that, because the broadcast is ours; it is a product which is worthy of copyright protection." Two months ago there was a meeting, which I had the honour to address, of governmental experts in Lausanne to consider this very matter, on the basis of an international convention. It was presided over, if I may say so, with great distinction by a Canadian, Mr. Finlay Simons, the Deputy Registrar of Patents of Canada. You will therefore see that there are problems, wherein the broadcasters, who so strongly oppose this right in Canada, are in a not too dissimilar position, asking for rights which, in my submission at any rate, are very similar, and, if I may say so, rightly asking for them.

The Chairman: With regard to the Rome Convention, you stated that the representatives of 39 or 40 countries appeared and adopted a convention for the protection of performers, producers of phonograms and broadcasting organizations. Is there a further step that would make that effective and binding on the countries who were present and adopted this convention?

Mr. Stewart: I am grateful to you, Mr. Chairman. This is so. In an international convention the first step is the negotiation of text and debate as to whether these rights should exist or not. When this is done and the convention is drafted, it is then signed by the representatives of states. That is only the first step, because every sovereign state having a legislature then has to ratify it. That means Parliament has to be consulted; in some cases the law has to be changed because it does not fit the framework, and then the country ratifies it. The Rome Convention has so far been ratified by 12 countries, which, as international conventions go, in ten years is not too bad a record.

For the reasons I have just given, in most countries it needs legislation, sometimes because the broadcast right is not in the law, sometimes because the record producers' protection is not in the law, and in a democracy that takes time.

The Chairman: Could you tell me what Canada has done?

Mr. Stewart: Canada participated, but has not yet, of course, ratified. Canada could ratify, as the law stands.

Senator Connolly (Ottawa West): Canada is a signatory?

Mr. Stewart: Yes.

Senator Connolly (Ottawa West): Mr. Chairman, this was the very question I was going to ask the witness, because the other day great play was made of the fact that Canada had not ratified. In the witness's opinion, does that make a material difference in the discussion that we are having here?

Mr. Stewart: Mr. Chairman, there is something I would like looked up, because I would not like to be guilty of telling you something that is not correct. I am not absolutely certain that Canada did sign, but I am having it looked up. They were there, there was a Canadian representative but whether or not he signed, I cannot tell you. I will tell you in a moment.

Senator Cook: I think he signed, with reservations, because of the fact that we were a federal state. Is that not so?

The Chairman: What is that?

Senator Cook: Were we not told that he signed, with reservations, but would have difficulty in ratifying

because of the fact we were a federal state and some of the rights might lie in the hands of the provinces and not in the hands of the federal Government?

Mr. Stewart: I did not know that. The United States, for instance, signed.

Senator Connolly: Has it been ratified by the United States?

Mr. Stewart: No, they cannot. They have to change the law, because, as I say, there is no copyright protection for the record producer at all on the federal level, only on the state level.

The other point I would like to make, if I may—again, because something was said before you on other occasions—is regarding the assertion that one can ratify the Rome Convention only if this right you are debating here, the performing right of the record producer, is given to both the record producer and the performer. Not so; not so. The Rome Convention gives each ratifying or member country the option to do either or both. In other words, the state ratifying the convention can give the performing right in records only to the record producer; it can give it only to the performing artist; or it can give it to both. The solution favoured by nearly all countries is to give it to the record producer and, in many cases, to put the record producer under a duty to share with the others.

Senator Carter: Who is "the record producer"? Is it the man who makes a master tape, or the one who presses the record after the master tape is made?

Mr. Stewart: The right originates in the man who makes the master.

Senator Carter: The master tape?

Mr. Stewart: That is right. He can, of course, assign his right, just as you can assign any other right, just as for instance the author of a book usually assigns his right to the publisher. It originates with the man who makes the recording, just as it originates with the man who composes a tune. I wanted to make this point because, as I say, it was said you must protect both, you must give the performing right to both, if you want to ratify that. This is not so.

May I say one word again about what you, Mr. Chairman, called the main stream of the argument, that is: Is this right justified; is it right and proper to give it? This is really the main argument, as I understand it, which has been presented to you.

I think the most succinct way of putting it is this. You can talk about this all day because it is a matter which borders on the philosophical. I think the realistic and the practical way of approaching it is the way in which Chief Justice Wendell Holmes in the United States approached it in the so-called "Sweetheart" case; and Mr. Justice Maugham in the United Kingdom approached it in the so-called Carradine case. It runs something like this. The record producer produces the record for playing in the home—that is, to a group of people, his family, a dozen people, perhaps. It is not a problem.

If, instead of being played to half a dozen people, this record, this product, is played to a million people over there, or to 500 people in a hall, then that is something beyond what the record was intended for, and, if it is done for profit—that is to say, the user makes money out of using the record for what it was not originally intended—then he ought to pay.

This is really the guts of the argument. There are many arguments of a moral and philosophical nature, but I think the purely materialistic and practical one is that. Look at other realms of the law, such as patents or copyrights or trade marks, or whatever it is: if somebody does something which is of value, and somebody else takes it and makes money out of it, he ought to pay. It is as simple as that.

Senator Connolly (Ottawa West): You set your argument on a property right?

Mr. Stewart: Yes.

The Chairman: That was the essence of Mr. Justice Holmes' judgment in the "Sweetheart" case.

Senator Connolly: In what case?

The Chairman: In the "Sweeheart" case.

Senator Connolly: I would not know about that.

The Chairman: Victor Herbert.

Senator Cook: There he was addressing himself to the composer. Victor Herbert was the composer.

The Chairman: But at the time he was the composer he did not have the right and he had to go to the Supreme Court of the United States in order to have the right recognized.

Senator Cook: The point was that the composition was something which would lend itself to copyright. The question is whether the mechanical act of a number of people lends itself to copyright.

The Chairman: This is the essential question here. Is a performing right something that is capable of being a copyright? This is what we are addressing ourselves to. Certainly, one element is that for the people who make use of it, they make money. That would appear to be an element in Mr. Justice Holmes' decision.

Senator Connolly (Ottawa West) It is an improper observation to make here, Mr. Chairman, but most people establish copyright in a sweetheart by marriage!

The Chairman: Well, so early in the morning, senator?

Senator Lang: I have a question for the witness. Throughout your remarks you use the term "record producer." Is there such a thing as a "record maker," as distinct from a record producer?

Mr. Stewart: In some legislation—for example, the United Kingdom—that is what he is called, a record maker. But I do not think it makes much difference. I think that what the honourable senator has in mind is the distinction between the man who makes the first

recording—and this is where the artistic concept lies—and the subsequent processes which may be completely mechanical; in other words, the man who makes the 10,000 copies by a machine going up and down. There is a very clear distinction between those two.

Senator Lang: Or, even further, I can see a distinction between a recording that is produced, made by a record maker, to which there has been no creative input at all, and recording made by a record maker in which there is a productive or creative element.

Mr. Stewart: Mr. Chairman, sooner or later, if you have the patience, you ought to be shown how a record is made, either by a film, which exists I believe, or in a studio, or something of the kind. I am only a lawyer, I am not a record man, but I am very interested in this and have been at many recording sessions. I would have thought that most recordings, and particularly the contemporary music recordings, have a great deal of creative element, because very often—may I say a word about pop music?—the work, that is to say the composition, does not exist when the musicians arrive at the studio. They go there to play; and they just play. Then there is the producer, who says "That was good. Take!" just as a film producer does. Then they spread back and he says, "The trombone does not sound very good; can you play it a little differently, fast, twiddle it around a bit. Take!" The record is produced in a similar way to a film, because the snippets of the tape are put together just as a cutter puts a film together. The end product, which takes hours and days to record, but only a few minutes to play, is the sum total of a great deal of artistic input.

This also applies in the classical field, because if it did not, why would it be that there are some recordings which are first-class and others that are not so good and, therefore, that are not bought or played by so many?

My submission, therefore, would be that the recording process has been much maligned in these hearings; that the artistic input has been very much underplayed; that and I wish you would find the time to go and have a look. I think the invitation would be extended to you, Mr. Chairman.

Senator Connolly (Ottawa West): It would be wonderful to see one of these.

The Chairman: We can decide on that later; we are not closing our hearings today.

Senator Flynn: It is interesting to hear of this difference between the producer and the maker, when the bill before us relates strictly to copyright in records, to sell the rights to reproduce any such contrivance. Therefore it gives the right to the producer to prohibit others making records by copying. The distinction is that if the record maker is acting with a licence or under a contract from the producer, he is in the same position as the producer. There would be no such thing as a record maker who would not have a right from the producer, because the act protects the right of the producer to prevent copying.

The Chairman: I wonder what the principle was in providing protection but not going further?

Senator Flynn: I think it is interesting.

The Chairman: A tailor may make a custom suit, but suppose I may take it somewhere else and have it copied and the tailor would have no right to prosecute.

Senator Flynn: But here the producer would have a claim.

The Chairman: What provides protection for the producer against reproduction?

Senator Flynn: It implies recognition of the creativity of the producer of the record.

The Chairman: Have you any comment on that statement, Mr. Stewart?

Mr. Stewart: It should be accepted that they are both copyrights and rights of the record producer, maker, or whatever term you wish to apply. One right is to allow or forbid anyone else to copy his record. This is known as piracy, which incidentally is a great problem today in the United States. Industry spokesmen there say they lose $1 million a year by people doing just that, taking a record, copying it and selling it at half price. The reason they can do it is that there is no federal law; they have to be chased from state to state. It is now called thieving, because when intellectual property is recognized as property and taken by some one who does not own it, it is thieving.

The other right, the conglomerate, is the one you are considering, the performing right. If a record is performed in public, the producer and/or the performer have a right to be paid.

Senator Connolly (Ottawa West): Earlier, Mr. Stewart, you referred to the artists's right to share in the proceeds of the sale of the record with the producer of the record, or the maker. However, now you have given an example of another element, the situation in which studio artists perform on musical instruments or sing, as the case may be. This involves a process of recording what they do.

You say another artistic element is then introduced, in that a producer will say to the performing artists: "We want this; we want that; we don't want this; we have too much trombone here, too much drum here, too much piano there". You would liken him to the artist.

Are these people in your conception inventors, originators and artists? Do they share in the royalities from the record, and should they?

The Chairman: The test would be: Is it an artistic work?

Senator Cook: Every eye sees its own beauty. That is so, whether we discuss an artistic work or not.

The Chairman: You may not appreciate this musical quality either. That is why I used the expression: Is it an artistic work?

Mr. Stewart: "Beauty," Shakespeare said," is in the eye of the beholder." In this case it is in the ear of the listener. There are three inputs in the making of a recording: obviously, there is the work of the composer and/or the textwriter; there is the work of the performer, who shapes it and gives it life; and there is the work of the record producer, who gives it existence in the form of a record, who handles it, who also shapes and forms it.

This really comes from the statement of the Registar of Copyrights in the United States with respect to translators and arrangers. No one has ever denied that a translator has a copyright and a performing right. What does he do? In the case of a French play to be performed in English, he will take the play as it is, a pre-existing work, and translate it into his own language. Sometimes, of course, he makes a considerable contribution because of his mastery of the language. It could not be said that it is a completely original work. However, I know of no legislature which has denied the translator the copyright.

Arrangement is a well-known process, as you know, in music. Suppose the Triumphal March from *Aïda* or the Toreador Song from *Carmen* were rearranged for the 375th time, this time for a jazz band or a small band of five. There is some originality in doing it, obviously, because otherwise those who perform it would not use the adaptation. However, it is not to be compared to the strokes of genius of Verdi or Bizet when they wrote the music. I cannot think of a copyright law that denies the adapter of the copyright, although it has been said that if you want to weigh it in terms of quality or originality, his influence is less original, sometimes considerably less orig nal, than that of the original composer.

The point I am trying to make, and I think it is worth thinking about, is that not all copyrights have the same degree of originality. Therefore, there is nothing derogatory in saying, of the right of a performer or a record producer, that his originality may not be, and in many cases is not, as high in degree of originality as that of the composer. All I am saying is that the weighing of originality is a matter for the Copyright Appeal Board, or those who negotiate these rights. In other words, as a lawyer would say: it is a matter of quantum, how much.

What should not be questioned is that there is sufficient artistic input, originality, in a record producer to amply justify the copyright. Incidentally, the Economic Council, which as you know was not very favourable to the record producer, did acknowledge this. They did speak of the artistic input.

The Chairman: I think they used the term "creative input."

Mr. Stewart: If I may draw these points together before I am asked questions, may I say there has been a great deal of copyright legislation in recent years. It has all been one way, apart from Africa and other developing countries. There is a very special reason for this. They have claimed, and in many instances rightly, special treatment. I do not think that is a point that I have to meet here.

Apart from Africa, it has all been one way. Either the right was confirmed in the legislation or it was granted for the first time where it did not previously exist, such as in Scandinavia or in Japan last year.

In Canada you have a situation which is different. You were one of the first to introduce the right fifty years ago. You have, as I said, invented the Copyright Appeal Board, a tribunal, which many countries have copied. You are now being asked to strike it out by way of a one-paragraph bill.

There are two points here, the first being that I cannot think of another example—I do not think there is one—where this has been treated by way of a one-paragraph bill. This has always been treated as part of a copyright revision where many rights are dealt with, rights of broadcasters among others. A big problem in modern copyright legislation is Zerox machines. How do you preserve the right of the author when anybody can take a book and stamp out a Zerox copy?

There are many complicated and important problems which have to be considered, and which, if I am right in my understanding, are being considered in Canada at the moment. Quite obviously the Copyright Act of 1921 or one that was revised in 1936 is due for revision.

What is singular, and what strikes me as odd, is this one-paragraph bill, which I think is unique. I ask myself the question: Why should a country, which has in many ways pioneered this, strike it out by a one-paragraph bill? I hope this is not unfair. I have asked myself this question seriously and I can give only one answer. It is because broadcasters do not want to pay what now appears to be something like $100,000. I honestly cannot think of another answer.

Senator Connolly (Ottawa West): Is that an informed figure?

Mr. Stewart: It is about that.

The Chairman: Applying the tariff rates fixed by the Copyright Appeal Board, that would be the amount in dollars.

Senator Connolly (Ottawa West): Per annum?

Senator Flynn: Yes.

Mr. Stewart: I should point out that the award was for six months. It is approximately $200,000 per annum. The award was $100,000, but it was a six months' award.

The Chairman: If you recall, the minister left a letter the last time he appeared before us in which he translated into dollars the effect of the application of the tariff proposed by the Copyright Appeal Board. His letter says that television stations are to pay only a nominal fee of $1 for 1971. Radio stations have been cut from a requested tariff of 2.6 per cent of gross revenue to 0.15 of gross revenue, and this is applicable only to stations whose gross revenue is more than $100,000. In effect, this means that radio stations will pay approximately $90,000 in 1971, instead of the $3 million or more which would have been received, if SRL's claim for 2.6 per cent of gross

revenue had been approved for the entire year. When they say $90,000 for 1971, since there is only half a year being considered, for a full year it would be $180,000.

The CBC will pay only $15,000 for the next six months, rather than the SRL request which would have amounted to almost $900,000 for the entire year. On this basis, for a full year the CBC would pay $30,000 under the tariff.

Is this a summary of what you have been saying in relation to this one-paragraph bill, that the field in which this industry operates is a progressive one that really has an unlimited horizon, and who knows in what areas it will push forward tomorrow?

Mr. Stewart: The Economic Council, in the parting shot of the paragraph devoted to this matter, said: Away with the performing right in records—and that the same should apply to video recordings. This is one of the things, Mr. Chairman that you probably have in mind, that in three years from now, or perhaps sooner, we will have on the market recordings which we will not only be able to hear but will also be able to see on our television screens, known as videograms videorecordings, audiovision material, or whatever you wish to call it. This is interesting, because if you do what the Economic Council suggested, in other words, you eliminate this right, and you eliminate it also for videorecordings or videograms, I would think that you would have within a very short time the broadcasters before you howling for protection, because it will be their products, because they will be making and are already making videograms that will be the subject of protection.

The proposition that a radio and television station should make a videogram or tape one of their performances over there, which should be taken by somebody else and produced, either in public, in a cinema or over the air by a competitor, would be hideous to them, and they would be quite right. In other words, you would have the broadcasters before you, as I sit before you today, asking for the right which at present, as I understand it, is a right in a record, and if you wipe that out and follow what the Economic Council seems to suggest—with respect, I do not think they have thought it out—you would wipe out the performing right in the videogram as well.

That is the only aspect of the future we can foresee, because it has been worked upon. As you, Mr. Chairman, said, in seven or ten years from now there may be many other things arising from this, which would come into the same category, and which you would have wiped out without even considering the consequences.

The Chairman: Are you ready for questions?

Mr. Stewart: Yes, Mr. Chairman.

Senator Connolly (Ottawa West): May I ask you one, Mr. Chairman?

The Chairman: Did you say "one", senator?

Senator Connolly (Ottawa West): Yes, just one. I know I ask a lot of you. As I understand it, this bill, while it was introduced in the name of the Leader of the Government in the Senate (Hon. Mr. Martin), is a bill that comes from the Department of Consumer and Corporate Affairs.

The Chairman: That is right.

Senator Connolly (Ottawa West): The minister was here a week ago. Am I wrong when I say that a letter he left with us would seem to indicate, or at least partially indicate, in a practical way the purpose of this bill? Am I right about that?

The Chairman: Let me put it this way. The main thrust by all those who have appeared so far in their first argument, and the thread running through their whole presentation, was the cost and the exporting of this substantial amount of money to the United States each year, in view of their other commitments and payments. Secondly, they said there was no artistic effort in pressing out a record. It makes me pause a bit in trying to analyze that in the light of what Mr. Stewart has said, and makes me, for one—whether the committee wants to do it as a body or not, I do not know—want to see how these things are done. The dollars were really the basis of the presentation. Even at our last meeting, when the Baton Broadcasting people were here, they raised that question. They say that more than $17 million is paid annually in respect of these records to foreign parent companies, and should a tariff be approved for the broadcasting of these records, 50 per cent of the money received by Canadian subsidiaries of foreign parent companies will be paid out to the foreign parent companies. They were talking on the basis that if you calculate what it will cost the industry in Canada, under the tariff which the SRL people had requested it would be $4.5 million or $5 million more, some figure of that kind. We are now talking in terms of something which might be $250,000 or $350,000.

Senator Flynn: It was the main theme of the speech made by the sponsor of the bill.

The Chairman: I suppose it is difficult to analyze intention, in legislation, except that in the background that we have here it would appear that dollars are a very important consideration. Canada participated in the principle of performing right protection in records even in the Rome Convention, and we would be getting out of line with a very substantial number of developing countries, and out of the trend that appears to be developing in the United States, so I think maybe the conclusion on your question, Senator Connolly, is that we have to use our own judgment on what the minister had in mind, but we could draw some conclusions from the evidence we have had before us.

Senator Connolly (Ottawa West): Along the lines I have suggested?

The Chairman: Yes.

Senator Cook: The minister was not asked.

The Chairman: The minister has not been invited yet. He will be.

Senator Cook: He is not acting off the top of his head. He is acting following the Ilsley Report and that of the Economic Council.

The Chairman: I would say that basically you would have to conclude he was acting on the basis of the Ilsley Commission Report, and also on that of the Economic Council.

Senator Flynn: Not the Economic Council, because their report had not been brought down when the bill was introduced. At a guess, he would have had advance information.

Senator Cook: That is because of the arrangement though; he was acting on the Economic Council report.

Senator Flynn: The Ilsley Commission Report.

Senator Cook: It was supposed to remain in a state of abeyance until the Economic Council report came, and then as one moved the other moved.

Senator Flynn: But the minister had moved even before the Economic Council started drafting its report, because we had a bill two years ago.

The Chairman: That is right. When there was an indication that SRL was going to apply for a tariff the minister sent a bill which was introduced in the Senate.

Senator Haig: Mr. Chairman, perhaps I might help the committee. Mr. Basford wrote on October 29, 1968, to the president of Sound Recording Licences Limited and said:

> I wish to express my serious concern about this application, and to inform you that I consider it not to be in the public interest...
>
> I must therefore inform you that it is my intention immediately to recommend to the government the introduction of legislation to prevent the levy of fees, charges, and royalties pursuant to your application and any other application of this nature in respect of fees, charges and royalties claimed for the year 1969 and thereafter.

Senator Burchill: In spite of the letter he read to us, he said he was still back of this bill, did he not?

The Chairman: Yes.

Senator Flynn: There was another question I wanted to put to Mr. Stewart. You mentioned the Rome Convention and said that the signatories can provide for performing rights for the artists or for the record producers, or for both. I was wondering if any legislation exists that lumps these two rights together; in other words, the performing right of the artist and the record producers would be the same, and it would be a matter for all the interested parties to arrange for the split.

Mr. Stewart: May I ask Mr. Sterling to deal with this?

Mr. J. A. L. Sterling, Deputy Director General, International Federation of Phonographic Industry, London, England: Mr. Chairman, first may I say what a great privilege it is for me, as well as my colleague Mr. Stewart, to address your committee. The honourable senator's question underlines that this complex field admits of several solutions as to the way performing rights can be granted in respect of records. I do not think anybody could be blamed for finding the field somewhat confusing when it is first entered, because we have under the copyright acts of various countries two musical works in one record, and we have two Rome Conventions—the Rome Convention of 1928, to which Canada is a party, and the Rome Convention of 1961, that deals with performing rights. What we are trying to do is isolate these various problems as best we can for your committee.

Senator Flynn's question has helped us because, as I said, it underlines that if you accept the concept, as many countries have, that there should be a performing right in a record, as distinct from the composition, this principle is recognized now in international law in the Rome Convention, 1961. But countries have adopted various ways of putting this principle into practice.

There is legislation of the type similar to the United Kingdom, which is the legislation of Australia, New Zealand, Canada, India and various other countries which recognize the right to the record producer. There is legislation of other countries such as the Scandinavian—Sweden, Denmark and Finland—which approached it from another angle and recognized two rights in the record, apart from the composer's rights. So they recognize, in effect, three rights: the right of the composer to a royalty when making the record or when his work is played, the right of the record producer and the right performer to get separate royalties.

The legislation of the type that we find in the Commonwealth countries tends more towards granting the right to the record producer and leaving it to him to share, under voluntary arrangements, with the performers. This has been done in the United Kingdom for many years and it is also the subject of an international agreement.

Senator Connolly (Ottawa West): Does it work?

Mr. Sterling: It works, sir. It has worked, I think we can say without exaggeration, extremely well. We have had it working in England for over 20 years, where the record producers, the English SRL, as it were, receives the royalties from the broadcasting corporation, and it pays 20 per cent of that royalty to the individual performer under contract with the record company, the man who has come into the studio and performed on his instrument.

Senator Connolly (Ottawa West): Who negotiates that agreement?

Mr. Sterling: That agreement is negotiated between the British record industry and the musicians' union. I have only told of half the arrangement. There is, first of all, I think 20 per cent to the individual performer under contract with the record company, so he gets his share because, after all, it is his performance; and 12½ per cent to the British musicians' union, which they use for benevolent purposes, mainly, for training young musicians, and that kind of thing. So the United Kingdom system is that about 32½ per cent, goes to the performer.

The Government of the United Kingdom was well aware of this arrangement when they passed the United Kingdom Copyright Act in 1956. In fact, I think they would have required it of the industry, in any case.

Senator Connolly (Ottawa West): May I interrupt again?—and I apologize. Going back to Mr. Stewart's illustration in the case of this agreement about sharing of royalties, the producer does not participate?

Mr. Sterling: Yes. The royalties are due in respect of the playing, the performing in public, or the broadcasting of the record.

Senator Connolly (Ottawa West): Yes.

Mr. Sterling: The law says—I am speaking of the United Kingdom now and am limiting it to that—that it is the maker of the record—that is to say, the record producer, the company, the firm or person that has gathered the artists together—who has the right. When he has the royalty, he voluntarily gives this 32½ per cent to the performers and to the unions. So, in the United Kingdom example, he retains about 67½ per cent.

Senator Connolly (Ottawa West): But the producer in the studio is not sharing?

Mr. Sterling: The actual producer in the studio—that raises a very interesting point, which has given copyright lawyers all over the world many problems in the field of literary work. Where you get a person writing, for instance, an article in the course of his employment with a newspaper, it is the same type of legal problem. You get two types of situation. First of all, the record producer, as the honourable senator has rightly called him, may come to the record company with the tape already made. He has made it outside the company's premises. In that case, he is the copyright owner, under the U.K. law, and he makes his contract with the record company.

Senator Connolly: That is another classification.

Mr. Sterling: He may say, "When this record is played on the radio, I want that whole 67½ per cent myself, because I am the copyrighter." Some record producers—as we call them, freelance record producers—do say that.

On the other hand, the record company may make a contract according to which it shares these royalties. But the actual employee—which is the question the honourable senator has raised—as far as I know, is in the same position as the writer who works for a newspaper. It is up to him to make his contract with the company.

After all, you get the same problem, as you said, Mr. Chairman, in the vast field that this opens up. You get the same problem with the person working in a scientific laboratory. He makes an invention. He could not have made the invention without the research facilities which the company has put at his disposal. So there is quite a large field for contract there.

To answer your question, I would say that in most cases in the United Kingdom the copyright belongs to the record company which has issued the record, which has either acquired the copyright from the producer or has made its contract with its employees. So you have simplicity in the United Kingdom system. I am not saying that this is the best system, but it is one system.

Now I am coming, if I may, to the honourable senator's question. The honourable Senator Cook said—and if I may respectfully say, rightly—that there are constitutional questions involved in the ratification of the Rome Convention. As a member of the Australian as well as the English Bar, I am very conscious of the constitutional questions perhaps that our English friends are not always aware of, that a system built on a federal structure confronts, in many cases, a seemingly simple piece of legislation. In Australia they are very seriously considering ratifying the Rome Convention. Constitutionally, they have no problem with regard to the broadcasting organization which must be given the right under the convention or with the record producer or record maker who must be given a right under the convention. The problem they have constitutionally is with the performer, and that we find in several countries because the performer must be granted specific rights under the convention, to stop people copying his live performance. This does raise constitutional questions.

The Federal Republic of Germany has the same problem under its constitution, but if felt that this came under the contract power.

In the United Kingdom, although they have not the same kind of constitution, they did have a problem but they solved it by giving the performer a penal right. In other words, they stated that the unauthorized copying of his record went to the criminal law.

Finally—and I apologize for taking so long in getting to the other system—there is a system where the individual record producer has the right, either under the contract or under what he does himself, that he shares voluntarily.

In the Scandinavian-type legislation, which is also influential, you get this approach to where the right is a different type of right. The honourable senator mentioned a property right. I think this is the concept of the common law approach, that this right is a property right. But the Scandinavian legislation, I would say, has a more sociological aspect than a purely property aspect. It says that the performer has contributed and he should have a share, and it provides that in the law. The law does not provide the shares. This is subject to the tribunal's decision, because following the Canadian pattern there are tribunals.

The main countries that follow the system of giving the right to the performer and the record producer are the Federal Republic of Germany, Sweden, Denmark, Finland and, most recently, Japan.

If you would permit me, I would mention one thing here. Perhaps, in the ultimate, this is a very fine, indeed a noble solution to the problem, this second way of dealing with it, but it does have problems because you are dealing with individual performers who may come from many different countries. So you do have to grapple with the problem of how you are going to make a foreign performer. For instance, he may be in a performance of

Aida and you have to decide how you are going to allow them to participate. But that is by the way. The official report of the Rome Convention, in which I have been attempting to check Canada's signature, contains a rather cryptic phrase. It states that the convention at the Rome Conference was signed by almost all the countries present. We believe that Canada signed on the basis referred to by the honourable senator, under reserve of the constitutional points. This is clarified by article 24 of the Convention. Canada's position is quite clear; it either signed the convention in Rome, in which event it has the right to ratify it if it so desires...

The Chairman: It has the right to ratify or not to ratify.

Mr. Sterling: That is correct. Under article 24 of the Convention a nonsignatory can ratify, provided it is a member of one of the universal copyright Conventions or the Berne Convention. Canada, of course, is a member of both, so Canada's position is the option, as you say, Mr. Chairman.

With respect to the very interesting suggestion of the honourable senator with respect to the necessity of seeing what happens when a sound recording is made, I respectfully suggest it is one of the magic things of our time when the sound comes out of instruments and a few minutes later from a material object. It is always a wonder to me.

I would conclude by saying that this wonder can be put to the test very easily. Consider a performance by the finest symphony orchestra in your wonderful National Arts Centre, which I have visited, in which a microphone is set up and the finest performers play a recording. It will sound awful because the art and technique necessary to translate it on to the tape, for translation on to the record which will recreate it, takes, with respect, Mr. Chairman, some doing and some skill.

Senator Connolly (Ottawa West): Would you say the same thing with respect to our speeches in the Senate?

Mr. Sterling: They have a copyright.

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The Chairman: There is no tariff, though, applicable to the speeches in the Senate.

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Mr. Stewart: Again, I am very grateful to the senator, because I did not deal with this problem; I tried to deal with what you, Mr. Chairman, termed the mainstream of the argument: Should there or should there not be a right?

Senator Connolly (Ottawa West): You are quite right in saying that, because that is the basic proposition. However, this other question was raised and pushed very strongly.

Mr. Stewart: I would very much like to deal with it, Mr. Chairman, if I may. It was my fault for not doing so before. It is not the first time, I assure you, Mr. Chairman, that I have heard this argument. It is advanced in every country where legislation is under consideration. It simply says, in a nutshell: "We are advertising your records by playing them on the air. We are doing you a good turn; one good turn deserves another. Therefore, you should not charge for them". It is an argument of quantity and I would not be surprised to hear, if ever we do hear the reasoning of the Copyright Appeal Board, that that argument had something to do with the reduction of the tariff.

What is the argument worth? First of all, let me say that everywhere in the world record producers have acknowledged that in certain circumstances broadcasting is beneficial and does help sales. No one has ever denied that. However, two of the witnesses who appeared before your committee are quoted in the transcript as stating that if there were not broadcasting of records, the record producers would go bankrupt. In other words, they could not sell their records if there were no broadcasting. I do not think that is right; in fact, I am sure it is not. The record industry as a whole—this is speculative, and I will tell you in a moment what little proof there is of it—thinks that if all broadcasting of records ceased tomorrow, it would sell as many records, if not more.

Senator Connolly (Ottawa West): Really?

Mr. Stewart: Yes, the industry does.

Senator Connolly (Ottawa West): I find that difficult to understand.

Mr. Stewart: May I illustrate my meaning, because I see that you are not with me? I was speaking of the industry as a whole; in fact, there is of course no such thing. It is a highly competitive industry, probably one of the most competitive. No single record producer would tell you that he could compete if his competitor's records were broadcast and his not. That is the trick. If the industry as a whole were not broadcast, they think that not only would they sell as many but then might sell more. I will tell you why.

I am now completely leaving the field of classical music, because it does not apply there. It applies to pop which, after all, accounts for the bulk of sales. A pop record has a very short life. It is thought that broadcasting has a great deal to do with this. The opinion is logical, because if the latest hit is broadcast on the radio twenty times a day, those listening may not be so willing to buy a copy. Furthermore, I do not know whether your

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children are the same as mine, but teen-agers have little machines which copy the record from the radio and then plays back something which is not quite as good as the record but is something, and which may be used. The argument that in that case the industry would go bankrupt is not true. An individual might encounter great difficulty if his competitors were constantly broadcast and he were not.

The little proof that there is has emerged in one or two countries where broadcasting of records was, for a variety of reasons, drastically reduced. Five or six years ago in Germany the record content of musical programs was reduced to one-tenth. This continued for three and a half months, during which time record sales increased. It is not conclusive proof, of course, but there is some evidence that there is a saturation point.

I think it was one of the artists who made this statement before you, who said that he—or I think it was a she—feels that the artist's working life or the life of her performance is shortened by broadcasting.

The Chairman: I think it is shortened by over-exposure.

Mr. Stewart: What I say is that when you have this argument before you, you have to weigh two things: the admitted fact that the record producer as an individual, as one producer, wants his records broadcast—evidence, he sends them, as you say, the records he wants them to play; but against that you have to weigh the fact that most broadcasting stations—and I note there are a few in Canada that might be an exception, but the bulk of them just could not survive one day without records. They just could not master the live music content. Why not? This is just not in Canada, because you have a dearth of talent. This is so everywhere. Why is this so? Because the live performance in the studio is far too costly, it is just economically not possible, whereas record playing is cheap.

Senator Connolly (Ottawa West): You can run a program all day and all night on records, but you cannot expect an artist to be there all the time.

The Chairman: With all due respect to the point you are making, Mr. Stewart, the real issue is not whether the record companies or the broadcasting companies would survive if the records were not played the way they are, or whether record producers would make or lose money, or whether broadcasting companies, if they did not buy records, would survive. I do not think that is the main issue, although I did get a statement from the Standard Radio people, I think, when they were appearing here with CAB, that they are, in one of their companies, making records. I asked them why they were interested in this bill. Well, they could not make enough records. Although they did not develop it, I take it that regarding the records they do make, they have some kind of arrangement where by they hand out to other broadcasting stations. I would be very interested in knowing—and I hope we will find out before we are finished—what is the basis on which other broadcasting companies pay one broadcasting company that is in the business of producing records as well. I would suspect that is not entirely gratuitous.

Mr. Stewart: Mr. Chairman, your suspicion is well founded, but I would like a Canadian to deal with it. I think I know the answer, and it is what you suggest.

The Chairman: Are there any other questions?

Thank you very much, Mr. Stewart and Mr. Sterling. This has been very informative.

Today we had the agenda organized so that SRL would appear. I have read their brief, it is quite lengthy, and we would not really do more than get going between now and the time we have to adjourn. While I tried to get permission from the Government Leader to sit this afternoon while the Senate is sitting, he did not see fit to agree to introduce that motion.

Therefore, next Wednesday we have Mr. Estey appearing as counsel for the Musical Protective Society and for the Canadian Cable Television Association. Perhaps this would be the time, since SRL is really in the position of being the respondent, when they should have an opportunity to defend their position, after everything has been said on the other side.

I have consulted Mr. Fortier, and he said that he will not complain if we do not hear him today. So, having cleared that, I think this is the way we should deal with it. I was going to suggest too that perhaps the meeting next Wednesday should start at 10 o'clock because the Chairman is obliged to attend quite an event the day before that is entirely personal.

Senator Connolly (Ottawa West): Many happy returns!

Senator Haig: We will agree.

The Chairman: Thank you very much.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 28

WEDNESDAY, JUNE 2, 1971

Fourth Proceedings on Bill S-9,
intituled:
"An Act to amend the Copyright Act"

(Witnesses:—See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON
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The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Haig
Beaubien	Hayden
Benidickson	Hays
Blois	Isnor
Burchill	Kinley
Carter	Lang
Choquette	Macnaughton
Connolly (*Ottawa West*)	Molson
Cook	Sullivan
Croll	Walker
Desruisseaux	Welch
Everett	White
Gélinas	Willis–(28)
Giguère	
Grosart	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the Motion of the Honourable Senator Urquhart, seconded by the Honourable Senator Cook, for the second reading of the Bill S-9, intituled: "An Act to amend the Copyright Act".

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

23972–1½

Minutes of Proceedings

Wednesday, June 2, 1971.
(31)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10.00 a.m. to *further* consider the following Bill:

Bill S-9, "An Act to amend the Copyright Act".

Present: The Honourable Senators Hayden (*Chairman*), Blois, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Grosart, Haig, Isnor, Molson, Welch and White. (13)

Present but not of the Committee: The Honourable Senators Lafond, McGrand and Methot. (3)

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

WITNESSES:

(Musical Protective Society:
(Canadian Cable Television Association:

Mr. W. Z. Estey, Q.C., Counsel;
Mr. C. David Macdonald, Counsel;
Mr. Stanley G. Simpson, Managing Secretary (M.P.S.);
Mr. Robert Short, President (C.C.T.A.);
Mr. J. Lyman Potts, President, Standard Broadcast Productions Ltd.

Radio-Québec:

Mr. Yves Labonté, President.

At 12.25 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, June 2, 1971.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-9, to amend the Copyright Act, met this day at 10 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, I call the meeting to order.

We continue our consideration of Bill S-9. Our first appearance this morning is the Musical Protective Society and the Canadian Cable Television Association. Mr. W.Z. Estey, Q.C., is appearing as counsel, and Mr. C. David Macdonald is with him. I take it that you, Mr. Estey, will introduce the other panel members. You may start as soon as you wish, and I take it that you are going to make an opening statement rather than read the brief. You can assume we have read the brief, but you can be copious in your references or anything else; you are the general.

Mr. W.Z. Estey, Q.C., Counsel, Musical Protective Society; Canadian Cable Television Association: Thank you very much, Mr. Chairman.

Mr. Chairman and honourable members of the Senate committee, I have with me this morning Mr. Robert C. Short, President of the Canadian Cable Television Association, the second from the right; Mr. Stanley G. Simpson, Executive Director and Secretary of the Musical Protective Society of Canada; and Mr. J. Lyman Potts, President of Standard Broadcast Productions Limited—all of whom appear with me on behalf of the Canadian Cable Television Association and the Musical Protective Society of Canada.

I should now say a word, Mr. Chairman, as to what those two organizations are and as to what they comprise. The Canadian Cable Television Association may be known to some of you as the National Community Antenna Television Association. It changed to CCTA, and it represents almost all the cable and televisional systems operating today in Canada and serving many hundreds of thousands of Canadian homes. Of course, the number of people served by and dependent upon cable television increases virtually hourly.

The Muscial Protective Society of Canada is a federal incorporation without share capital. It was incorporated in 1927. It embraces all of the music-using components of the Canadian scene, including the Canadian Fair Association, the Ontario and National Arenas Associaton, the so-called wire music or background music services such as Muzak, the Canadian Association of Broadcasters, the CTV television network, the motel associations, the two large theatre chains, the four independent theatre associations across Canada, and smaller but no less important users of music throughout Canada.

MPS has appeared in all the significant copyright hearings held in this country since 1927, including the 1935 royal commission presided over by His Honour Judge Parker, which resulted in the establishment of the Copyright Appeal Board and the passage of those parts of the act with which we are primarily concerned today.

MPS also participated in the Massey Commisssion hearings when they went into the use of music in Canada by our many state-and private-owned institutions; and also in the Ilsley Commission proceedings starting in 1954, and throughout that period until the report came down in 1957.

The interest of the people we are speaking for this morning, honourable senators, is vital in the application of the Copyright Act in this country, for this reason: the broadcasting components of the people we represent comprise a rather brittle industry in our spectrum of commercial activity in Canada. That goes without debate by reason of the fact that the Government of this country is now, and has since 1932, been spending a very large proportion of the Gross National Product, collected by the Government, in the maintenance of a national broadcasting service. In this year, 1971, this industry is subsidized by the federal Government in the amount of one-quarter of a billion dollars. Therefore, we submit to this honourable committee that any measure which is introduced in the legislatures of Canada which is going to be a burden on the economic well-being and health of the broadcasting industry, should be very carefully scrutinized.

The Canadian Broadcasting Corporation, of course, can speak for itself, and has spoken; and we support everything they have said with reference to this bill.

The private broadcasting organization has spoken. Again, we support them in that regard, and will add something to that as we proceed this morning.

As the Chairman has said, I do not propose to follow the brief. I am appreciative of the fact that this committee does its homework and has read the brief.

Turning to cable television—and then I am going to deal with theatres and then SRL—cable television is not at the moment in the line of fire. SRL did file a tariff which was published in the *Canada Gazette*. The Cable Association did respond to that by filing objections in the Copyright Appeal Board, and then a letter was received from SRL withdrawing, for the moment, their demand for the payment of licence fees by the Cable Television Association membership.

We do not believe in living on the edge of a Munich-like situation. If this organization, which I will come to in a moment, has aimed the gun at us only briefly, we are realists enough to assume the gun will again be pointed at us. Therefore, let me tell you in a brief word or two what cable television is and why we bitterly oppose the introduction of any burdensome right for the use of phonograph recordings.

First of all, cable antenna services are simply an improvement on the rooftop or rabbit ears antenna attached to your television sets.

The cable service is now not a luxury but a necessity in many areas, for a multitude of reasons, the two most important of which are: firstly, natural topographic interferences such as electronic shadows cast by hills, mountains and created in valleys; and secondly, man-made shadows created by highrise buildings and by what the engineers refer to as radio noise.

To overcome those two difficulties and to give high-quality television reception in the home, over one million Canadian homes are dependent on cable television for that signal. Cable television is not a method of originating broadcasting and competing with the broadcast industry: it is first and foremost an antenna service for the improvement of the operation of television and FM sets, particularly in the age of colour TV with the high demand for accurate reproduction in the colour set.

The Canadian Radio Television Commission, when it assumed jurisdiction over cable television on April 1, 1968, took a somewhat different stance, at least in the opening phase of its history, than did the prior administration under the Department of Transport; and CRTC have said, for reasons I need not burden this committee with, that on occasion and in some areas and for some purposes, cable television should serve the neighbourhood by originating a specific type of television service–I do not use the word "program"–and that that should be relayed to the areas served by this antenna system. That kind of local production is not the Ed Sullivan type of performance, but is the weather eye, time, local news, local organizations, local music groups and that sort of thing, where on an unoccupied channel of the receiver you can tune in and receive this local service.

It varies widely in parts of Canada as to who does this. In the larger cities, where the licences for the antenna systems divide the city geographically, you get area services. For example, in the City of Montreal you have National Cablevision serving one area of the city, giving one type of program, you have Cable TV Limited serving another part of the city giving its own type of domestic programming, and so on across the country.

In the City of Winnipeg it is divided down the Red River and the programming on one side of the river by Metro Videon carries a local program designed to meet the communication and information needs of the people on that side of the river, and there is Selkirk Broadcasting and a local system on the other side of the river.

In conjunction with those services, the systems do on occasion and now frequnetly provide either a background music service or use recordings in connection with some programming. It varies. It will vary on one system from week to week, and you may go a month or two with no recordings. It is not of primary importance, but it would be a loss of service to the community if those systems were unable to use those recordings except by payment of a fee. We know where that fee would come from. It would come from the people who pay to get this antenna signal connected to their antenna and their FM sets.

The Chairman: There is nothing new in people paying.

Mr. Estey: No, and it will not end with this committee either. I suppose there is nothing new in people dying, but we should try to avoid it.

The Chairman: You are talking about this cable system. Did I understand you to say they originate some programs?

Mr. Estey: Yes, sir.

The Chairman: How would that interfere with my reception of a program that I wanted to get on a particular station?

Mr. Estey: I should explain that. Let us take Ottawa Cablevision or Skyline Cablevision, the two systems here. One is for the east and the other is for the west, and the Laurentians and Hull. Those systems carry a variety of signals. For example, Skyline carries the two CBC transmitters CBO on channel 4 and CBOF-TV on channel 8. They carry CJOH-TV, the CTV affiliate on channel 13, and CFTM in Montreal, the independent. They transferred that to another channel, I think.

Senator Connolly (Ottawa West): Where do you live?

Mr. Estey: In Toronto.

Senator Connolly (Ottawa-West): How do you know about all this in Ottawa?

Mr. Estey: I have the fortune or misfortune to come down here once a week; and I incorporated the Skyline Cablevision system, and unhappily sold the idea to Ottawa Cablevision.

When they started out they also carried Plattsburg, New York, and Burlington, Vermont, two Syracuse stations, and WWNY, which is a CBS affiliate on channel 7.

Due to electronic difficulties, distance, phase and local noise, some of those US signals have been dropped and they do not have that full complement. On each system they have one dark, vacant channel, and it is on that channel that they carry the local signal. The way it works is very simple. At the antenna head where they receive the signals, at the bottom of the mast, there is a little house that amplifies the signal and puts it on the coaxial cable, that eventually splits into the distribution cables and connects to the house. At that little house they also feed in a synthesized television program which will come out on that vacant channel and look as though it came down the antenna as an antenna signal.

The antenna service has a studio, which has in it the equipment of a television station. It has a camera, a microphone, an announcer, a producer and a recording turntable, and they build up a program of local interest. They do not set out to compete with "This Week Has Seven Days" or some Hollywood spectacular, but they carry the local church groups, council meetings, where the municipality permits it, travelogues from people in the community who have been away, and travel promotions of the community, as they do in the city of Montreal; also local sporting events. There is a system serving a piece of southern Ontario that carries organized baseball in summer and junior hockey in winter, and they do it just like a televison station.

That is an alternative to the three major US networks, the three major Canadian networks, and the educational TV stations which are carried in the southern parts of Canada, which does not quite include Ottawa. There is no US educational TV here.

Senator Molson: What are the three Canadian networks?

Mr. Estey: CBC English, CBC French and CTV.

Senator Molson: What about Canadian French?

Mr. Estey: That is not a network. It is CFT in Montreal which is a single station. Now they are starting to formulate a combination of CFT in Montreal, CFT in Quebec City, one in Jonquiere and one

other. They are being tied into what will be the equivalent in the French language areas of the CTV English language service.

There is a fourth network in Canada that is claimed to be operated by the Government of Ontario, although that is a bad word in the politics of this country at the moment. They operate channel 10. The station is owned physically by the Government of Canada and operated by the Province of Ontario on channel 19. That is becoming the flag station of an educational group. They shy away from the word "network". Cable television carries that in Toronto on channel 13. They do that by taking off the redundant CTV coverage on channel 13. They also carry other educational signals, but at the moment they are all coming from the United States.

That is cable TV. All of us appearing today take the view that this alleged rate does not exist in law; that if it does it should not; and that it does not exist in the country which substantially sends into our country this recorded music.

Let me turn from the passive side of broadcasting, which is cable TV, to the active side of broadcasting, which is the transmission side. It divides itself into three categories. There is radio AM, which we are all accustomed to, there is radio FM, which is short-range and high quality broadcasting on the high frequency spectrum, and there is television broadcasting. I have named them in the order in which they were discussed in Ontario's recent famous Copyright Appeal Board hearing. AM radio was the target of most of the evidence as to what they did with recordings–not so much with FM radio and in television hardly at all.

I have already hinted at the view expressed by saying that this industry in Canada is one that has been the subject of more royal commissions than any other single phase of our Canadian activity, including the railways. The broadcasters are now ahead on royal commissions by one over the railways and they are much newer. Ever since the Aird Commission of 1929, broadcasting in Canada has been found to be, first, a national necessity if we are going to keep the country together and develop its own cultural community, and secondly, that broadcasting, because of our geography, has to be assisted. It would not naturally survive against the vast American area of broadcasting.

When you consider broadcasting in this country there are some factors that are essentially carried foremost in one's mind. The first is that in AM broadcasting we are up against 3,700 United States stations. They have clear channels on three times as many frequencies as we have in Canada. It means that their 50-kilowatt transmitters come rolling in here by day and by night. I say that neither with alarm nor fear, nor dislike. It is a fact of life. 70 per cent of our population can receive United States AM radio in the day time and 100 per cent at night.

Senator Isnor: Does that apply to all parts of Canada?

Mr. Estey: Yes, clear up to Inuvik. It is much easier to get American signals than Canadian in the day time because of the nature of the radio navigational waves. For example, in the city of Saskatoon you can hear WGN Chicago much easier at night than you can hear Regina 150 miles away. In the city of Toronto we can hear WCBS New York in the winter time throughout the day. You have high level broadcasting which our people have come to like for one purpose.

In FM broadcasting the penetration is very great, but not as great because of the nature of the wave jump. Edmonton, for example, one of Canada's leading cities, cannot get United States FM. Calgary cannot get American FM, but in Winnipeg you can and certainly all across southern Quebec, southern Ontario, the maritimes, and southern British Columbia, where most of the population of B.C. receive the high-power output of the American radio industry. There is an historical reason for that. One reason, unfortunately, is that–for reasons that I need not go into here–for a long time government policy was to hold the power of our broadcasting stations down to the power they held in 1940. It was a so-called power freeze. The Americans have no such philosophy. They treat radio frequencies like mineral resources; they are no good unless you develop them. So everybody gets the maximum power in the United States. You have Buffalo, for example, compared to Toronto. I was going to say that Buffalo is a second-rate city, which might start up the war of 1812 again. It is certainly a long way down from the metropolitan level of Toronto, but it has eleven FM stations. Eleven! They all roll into Toronto. We have in Toronto three or four commercial stations, one Province-of-Ontario-operated station and a CBC station on the Beethoven-kind of wave length, battling against 11 good United States FM stations.

Now we come to television. Over half the country is within roof-top range of American television broadcasting stations. All that means is that you can put up an antenna on your roof-top without needing any cable system. Rabbit ears would not get a U.S. station in many areas, but with normal roof-top antenna which you see in southern Canada, and really south of this city, you can bring in, without reference to sunlight or darkness, from up to 120 direct miles, a good American station signal.

I do not say this with any animosity or ulterior motive at all, but the United States government and citizenry are dedicated to the view that if you are going to use a frequency then really use it. So they put up 1,000-foot and 2,000-foot masts–heights which are unheard of in Canada. We think the airplanes may hit them so we do not allow them, but height is the thing in propagation for television. They also go to the maximum power–100 kilowatts below channel 6 and 300 kilowatts below channel 8–and they almost always operate at that peak. So they roll into our big population centres.

Senator Connolly (Ottawa West): You are not suggesting, Mr. Estey, that these are being especially beamed towards Canada? Perhaps in some cases they are, because of the market, but it just happens that they do, I take it, use these frequencies and they can, in fact, reach Canadians. But surely their prime target is the American market.

Mr. Estey: That is correct, Senator Connolly, with four major exceptions. The four exceptions, from west to east, are KVLS, Bellingham, Washington, built for and advertising in the Vancouver market. In fact, it does not even bother to say it has a Vancouver telephone number when they announce it or show it on the screen. Then there is the Pembina-Minnesota-Manitoba station on channel 13, a big 300-kilowatt transmitter, whose masts and guywires are 50 feet from the Canadian boundary. Of course, they serve only gophers in that immediate area; there is nothing there. I hate to say that about the Prairies, but there is nothing around Pembina. They go into Winnipeg and they have a sales office in Winnipeg; that is the Winnipeg station. Then there is the Burlington, Vermont, area,

carrying Montreal advertising in a big way. It does not roll in with the impact that the Winnipeg one does, because of the prairie characteristics for disseminating those signals, but it is big in Montreal. Then there is WWNY in Watertown, New York. That cannot be justified on its level of operation by what is in Watertown. They reach Kingston and up into Ottawa and, of course, on occasion you will hear Canada's national anthem when they sign off. Quite frequently they play the Canadian national anthem at the end of the day.

Senator Molson: That is very courteous of them.

Mr. Estey: You can imagine what would happen if we reciprocated. There would be pickets.

The Chairman: I do not like to interrupt, Mr. Estey, but I was just wondering, when we are hearing about all these intrusions, deliberate or otherwise, into our air space by American stations, how does that touch on this bill?

Mr. Estey: I was just going to come to that when I answer Senator Connolly's (Ottawa West) last question, sir. In our respectful submission, it is a vital connection and it is the second key connection. The last area which is of some importance is that the three major Buffalo stations are all maximum-power, maximum-height stations, and at least one of them has located its antenna up to the edge of what they call the Niagara frontier, with a view to getting to the metropolitan Toronto market, and they advertise in their station rate-card, which is what they send out to the advertisers, that they reach 824,000 Canadian homes. That is a lot of homes. That exceeds what any Canadian television station reaches, including channel 9. That is WGR-TV, an NBC affiliate in Buffalo. It exceeds the reach because it is on the highest propagation channel there is in the television dial. As the numbers go up, the reach goes down. They are on a very strong base.

Now, Mr. Chairman, the point of my submission with respect to broadcasting is simply that on those Burlington, Bellingham and Buffalo turntables are spun the records broadcast into the Canadian communities. Those records, of course, come from two major sources. They come from their own talent sources, RCA, Columbia, Warner Brothers, MCA, Capital; and they come from Deutsche Gramofon by way of Polydor, or from Decca, U.K.–the London record group. Those records are turning on those turntables, the signals are broadcast into Canada, and the big radio stations of the United States do, indeed, make music hits in Canada. We have many examples where those U.S. radio stations' disc jockeys are talking about Canada and requests from Canada. They are big in southern Ontario through WKVW. With 50,000 kilowatts in Buffalo they are broadcasting to the youth of Ontario with these records. I do not want to take time to point out that Detroit has a dozen AM transmitters within four or five miles of southern Ontario, but at the same time that they are competing for the audience you have the Canadian stations in Windsor, Montreal, Vancouver and Winnipeg playing exactly the same records and competing for that audience. Oddly enough, on those Canadian turntables are spinning the Columbia records, the RCA records, the MCA records, the Decca-U.K. records and the Polydor Deutsche Gramofon records. They are precisely the same records. I will come back to the superficial distinction of "Made in Canada," but let me say that they are precisely the same records.

It is an anomaly beyond human understanding that a little country like Canada, with one-tenth of the population and one-twentieth the entertainment budget of the U.S., should say to the Montreal radio station, "You pay that foreign recording company 50 cents to play that record, but the American station, playing the same record, does not have to pay the American recording company." That is an anomaly which is really difficult to understand in a country of this size.

If there were something immoral about it then that would be another thing; that is if Canada could not afford nationally to be a big trading nation, as we are, and at the same time defeat other countries' legitimate rights. But that is not what is happening. In the United States, which is clearly the greatest entertainment market known on the face of the earth, there is no such right in a gramaphone record. It has been well litigated. Mr. Paul Whiteman went all through the courts against RCA trying to get such a right in the recordings, but the United States courts have always said that there is no such right, and the reason they give for that is that they go back into English history where copyright originates, back to Edward the Confessor's day, and tracing it down it is apparent that what you are doing in copyright is protecting an intellectual function. You are not protecting a tangible commodity. You are protecting an intellectual property or works, and it has to be a musical work, an artistic work or a dramatic work.

When you make that work into a piece of sheet music, for example, you have not created anything intellectual at all; you have just created a device by which the intellectual process can be repeated for some one else's benefit. When you make a trombone with the slide device all you have done is created a mechanical device which will reproduce the intellectual property for the experience of the listener. Or you do it by a recording where you have a pianist sit down in front of a microphone and the vibrations are translated onto the surface of the disc or the record. But that can be used like the trombone and like the sheet music and like the pianola to reproduce by acoustic representation that intellectual work.

Senator Connolly (Ottawa West): Do you restrict the intellectual work to the work of the originator–for example, the author of the piece of music?

Mr. Estey: Yes.

Senator Connolly (Ottawa West): Is that the rationale for the American decision?

Mr. Estey: The same rationale.

Senator Connolly (Ottawa West): In the Whiteman case and in others, did they argue in the courts that their contribution to that original intellectual work was another intellectual effort on their part, namely in the way they interpreted the work and the kind of results they got from it?

Mr. Estay: Yes, that argument has been made and made repeatedly, and some day that argument may find itself in a statute in the United States. The performer by the way he plays it or by the way he performs it undoubtedly adds something, because I am sure that if you or I were to render a piece of music and then Mr. Whiteman were to render it, there would be a noticeable difference although the work would be the same. The Americans have argued that and have done so very aggressively. But before Paul Whiteman's time, another great orchestral leader, Fred Waring, launched litigation to stop somebody from playing his Pennsylvania records.

He made that argument, but he was faced with the fact that that argument is unknown under copyright law. That is not to say that is not a good law, but it is unknown to that philosophy.

The Chairman: You mean copyright generally or in the United States?

Mr. Estey: Generally. The Waring and Whiteman discussions are not in the United States statutes because the parties admitted at the outset that the Copyright Act could not help them, but they argued the English common law of copyright. Now the United States statute still does not help the recording companies and the RCA company have no rights in the United States.

The Chairman: I am just wondering about the relevance of your reference to common law in this regard because in England now they do have a statute. So if another country is looking for some persuasion or leadership, they might make use of common law decisions in another country, but actually those common law decisions do not reflect the state of the law in England.

Mr. Estey: I suppose the last thing the Americans would do would be to follow an English statute, but they were arguing the philosophy was against that recognition, so it would have to be pure statute if you wanted to create a performer's right.

I think this creates a very important right. The performer here is sort of riding jockey-like on the back of SRL to get something out of the broadcasting industry. Mr. Wood who appeared before you was first to say that. They would like to get something from people who play their artists' records, and it is a convenience to them to get the money now from SRL if that is the best they can do, but really what we are deciding and talking about in this legislative arena is whether section 4.(3) of our act should protect not a performer's right, but a recording company's right, not just to prevent piracy of the record but to prevent the use of that record in broadcasting. For example, I have a Polydor record, a 45 rpm record which is the kind the radio stations play, and the evidence is that this is the kind of thing that the radio stations sell in a big way to the youth of this country by the playing of that record on the air. Now this record represents and focuses the anomaly of the situation with which you gentlemen are faced. This record is thrust into the hands of the broadcaster by the recording company with the request to play it, so much so that CFRB, which is a large broadcasting station in Toronto with a vast audience, has a chair reserved in their music director's office for the representative of Mr. Wilmot's company, Columbia Records (Canada) Limited, because he is there almost every day to push these records. Yet on the face of this Polydor record it says "Unauthorized copying, public performance, broadcasting of this record are prohibited."

Copying the record is treated in a strange way in various countries. There is a great conference going on now in Europe—and it will resume in November—at which Canada is represented, trying to ascertain the extent to which pure copying is going on and how it should be stopped. Piracy of the record, is, of course, prohibited by our statute. You cannot copy this record. Now ironically enough in the United States there is no prohibition against straight copying of a record and "piracy" is not the word to use there because it is not unlawful. Piracy is a big industry in the United States. Some states have acted to stop it but we do not have it here. Then broadcasting is prohibited, but broadcasting is not prohibited by Polydor; in fact they go a long way out of their way to make sure it is broadcast. So that is an anomalous duality of position which has been assumed by the recording industry.

Senator Connolly (Ottawa West): Where is that company located?

Mr. Estey: Polydor Limited is located in Hamburg, Germany, and I think it is a truly international company because it is in Holland to start with, I think. It is partly owned by Philips and partly by Deutsche Gramofon of Hamburg, and I think Deutsche Gramofon is owned by Siemens A.G., the large German company.

Senator Connolly (Ottawa West): Would you assume that that prohibition is put on the record to suit the legal situation in various countries in the world? I assume from what you say that they operate in various countries.

Mr. Estey: It might be possible that that is the case, senator, except that this one says "Made in Canada," and that printing is put on in Canada.

Let me now deal with the point as to how the industry operates here and as to what SRL is.

Senator Cook: Do I gather that if there is any extension of the copyright at all, as you see it, you would rather an extension in favour of the artist rather than the extension in favour of the manufacturer of the record?

Mr. Estey: You are putting me to an evil choice as I speak for people who have a thin time of it in using these records. We would not believe that either one should have a right to any payment for the use of this record. If I had to put them in scale of order, I would give it to the performer because he brings something to the record. The recording company brings nothing to it except tangible hardware just as though they manufactured the keys on an organ.

Senator Grosart: I take it, Mr. Estey, you are making a case for limitation of the performing right to the original composer and author?

Mr. Estey: Yes, sir.

Senator Grosart: Would it be correct to suggest that perhaps you are thinking of the possible effects of the proliferation of the performing right to the record manufacturer, the performer, the producer, the artistic director, the sound man—all of whom can contribute greatly to the success or failure?

I am suggesting that in speaking of the dangers of that proliferation you are looking for a point of cut-off—the point at which the performing right should subsist in only one legal person, that is, the original composer. Is what is in your mind is that all the rest are users of the other man's property?

Mr. Estey: That is right, sir.

Senator Grosart: That is the cut-off point. Everybody else is taking somebody else's property, voluntarily obtaining permission, which you must, to license the use of somebody else's property, and knowing that under present circumstances, and as they have existed up until this point and still exist, to make money using that man's property. Is that it?

Mr. Estey: That is precisely the position, and I would not like to change one word of it.

You can document that as you, sir, may well know. First of all, the Gregory Committee in the United Kingdom said that this proliferation of right gives rise to great difficulties. The Ilsley Commission in Canada, the late Chief Justice Ilsley said, "We do not

want to import that into Canada, but if it is in the act it should be out." You find many examples. For example, it has been discussed in other forums what would happen at a football game of the Ottawa Rough Riders if we had this proliferation of rights. Could the public ever hear or see that game by electronic means if we proliferate the rights?

First of all, in order to get the thing on the air, if the performers had a right, because of the dramatic performance alleged by the football players, I suppose, you get the fellow who owns the team to give the right to put that representation on the air, video.

If you play any kind of music at all, live or recorded, you get the rights licensed by the owner of the works. If you use recorded music you get another licence from the recording company. Then, if you wish to use it in a bar-room or any place where there is public access to the set, you have to get a licence from the broadcasting station, and maybe the station would have to get a special licence from the network, as sometimes has been argued in the United States. So you would have five rights before the public could ever enjoy an Ottawa Roughrider football game.

Senator Grosart: And the quarterback might assert a performing right in his signals, which are an essential contribution to the success of broadcasts.

The Chairman: That may be creative too.

Senator Grosart: Yes.

Mr. Estey: Yes. As Joe Capp said, that is worth half a million dollars.

Senator Grosart: And the fullback might claim that he had an educated toe and, therefore, it was an intellectual contribution.

Senator Carter: Why not take hockey? Then you have all kinds of performers.

The Chairman: Mr. Estey, could I summarize? Is the point—it seems to me it is—that you are putting forward at this moment, that to maintain this performing right in records would add a cost to the users who make use of the records, and they have a thin operation? I think that was the expression you used.

Mr. Estey: That is right, sir.

The Chairman: So, is this the measure that we should look at, the dollars?

Mr. Estey: I think that national self-interest is always a strong emotion, and I think that it is an enlightened self-interest in Canada because the community needs the broadcast industry. I do not need to argue that; the Government of Canada has argued that for 40 years for me. Sometimes I have argued against it. Also we should not do anything which is intellectually dishonest which impedes the growth of that industry and allows it to serve the community of this country.

The Chairman: Which industry are you talking about?

Mr. Estey: Broadcasting. And, of course, it employs many Canadians. It is the open door to the construction of a Canadian cultural community, according to the CRTC, the Massey Commission, the Fowler Commission, and any number of others.

Mr. Chairman, I know the committee has heard a great deal of this before, but I would like to deal with it briefly.

The Chairman: Just before you jump to that, you are talking about national self-interest. I just wonder if you could develop that. I do not quite understand it; I do not follow you.

Mr. Estey: It has been the history of our broadcasting industry, and now our press industry, as the Davey committee has indicated, that we exist in face of enormous intellectual pressure from the United States. It is a good pressure, in that it excites our demand for progress and brings us know-how which otherwise we would have laboriously to put together, but it has its disadvantage—or its price, which is perhaps a better way to put it.

One of the prices is that to find spectrum space for our industry we have to have an economic base for that industry, to buy the transmitters and to buy the talent, and to combine the two and put signals on the air and into the living rooms of this country.

We cannot operate a network economically. The Canadian Broadcasting Corporation loses $45 million a year running its radio operation because it runs a network. We cannot economically run a television network in Canada. The microwave circuit is 4,300 miles long. The United States network is 2,400 miles long. We have 21½ million people supporting it. They have 215 million people supporting it. They have a vast advertising industry. We are a very small advertising industry.

We have to maintain some kind of east-west communications in this country; that is Government policy. Political parties to the contrary, it is always Government policy.

Here we are asking ourselves to impose upon this great and vital industry a tariff which some day will rise, as all tariffs do, to a tariff of considerable importance. I am asking you what are the value priorities? Is there something here which we are robbing from foreign owners for which we should compensate them; or are we inflicting on one of our main industries a burden which the competing United States industries do not have? I say it is not in our national interest to do it.

I can go on at great length on variations of that theme, but that is the bedrock proposition, and it is as true on Vancouver Island as it is in the City of Montreal or in Bonavista-Twillingate.

Senator Cook: They are two different towns.

Mr. Estey: I put them together.

The Chairman: Senator Cook, I do not know how you came to be named. Is Twillingate your territory?

Mr. Estey: I thought that if I put them together they would equal Montreal, but I guess that is not right.

Senator Connolly (Ottawa West): Perhaps if you went to Bonavista-Twillingate, you would see how important it was.

Senator Flynn: It was in the days of Mr. Pickersgill!

Senator Cook: Then we heard all about it.

Mr. Estey: The recording industry itself deserves close attention in these deliberations because it is our respectful view that this legislative body, before it considers its statute, should be very keenly and completely aware of the industry that is being affected.

The industry we are talking about is the recording industry of Canada. The evidence before the Copyright Appeal Board is that more than 90 per cent, and I think 95 per cent, of all records are

imported, one way or another, into Canada, and 5 per cent are produced, in the sense that the recording session is here, in Canada.

90 per cent of all records sold in the stores of this country are like this little fellow that I am holding up, the Polydor record. They are produced by eight main enterprises, which includes five from the United States, Polydor from Europe, London or Decca (UK) from England, Capitol which is EMI, split US and UK, Quality, which is MGM, Selkirk Broadcasting, and some others. I understand the casting vote for control is MGM Records.

Those companies produce very few original recordings in Canada. I say that as being neither good nor bad, but factual. They import into Canada a tape of which I have a copy here. It is a master tape or mother tape which is the result of a recording session with some organization, pianist, organist, Paul Whiteman, or somebody else, and this very valuable creation is then duplicated.

Let us take one made in West Germany. They make a basic tape which they put in their vault. They make copies or replicas of that tape of the kind I have here, and they send one to each of their affiliates around the world. It could come from RCA in the United States.

The Canadian company or subsidiary, under its licence agreement with the parent, brings this type across the boundary. It pays very little duty on it. Actually it is 20 per cent of $15, which is $3 to bring this in.

You do not need an orchestra in Canada once you have this in your possession, because this is an orchestra. They play this through their machinery and they produce a stamper, which is what I am holding up now. They lock this thing into a press, as though you had type in your press, and it jumps up and down and punches out these little records. They then stick on the label which indicates that it is made in Canada. The record is made in Canada, but the vital part, the performance right, is not made here. We do not use Canadian musicians or Canadian engineers. That is not made here at all.

In an emergency, where it was a big hit in the United States, they would bring in this little record. Then by a slightly different procedure they would make a master from that and stamp it out; but in the main it is through this tape.

Those records so made are distributed across Canada through wholesalers and other people, sometimes know as rack jobbers. They are like pocketbook distributors. They are the fellows who put these out on the shelves in the music stores. The evidence was that some of the rack jobbers are owned by the recording companies, and some of the retail outlets are also owned by the recording companies. That is a fact of life.

Those recording companies then banded together—they are all non-Canadian, except Quality, which is half Canadian—and they formed SRL. SRL is a private company owned by eight stockholders. They have no definitive arrangement as to what they do with the money they get, if any. They say they are going to give it to Canadian talent, musicians and so on. But I ask the committee to remember one very illuminating fact, which is that when the Canadian radio and television Commission held extensive hearings "on how" we get Canadians on to the air in Canada, how to build a recording industry, and how to nurture this entertainment group so that they are nationally capable and internationally known, and so on, no recording company came to those hearings. There was not any great gesture that "we are going to put this or that into it." There are some Canadian recordings made. I am not saying there is none, but these people did not do it. We have broadcasting stations making them. For eight years the Standard Broadcasting group have been making recordings in Canada. They spent over $1 million on Canadian talent.

Senator Connolly (Ottawa West): Over what period?

Mr. Estey: Since 1963. They have a service which they first introduced for radio stations and they sell them to the public. That is a charitable operation. That loses money. The group, I understand, make records in the sense that they pay for recording sessions, they make the tape and the master, and they give it to CTL, Canadian Talent Library, the standard organization.

I understand the royalties would not fill the petty cash fund. It costs $12,000 to make that LP and they would not get $100 back. I am not damning the record companies for not doing this. I am pointing out that the economic facts of life in our country make it very difficult to nurture a Canadian original recording industry, and they make it very difficult for the broadcasting industry in Canada to do likewise. But they are required to do it by the Canadian Radio and Television Commission and they should be because they are part of the Canadian radio and television industry.

To say that SRL needs the money for this is to say that they need it more than broadcasters need it. Let us examine the next stage of SRL. What rights do they get in this process? Let us go back to the beginning. The first thing that happens is, they press this record from a tape they did not produce. So they have the profit from the sale of the record, whether they sell the LP for $5, $4, or $6, or they sell the little 45 for $1 or $2. There is a profit in the operation. According to the 1970 statistics, Canada they sold 45 million records. So the industry is not bad, and Mr. Chislett of MCA told the Copyright Appeal Board that it is a $100 million a year industry.

Senator Connolly (Ottawa West): In Canada?

Mr. Estey: In Canada. That is a pressing and distribution industry really. In addition to that profit—

Senator Cook: What do you mean exactly by profit?

Mr. Estey: Profit on that operation.

Senator Cook: Turnover.

Mr. Estey: But they do not do it at a loss. I am not saying profit. I am saying that Canada Statistics say 45 million records, and Mr. Chislett said it is a $100 million business. It is a big business.

Senator Flynn: CBC is a big business, but it is losing money.

Mr. Estey: Well, let us not get into that.

Senator Connolly (Ottawa West): We can assume that this is a profit-making industry.

The Chairman: We can assume that it was intended to be. The $100 million is the volume of business.

Mr. Estey: Gross volume. These recording companies, in addition to that stage of operations, are getting more and more into what is called the publishing business. You see on the face of these records the name of the publisher. The evidence before the board was that almost all of the recording companies have two publishing houses, one of which is a member of CAPAC, the Composers, Authors and

Publishers Association of Canada, or one is a member of BMI (Canada) Limited. That means that when they first make their contract with a composer he assigns his rights to them and they assign the performing rights to one of these societies. The record company will now get a royalty from the tariff approved by our Copyright Appeal Board for the use of that music on the air in Canada, whether it is by recording or sheet music or whether somebody whistles it. It does not matter. So you get that second return—the performing right of the work itself. That is significant.

Senator Grosart: Your brief seems to suggest that this is 50 percent of the original performing right now being collected on behalf of the original author and composer. That 50 per cent would go to the recording company which was the publisher of the composition involved.

Mr. Estey: That is the CAPAC maximum. CAPAC has a by-law which assures that its composer must get half of the performing right, and the record company gets half. I do not know if BMI has a by-law like that which would protect the composers.

Senator Grosart: Or protect the publishers.

Mr. Estey: The publisher would otherwise get it all.

Senator Grosart: Surely, the composer as a member of his own society.

Mr. Estey: I was thinking in terms of his assignment of his rights. If he assigned them all to the publisher, then the CAPAC by-law would cause the 50-50 split to occur. It could be by contract, of course.

Senator Grosart: Surely, his first assignment as a member of that society is his assignment of the performing right to his own society.

Mr. Estey: If he does it that way, then, of course, he is protected.

Senator Grosart: I am told that that is a condition of membership.

Mr. Estey: In any event, the recording company gets part, up to half, of the performing right with respect to that music, whether it is by the record company or not. That is its second return.

The recording company has a third source of return. Under section 19 of the Copyright Act anyone who wishes to make a record of a copyrighted work may do so by paying the publisher of that work or the owner of the work, whoever he is, two cents per side which is, in fact, two cents per selection. So the publisher, which is the recording company where it owns that right, gets that third return.

The fourth return would come under the recently-approved SRL tariff by the Copyright Appeal Board so that when a person buys a record, pays the $5 for the record, that is just the beginning. Somebody then pays the performing right, the recording right, and then a performing right to SRL. What is really before this house, the Senate of Canada, is whether or not these record stamping companies are entitled, either intellectually or economically, to those additional augmented earnings over and above what they are getting from their conduct of their normal business, which they have done for years and which they do in the United States without any such tariff. If the answer to that is in the affirmative, is it still in the interests of this country, knowing that the impact is going to fall substantially upon the broadcasting industry, to allow the act to be interpreted in that fashion to cause that drain?

I know that for the first half of this year there is no fee, and it is $1 a year for the small stations in the last half. But those figures I find very illusory because of my fortunate, or unfortunate, experience of participating in every Copyright Appeal Board hearing since 1948. During the last few years we have seen some remarkable changes in the compensation paid to performing rights societies. In the case of BMI, since 1952, when they started, they received $76,808 that first year. They filed a tariff of only one item, broadcasting. By 1969 BMI had risen from $76,000 to $1,415,898, which is a 1,700 per cent increase over a period of 17 years.

The Chairman: But, surely, the volume went up.

Mr. Estey: Everything went up. There has been inflation and communities have become more prosperous. Everything has contributed to that rise, but the tariff has been increased, Mr. Chairman, by percentages—

The Chairman: Well, what would be the increase in percentage of the tariff?

Mr. Estey: First, it changed its base. It went from a yardstick tariff to a percentage tariff. The broadcasting tariff went up about seven or eight times and then the CBC tariff went up as well.

The Chairman: Mr. Estey, when you give us these figures of $76,000 for BMI for the first year and $1,415,000 for 1969, surely you must have a purpose in doing so. The particular purpose that would appear to me to be pertinent so far as I am concerned, considering this, is what part of that is represented by the increase in the tariff?

Senator Flynn: And we have had the volume of business of the broadcasting corporation increasing.

The Chairman: And, of course, all costs have gone up.

Mr. Estey: I would be glad to file a documented, authoritative analysis of that rather than guess at it, Mr. Chairman.

Just continuing with these figures, the total performing right fees under the Copyright Appeal Board authorized tariffs in 1952 were $589,307. The figure for 1969 is $5,640,280.

Senator Connolly (Ottawa-West): It went up ten times. By whom is that paid?

Mr. Estey: That is paid by the music-using industry of Canada to BMI and CAPAC.

The Chairman: That is for a licence?

Mr. Estey: For a licence to use on the air, in theatres, everything, all the repertoire.

The Chairman: The whole portfolio of music or musical works that they have.

Mr. Estey: I do not mean to speak in a derogatory way about the performing right societies. In the case of CAPAC we are talking of the repertoire of over three-and-a-half million works. BMI's repertoire is much smaller, but it is still very substantial and it is very useful, apparently.

Senator Grosart: Would those great increases also be a reflection of the very greatly increased use and value of music?

Mr. Estey: I think that is a factor, sir.

The Chairman: And the increase in volume in the production of music; the increase in the number of writers.

Senator Grosart: Yes, the increase in population. Would it also be that part of that would be the fact that in the earlier tariffs of some of these performing right societies they did not ask for a tariff over the whole spectrum of use?

Mr. Estey: BMI was one tariff in 1952 and 12 tariffs in 1969-70.

To get back to the use, sir, the number of composers would not affect it because you can only use so much music. You can only have so much water through a pipeline and that is the same with the broadcasting industry. The number of transmitters since 1952 has not increased particularly or anything like the royalties have. The number of hours of broadcasting, which is the yardstick, has really not increased substantially since 1952.

Senator Grosart: Has the revenue of the broadcasters increased substantially?

Mr. Estey: The revenue of some broadcasters has increased substantially. You have new broadcasters such as CFTO TV, which were not on the air in 1952. You have some broadcasters whose revenue has gone down, but the industry has gone up.

Senator Flynn: You have much wider coverage now than in 1952.

Mr. Estey: Not in radio, sir, where the big use of music is. There is no wider coverage than radio now. The number of watts going on the air, the horsepower, since 1952 is not substantially greater.

Senator Flynn: I am not interested in the strength of a particular station.

Mr. Estey: Well, the watts give you the reach.

Senator Flynn: The coverage of the whole territory of Canada is much improved since 1952, surely. It must have improved in those 17 years.

Mr. Estey: With regret, sir, I must say that that is not so in the case of radio. It has not improved the slightest bit. The coverage of Canada, the population reach since 1952, has not substantially increased.

Senator Flynn: But there have been new stations since then?

Mr. Estey: Not in radio, sir.

Senator Flynn: I know of at least two in Quebec City.

Mr. Estey: Yes, and I can tell you of one in Melford, Saskatchewan, one in Rosetown, Saskatchewan, and one in Weyburn, Saskatchewan, but those are 100-watt stations. There are two in Toronto. But the population percentage reached by radio in 1952 would be 97 or 98 per cent. That has not changed.

The Chairman: Is not the real test the increase in the use of broadcasting?

Mr. Estey: Yes, that is right.

Senator Grosart: Yes, Mr. Chairman, that is right. But is not the real test the decision of the Copyright Appeal Board which is a Government body, a quasi-official body set up to determine the fairness of these rights. Is not that the real test of the validity?

Mr. Estey: I do not think so, senator. I was going to come to that, so I might as well deal with it now.

Senator Haig: Mr. Chairman, it might help the committee if I put on record a summary of the payments made by music users in Canada to BMI and CAPAC. In the year 1969 the BMI total from radio and TV was $1,175,898 while the CAPAC total from radio and TV in the same year was $3,382,382. Now in connection with CBC, they paid BMI $240,000 and in CAPAC radio and TV $842,000. That is also for the year 1969.

Senator Grosart: What I was suggesting, Mr. Estey, is that these increases were the result of the publication of a suggested tariff on behalf of the composer and author, an opportunity for all users, that is all those who would pay, and you appear year after year to object, and as I understand the rates have decreased.

Mr. Estey: They have.

Senator Grosart: And the decisions over the years were the judgment of the Copyright Appeal Board as to what was a fair rate of compensation to the composer and author. Is that a fair statement?

Mr. Estey: Yes, sir.

The Chairman: Senator Grosart, I do not understand that Mr. Estey is contesting the rates paid to the authors and composers.

Senator Grosart: Mr. Chairman, he has referred to the very great increase and there have been a number of questions on it. I have already indicated before the committee that I have a long-standing interest in the position of the composer and author, not a fiduciary interest, but it is an interest I have had over the years.

The Chairman: All I am saying is that they are not challenging that amount. What you are seeking to establish here gratuitously is that the rate is a fair rate.

Senator Grosart: Gratuitously perhaps, but I am not aware, Mr. Chairman, that there is a definition that would regard certain questions asked in committee as being gratuitous.

The Chairman: I mean gratuitous in the sense that it does not go to the core of the problem in this bill.

Senator Grosart: In my opinion, it does, but in yours, it does not. But I am just a member of the committee.

The Chairman: That is right.

Mr. Estey: There is another subject I would like to touch on here, and I will be brief. You have heard all this before, I think. If this were other than a legislative tribunal, Mr. Chairman, it would be necessary to talk at length and *ad nauseam* about what is the legal basis for all this. All I would like to say is that Mr. Justice Thurlow and his colleagues on the Copyright Appeal Board made it very clear when they resumed their hearings in April that they were not indicating that the Board had reached any decision as to whether the people who opposed this tariff were right or wrong in saying that the Act created a right in these records. I have the transcript in front of me of what Mr. Justice Thurlow said on that occasion so that we are not coming here by way of appeal from the Copyright Appeal Board in a kind of a sour-grapes approach that if we cannot

get it through one avenue, we will try through another avenue. What we are doing here is asking the legislative fountainhead of Canada to look at section 4 (3) and at the Ilsley Report, and to consider the impact of this argument on the Copyright Appeal Board and then decide whether or not section 4 (3) should be clarified—and I put it no higher than that—by doing that which Chief Justice Ilsley thought should be done.

Senator Cook: I am glad you came back to the legal argument because I want to ask a question. I understand your argument to be this; that the proposed subsection (4) in the bill merely sets out the true and correct definition of the copyright which does in fact exist and which is created by subsection (3) in records.

Mr. Estey: Yes.

Senator Cook: Even if this act were not passed, you would still maintain that subsection (4) is the correct and true definition?

Mr. Estey: Yes, sir.

Senator Cook: And all the financial and economic consequences are just by the way to substantiate that that should be the true situation?

Mr. Estey: Yes, sir.

Senator Flynn: You suggest that the Copyright Appeal Board had no competence to deal with this particular problem and to interpret the act as you think it should have been?

Mr. Estey: No, sir. I am not saying that at all. I am saying that the Board took the view and historically, senator, the Board has always taken the view, even in Mr. Justice Thorson's era, that they were not a court. Let me give you a precise example which has happened. Several years ago one of the societies brought in a tariff applicable to the CTV Television Network only, and the Network appealed before Mr. Justice Thorson and the other two members of the Board then said that that tariff could not be approved because the act does not recognize the right of the Performing Rights Society to license a network since they do not broadcast. Mr. Justice Thorson listened to the argument and reserved his decision, and then he decided that he could not determine and did not have the position to determine whether or not it was a good or bad argument, and he said, "I am going to approve the tariff, and if you do not like it or if you think I am wrong, don't pay it, and then they will take you to the Exchequer Court and I will sit and I will tell you whether you are right or wrong." That is what we did.

Senator Flynn: What was the outcome?

Mr. Estey: Unfortunately, Justice Thorson did not sit and we won.

Senator Flynn: You mean you won in what was a conclusion.

Mr. Estey: It went to the Supreme Court of Canada finally, and the Supreme Court said that the Copyright Act did not authorize the performing rights society to licence a network because they did not broadcast.

Senator Flynn: But what you are suggesting now is that if we did not have this bill you probably could go to the Exchequer Court or the Supreme Court if necessary to determine that what we are doing now is simply clarifying the proper interpretation of this section of the Copyright Act.

Mr. Estey: That is correct.

Senator Flynn: Why do you not do that?

Mr. Estey: Well, my clients say that money does not grow on trees and they would rather have it settled this way than take a very expensive and long route through the courts.

Senator Flynn: That does not sound too convincing to me, when one considers all the counsel who have been hired and whom we have heard here.

The Chairman: If you look at the explanatory note to see what the Government thinks it is doing in presenting this bill, it says, "The purpose of this amendment is to combine copyright . . . "

Senator Flynn: I know what you are going to say. We have to take for granted that the right exists since the bill wants to take it out.

The Chairman: The bill says it is for the purpose of taking that right away.

Senator Flynn: I agree with that, but that is why I wanted to question the witness as to why he did not go to the court to have the interpretation confirmed, and I have grave doubts that he was confident that he could succeed.

Mr. Estey: Well, may I answer the question this way, senator? I acted for the CTV network. I was not foolhardy enough to write a letter to them saying, "Don't worry, we will win this hands down! " And I am not foolhardy enough now to say, "You will win this hands down," but I can say this, that in the whole array of copyright decisions around the world, on statutes which are similar, if not identical, to ours, there is no case against me, and I have one squarely for me. There is an Australian case on it squarely for me, a judgment of Mr. Justice Low.

Senator Cook: Is that in the brief?

Mr. Estey: I do not think so. It is *Australasian Performing Rights Society.*

Senator Flynn: I was merely following the argument of Senator Cook.

Mr. Etsey: I must say that Senator Cook, with great respect, was correct, in my opinion, but I may be all wet. Obviously, it makes more sense, Senator Flynn, for this great country to have the thing clarified for all parts of the community at once than to have the several industries mark time while some pioneer litigates this thing out.

Senator Flynn: Indeed, but if you really want to cure the situation entirely you should not do it peacemeal that way, but you should consider the whole spectrum. When I see that you are paying $5½ million to CAPAC and BMI, and you are worried about paying $200,000 to SRL . . .

Mr. Estey: I am not really worried about paying $200,000. I introduced those figures to show—and I have experienced this personally—what happens to a board that is fixing rates, and it is always that way, whether it is a public utility board or anything else.

Senator Flynn: But this has not been established, whether the increase is the result of the increase in your own business volume or

in the tariff. The way the bill was presented to us was simply on the basis of the financial burden that was to result to CBC and CTV from the tariff filed by SRL. That was the basis, plus the additional argument which you put forward that the greater proportion of this money would go outside the country. But this problem is the same with BMI and CAPAC, and it is even worse now that we know what is the decision of the Appeal Board. You say here you do not complain about what you are paying CAPAC and BMI, so there is really a problem there of sending money outside the country. Why are we dealing with only $200,000 when we have a problem of close to $6 million involved?

Mr. Estey: I have four reasons for that. One of them is the intellectual property of the composer and author has been recognized by our community since the days of Edward the Confessor, and we do not challenge that right. The composer, the author has created something without which none of us would be here.

Senator Flynn: The performing rights of the musician.

Mr. Estey: The brains of the musician have brought into being the recording companies and all of us.

Senator Grosart: The brains of the composer and author.

Mr. Estey: Yes, the composer and author. What did I say?

Senator Grosart: "The brains of the musician".

Mr. Estey: No, the composer and author. That is one reason.

The second reason is that we have to look after ourselves in this international, competitive world. I do not think we should try to outrun the United States, and we would be outrunning the United States if we did not clarify our legal position here.

My third reason is that the broadcasting industry is a dam which we have built up laboriously like beavers up here, to hold back a little of that American wave so that we can build our own.

The fourth reason is that I do not think it is in our interests to turn over this large sum of money to companies which have no track record.

Senator Flynn: When you say "large sum," do you mean the new tariff approved by the Appeal Board?

Mr. Estey: The new tariff, and the tariffs which will march behind it like an army, year after year. This is an annual tariff.

Senator Flynn: That is it; that is my point: why do you not complain about what you are bound to pay to CAPAC and BMI? This is a large sum of money. All your arguments are more valid, I would say, as far as CAPAC and BMI are concerned. If the economic argument is valid, it is valid against the two others. That is my point.

Mr. Estey: Senator, may I tell you that the industries which we have represented through the years have spent in executive time, legal fees and studies by economists and statisticians, hundreds of thousands of dollars in the courts and in the Copyright Appeal Board, fighting those two tariffs–not challenging the basis for their compensation, because historically that has been recognized and honoured, but the quantum we have always challenged.

Senator Flynn: It is quite clear with regard to the composer, but when you come to the performing rights of the musician you come very close to the performing rights of the publisher of the record.

Mr. Estey: We oppose the musicians.

Senator Flynn: There is a joint venture there. Maybe there should be only one right for the musician, the performing right, and the record producer. I use "producer" in the sense that you understand. Maybe it should be only one, but if you really want to make an argument out of the exporting of funds from the country, I think you should go further than oppose only this right.

Mr. Estey: Senator, for one month I lived in Ottawa, during the Ilsley Commission hearings, and we opposed everything which you have catalogued now. We very nearly persuaded Chief Justice Ilsley to abolish performing rights, but we fell short. Since that time, on sober reflection, I do not think we should abolish them; but if you do, you threaten the origination of these intellectual works. England has recognized that since then. We have had lots of learning on this subject since then.

However, let me come back to something else which you have triggered off by your questions, and that is this. Apart from the fact I represent these people this morning, there is another funny little fact that bothers me as a citizen of the country. These copyright fees and the collection thereof is the only activity in this country, including the Boy Scouts of Canada, that makes no contribution under the Income Tax Act. They pay no income tax, and there is no withholding tax paid on the licence fees exported from the country.

Senator Flynn: Why?

Mr. Estey: I do not know. I asked Chief Justice Ilsley that and he said, "I do not know. Who passed it? " I said, "You did, sir; you were the Minister of Finance," and there has never been an explanation.

Senator Grosart: May the explanation not be the reciprocal obligation of Canada under the Berne and other international conventions?

Mr. Estey: Under the Tax Act, senator, I do not think so. There is probably an explanation on that, but I do not know what it is. It is in the treaty between Canada and the United States so you could not change it unilaterally.

Senator Grosart: I suggest to you that if you are looking for an explanation you might consider the fact, as I mention, that it is an obligation Canada undertook in order to have exactly the same reciprocal arrangement with the other countries of the Berne Convention. This is just a suggestion.

Mr. Estey: I think not–and this is also just a suggestion–because the United States is not a party to the Berne Convention.

Senator Grosart: I said "the Berne and other international conventions," and we are a party to the Universal Copyright convention.

Mr. Estey: But the treaty with respect to taxation is twenty years older than the UNESCO Treaty.

Senator Grosart: But is not the essence of this exemption from the withholding tax the fact that when this is given to foreign composers and others it becomes available in all other countries?

Mr. Estey: I think that may be right.

Senator Flynn: If the records were produced in Canada, would you take the same attitude, or could you use the same arguments?

Mr. Estey: Yes. This is like the afternoon speaker who goes another hour by saying, "I am glad you asked that question." The records produced in Canada, and may there be hundreds or thousands of them, because it is in our interests, in our broadcast music-using industry in this country, to see the record company here grow. If they were produced in Canada they would be sold in an economic way to our public only if they were performed by these broadcasting stations. I put it to you as a matter of grass root equity, why should the radio stations, who are begged by the recording companies to play these records, turn around and be hit with a licence fee for playing them? There is no demonstration of an economic need for that. The Economic Council of Canada stated that in the last two months.

Senator Flynn: Suppose you had very strict rules as to the Canadian content? You would need more Canadian records.

Mr. Estey: Yes. We do now.

Senator Flynn: You could not do without these records. They need to be played over the radio stations to become popular. That is obvious. But you are selling the music that you are using to your customers too.

Mr. Estey: Yes.

Senator Flynn: If you add more Canadian records, it would be much easier for you to produce programs with more Canadian content, and there would be less money going to the United States or elsewhere. The mainstream of your argument in favour of this bill could not stand if the records were 90 per cent produced in Canada. The fee would be paid to Canadian performers or producers and would remain in Canada.

Mr. Estey: Unhappily that is not so.

Senator Flynn: I know it is not so, but I am suggesting what would be your attitude.

Mr. Estey: Even your hypothesis would not be so, because, firstly, it is a blanket licence fee. If we play one MCA record we have to pay the whole fee. Secondly, you have to do more than just have all these records produced in Canada. You would have to make them popular in Canada, and after that you would have to sell that proposition.

Mr. J. Lyman Potts, President, Standard Broadcast Productions Ltd.: It would certainly help the sale of Canadian records. We cannot get Canadian records in the stores. I produced about 60 records, but you will not find one. You can go into the National Arts Centre and ask for an Anne Murray record and the clerk will tell you that she has never heard of Anne Murray.

Senator Flynn: Would you suggest that we should ban the importation of foreign records in Canada?

Mr. Estey: No.

The Chairman: Do you think we can come back to the central point of the bill?

Senator Connolly (Ottawa West): You seem to be complaining primarily about the fact that broadcasters should not have to pay a licence fee, a royalty fee, because the impact would be very great. It is beginning to be great now, and it will be greater in the future and will add to the cost of broadcasting.

What you say in the second place is that most of this money will go outside of Canada because the records are 95 per cent made outside of Canada and brought in. The master tapes are made outside of Canada and are brought in and records are pressed from them in Canada by foreign-owned companies, presumably. If a fee is payable to them, that money will go outside of Canada.

Suppose, for the sake of argument, that you prohibit the introduction of this foreign material in any way and confine the Canadian radio industry to the use of Canadian-made records. You would then presumably have to pay a fee. Is your argument not materially downgraded, because you will not have the point that the money is going outside of Canada? All you will be left with is the point that you are going to have to pay too much.

The Chairman: No, Senator Connolly. The point would be that this is not something that you can perpetuate in a performing right. But, by statute, in a country you can create any kind of a right within the power of Parliament. In discussing it on a philosphical basis, the question is, is the concept of a performing right on a record the kind of concept that you would normally think should exist?

Senator Flynn: Agreed, but the bill was not presented in that aspect.

Mr. Estey: I have three comments to make. My first is on the philosophic point made by the chairman. The second is, even in Senator Flynn's theoretical situation we have to remember that the Davey Report said 75 per cent of the country is within the umbrella of American television broadcasting and 100 per cent in radio. If we ban the importation of US records and confine the industry to Canadian records, we would just deliver our audiences to US stations, with disastrous results.

As far back as 1923 the Department of Canals and Railways was predicting that our country would fall apart because American radio station signals were coming into the country. I think that would just revive the situation 1,000 times.

I would like to make sure that I leave the impression on this subject that I am most anxious to leave, which is that exporting the money from Canada is an argument. It is of vital consideration from the point of view of our national well-being, but it is not the crowning argument. It is one of those things that we have to take into account when we are talking about any industry in Canada, the growing of wheat or anything else, how you are going to survive with that industry. The crowning argument is the one Senator Cook has made. The act seems to say that there is no such right and let us clarify it. The second point is, why do we race ahead of the United States? Australia does not and they are not even up against the problem of American signals. Australia says, "We will not give a right to a record which it does not enjoy at home." Immediately, all American records are without fee in Australia. My third point is, that when we are looking around the world we should not waste much time on saying what they do in Bulgaria or some other country. We should look at people who are like ourselves. We are, with the United States and to some extent with Australia, the only countries with this great commercial booming radio voice that seems so much a part of our community, and in those areas this record right is not known.

There was even an illustration in the British House of Commons in just the last few weeks where this very thing came up in debate. A

member of Parliament, who was very knowledgeable on broadcasting, pointed out that with the suppression of the United Kingdom pirate radio stations, they killed off the origination of British popular music, both in England and abroad. They lost their position in the United States. It is an odd thing that commercial broadcasting seems so closely tied to what we call community or native culture.

If we saddle our broadcasters with something that our great competitors—and that is what they are in the United States—do not do, then I put it to this legislative body that we are threatening one of our institutions which we think is vital—which the nation thinks is vital. I really introduced that taxation matter as a sort of national lunacy that we have that hole in our tax act.

Senator Flynn: I would feel much happier if we had a bill which would really try to achieve what you are suggesting, namely, clarifying the copyright of the composer, the performing rights of the musicians and, possibly, the performing rights of the producers. But this is not what this act is doing. It is simply plugging what you have considered to be a sort of loophole, through which you would have to pay a little more now. The minister says that because this would mean that CBC would pay $840,000 a year more and because it would mean that CTV would pay about $4 million a year more, therefore we are just doing this now instead of having them come to us to present arguments on the basis of the principle involved.

That is why it is so difficult. But really, you are not doing anything more than plugging this loophole.

Mr. Estey: We are putting a patch on the tyre, so to speak. I agree.

Senator Flynn: It is entirely unsatisfactory from our standpoint to have to deal with a bill like this, because it is only because of the application of SRL that the minister has introduced it. He withdrew the bill in the first place and then he brought it back again because SRL presented a new application to the Copyright Appeal Board.

Merely on the figures that I have just mentioned, the minister says to Parliament, "Pass this bill. We will deal with the rest later on." And I say, "Why not? "

Mr. Estey: May I direct myself to that, Senator Flynn? I cannot disagree with the words you have said, but I would like to convey to you in the short time that we have been involved in copyright, which is not very long when you consider copyright itself, we, in Canada, have had two royal commissions devote a great deal of energy to trying to get a new act; the Under Secretary of State drafted a new act in 1948; we had a new act drafted after the 1957 commission; and we had the honourable Judy LaMarsh draft an act. Moreover, we have seen that in the United States they have had an act in the legislative mill for at least seven years that I am aware of. I have that act here and it has so many revisions that you cannot read it.

To change the Copyright Act is a monumental task, involving changing treaties and re-negotiating with 57 communities in the Berne Convention, looking at the UNESCO obligations and looking at the bilateral deals we have with the United States and elsewhere. It is a very difficult thing to do and in the immediate foreground is the problem of the possible crescendo of tariffs for the recording companies, and that is why we take this position. Certainly, you are quite right in saying that we are merely patching the tire instead of renewing it. Nevertheless, in circumstances such as this, when the boat is sinking, you swim to shore. You do not stand there and say, "Let us repair the boat." And that is what we are doing now, we are swimming to shore. It is too big a task to ask this house to rewrite the Copyright Act on this occasion.

Senator Flynn: On this occasion, I agree. We have nothing before us. But what you are suggesting comes to this: the efforts that have been made by royal commissions, successive governments and departments being followed by this bill amount to, to translate a French expression, a mountain of labour producing a molehill. If you are satisfied with that, then you have very limited objectives.

Mr. Estey: In this life we are lucky to obtain limited objectives, and that is what we have here.

Senator Grosart: Mr. Chairman, you have spoken of the "philosophy"of this and Senator Flynn spoke of the "principle" involved here. Just speaking to what Senator Flynn had to say, it seems to me that the normal way to deal with an emergency situation is to bring in legislation.

The Chairman: Senator Grosart, you used one word there which I do not think you will find unanimous support for—the word "emergency". That point has not been made yet.

Senator Grosart: The minister makes that point.

The Chairman: The minister has not been here yet.

Senator Grosart: The very fact that he has brought in a bill such as this indicates that, in his view at least, this is an emergency situation which must be dealt with in an extraordinary way.

The Chairman: He does not say that in the explanatory note, senator, and if it were an emergency situation I think he would say so right there.

Senator Grosart: Not necessarily, Mr. Chairman, and in any event the explanatory note is the draftsman's, not the minister's.

The Chairman: You cannot dismiss it that quickly, senator. The minister is responsible for all of this bill.

Senator Grosart: I am sure he is, Mr. Chairman, but, as a matter of fact, it is the draftsman's note and it would be so regarded in law, as I understand it. However, I will not argue that.

Mr. Estey, from the point of view of the composer and author only—the original owner is not one of the considerations here that the Copyright Act—the statute here and elsewhere in the world—has taken away his common law right in that property? I suggest that this is a very important aspect, because the Copyright Act is not something that grants composers, authors and others any great privilege. The Copyright Act limits their basic common law rights. If the composer and author, that is, the original owner, were in a position to exercise that right, he could immediately withdraw the performing right from the record manufacturer.

Now, the Copyright Act limits him in many ways. It takes him out of the ordinary, normal market right of price negotiation that anybody has for a product. The Copyright Act says that he cannot negotiate his fee. The Copyright Appeal Board says: "You may negotiate it, but you must come to us for approval". We will tell you what you can charge for your property." That is one limitation.

In the record field there is also the limitation of the compulsory licence. The composer-author does not even have the right to say

that he will limit his license to record manufacturer "A" to make the record. Once he does that a section of the act provides that he will be required by law to let anybody else make a record. So these are limitations, I suggest to you, of a basic common law right.

Therefore, I say that to the extent that this bill is dealing with a limitation, a possible limitation or a possible extension in the act, it is quite a proper way to do it, because the composer's right is entirely a statutory right, and the way to deal with it is by statute.

The Chairman: Nobody has argued that the subject matter cannot be dealt with by legislation.

Senator Flynn: Certainly not.

Senator Grosart: My friend Senator Flynn seemed to suggest that.

Senator Flynn: Not at all. I said that this is piecemeal legislation because Mr. Estey has explained that the problem is much wider than what is being attempted by this bill. This bill deals only with a very small problem and does not deal with the main problem.

Senator Grosart: If we turned down every bill that came before us on the basis that it was piecemeal legislation, we would not let many of them through this committee.

Mr. Estey: Senator Grosart, you raised one point which I did not but should have touched on. That is that the recording industry in Canada is not only based on 95 per cent importation of tapes and records, but it is 100 per cent, so far as that group is concerned, based on the invocation of the compulsory licence. Not only does the composer lose his right to say, "I don't want that record made", but he loses the right to prevent somebody recording his works in a way that he does not like. Let us take Gershwin music for example and having it played rock and roll. He cannot stop that. This is a very serious invasion.

This section is part of that creative or limitative, whichever way you wish to look at it, provision of the statute, so that it is not really piecemeal to clarify that bedrock piece of the statute because it is fundamental, and I do not wish to leave the impression that we do not regard this as an emergency. In the annals of broadcasting history through which many of you have lived, as have we, this is as earth-shaking as anything we have ever encountered. It is that vital.

The Chairman: You mean even at $200,000?

Mr. Estey: Even at $200,000.

Senator Connolly (Ottawa West): You feel that the figure is alarming because you think it is inevitable?

Mr. Estey: Yes.

Senator Connolly (Ottawa West): I find some difficulty in understanding why the Copyright Appeal Board should be setting tariffs for what I take to be the reproduction of contrivances and the use of contrivances to be produced when we are only legislating that now. There is some confusion in my mind, and that is why I ask the question.

Mr. Estey: We argued that, senator, and this is further confused by the strange coincidence that the day the Copyright Appeal Board's decision came down was the first day of the existence of the Federal Court to which we have an appeal to raise this very question. It seems odd in our community that we would have in the legislative process to raise this issue and we should have a quasi-judicial body which does not have to report to the litigants—and have it reach a decision—but that is an anomaly which I suppose comes from the 1930s when section 48 was passed. In our respectful view, and we urged this on Mr. Justice Thurlow, they really should have sat back and waited and said, "Until the air clears, we don't believe we should fix a tariff." That is what SRL did with respect to CATV.

Senator Connolly (Ottawa West): Do you think the Copyright Appeal Board would have had something more to go on if this bill had been passed?

The Chairman: They would have had nothing.

Senator Connolly (Ottawa West): Nothing to go on?

The Chairman: That is right.

Senator Grosart: Nothing except law.

Mr. Estey: They would not have had any right to that.

Senator Cook: There would have been no application?

The Chairman: They would have had no authority to conduct a hearing.

Senator Connolly (Ottawa West): So if this passes, will the tariff they have set out have no foundation?

Mr. Estey: No foundation.

Senator Flynn: You probably heard that the Canadian Labour Congress came to us and they were worried about this because if this bill passes, it will eradicate any right for the record producers.

The Chairman: Where section 2 of the bill said that this is retroactive to January 1.

Senator Flynn: But the Canadian Labour Congress was worried because they considered that the performing rights of the artist are, to some extent, linked to the rights of the record producers—and again I say "producers"— and that is why I say to Senator Grosart that this bill is dealing with only one aspect of the whole problem. That is why it is not satisfactory, as far as I am concerned. We are not exploring the whole spectrum of the situation.

Senator Grosart: Since my name has been mentioned, could I suggest that probably the reason it does not deal with what Senator Flynn calls performers' rights—that is, the right of the creative people, the musicians, the singers and so on—is that those rights do not exist.

Senator Flynn: That is right, but they are recognized in fact.

The Chairman: You mean they do not exist as a matter of law.

Senator Grosart: That is the only way they can exist.

The Chairman: Oh, I do not think so.

Senator Flynn: There are contractual rights.

The Chairman: And there is custom.

Mr. Estey: I have thought a lot about that. There is an anomaly in the Canadian Labour Congress appearance here, and I think it comes more from fear or a hunch than it does from logic. In Europe the trade unions and the recording companies have sort of formed an interlocked alliance very critically commented upon by the

Gregory Report in Britain, and it is probably that which has led you to believe the words "somehow linked" in connection with those rights. Whereas in political and legal fact, the Labour Congress would be much stronger to pull away from the recording companies and come in on their own feet and say, "We should have a performer's right because there is an intellectual input in performance and there is no intellectual input in making a piano or making a record."

Senator Flynn: You mean by amending the act to provide for this right?

Senator Connolly (Ottawa West): They were here some weeks back and they voiced this view on behalf of the artists, the singers, the actors and the people who perform on musical instruments.

Mr. Potts: Senator Connolly, if they got that, 75 per cent of the money so collected would go out of the country to The Beatles and Frank Sinatra, and it would have to be distributed in much the same way. They would possibly only get 25 per cent.

Senator Connolly (Ottawa West): I was just telling Mr. Estey that the point has been raised.

Mr. Estey: I have read their brief and I say it is somewhat anomalous to me that they would allow themselves to be linked in their rights and equities to a recording right because they are as unlike as day and night.

Senator Flynn: But they feel that the record manufacturer constitutes a protective wall because they are located in between the composer and the record producer and if the wall falls on one side, they may be carried away.

Mr. Estey: That may be right too, but it does not strike me as being logical.

The Chairman: Do you have anything further to add, Mr. Estey?

Mr. Estey: No, Mr. Chairman, I have nothing further to say, but to thank your committee for the opportunity to come down and make our presentation.

The Chairman: Honourable senators, we now have Mr. Yves Labonté, Président of Radio-Québec, and perhaps we should hear him at this time.

MR. YVES LABONTÉ, PRESIDENT AND GENERAL DIRECTOR OF THE RADIO-TELEVISION BROADCASTING BOARD OF QUEBEC:

Mr. Chairman, honourable senators, gentlemen, I would like to introduce to you Mr. Bernard Benoit, who is with me today, and who is the legal adviser to the Radio and Television Broadcasting Board of Quebec, of which I am President. You were kind enough to postpone for several days my appearance before your committee, and I would like to thank you for this kind gesture. Besides, you will find this postponement to your benefit, also, as it has allowed me time to better structure my thought and to condense it so much the better for oral presentation!

The Radio-Television Broadcasting Board of Quebec is particularly well placed to clearly consider the questions raised by Bill S-9, since it is both a production company as well as a broadcasting center, indirectly for the time being, but no doubt directly someday, and since it feels the effects of some of the difficulties presented by the different attitudes shown towards this project.

I dare hope, it would not be showing disrespect to our institutions to say, as so many others, that the Law on Royalties is out-of-date. There has been a complete evolution since 1911 in the method of intellectual creation, along with the equivalent right of ownership of works produced, that only a complete rewritting of the legislation concerning it can prevent the multiplicity of legal amendments similar to the project we are discussing today.

A better distinction could, therefore, be made between three aspects that are at this time covered by the same law, -- I'm on page 2, -- and I continue. A better distinction could be made between three aspects that are at this time covered by the same law, these are:

First, the creation: its continual protection is essential for sustaining intellectual life.

Secondly, the adaptation: in several countries including Great Britain, this is the subject of distinct and specific legislation.

Thirdly, the ownership of the material object often produced by combining the creation and the adaptation: this ownership usually belongs to the producer who put the work together.

Bill S-9, like its forerunner, Bill S-20, is meant to answer a specific problem,

the entry into the field of Sound Recording Licenses, on the parts of CAPAC and of MBI, in the request for copyrights to the Commission of Appeal for Royalties. At least, this is the interpretation given to it by the honourable senator, Earl W. Urquhart, who proposed the second reading.

I dare say that the business of Sound Recording Licenses provides a suitable juncture, but it is not the reason for the proposed bill. In this respect it could act as a catalyst bringing a revision of the Law of Royalties, giving the impetus for distinguishing the three aspects mentioned previously, - the creation, the adaptation and the ownership, - in the two situations in which they are met: the material reproduction and the public performance.

Only by taking things in their context and by considering the present project as part of a larger revision than that concerning Royalties, is it possible to take a stand on the recommendations of Bill S-9.

Let us consider first, the material reproduction. It is reasonable to expect the originator of an intellectual work to have some sort of right, called precisely, royalties, when this work is made public and reproduced many times, - books, records, cassettes, films. In the English fashion, it is the copyright on his work.

He can if he wishes, "sell" this right to the editor or to the producer, who publishes or broadcasts his work. However, this purchase, giving money to the author which is his due, does not, therefore make of the editor the originator.

Let's pass now to the public performance. The author, who has already obtained copyrights for the material reproduction of his work, can also claim royalties for its public performance.

But other people contribute also to the originality of the public performance, notably interpreters but also from its very nature, the stage director and the other creative craftsmen, can in their turn claim rights if the performance they produce is used later, either before a given audience, -- cinema, juke-box, -- or for a wide-spread audience, by radio and television.

One or another of the contributors has to give the management or even the ownership of his rights to the producer in some way, for he manages the business of providing the authors and interpreters with the tools necessary for a public performance; this does not give the producer the right to claim royalties, since:

first, his own talent as originator is not involved here;

secondly, his contribution to culture is not intellectual;

thirdly, his personal living is not provided for by the creation or the adaptation of intellectual works.

No doubt, the producer can administer the royalties for his authors and interpreters. He can even "buy" universal rights from all the contributors. But that does not give him an intellectual right over the works he produces. Therefore, it does not come directly under the Law of Royalties.

Please don't think I am scornful of the part played by the producer in the distribution of culture. But if you'll allow a classical comparison, I would identify him with the industrious ant before the innocent grasshopper who is the artist, the intellectual, the author.

A class of men are protected by royalties who, by the very nature of their work, are inclined often to a rash detachment from material goods, totally involved as they are with intellectual creativity. As to the ants, they have long since learnt how to manage their affairs.

Does this mean that producers do not risk being exploited themselves? Certainly not. I am mindful of the well-founded comments of Mr. Stephen Stewart, at the International Conference of the Music Industry:

> If the radio ceased to broadcast records, tomorrow, record companies would still sell them in large quantities. Some claim that their sales would increase, others that they would diminish: but if records were withdrawn from transmission, there would be no question of increase or reduction of volume of radio broadcasting, for they would be obliged purely and simply to close down, since their programmes consist of records for 80 per cent of the time.

Producers, therefore, have to be protected. But that does not seem to me to be under the jurisdiction of Royalties, but rather covered by the civil code, -- right of ownership, -- since they create not an intellectual work but a material product, all of which is within provincial jurisdiction.

It appears to me that Sound Recording Licences could be a valuable instrument in the hands of producers. It's certainly necessary to considerably redraft contracts for sales and for the distribution of records and cassettes, and, probably, to prepare special impressions for public usage. However, it is premature to work out the details for accomplishing this: it is enough for the moment to emphasize that all this is outside of the scope of royalties.

Consequently, it remains for me only to signify my agreement with Bill S-9 in as much as it attempts an in-depth revision of the Law of Royalties, and in as much as it tries to distinguish royalty to the author from the material ownership.

These last two paragraphs that I have just read sum up in the main our idea. We, at Radio-Quebec, think that the right under discussion here, is not in the last analysis, a right to be protected by the Law of Royalties, precisely because it is not a question of royalties. Secondly, I agree with what the honourable Senator Flynn said before, that what we need, is evidently, a complete and total redrafting of The Law of Royalties.

SENATOR FLYNN: Mr. Chairman, may I ask the witness to clarify what he means on page 6 when he

says: "Producers, therefore, have to be protected". Producers have to be protected but, let's say, by means of the civil code, of a provincial law, since they create not an intellectual work but a material product. Would you say the same thing in respect to patents and trade marks, because, in fact, there is a question there, -- a material product is produced with a patent? Surely there is a kind of royalty for a patent.

MR. LABONTÉ: I believe the main reason for the rights of royalty and even trademarks being under federal jurisdiction, is evidently, that under the C onstitution there are consequences outside of the country and international

agreements are involved here. In fact the patent that is granted and that could, if you wish, be compared to and considered as a royalty is for a plan, and not for the machine itself, not for the instrument. We are speaking here of records, this is a material object, and it's that that we want to protect.

SENATOR FLYNN: By reproduction, you are not referring to the actual manufacturing of the records, but rather to their being played in public; it is what the record represents that is to be protected. Yet, you seem to say that the interpreter has himself, a right to royalty. Is this the gist of your idea?

MR. LABONTÉ: I believe the interpreter brings a certain creativity to the work.

SENATOR FLYNN: As you define it, this is not really a royalty?

MR. LABONTÉ: There is a right to royalty because first and foremost it's a work of the intellect.

SENATOR FLYNN: Excuse me if I draw from your memorandum the conclusion that it seems to me to imply. Not only should every right not belonging to the author, the very originator, be removed from the Law of Royalties, but even all the rights of those who spread his work such as interpreters. I know that there is no law as such covering this at the moment, however, the rights of the so called author and of the producer are nevertheless upheld in practice. This is where I see a conclusion in your memorandum. While wishing to defend the interpreters you exclude them from the law and by so doing you remove them from the implicit protection that the law gives to them and

to the producers of records

MR. LABONTÉ: What I propose, in fact, what I would like to contribute here, is to make you aware, -- I am going to point out, if you'll allow, the gaps in the present law, and to try to make you grasp the necessity for a complete rewritting of the law which will take account of the three aspects of this right.

Concerning the second, that of the interpreter, perhaps in practice it is protected by that of the record producer. It's a hyperthetical case, but there are really two rights completely different.

SENATOR FLYNN: This is why I had some doubts when you said: I signify my agreement with Bill S-9 in as much as it attempts an in-depth revision of the Law of Royalties.

Do you really believe that it is the aim of Bill S-9, as it is drawn up, as it has been explained by its sponsor, Senator Urquhart, for example, whose address you have read out? Do you really believe that this is intended, or is it simple and purely to obstruct the request for Sound Recording Licences, which, as you said at the beginning, provides in truth simply a suitable juncture, and not the reason for the Bill?

MR. LABONTÉ: Perhaps it sounds a little "holy", senator, but I would like to bring the attention of the law maker to the fact that the whole question has to be considered and decided immediately,-- always supposing that there is some urgency to correct the law. I say that you should not limite yourselves to just one aspect, and then wait another 50 years, because one should have full knowledge before tampering with the law, it should not stop at that

for 50 years before the law is completely rewritten which really needs to be done now.

SENATOR FLYNN: Would you be really disappointed if Bill S-9 proved to be only the prelude which eventually was to absolutely limit the rights of interpreters?

MR. LABONTÉ: I would be really disappointed.

SENATOR CONNOLY: (Ottawa-West): What is Radio-Quebec?

MR. LABONTÉ: Radio-Quebec is a, -- I think a more direct answer would be to say that it's the ETVO of Quebec, "Educational TV of Ontario". It's an organization in the province of Quebec whose job is also to produce educational documentaries.

SENATOR CONNOLLY (Ottawa-West): and the owner is the ---?

MR. LABONTÉ: It's a Crown agency, if you want.

SENATOR CONNOLLY (Ottawa-West): It's the Crown?

MR. LABONTÉ: The funds are supplied by the government of Quebec, if you must.

[*English*]

The Chairman: Are there any other questions? Thank you very much, Mr. Labonté. We have gone through the subject pretty thoroughly so far, and we will pay attention to what you have said.

Honourable senators, we have the following position to consider. SRL is here with a delegation, and we also have representatives of the Canadian Recording Manufacturers' Association. I expect that it will take some time to hear those gentlemen. If it is satisfactory to you, Mr. Fortier, I would suggest that we adjourn until 4 o'clock. The Senate is sitting at 2 o'clock. I have explored the possibility of obtaining permission for the Committee to sit while the Senate is sitting, but we find that it is not practicable. If the Senate has not completed its business by 4 o'clock we will be able to sit, starting at that time. My suggestion is that we adjourn and continue our hearing at 4 o'clock.

Mr. Yves Fortier, Counsel, Sound Recording Licences (SRL) Limited; Canadian Recording Manufacturers' Association: We are here at the convenience of the committee, Mr. Chairman.

The Chairman: Is that satisfactory? Does the committee agree with that?

Senator Flynn: I would agree, Mr. Chairman, but I am rather inclined to suggest that SRL might get a better hearing if they were to come back next Wenesday at 9.30.

The Chairman: It seems unfortunate since they are here now and were here last week.

Senator Flynn: It is only a short trip from Montreal.

Mr. Fortier: We are at the convenience of the committee, Mr. Chairman. Moreover, I am sure that, be it four o'clock this afternoon or 9.30 next Wednesday morning, we will at all times get a good hearing. But, if by "good hearing" Senator Flynn means a larger representation of senators of the committee being in attendance, then I would certainly rather have a full house than an empty one.

The Chairman: If you wish to go ahead this afternoon we will certainly have a quorum.

Senator Flynn: We do not know exactly what is going to happen in the house this afternoon. We have quite a heavy agenda today.

Senator Carter: The Finance Committee is also sitting at four o'clock.

Mr. Fortier: We leave it entirely to the committee, but I have noted Senator Flynn's comment.

The Chairman: The one advantage of starting on Wednesday morning next is that there would be no one ahead of you. So far as the attendance of the minister is concerned, he is out of the country and is not available.

Senator Flynn: Is that an advantage?

The Chairman: It might be. We have indicated June 23 to the minister, and he has accepted that date.

Mr. Fortier: I might say, Mr. Chairman, that we certainly do not think we have wasted our mornings, either last week or this week. Far from it: we have benefitted greatly from hearing the presentations.

The Chairman: If I might smile a little while I say this, I except, too, that you have learned the course and direction of the questioning and the thinking on different points and maybe we will not get too far afield.

Mr. Fortier: Since we represent the one party which this legislation aims at, another week's delay, in view of Mr. Estey's very eloquent presentation this morning, may give us a chance to further synthesize our presentation.

The Chairman: You mean that we might come out from underneath the influence of his eloquence this morning.

Mr. Fortier: In so far as Mr. Estey is concerned, I find that time has cured everything.

The Chairman: If it is satisfactory to your group, then, we will meet next Wednesday morning at 9.30.

Mr. Fortier: Thank you, Mr. Chairman.

The Chairman: There will be no interferences with your right to proceed.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable JOHN J. CONNOLLY, *Acting Chairman*

No. 29

THURSDAY, JUNE 10, 1971

Complete Proceedings on the Following Bills:

C-242, "An Act to amend the Senate and House of Commons Act, the Members of Parliament Retiring Allowances Act, and An Act to make provision for the retirement of members of the Senate".

C-207, "An Act respecting the organization of the Government of Canada and matters related or incidental thereto".

REPORTS OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28)

Ex officio members: Flynn and Martin

(Quorum 7)

Orders of Reference

Extracts from the Minutes of the Proceedings of the Senate, Wednesday, June 9th, 1971:

Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Martin, P.C., seconded by the Honourable Senator McDonald, for the second reading of the Bill C-242, intituled: "An Act to amend the Senate and House of Commons Act, the Members of Parliament Retiring Allowances Act, and An Act to make provision for retirement of members of the Senate".

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

The Bill was then read the second time.

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

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

Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Connolly, P.C., seconded by the Honourable Senator Lefrançois, for the second reading of the Bill C-207, intituled: "An Act respecting the organization of the Government of Canada and matters related or incidental thereto".

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

23974—1½

Minutes of Proceedings

Thursday, June 10, 1971.

(32)

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

Present: The Honourable Senators Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Flynn, Hays, Isnor, Macnaughton, Martin, Sullivan, Walker and White—(13).

The following Senators, not Members of the Committee, were also present: The Honourable Senators Forsey, McDonald, Michaud and Smith—(4).

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

On motion of the Honourable Senator Walker, the Honourable Senator Connolly (*Ottawa West*) was elected Acting Chairman.

The Committee proceeded to the consideration of Bill C-242 intituled:

"An Act to amend the Senate and House of Commons Act, the Members of Parliament Retiring Allowances Act, and An Act to make provision for the retirement of members of the Senate".

The following witnesses were heard in explanation of the Bill:

The Honourable Allan J. MacEachen,
President of the Privy Council;

Mr. H.D. Clark, Director,
Pensions and Insurance Division,
Treasury Board.

The Committee then proceeded to the consideration of Bill C-207, intituled:

"An Act respecting the organization of the Government of Canada and matters related or incidental thereto".

The following witnesses were heard in explanation of the Bill:

The Honourable C. M. Drury,
President, Treasury Board;

Mr. H. D. Clark, Director,
Pensions and Insurance Division,
Treasury Board.

Miss E. I. MacDonald of the Legislation Section of the Department of Justice was also present but was not heard.

The Honourable Senator Flynn moved that the said Bill be amended as follows:

Page 6, Clause 18: Strike out Subsection (1) and substitute therefor the following:

"18. (1) An Order in Council authorizing the issuance of a proclamation under section 14 or 16 shall not be made until the proposed text of the Order in Council has been laid before the Senate and the House of Commons by a member of the Queen's Privy Council for Canada and the making of the Order in Council has been approved by a resolution of both Houses."

The question being put, the Committee divided as follows:

Yeas—3 Nays—4

The Motion was declared *lost.*

It was Resolved to report the said Bill without amendment.

At 12:40 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

Reports of the Committee

Thursday, June 10, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-242, intituled: "An Act to amend the Senate and House of Commons Act, the Members of Parliament Retiring Allowances Act, and An Act to make provision for the retirement of members of the Senate", has in obedience to the order of reference of June 9, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

John J. Connolly,

Acting Chairman.

Thursday, June 10, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-207, intituled: "An Act respecting the organization of the Government of Canada and matters related or incidental thereto", has in obedience to the order of reference of June 9, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

John J. Connolly,

Acting Chairman.

Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, June 10, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-242, to amend the Senate and House of Commons Act, the Members of Parliament Retiring Allowances Act, and An Act to make provision for the retirement of members of the Senate, met this day at 10 a.m. to give consideration to the bill.

Hon. John J. Connolly (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, to help us in our consideration of Bill C-242, we have with us the Honourable Allan J. MacEachen, President of the Privy Council and the House Leader on the other side; and Mr. H. D. Clark, Director, Pensions and Insurance Division, Treasury Board.

Is it your wish that we have Mr. MacEachen speak to the bill first?

Hon. Senators: Agreed.

The Acting Chairman: Mr. Minister, it is customary when we have the privilege of having a member of the ministry with us, to ask him to make a general statement. Perhaps you would like to do that.

Hon. Allan J. MacEachen, President of the Privy Council: Thank you very much, Mr. Chairman.

This is a bill that was certainly well understood by members of the House of Commons when it was before that place. Probably it is also well understood by members of the Senate, so it may not be necessary for me to go into much detail.

We had opened the question of pay and allowances for Members of Parliament through the appointment of the Beaupré Committee some time ago. As you know, that committee made a valuable contribution to our understanding of the problems facing Members of Parliament. This included specific recommendations as to what ought to be done to improve the position of members of Parliament. We generally agreed with the analysis of the committee as to the role of the members of Parliament, their changing responsibilities, and increasing functions; but we did not implement all the recommendations of the committee, and differed from those recommendations in a number of critical respects.

The Acting Chairman: Particularly on the question of parity as between the houses.

Hon. Mr. MacEachen: Yes. As you know, the Beaupré Committee recommended that the members of the Senate be treated differently from members of the other place; that the parity which had existed up to the present be altered, and that the members of the Senate be compensated—if that is the right word—at a lower rate than members of the other place. That is one recommendation that we did not accept. We recommended to the other place, and recommend in this bill, that the members of the Senate and the members of the other place be, so far as their pay or compensation is concerned, treated in exactly the same way as they have been in the past. That is one important departure from the recommendations of the Beaupré Committee.

Another departure is that we are proposing that the so-called expense account of members of Parliament be treated in the future in exactly the same way as it has been in the past. As you know, the Beaupré Committee recommended that the so-called non-accountable tax-free expense account of members of Parliament be abolished altogether, and that in its place a new system be developed by which members of Parliament would submit vouchers for certain specified expenses in certain categories, in most cases up to a definite maximum. This was a quite difficult problem for us, and ultimately we decided to retain the present system, and to propose an increase in the total amount of the present expense allowance. We did that because we thought the present system was more in keeping with the status of a member of Parliament than putting him on an itemized expense account system.

The Acting Chairman: I understand you had a good many discussions with members of the various parties on this very problem, and that this was generally the conclusion believed to be the appropriate one by a wide consensus of members. Is that so?

Hon. Mr. MacEachen: Yes.

The Acting Chairman: I should think it is primarily more a problem for members of the other place than it is for members of the Senate, although it does affect senators. Certainly, very heavy expenses are incurred by senators in coming to Ottawa as much as they do and living here, but perhaps the problem is greatly accentuated for the member of Parliament. Do you find that to be the fact?

Hon. Mr. MacEachen: Yes, I think it is a greater problem for members of Parliament. We did have consultations with all parties in the other place as we were developing the proposals. I do not claim that we, in any sense, got unanimous support for the proposals we made, as I think the votes in the other place indicate. We did have consultations, and I think there was relatively wide support for the concept of the present non-accountable tax-free system.

We had to balance the status of the member of Parliament against the argument, which has a certain amount of force, that members of Parliament should for tax purposes be treated in exactly the same way as other citizens. It is clear that members of Parliament are not treated as other citizens in some other important respects, because of their special responsibilities. It has certainly been a tradi-

tion to attempt to support the independence of members of Parliament, and for that reason they have certain immunities as members of Parliament that no other person has. That is not because of a desire to create privileges for individual members; it is because of a desire to maintain the independence of members so that they can speak in the other place and act there, and elsewhere, without fear or favour. That has been well embedded.

Whether you agree with our reasoning or not, that is why we maintained that system, because we thought it was rather invidious to have members of Parliament totally submissive for the reimbursement of expenses to the examination of their accounts by bureaucrats, which I believe is the term.

The Acting Chairman: That is the word.

Senator Smith: I do not want to interrupt unduly, but is it not also the same system that we have had and are now proposing to continue?

Hon. Mr. MacEachen: Right.

Senator Smith: And is it not in existence in every one of the other provincial jurisdictions?

Hon. Mr. MacEachen: Yes.

Senator Smith: Is there any exception to that? I do not know of any.

Hon. Mr. MacEachen: I do not know of any exception. I think what is important, too, is that it has worked rather well, and it has been endorsed by, I think, three preceding Parliaments. Anyway, that is an important way in which we differed from the Beaupré Committee, and it was the most difficult problem we had in our consultations within our own group, with other parties, and within the Government. Finally, we decided on the basis of principle that we would go in this direction, and probably it is the best system for Parliament itself.

The Acting Chairman: In the Income Tax Act there is an exemption for these allowances paid to members of provincial legislatures. I suppose there would be a certain amount of invidiousness about not having it for federal members of both houses, but having it in the Income Tax Act available to members of the provincial legislatures.

Senator Flynn: You also find that at the municipal level.

The Acting Chairman: At the municipal level too.

Senator Macnaughton: There is a long historical precedent for that. All you have to do is go through your parliamentary history and you can see that the reasons given by the minister are up to date.

The Acting Chairman: I can remember the former Senator Power talking so well about this matter, and not when a bill was before the house either. His view, which he inherited from parliamentarians who were much senior to him, was that the parliamentary indemnity was not income. We have changed our direction in thinking about this. Perhaps the reason is that we have not thought about preserving the independence of the members, as the minister points out, to the same extent that they used to in days long gone by. We have to move. It is income and is treated as such now, but there was a case, and a very strong one, made at that time.

Hon. Mr. MacEachen: I think that is a major point of difference. I do not know if you wish to spend any time on this, but I think it is worth pointing out that the Beaupré Committee, although it was asked, did not come up with a method of determining the changes in pay and allowances in future. They said, "Well, we have not been able to grapple with this at the moment. We suggest that there be another committee or commission appointed in the future to deal with this."

I tried valiantly to come up with an agreed solution, so that I could put an amendment on this question in the House of Commons. I failed because I could not get any wide consensus as to the appropriate method of future escalation in the pay, especially, and allowances of members of Parliament. So that is an unsolved problem, regrettably, for all of us, or for those of us who will be grappling with the problem in the future.

Mr. Chairman, the amount of the change in the salary or pay portion . . .

The Acting Chairman: The indemnity.

Hon. Mr. MacEachen: Yes, the indemnity. For simplicity, I refer to this bill as the "pay bill," but that is because of my working-class background.

The amount of the increase is less than was recommended by Beaupré, in comparison with movements in average weekly wages and salaries. It is well justified in comparison with movements in other professional groups, so I do not believe that a solid case can be made out that this is in any way excessive. It is a reasonable and justifiable increase at the present time. That is our view.

In fact, it is considerably less than the total recommendation of Beaupré.

In so far as the expense account portion is concerned, we have increased that from $6,000 to $8,000, and we have maintained the relative position of members of the House of Commons and senators. Why did we end up with $8,000 instead of $9,000 or $10,000 or $7,500? We did attempt to take a look at the increase of expenses that the Beaupré committee said ought to be reimbursable, in their scheme, by vouchers. We took these categories, put a figure opposite each of them and reached rough totals. So, taking the rough total, if a member were going to look at Beaupré and say, "Well, is my $8,000 sufficient to do for me what Beaupré recommended for us?" then I think that he could say, "Yes." If he wants to operate under the Beaupré method or proposal, then he is getting about as much under the $8,000 proposal as he would if we adopted the categories and the method proposed by Beaupré.

We think that this is more in accordance with the independence of a member, because he can take his $8,000, in the case of a member of the House of Commons, and deploy it in the way that he thinks will best and most effectively serve his constituency. That is his responsibility: to determine the way in which he will use that money to carry out his duties as a member of Parliament.

He is not accountable, in the strict sense that he must submit vouchers to anybody, but he is accountable certainly in a wider sense, to his fellow members, to the press, to public opinion and ultimately to his constituents. That accountability seems to me to be very valid in the circumstances.

We have also proposed an amendment to a section of the bill that will widen the authority of the houses of Parlia-

ment to determine transportation expenses and telecommunication expenses for reimbursement. At present, the limitations are such that a member of Parliament, for example, could be reimbursed for taking a cab from his local airport to his home in his constituency, or vice versa, but not from Ottawa airport to his office here, or vice versa. One is possible and the other is not possible. It is because of the wording. We will be able, if it is desired, under this new wording, by both houses, to provide more adequately for the transportation of parliamentarians within their constituency, from their constituency to Ottawa, within any part of Canada; and the same will apply to telecommunication expenses.

You know that members of Parliament at the moment are allowed a free return air trip a week to their riding. Only the member himself is eligible, and he cannot go to any other part of the country. Beaupré suggested that these 52 units of travel be available in the future, but that a certain portion could be available, for example, to the member's wife, or that a certain number could be used for travel on public business to other parts of Canada. I think that was a sensible proposal and this amendment will enable the houses to make those changes, as they wish, to improve the ability of members of Parliament to serve their constituents and their country.

The Acting Chairman: The former one was much too restrictive.

Hon. Mr. MacEachen: It was much too restrictive. Anyway, the Commissioners of Internal Economy were prohibited from acting, because of the limitations of that section.

The Acting Chairman: What section is that?

Senator Macnaughton: Section 44, is it not?

Hon. Mr. MacEachen: Yes, section 44.

The Acting Chairman: It leaves it to the houses to prescribe the way in which this can be done.

Hon. Mr. MacEachen: Yes. If the houses so wish, they can implement a certain number of these recommendations which were made by Beaupré, to give greater flexibility.

The Acting Chairman: That would be the Internal Economy Committee of this house.

Hon. Mr. MacEachen: Honourable senators, I believe that is almost all I have to say about the bill. Members of Parliament will now contribute on the basis of their indemnity for pension purposes, rather than on the present basis of their indemnity and their expense allowance. You may recall that, when we established the present pension provisions, they were based upon recommendations of Professor Curtis who said or recommended, in order to develop a more adequate pension for members, that the contributions be based not only upon the indemnity but also the expense account. That was not a normal situation—at least, so it was pointed out frequently in the house and elsewhere. Now, by basing the pension solely on the salary or indemnity of $18,000 it will be possible to remove that criticism and to maintain in the future the present contribution rate and the present eligibility for pension. Nothing changes there. There is a change with respect to the $15,000, however.

Senator Flynn: So far as the members of the house are concerned it is more rational, but it does not change any figure because they used to calculate the contribution on the $18,000. It was $12,000 plus $6,000. Now they calculate it only on the indemnity, which is $18,000. In other words, it is the same amount and the benefits are exactly the same as before.

Mr. H. D. Clark, Director, Pensions and Insurance Division, Treasury Board: Senator Flynn, senators have been contributing under the Members of Parliament Retiring Allowances Act, and have been contributing on the $15,000—the combined $12,000 and $3,000. In order that there would be no change in the overall pension effect, this bill provides that they would contribute on five-sixths of the $18,000, or the $15,000 as before.

Senator Smith: Mr. Clark, has anything been changed with regard to those members of the Senate who were members in 1965, before the act was changed?

Mr. Clark: No, there is no change in so far as they are concerned either, senator. In their case the contributions and the benefits were related to the $12,000 indemnity, and the amendment to the 1965 act which is contained in this bill simply continues that provision of contributions and benefits being based on the $12,000.

Senator Smith: In other words, there is no change in this bill?

Mr. Clark: The only amendment is to continue things as they have been.

The Acting Chairman: Despite the increase of the indemnity?

Mr. Clark: That is right.

Senator Smith: For the record, what is the effect on those who were appointed before 1965 and who have not made the election to resign at the age of 75? The general complaint is that we pay quite a large premium but we get nothing back. Can you clarify that?

Mr. Clark: Last year the act made it possible for those senators who were then under the age of 75 to indicate that they would relinquish their seats on attaining the age of 75. If they so elected, there was an automatic protection for their widows in the event of death before the age of 75. A number of senators made such an election. For those who did not make such an election, there is no change in the situation.

Senator Flynn: I think there is one change, if I am not mistaken, Mr. Clark. Previously, there was no refund to the estate of the contributions, whereas now, for those who have not made the election to resign at the age of 75, their estates will be entitled to a refund of the contributions.

Mr. Clark: But that is not accomplished by this particular measure, Senator Flynn.

Senator Flynn: No, but I think that has to be pointed out, because it would make a difference between those who elected to resign at the age of 75 and those who did not so elect. Before that, if you died in office, no refund was made to your estate; nor was any payment made to your widow.

Senator Smith: That is what I had in mind and what I wanted to get on the record, Mr. Chairman.

Senator Cook: Those of us who have made the election pay on the total of $15,000 now, do we not?

Mr. Clark: That is correct.

Senator Flynn: And we will continue to pay on the same basis.

Mr. Clark: Just to be clear, those who made the election in this last year, indicating that they intend to retire at the age of 75, will still be contributing and will be pensioned in relation to the $12,000. There is no change on that. The $15,000 only applies to those senators who have been summoned to the Senate since June 2, 1970.

Senator Flynn: No, that is not the case. We all pay on the $15,000 now.

Mr. Clark: Well, not all of you should be.

Senator Flynn: This was the consideration paid for obtaining the possibility of a pension to a widow of a senator who died in office before attaining the age of 75.

Senator Cook: We are paying on the $15,000.

Mr. Clark: I will have to have a word with your accounting people.

Senator Cook: Those who made the election, I mean.

Senator Flynn: Everybody is paying on the $15,000, Senator Cook.

The Acting Chairman: We all pay the same thing.

Senator Flynn: We all pay 6 per cent on $15,000. We all pay the same amount.

Senator Blois: Even those of us who are not eligible for pensions, as is the case with myself. I still pay, but my estate will get it back when I have left this world. I think that is the way it works. I will never get a pension, but I pay just the same.

Senator Smith: But you will get it back.

Senator Blois: My estate will. It will not be much good to me where I am going.

The Acting Chairman: You never can tell.

Senator Walker: It will be too hot to spend!

The Acting Chairman: They may change those rules, too.

Senator Walker: I do not mean the money will be too hot; I mean the place will be.

The Acting Chairman: I am glad that the Leader of the Opposition and Mr. Clark are both confused about this.

Senator Flynn: I am not confused at all. We have to remember, Mr. Chairman, that when the 1965 legislation was passed those senators appointed before June 2, 1965 then had the choice of going under the House of Commons pension scheme. However, only one senator elected to go under that system.

The Acting Chairman: Because he was young.

Senator Flynn: And because he had already gained a pension in the other place.

The Acting Chairman: That is right.

Senator Flynn: It was generally agreed that the choice was impracticable for those appointed before 1965. Subsequently, there was the amendment of last year. That amendment was made because we were paying in the order of $600 a year and, if you happened to die in office, not even having had the chance of resigning at the age of 75 or resigning because of ill health, there was no refund to your estate of the contributions you had made, which would have amounted to something in the order of $20,000. Nor was any payment or pension made to your widow in that event. The legislation of last year tried to correct that, but in compensation for the added benefit of a refund or a pension we have been paying that 6 per cent on the $3,000 expense allowance.

Mr. Clark: I am sorry, but that cannot be.

Hon. Mr. MacEachen: It may be that you are in for a bonanza, senators. You may be getting a refund, if Mr. Clark is right.

The Acting Chairman: We will certainly hire Mr. Clark to be our spokesman, if that is going to be the result.

Senator Smith: Mr. Chairman, all I have seen Mr. Clark do so far is to shake his head and grin. What does he mean by that? Let us have something on the record.

Senator Walker: Let us have him on the record. What is the law of the Medes and the Persians?

Mr. Clark: I have before me the amendments of last year, and those amendments, while they made it possible to protect the widow in the case of death before attaining the age of 75, did not amend the definition of sessional indemnity. In fact there was no definition of sessional indemnity which meant that you looked at the terminology as it was in the Senate and the House of Commons Act, namely $12,000, and while the definition of sessional indemnity for the separate act, that is the Members of Parliament Retiring Allowances Act, was changed last year to include the expense allowance, that amendment was not made in the act to make provision for the retirement of members of the Senate. The amendment in the bill now before us simply continues the present provision, as it is in the law, for the contributions and benefits being based on $12,000, in keeping with the policy that these amendments should not change either the contribution basis or the benefit entitlement.

The Acting Chairman: What you are saying is that the contributions that have been paid by senators, or the contributions that have been deducted from the indemnity of senators, have been deducted on the wrong basis; it has been deducted from $15,000 instead of $12,000.

Mr. Clark: For those senators who are subject to the 1965 Act, yes. But for those who are contributing on the basis of the Members of Parliament Retiring Allowances Act, a separate act, it is a $15,000 base which was applicable.

The Acting Chairman: Well, we have been making this contribution now for six years.

Senator Cook: No, on the $12,000 for six years, but on the $3,000 for only a short period.

The Acting Chairman: For how long?

Mr. Clark: Since April last year.

The Acting Chairman: I would not want us to go beyond this point without getting it clarified and without getting

an arrangement made whereby this situation will be rectified. Would you speak to Mr. Dean and clarify this position? We may have had a profitable morning for a few senators.

Senator Flynn: I was going to suggest a bargain to the Minister, that they change the provisions as far as pensions to the widows of senators appointed before 1965 are concerned. However, I wanted Mr. Clark to put on the record what is the proportion of the member's pension which goes to his widow under the Members of the House of Commons and Dependents Pension Act. I think it is 60 per cent.

Mr. Clark: Under that act it is 60 per cent, related, of course, to the amount of pension based on the length of his service.

Senator Flynn: Presently the pension payable to the widow of a senator appointed before 1965, in the case where it is payable, is $2,667.

Mr. Clark: That is right.

Senator Flynn: The pension payable to the widow of a member of the judiciary of, let us say, a supreme or a superior court of a province?

Mr. Clark: I would not want to put a figure in dollars, but it is one-third of the judge's pension, which is the formula in the act to make provision for the retirement of members of the Senate. In both cases it is one-third.

The Acting Chairman: The percentage is the same?

Senator Flynn: I just wanted to put the figure in. The new act would provide for a salary of $39,000, if I am not mistaken, to a judge of a supreme or superior court of a province.

Mr. Clark: Well, I cannot speak on that.

Senator Flynn: If it is so, then his pension will be two-thirds of that?

Mr. Clark: Yes, that would be so.

Senator Flynn: Then the pension payable to his widow would be one-third of his own, and that is about $8,000.

Mr. Clark: Yes.

Senator Flynn: And if I am not mistaken, under the Members of the House of Commons Act, concerning their pensions, the maximum pension is $13,500 to a former member.

Mr. Clark: The maximum after up to 25 years of service, yes.

Senator Flynn: And the pension to the widow would be 60 per cent of that?

Mr. Clark: That is correct.

Senator Flynn: That is also close to $8,000.

Mr. Clark: Yes, at the maximum.

Senator Flynn: And in the case of members of the judiciary and members of the House of Commons there are provisions for the children?

Mr. Clark: Well, at the moment there is no provision for the children in the case of members of the judiciary.

Senator Flynn: But I understand there is some provision in the act presently before Parliament.

Mr. Clark: Yes, in the bill presently before the House of Commons there is an amendment to that effect.

Senator Flynn: So that by comparison the pension payable to a senator appointed before 1965, especially if he has been here over ten or fifteen years, is very much below that which is payable in the other case.

Mr. Clark: I would not want to say where the dividing line is, but certainly after 20 years there would be a difference in any case.

The Acting Chairman: The difference would be below the poverty line, almost—$2,600.

Senator Flynn: I know of several widows of former senators who have only that pension to live on and they are in a very difficult situation.

The Acting Chairman: I think it is very valuable to have this information on the record.

Senator Flynn: I know it cannot be corrected at this time, but I wanted to put that on the record for future amendments.

The Acting Chairman: And for the edification of the minister.

Senator Flynn: Before the amendment of last year the situation was also very difficult. I know of a case of a widow of someone who had been in the department for half a century and who did not receive a cent in the way of pension.

The Acting Chairman: Are there any more questions?

Senator Carter: I do not understand your difficulty in putting in an escalator clause for future adjustments, because the main argument that has been advanced for this one is that the cost of living has gone up since the last increase in 1963, and that we are now compensating for that. In effect, the rationalization of this increase has been based on the rise in the cost of living. That is the main argument we used in connection with the former increase. If we can use that argument twice, why is it not good for the future?

Hon. Mr. MacEachen: When the increase was proposed in 1963, it was never suggested that the increase was to look after many future years. It concerned the past. This was a confusion that developed in the press and elsewhere, that it had been stated in 1963 that the size of the increase was large because we were looking after the future. That was never stated by anyone who was a member of Parliament. What the Prime Minister of the day said, I believe, was that it was looking after what had happened in the past, since the former increase. That is what we have done again. We are picking up the fact that there has been no increase since 1963.

I suppose it is not, strictly speaking, the best way of putting it, to talk about the cost of living. We are talking basically about movements in wages and professional compensation, to which I think members of Parliament can legitimately draw comparisons.

Senator Carter: Even taking that argument, why could you not base your formula on that?

Hon. Mr. MacEachen: Why not?

Senator Carter: I cannot understand the difficulty.

Hon. Mr. MacEachen: I produced what I thought was a very good formula. I thought it was splendid. However, it did not go with members of Parliament. There were objections on differing grounds. Nevertheless, I thought it was very good and I firmly believe that whoever does this job on the next occasion will appreciate what a mistake it is that we are not doing something now to provide for future escalation. However, we just could not get general agreement on what would be a good basis.

I had developed a formula whereby we would hook future escalation of the pay of members of Parliament to the mid-point of the executive category in the Public Service. The executive category of the Public Service is normally based upon an examination of the movements of the private sector. There would therefore be an objective examination leading to an adjustment in the executive category, and the pay of members of Parliament would be adjusted to that.

I thought that would be one feature of the formula and that the first pay increase would take place on the day of the election of the thirtieth Parliament, and thereafter on an annual basis.

It had some good features and, I suppose, some disadvantages. It had one feature, if accepted, that members of Parliament would be establishing a formula that would not necessarily benefit themselves because there would be the intrusion of two elections before it would come into play.

The Acting Chairman: Plus an outside forum of reference.

Hon. Mr. MacEachen: Yes. There would be a definite method and it would take place annually, on an objective basis. I still think it is pretty good. However, in this business many people have to think it is pretty good before it goes, and it did not go.

Senator Walker: I suppose that you have made provision for the contingency that if salaries for the top brass go down, the salaries of members of Parliament will also go down. Is that in the formula or is that one of the things that held up the adoption of it?

Hon. Mr. MacEachen: That did not hold up the adoption of it. It was not in there.

Senator Hays: If you relate these increases to those that the press get each year, rather than to senior public servants, that might be a better way of handling it. The press received increases totalling 58 per cent over the same period, and in some industries the figure has been 90 per cent. This might be politically more acceptable.

The Acting Chairman: That might take the cursing out of the editorials!

Hon. Mr. MacEachen: In saying that it did not go, I do not blame anyone. I am not critical, because it is a very difficult subject, politically and otherwise. People really do not like to deal with these matters. However, we did consider it, and I have that formula in my file for future generations of members who might wish to have it.

The Acting Chairman: We have it on the record here, and it might be a guide.

Senator Flynn: Is my understanding correct that occasionally there is an adjustment in pensions pair to retired civil servants or their widows to take into account the increased cost of living or the decrease in the dollar value?

Hon. Mr. MacEachen: Yes, senator. This applies to former members of the Senate and the House of Commons on pension, and their widows.

Senator Flynn: I think that before the last changes, the maximum pension payable to former members of the House was $3,000 a year.

Hon. Mr. MacEachen: Yes.

Senator Flynn: Has it been adjusted?

Mr. Clark: Former members and their widows.

Senator Flynn: But there was no payment to the widow of a former member.

Mr. Clark: They obtained the benefit of this legislation which was passed last year, and have been receiving escalation in their pensions since April 1 last year.

Senator Flynn: That would not apply to the pension payable to a widow of a senator appointed before 1965.

Mr. Clark: It did not provide a pension where none was payable. However, where a pension was in pay it would provide escalation in her pension.

Senator Flynn: Even on this $2,667?

Mr. Clark: Yes, that would be subject to the escalation.

Senator Flynn: I did not know this; this is probably good news for many widows.

The Acting Chairman: The amount is minimal.

Senator Flynn: Yes, but sometimes it is 10 or 15 per cent.

Mr. Clark: In the case of a senator who retired in 1965 it would have been a little more than a 10 per cent increase. Then there was another 2 per cent increase from January 1 this year, and potentially there will be another 2 per cent increase on January 1 next year. There is provision in last year's legislation.

Senator Flynn: What is this legislation?

Mr. Clark: The Supplementary Retirement Benefits Act. In Schedule A, item 3 of that act is included: "An Act to make provision for the retirement of members of the Senate".

Senator Flynn: Would it be under this act that we pay 6 per cent on the difference?

Mr. Clark: No, this is the occasion of the half of one per cent. You may remember that as of April last year there was an extra half of one per cent contributed.

Senator Flynn: Only one-half of one per cent?

Mr. Clark: Yes. This was to help provide for the cost of escalating these pensions in pay.

Senator Carter: I know that you cannot give actual figures for individuals, because there are different family sizes. However, what is the net value of this increase? How much of it will go to income tax and how much will be an

actual increase, on average? A person receives an indemnity. Let us take a member with a family of two children.

The Acting Chairman: Has he no other income?

Senator Carter: Yes, with no other income.

The Acting Chairman: I think, Senator Carter, it would be almost impossible for Mr. Clark to answer that. It is a matter of the Income Tax Act and regulations.

Senator Carter: The general impression is that this is $6,000 spending money; it is not.

The Acting Minister: Of course it is subject to tax, but not in the isolated case of this amount of money being transferred. It will be subject to tax at the rate applicable to the individual taxpayer.

Senator Carter: That is right, but we know what the marginal rate is for $18,000.

The Acting Chairman: Yes, but Mr. Clark does not, unfortunately. This is the point. It probably would reduce the increase by 25 per cent, or perhaps more. It is all taxable. It is a good point to raise, but unfortunately we do not have the figures.

Gentlemen, if there are no other questions, I know the minister has to be in the house for 11 o'clock. Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Acting Chairman: Mr. Minister, thank you for coming here this morning and not only discussing this particular bill but really dealing with the whole area. It has been very helpful and everyone is most gratified, first, with your presence and, secondly, the able manner in which you have conducted the discussions.

Hon. Mr. MacEachen: Thank you very much.

The committee then proceeded to the next order of business.

Ottawa, Thursday, June 10, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-207, an act respecting the organization of the Government of Canada and matters related or incidental thereto, met this day at 11 a.m. to give consideration to the bill.

Hon. John. J. Connolly (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, we now have for consideration Bill C-207.

As you know, the burden of the criticism in the house was that included in an omnibus bill are a great many different types of food which you are asked to digest together. However, perhaps we can use the fact that this bill is segregated. While awaiting the minister's arrival, as we have Mr. Clark here, would it be your wish to have him deal with Part VII of the bill, which contains the superannuation provisions on which he is the expert? It is not a controversial section, but it is probably one with which the minister would prefer to have Mr. Clark deal.

Hon. Senators: Agreed.

The Acting Chairman: We will proceed with Part VII and then deal with the other parts of the bill with the minister.

Perhaps I could help the committee by telling Mr. Clark that in the explanation which I gave in the house I used seven examples or classes which were touched by the proposals in the bill in respect of the superannuation of public servants. I do not ask Mr. Clark to confine himself to those cases. However, perhaps he would explain in a general way the proposals of Part VII. Would you, Mr. Clark, in particular deal with the situation arising out of the Pension Benefits Standards Act, with reference to which Senator J. M. Macdonald asked me a question which I was reluctant to answer in the Senate? The implications of that act only arise in one of the areas covered by Part VII of the bill, but I would ask Mr. Clark to keep the application of that particular act in mind.

Mr. H. D. Clark, Director, Pensions and Insurance Division, Treasury Board: Mr. Chairman, honourable senators: I think I can confine my remarks to a very short space of time in view of the explanation given by Senator Connolly when the bill was debated earlier.

The Acting Chairman: Were there any mistakes made in the explanation?

Mr. Clark: There were none of which I am aware.

The Acting Chairman: So there was no misleading as far as I am concerned. You have to be sure, because when discussing superannuation it is very easy to stray.

Mr. Clark: These amendments reflect the results of a review we have been making for some time with the objective of improving benefits in the event of early retirement from the Public Service, whether at the initiative of the employer or the employee.

In brief, the amendments provide that if an employee retires, either at the initiative of his employer or voluntarily, after he has attained 55 years of age, and has 30 or more years of pensionable service to his credit, an immediate annuity shall be paid to him without actuarial reduction. At the moment, if a person goes out before 60 years of age, say at 55, his pension would be reduced by something like 30 per cent, because of the early retirement.

The Acting Chairman: His immediate pension.

Mr. Clark: His immediate pension, or he could have had a deferred annuity commencing at age 60. The effect of this is, if he has 30 years service to his credit at that time, to eliminate this reduction.

In the case of a person who goes out at the age of 50 and has 25 or more years of pensionable service to his credit, the immediate annuity, if he desires to have one, is related to the deferred annuity but is reduced by five per cent for each year that his age is less than 55 or the number of years his service is less than 30, whichever is the greater.

The Acting Chairman: If I might interrupt, perhaps I could welcome the minister who has now arrived.

Honourable C. M. Drury, President of the Treasury Board: I apologize for my late arrival.

The Acting Chairman: I think it is desirable to finish with the part we are on, as I think you will agree, Mr. Minister. What we are doing is going on with Part VII, which has to do with the Public Service Superannuation Act. Mr. Clark has indicated that he will not be very long, and perhaps we can get that out of the way.

Mr. Clark: That is the situation in the case of either voluntary or involuntary retirement for employees of 50 or more years of age with 25 or more years' service to their credit.

In the third area, we have a situation where a person cannot qualify under either of these two provisions to which I have just referred, but has attained the age of 55, has 10 years of service to his credit, and is retired involuntarily. In such a case the Treasury Board is given authority to waive the actuarial reduction that presently takes effect in those cases. Roughly speaking, the actuarial reduction is on the basis of 5 per cent for each year that the man is short of 60, so if he were aged 55 and with ten years of service, at 5 per cent a year, he would then receive a pension of at least 75 per cent of the full deferred annuity commencing at age 60, but the Treasury Board would have authority to waive this reduction, depending on the criteria the board adopted.

Those are the three features of the early retirement legislation, which Senator Connolly (Ottawa West) explained in the Senate chamber earlier.

The Acting Chairman: Would you put something on the record with reference to the Pension Benefits Standards Act and its application? That is subsection (E), I think.

Mr. Clark: That has to do with one of the options an employee has on retiring before the age of 60. He has the choice between a deferred annuity which is payable immediately, the amount of which can depend on the length of service and the conditions of retirement that I have just described, or a return of contributions, with the one proviso which Senator Connolly mentioned in respect of what we call the locking-in contributions. If he is over the age of 45, the Pension Benefits Standards Act sets forth the principle that a person who retires after 45, with 10 or more years of service, cannot receive a return of his contributions in relation to service performed after September 30, 1967. This locking-in provision, as we call it, is described on page 11. The closing lines of subsection (E), lines 9 to 16, merely continue the locking-in provisions of the Pension Benefits Standards Act.

The Acting Chairman: I understood there was some correlation here with the Pension Benefits Standards Act in its application to provincial public servants too. Is that so?

Mr. Clark: This is right. This is similar to provisions contained in the pension benefits acts of Ontario, Quebec, Alberta and Saskatchewan. Some of them have slightly different dates. The Ontario date went back to 1965. The effective date in the federal legislation was October 1, 1967. This is why we have reference here to the locking-in of contributions after September 30, 1967.

Senator Isnor: When you mention these provinces, you are referring to government retirement pensions, are you?

Mr. Clark: The provinces I just mentioned?

Senator Isnor: Yes.

Mr. Clark: Ontario, Quebec, Alberta and Saskatchewan are provinces that have legislation providing for the locking-in of the contributions of employees who leave employment after the age of 45 with 10 or more years of service.

The Acting Chairman: In the public service of those provinces?

Mr. Clark: Applying to private plans primarily. This is designed, of course, to ensure some retention of pension rights for older employees whose employment is terminated or who are transferred to another employer.

Senator Isnor: That is all right as far as the Government and the provinces are concerned. Was there ever a comparison made between private enterprise for commercial life pensions as compared to the governments?

Mr. Clark: We have made comparisons; and the Government pensions, those under the Public Service Superannuation Act, compare favourably with the better private pensions. There are some that are much better, but more that are not quite as favourable.

Senator Isnor: I would say that the majority were not as favourable.

Mr. Clark: The majority would not be as favourable. On the other hand, there are many plans of which we are aware that are better.

Senator Burchill: Do private pensions have that locking-in feature?

Mr. Clark: The provinces of Ontario, Quebec, Saskatchewan and Alberta which I mentioned.

Senator Burchill: They would all have it?

Mr. Clark: Yes. In Saskatchewan there is a little variation. In the case of married women, there was some pressure exerted in the passage of that bill, and there is an exempting provision in the case of women. But across the country, insofar as the men are concerned, in those provinces it is applicable.

Senator Burchill: Thank you.

Senator Isnor: I have one more question. It appears to me that the Government pension scheme is very generous in regard to age retirement, as compared to other schemes.

Mr. Clark: Well, yes and no. What we call the normal compulsory retirement age is 65, beyond which special authority for extension of employment has to be given. Under the present act and regulations, a person can go out at the age of 60 and receive a full pension based on his life category.

Senator Isnor: Are you speaking of the federal Government?

Mr. Clark: In the federal Government.

Senator Isnor: Not 60, but 55, is that right?

Mr. Clark: This bill would make it possible for a person to go out at the age of 55, provided he had the 30 years of service, and receive an immediate pension based on his length of service, without any other reduction. But this applies in a number of other plans of which we are aware, too. We are not unique in making this proposal.

Senator Isnor: But you say that you are very generous in regard to these people?

Mr. Clark: Certainly we are among the better plans; there is no doubt about that.

Senator Isnor: I think I have made my point as far as I want to go.

Senator Flynn: Mr. Chairman, my attention has been drawn to the case of former employees of the Canadian Arsenal in Valcartier, who were forced to retire before reaching the age of 60, some years ago, when the Government disposed of the plant. Some have not reached 60 for a deferred pension, but they have 30 years of service. My understanding is that the provisions of this act, or the amending provisions, do not apply to them, that they cannot start drawing a pension at 55, but they still have to wait until they reach the age of 60.

Mr. Clark: They have the option, as they have had from the time they retired, of requesting that what we call an actuarily adjusted pension be payable, at any time after the age of 50. That has always been their privilege.

Senator Flynn: But the provisions of this act would allow the option to be taken at 55?

Mr. Clark: That is so in relation to retirements after the effective date of this legislation.

The Acting Chairman: This legislation does not apply to past retirements, is that what you say?

Mr. Clark: It does not extend these early retirement provisions to people who retired, who ceased to be employed, before the beginning of the year.

Senator Flynn: They did not have that option, and it is not given to them by this act?

Mr. Clark: This act does not have retroactive effect to the Canadian Arsenal employees, or to any other group that retired.

Senator Flynn: This was forced retirement I am speaking of, in most cases.

The Acting Chairman: Are there any other questions on Part VII? If not, can we take it that Part VII is satisfactory to us?

Senator Flynn: Well, we understand what it means.

The Acting Chairman: There are no amendments? May I put the question? Are there any amendments to Part VII? Senator Flynn? If not, thank you, Mr. Clark, for your assistance.

Mr. Drury, would you like to make a general statement about the provisions of the bill?

Hon. Mr. Drury: Mr. Chairman, I have read the introductory speech you made in the Senate and nearly all of the other speeches made. I am not sure that there is much I can add to the outline you have given. Perhaps it would be a little presumptuous on my part to comment on other remarks made by senators during the debate. However, I would be glad to try to answer any questions, or even any challenges.

Senator Flynn: Mr. Minister, you are at a disadvantage, because the only one in the Senate who spoke in favour of the bill was the present chairman of the committee. All the other speeches were against, and no one came to the rescue of Senator Connolly.

The Acting Chairman: Nobody spoke about all parts of the bill.

Senator Burchill: If we had done that, it would never have gone through.

Senator Flynn: That is the only thing that worries the Leader of the Government; "Pass the bill!"

Hon. Mr. Drury: That is an occupational hazard for the Leader of the Government.

Senator Walker: I think the point that worried us most was the necessity for this bill. What is the necessity for the creation of these ministers of state? There must be some particular department you have in mind at the present time. Otherwise, this bill would not have been brought to our attention. Also, once it gets under way, having in mind the fact that these ministers seem to be called on to formulate and develop policy in connection with matters, once those policies are formulated, do you expect to bring to an end the ministry set up? In other words, are these ministries temporary matters? If you read the speeches you will realize that these are the questions we are interested in. It is not in any critical way that we are asking now for some explanation as to the necessity for the bill at the present time.

Hon. Mr. Drury: I think the question is related to the bill. I do not need to argue the necessity or desirability of having a Department of the Environment, nor the part of the bill, Part VII, to which Mr. Clark has been talking, the desirability of a greater degree of flexibility than we have had in the past in the matter of retirement.

In so far as the ministries of state and ministers of state are concerned, there has existed, as part of the prerogative, the right of the Crown to create ministers without portfolio in unlimited numbers with unspecified duties and responsibilities, subject only to the provision by Parliament of the necessary funds to pay the salary. This can be obtained either in advance or, as is most usual because the creation of ministers without portfolio is not foreseen enough in advance, by way of supplementary estimates.

One thing that has become quite apparent is that the pace of change of both social and economic conditions in all western countries has accelerated quite considerably. Most governments tend to be structured in relation to historic trends. Perhaps we are somewhat like the universities in that we have come into this post-war period with a series of departments which are related to ancient disciplines. As an example I might cite the Ministry of Agriculture, which is a traditional occupation in Canada. The ministry of Fisheries is perhaps another. If I may make reference to Senatory Forsey, we have experienced the same kind of phenomenon that occurs in relation to the structure of a university, namely, that the old, narrow disciplines and the concentration on them does not fit the current circumstances, so that it has become necessary to create interdisciplinary, combining functions in order adequately to get at our fundamental problems.

This has led to the kind of proposal found in this bill, namely, the creation of a Department of the Environment which cuts across a whole lot of old, particular, departmental functions. When you are creating new departments, obviously, if you are going to avoid unnecessary expense and confusion—and the confusion is probably more deleterious than the expense—you should try to abolish some of the old, traditional departments or meld them into a new structure.

The ministry of state concept will allow this process to be carried on. It will perform two functions. In effect, it will be either a pilot project for a continuing full-fledged department, in which case the ministry of state will be

converted by an act of Parliament into a regular department of government, or it will allow the establishment of a coherent apparatus to focus on a particular problem and propound solutions. If these solutions are able to be carried out adequately by perhaps one or more existing departments, then the necessity for the ministry will disappear and so will the ministry. If not, then we will need a regular department of government—perhaps another one—and the ministry of state to provide an instrument for restructuring the Government in a less permanent but more rapid way than by the creation of a full-fledged department of government such as the Department of the Environment.

Senator Connolly (Ottawa West): It would also be less rigid.

Hon. Mr. Drury: We have had considerable experience over the past few years in that there has been a Government Organization Act each year doing just this. There has also been quite extensive use made of the Transfer of Duties Act to bring about this kind of restructuring or reorganization of the Government, as new problems develop or as existing problems change their relative priority and become important while other existing problems appear either to be solved or to recede in importance.

Senator Walker: Then the ministries of state are, initially in any event, temporary creations, unless it is indicated that they should be permanent, in which event the ministers will change from ministers of state to regular ministers of the cabinet.

Hon. Mr. Drury: I think one should look rather more at the ministry than at the minister. The ministry starts out as a secretariat. We are indicating quite clearly that there will be a ministry of state established for urban affairs. It is not quite clear at this point what the role of the federal Government should be in urban affairs. This is going to evolve. Before we try to set up a department with clearly defined and, one hopes, relatively permanent functions in this particular field of urban affairs, some evolution both in thinking and in experience is needed. But perhaps at this juncture it would be unwise to try to establish a department of urban affairs, because it is not too clear what kind of role the federal Government should play in assaulting this particular problem.

The Acting Chairman: Because of provincial and municipal interests?

Hon. Mr. Drury: Because of the provincial and municipal interests and, indeed, jurisdiction.

Senator Walker: Are there any other prospective ministries that would necessitate this bill, which seems quite ample to deal with the creation of ministries of state? It occurs to me that there could be some conflict between housing and urban affairs since they are so interrelated.

Hon. Mr. Drury: They are interrelated and quite clearly the housing function of the federal Government will be part of the responsibility of this particular minister of state. That is the permanent plan.

Senator Forsey: It will be "housing and urban affairs," then?

Senator Flynn: It is a question of semantics.

Hon. Mr. Drury: Put it this way: housing will be included in urban affairs.

Senator Walker: Mr. Andras is a minister without portfolio, is he?

Hon. Mr. Drury: He is a minister without portfolio, yes, "in charge of housing," which means that CMHC reports to him.

Senator Walker: I see.

Hon. Mr. Drury: As a minister without portfolio responsible for housing he also answers to the Government in respect of housing questions.

Senator Walker: Yes. Have you any other indication, Mr. Minister, as to other ministries that might be created that you might care to name?

Hon. Mr. Drury: There appears to be emerging a clear desirability for a minister of state and a ministry of state for science. These are the two to which a considerable amount of thought has already been given, and I would forecast as being likely.

Senator Carter: Is that for science or for science policy?

Hon. Mr. Drury: Well, I am not quite sure how one distinguishes between science and science policy.

Senator Flynn: Science is more inclusive, perhaps.

Hon. Mr. Drury: Science is perhaps more inclusive than science policy.

Senator Carter: Well, straight science would be more or less dictating projects which should be left to scientists themselves, whereas the overall policy would be concerned with the determining of goals and priorities and the allocation of resources. A science minister should be responsible for policy without the actual responsibility of saying, "This will be done there, and that will be done somewhere else."

Hon. Mr. Drury: I would agree with you that the function of such a ministry would be co-ordinating and dealing with questions of policy rather than trying to operate as manager or controller of large scientific or research establishments. I might add the further qualification that the desirability or the pressure for this is much greater in the

field of the natural sciences than in the social sciences, and when one talks about this prospective ministry of state for science policy, there is a possibility that this will be related to the natural sciences or the physical sciences rather than the social sciences.

The Acting Chairman: But the minister would not be responsible for the day-to-day operations of whatever establishments come within the purview of his department.

Hon. Mr. Drury: That is one view. I think the general consensus at the moment is that such a minister should not be in charge of, or have put under his jurisdiction, all the scientific establishments under the control of the federal Government.

Senator Forsey: He should not?

Hon. Mr. Drury: He should not. This does not mean that under his jurisdiction there may not be one fairly large operating establishment such as the National Research Council, which is a big operating establishment. On the other hand, it would be clearly undesirable that he should have the functional control, for instance, of the Defence Research Board, or the Communications Research Laboratory of the Department of Communications, or the Experimental Farms of the Department of Agriculture. I do not want to say he would have none, because the National Research Council has to come under somebody, and I do not want to say he is going to have them all.

Senator Walker: Mr. Minister, there are a great many Crown corporations formulating policy, and once such policies are formulated you do not have to go back on them very often because policy is policy and is not changed from day to day. Have you in mind creating ministries of state and attaching to them the various Crown agencies?NSTANCE, THE CBC is one that I can think of, and Polymer, and keeping in mind that the purpose of the function of the minister is to formulate policy, have you something like this in mind, or is it going to be a very narrow field where only a few ministers are going to be appointed?

Hon. Mr. Drury: Well, my guess would be that the number of ministries of state or ministers of state created would not be large. At the present time each of these Crown corporations, and there is quite a variety of them, is the responsibility—insofar as the Parliament of Canada has a direct responsibility for them—of a named minister. By way of example, the Canadian National Railways reports to Parliament through the Minister of Transport. This is part of his load of responsibility, and because the railway operation is so intimately linked with the general operations of the Ministry of Transport, as long as this is not too great a load on the particular minister this would seem to be a satisfactory continuing arrangement. Polymer Corporation reports to Parliament through the Minister of Supply and Services, which again appears to be the appropriate one. I cannot remember all the list, but there are a number in the financial field who report through to the Minister of Finance. The Canadian Export Development Corporation reports through the Minister of Industry, Trade and Commerce, and this is closely linked to his departmental functions and responsibilities.

The Acting Chairman: CIDA?

Hon. Mr. Drury: CIDA reports through the Secretary of State for External Affairs.

The Acting Chairman: Of course, that is not strictly a Crown corporation.

Senator Walker: It would be a pity, would it not, to bring in ministers to interfere with functions of the Crown corporations unless there was some new project where you were going to enunciate new policy and change the Crown corporation radically, and even then it would be a temporary measure? In other words, what I am getting at is that you do not contemplate the creation of these ministries for the purpose of supervising or checking or controlling or running the Crown corporations.

Hon. Mr. Drury: That is not the plan, Mr. Chairman. I will not say it will never occur because, in fact, we are contemplating doing this in relation to Central Mortgage and Housing which is a Crown corporation. The reason for this is that the activities of the Crown corporation are such that it is too much of a load to attach this additional responsibility to a minister who already has heavy departmental responsibilities. As you remember at one time Central Mortgage and Housing reported to Parliament through the Minister of Transport.

Senator Martin: Senator Walker—or Mr. Walker as he then was—had this responsibility.

Hon. Mr. Drury: I am looking at more recent history.

Senator Martin: He is familiar with having several departments, including this one.

Senator Walker: I had three. I had the National Capital Commission, Public Works, and Housing. We got along well. We had a huge expansion in housing at that time. We got along well and we had a huge expansion of housing at that time in the National Capital Commission. I do not see why, if you have departments competently led, you need to have a Minister for Housing to run the present outfit. It is doing pretty well. Why would you need a minister?

Hon. Mr. Drury: In the current year we are likely to have what is termed a record in housing starts. This is partly due to having an energetic minister who is devoting full time to this and nothing else.

One of the important ingredients in the success of CMHC is the availability of loan funds for placement in the private sector. That particular Crown corporation has to bid for these funds, the sole source of which is the fisk, against other ministers. It helps a great deal to have a minister engaged in this process of making the case rather than merely the president of the corporation.

Senator Walker: Is not this the beginning of proliferation? You will have a minister of state for urban affairs. I am not criticizing it. I know you are feeling your way on this, as you must. A great part of the housing department is going to be transferred to the department of urban affairs. Surely, having another Minister of State for CMHC, which deals almost exclusively with housing and apartments, would mean a proliferation. In other words, you are splitting the great housing problem into two parts and having two new ministers. This thing could grow like Topsy. This is what we are worried about.

Hon. Mr. Drury: Perhaps I did not make myself clear. There will be only one minister for urban affairs, including housing.

Senator Walker: And a separate one for CMHC?

Hon. Mr. Drury: No. CMHC includes housing.

Senator Walker: When you say that we are going to have a minister of state to take care of CMHC, you mean that it would be the minister of urban affairs.

Hon. Mr. Drury: That is correct.

The Acting Chairman: The only additional one is the possibility of a minister in connection with science or science policy.

Hon. Mr. Drury: Some argument has been put forward in the House of Commons for naming a Minister of State to deal with the Report on the Status of Women.

Senator Flynn: That is a full-time job.

Hon. Mr. Drury: The problem concerning that report is that it does not fit into any particular of our departmental structure. This is the kind of phenomenon which, if it is of sufficient importance and is going to be dealt with in a focused way, might best be handled by one of these inter-departmental disciplinary ministers of state.

Senator Walker: All 28 ministers will keep their eye on that problem. They are, anyway—particularly the first minister.

Hon. Mr. Drury: Clearly there is a danger or possibility of a proliferation. However, the experience of the present Government indicates that there is a desire, when a new department or agency is created, to at least co-ordinate, consolidate, meld or abolish some of the older ones that do not quite seem to fit. The process of organization development does not lead to increases with no corresponding offsetting decreases.

The Acting Chairman: We have had an example of that in connection with the proposed establishment of the Department of the Environment to which, as I remember the figures, some 10,000 employees of various departments will be transferred.

Hon. Mr. Drury: That is correct. The Department of Fisheries and Forestry will no longer continue as a department.

Senator Forsey: It will disappear?

Hon. Mr. Drury: As a department.

Senator Walker: Have any disappeared yet?

Hon. Mr. Drury: I am not sure how you measure disappearance. If one looks at the salaries one will find that there is no longer a salary required for a Minister of Industry. Under this bill a salary for the Minister of Fisheries and Forestry will no longer be provided.

Senator Isnor: What is the argument for doing away with that?

Hon. Mr. Drury: Well, the term "doing away with" means having the function of these particular departmental arrangements conducted by someone else.

Senator Burchill: Will the name be dropped?

Hon. Mr. Drury: The name will not be dropped. In response to an expressed desire, the name "Minister of Fisheries" will be continued. I think there is a specific amendment in the bill which allows for that.

Senator Forsey: There will be someone who will be minister of something or other and also Minister of Fisheries. He will have two portfolios?

Hon. Mr. Drury: It would be difficult to say that he would have two portfolios, because there is no portfolio of Fisheries.

Senator Forsey: I should have said that he would have two departments under him, which used to happen with the Department of Mines and the Interior, and that sort of thing. There was no provision for a separate minister in some instances.

Hon. Mr. Drury: In this case there is provision for two ministers but only one department.

Senator Flynn: Section 3(3) says:

> The Minister of the Environment is the Minister of Fisheries for Canada

That means only one. I suggest also that it means that he will always be called the Minister of the Environment. The Minister of the Environment discharges the responsibilities of the Minister of Fisheries, but that is not his title.

Hon. Mr. Drury: It is quite clear. The Minister of the Environment is also the Minister of Fisheries for Canada. He is the Minister of Fisheries and people are entitled to address him as such.

Senator Isnor: How would they address him in future?

Hon. Mr. Drury: I am not sure what you mean by "they". It is quite clear that some of the members of the House of Commons who represent Newfoundland will address questions in the house of Commons to the Minister of Fisheries, and the Minister of Fisheries, otherwise known as the Minister of the Environment, will rise in reply.

Senator Walker: Have you in contemplation the creation of a minister of state responsible for the CBC?

Hon. Mr. Drury: Not at the present time.

Senator Walker: You surely would not create one for the National Capital Commission?

Hon. Mr. Drury: That is not in contemplation either at the present time.

Senator Walker: But that does not mean, of course, particularly with reference to the CBC, that you have not been thinking of it?

Hon. Mr. Drury: We have been thinking in both fields.

Senator Flynn: It is an obsession with every government.

Hon. Mr. Drury: It is really a determination or judgment as to whether the activities of a particular agency or Crown corporation are such as to warrant virtually the full time attention of a senator.

Senator Walker: Did you ever consider one minister, a member of the cabinet, not just a minister of state . . .

The Acting Chairman: A minister with portfolio.

Senator Walker: A minister with portfolio, for Crown corporations?

Hon. Mr. Drury: Yes, that has been considered and rejected, I think for the reasons you indicated, that a minister of

state for Crown corporations would find himself with responsibilities for widely differing functions. The only common denominator of the whole field is that they are corporate in their structure.

Senator Walker: Quite so; thank you very much.

Senator Flynn: With regard to the principle contained in clause 14, does the minister not agree that under its powers the Governor in Council would in effect legislate and create new departments of which we would be unaware? It could be any department that the Governor in Council decided should be organized immediately.

Hon. Mr. Drury: It is difficult to get at the motivation, if you like, for the decision-making process. Someone decides, but the effective implementation of this decision or desire is subject to certain restrictions.

In the case of clause 14 . . .

Senator Flynn: And clause 16.

Hon. Mr. Drury: The Governor in Council may decide, put it that way. However, all he can do under the provisions of clause 14 and subsequent clauses is submit a proposal to the House of Commons, which has the right to reject it.

Senator Flynn: It is legislation; that is why I wonder why only the House of Commons would pass on this?

Hon. Mr. Drury: There has been, I am told, a number of instances involving delegation of functions between the two chambers.

Senator Flynn: Delegation, yes, by one house to the other. That happened in connection with divorce. The other place was quite satisfied to delegate the power. However, the Senate has not been asked to delegate its powers in the present case.

Hon. Mr. Drury: Perhaps not expressly, but it has certainly been asked implicitly.

Senator Forsey: It is being asked here.

Hon. Mr. Drury: That is right, as I say, implicitly. The question asked is why? The rationale is that the executive is controlled by and directly responsible to the House of Commons, rather than to the Senate.

Senator Flynn: As far as a vote of confidence is concerned, I agree; the Senate cannot vote non-confidence in the Government.

The Acting Chairman: And have it stick.

Senator Flynn: I suggest that if we never have any amendment to the organization legislation, it would mean legislation by order in council approved only by the House of Commons. A permanent department could be created by this means.

Hon. Mr. Drury: I will put it another way: it will be legislation approved only by the House of Commons, that is correct; not Parliament as a whole.

Senator Flynn: Do you see any advantage in keeping the Senate out of this?

Hon. Mr. Drury: Not really any significant advantage. It does appear to be organizationally rather more tidy to acknowledge the prime responsibility of the House of Commons for control of the executive. It is the body which effectively can put them out of office. The other effective control, of course, is the supply procedure, which also is essentially a House of Commons device.

Senator Flynn: Would you say that if the house refused to approve such an order in council it would be the equivalent of a vote of non-confidence in the Government?

Hon. Mr. Drury: I would think it would, yes, although this is a question of judgment. We have no constitutional rules with respect to this.

Senator Flynn: We have a precedent under which the house can reconsider its decision.

Hon. Mr. Drury: Yes, that has happened.

Senator Flynn: Would you not agree that in such a case, if it were not considered as a vote of non-confidence, resource could be made to clause 23 in order to accomplish the same end without having the approval of the house? It seems to me that under clause 23, in practice, a minister of state may be appointed for exactly the same purposes as a minister for specified purposes.

Hon. Mr. Drury: The essential and significant difference between clause 14 is contained in the words "ministry" and "minister". Under clause 23 a minister of state can be named, but he cannot be provided with any apparatus with which to be effective.

Senator Flynn: He can be provided with employees.

Hon. Mr. Drury: He cannot.

Senator Flynn: At the present time for instance, the minister without portfolio responsible for Information Canada has staff. He may not have a deputy minister, but he has a large number of staff.

Hon. Mr. Drury: No; the staff is that of the Secretary of State.

Senator Flynn: I know, but in practice this staff is under the authority of this minister without portfolio.

Hon. Mr. Drury: When you say "in practice," it is by agreement with the Secretary of State.

Senator Flynn: Yes, that is what is provided also in section 23.

Hon. Mr. Drury: That is correct, but I suggest that this is not quite the same as providing him with staff for whom he is responsible.

Senator Flynn: Especially when he would not have the same authority in principle. Also, in practice, his salary would only be half; he would receive $7,500 instead of $15,000.

Hon. Mr. Drury: That also makes a difference; if his responsibilities are less, that seems to be appropriate.

The Acting Chairman: The legislative authority provided by the bill is legislation by order in council in respect of the appointment of these men. Clause 18 is simply a provision to confirm the proposed action of the Governor in Council, but the authority to legislate is an authority that is to be exercised by the Governor in Council.

Hon. Mr. Drury: The authority to name, I would not quite call it legislation, is in the Governor in Council. However, I was indicating the restrictions contained in the bill. The proposed order in council must be approved by the House of Commons. Secondly, the provision of supply moneys to pay his staff and put this ministry or secretariat in being must also be approved by legislation of the House of Commons through the Estimates and supply procedure. The Governor in Council is not free to act in any way he wants without scrutiny, and indeed legislative approval, as perhaps just a reading of the words themselves would indicate.

Senator Flynn: The Auditor General is not entirely in agreement with your last statement.

Hon. Mr. Drury: Well, the Auditor General has some views. I hope we are going to debate these.

Senator Martin: Not today.

Hon. Mr. Drury: Not today?

Senator Walker: Mr. Minister, in any questions I have asked, when I have said "Do you contemplate", you were referring in your replies, I presume, to the Government; you were not just giving your personal point of view?

Hon. Mr. Drury: Insofar as I can discern or engage the views of the Government.

Senator Walker: Is there any thought, that you know of, of creating a ministry of unemployment, which is the greatest problem in Canada today? I am reminded of this because we have here the Leader of the Senate (Hon. Mr. Martin) who was the chief critic of another government at the time of the recession. It is a serious question I am asking.

Hon. Mr. Drury: Obviously consideration has been given to this. There are perhaps two problems in connection with it. First, we have not got the right to do it yet.

Senator Walker: You mean until this bill is passed?

Hon. Mr. Drury: That is correct.

Senator Walker: Well, we will accomodate you in that way in half an hour.

Hon. Mr. Drury: Secondly, there is the efficacy or desirability of doing it. I would be very glad to hear your views. Do you think we could have them?

Senator Walker: You should do something, God knows.

Hon. Mr. Drury: We are doing something.

Senator Walker: I suggest it would be a good idea, so that you could have somebody focus his particular attention on unemployment and call on all the different departments of the Government to assist, because one person could then formulate policy and think of nothing else except that. He would be given, I would think, co-operation from all the other departments in carrying out any plans he might enunciate which found favour with the Cabinet. I think that is one place where you could do a lot of good, and one hopes it would be only a temporary ministry, that some day you would get this solved.

Senator Forsey: The Labour Government in England did that in 1929. It put two ministers in charge, Jimmy Thomas and Sir Oswald Moseley, and the thing was a complete frost.

Hon. Mr. Drury: In response to Senator Walker, I might say that we regard this problem of unemployment as of such importance that it is the first priority of all ministers. It might well be that the appointment of a single minister, especially a minister of state, who is likely to be relatively junior, would be downgrading this problem rather than improving it.

Senator Walker: At the present time, though, there is no particular minister concentrating on it. If we could loan you the honourable Senator Martin, who was the greatest authority on unemployment when he was in opposition—and had a lot of bright ideas, it would not downgrade any department to put him in charge of it.

Senator Flynn: He was served by a special bureau of statistics too.

Hon. Mr. Drury: While we have not got the body, at least we have a large part of the mind of Senator Martin already, who is worried about this and providing ideas, and useful ideas I am glad to say.

Senator Walker: I do not care about the Labour Government in England in 1929; that was at the beginning of the great depression, and in any event many of those fellows think from the ears down, particularly in those days they did. Right now, with all the bright people around, with 155 members on your side, all of them looking for an extra job, surely this must be a wonderful opportunity for originality, forcefulness and administrative ability to really solve this over-riding problem, which depresses everybody, including the Government. Would you give it some thought and perhaps let the matter go back to the Cabinet for a word there?

Hon. Mr. Drury: I will certainly convey those views to the Cabinet.

Senator Forsey: I would like the minister to give us some idea why there is a possibility of such a considerable increase in the Cabinet. This worries me. I recall when the first cabinet was formed, it had 13 members, and Mr. Mackenzie, the leader of the opposition, said this was too many. It was held at that number until about 1896; it ran up a little sometimes; then it began to grow and grow. It seems to me from the look of this thing that we might very soon have not merely a cabinet of 30, which we had a year or so ago, before the resignation of Mr. Kierans and the disappearance of somebody else—I cannot remember who now—but a much larger cabinet. I am doubtful about the efficiency of a decision-making body of that size. I notice that the minister spoke of the possibility of abolishing old departments. The only one that seems to be going now is the Department of Fisheries and Forestry, unless I am mistaken.

Senator Flynn: It is to be replaced by a department of environment.

Senator Forsey: Quite, but even so there is only one going. The minister seemed to paint a picture of a new broom sweeping very clean and getting rid of these superannuated passé departments and putting new ones temporarily or permanently in their place, but I do not see any sign of any of the old departments going.

I cannot understand quite why the maximum number of

ministers of state is put at five. We have had mention of a couple of things that might be put under ministers of state, but five seems a more than ample number.

The Acting Chairman: I do not think that remains in the bill.

Hon. Mr. Drury: No.

The Acting Chairman: That does not remain.

Senator Frosey: What does it say now? Nothing?

The Acting Chairman: It is open ended.

Hon. Mr. Drury: It says nothing.

Senator Forsey: Oh! This is worse still.

Hon. Mr. Drury: There is no limitation. The trade, if you like, was a maximum of five ministries of state to be set up by proclamation. Now provision has been made for scrutiny by the other place of each individual creation, so the number five has been taken out. This is the control rather than the ceiling.

Senator Forsey: I am sorry, but I left my glasses behind this morning and I had not looked at the amended version.

The Acting Chairman: This was not in the original print of the bill. It came only after the amendment in the other place on third reading.

Senator Frosey: I know that, but it was five in the original print?

The Acting Chairman: Yes, it was.

Senator Forsey: That is how I came to make the mistake. I had not had an opportunity to look at it again. I am throwing out a number of ideas. The other thing that occurs to me is why there was not perhaps considered to be some opportunity here to reduce the size of the Cabinet as such, and set up something like a two-tier ministry and cabinet à la English practice of long standing. We did have the germ of that here in the creation of the solicitor generalship and the controllerships of customs and inland revenue, I think it was, under the acts of 1888, if I remember correctly. From 1892 to 1895 we had a ministry which included the solicitor general and the controller of customs and inland revenue, and a cabinet that excluded those ministers. Then, right from 1892 to 1915, the solicitor general was never in the cabinet. After that, until about—I have forgotten just when—1930 or 1935 he had a sort of "in again out again, on again off again, gone again Finnegan" existence. Sometimes he was in the cabinet and sometimes he was not. He was still a subordinate personage in the Department of Justice, but when he was in the cabinet he was a fully-fledged cabinet minister.

I remember that the front page of *Hansard* in 1915, when Meighen was Solicitor General and was put into the cabinet, described him as minister without portfolio with "Solicitor General" in brackets.

But we had the germ then of this two-tier system. It seems to me that the cabinet is getting so very large now, some consideration might have been given to the possibility of placing, for example, a department like National Revenue under the authority of the Minister of Finance, and having a sub minister for National Revenue outside the cabinet. Similarly, the Post Office could be put in the same kind of relationship to the Department of Communications. Perhaps that was considered, I do not know; but I am really rather frightened by the growing size of the cabinet and I am not by any means certain that it is a case of the larger the cabinet the more efficient the process of decision-making. It seems to me that quite possibly it might be the reverse.

Hon. Mr. Drury: Mr. Chairman, the senator has raised quite a broad issue and it is one of, I suppose, a value judgment, as to what works best. Ideally, in theory, the most efficient in the decision-making process would be to have one minister only, call him the prime minister, and there would not be much of a problem then of co-ordinating ministers.

Senator Forsey: That is a *reductio ad absurdum*. Nobody proposes that.

Hon. Mr. Drury: I agree that that is so, but there are these two extremes. The other is to have every elected representative as a minister, a decision-maker, a part of the cabinet. Somewhere in between these two extremes lies the right answer.

If the cabinet, the number of decision-makers at the political level, is very small, this means that most of the decision-making in fact is done by people other than cabinet. They only have so much time, they can only absorb so much and understand so many questions. If the number of ministers is few, the multiplicity of decisions required to be made must be taken by somebody else, which means bureaucracy.

Senator Forsey: Does the minister think that is the state of affairs in the United Kingdom now, for example? Their cabinet is somewhat smaller than ours, if I recall correctly; and their ministry is vastly larger and takes in all kinds of parliamentary under-secretaries and I do not know what-all.

Hon. Mr. Drury: This is correct. One gets into a bit of a semantic problem. What is the difference between a minister in the cabinet and a minister of state not in the cabinet, in the United Kingdom? How does this affect the decision-making process? Is there any value to having a minister of state not of the cabinet, and presiding over a department? Why not just have a deputy minister? He is not in the cabinet, either. Why insert this fellow?

Senator Forsey: Do you mean a deputy minister in the sense of a parliamentary under-secretary.

Hon. Mr. Drury: No. Our kind of deputy minister, or a permanent secretary.

Senator Forsey: That is really quite a different thing.

Hon. Mr. Drury: What is the difference between a minister of state not of the cabinet, with no powers to make decisions, presumably, and a permanent secretary who also is not of the cabinet?

Senator Forsey: One is a civil servant and the other is a political personage. I should have thought that was the simple answer to that. It seems to me that what the minister is overlooking is the difference between policy formation, broad policy formation by the cabinet, and a relatively detailed decision-making by junior ministers. Surely there is some possibility of devolution and delegation there, so that the people in the cabinet are concerned rather with large policy formation and do not have their minds cluttered up with a great mass of detail.

Hon. Mr. Drury: I agree with this. The Canadian solution to this dilemma of, in effect, decentralization is, rather than have a formal structure of a cabinet, quite small, and a much larger ministry which has to be co-ordinated, we have a larger cabinet than the United Kingdom and a larger cabinet than the United States, which does not really function as a cabinet, anyhow.

The Acting Chairman: It is not parliamentary.

Senator Flynn: It is not like ours.

Hon. Mr. Drury: It is not parliamentary at all. Our solution is to establish functional cabinet committees.

Senator Forsey: Yes, I know that.

Hon. Mr. Drury: This performs the same kind of function which the two-level ministry does in the United Kingdom. The time of the cabinet, on what you have described as minor subpolicy matters, is not taken up, in the case of the cabinet as a whole. These things are performed in the cabinet committees. The larger policy issues, which do come to cabinet, do come to a larger body, but they have already been refined to a limited number of issues.

Senator Walker: And that is what you are doing at the present time.

Hon. Mr. Drury: That is what we are doing at the present time.

Senator Burchill: Do all those committees report to the cabinet?

Hon. Mr. Drury: They do, sir.

Senator Burchill: When the report is presented, does that not arouse a long discussion with a large group in cabinet?

Hon. Mr. Drury: No, because the reports and decisions, I suggest, are so sufficiently coherent and well-reasoned that they do not give rise to discussion.

Senator Carter: Could I ask, taking the average week, how many hours a week are spent in cabinet?

Hon. Mr. Drury: Are spent in cabinet as a whole?

Senator Carter: Cabinet meetings, yes.

Hon. Mr. Drury: Let me see. Roughly, three.

Senator Carter: Three hours a week?

Hon. Mr. Drury: Thursday morning, from 10 to 1.

Senator Carter: Is that all?

Hon. Mr. Drury: That is the schedule. Now, there are a number of occasions when we have a special cabinet meeting, and there are others when we enjoy a sandwich lunch beyond one o'clock.

Senator Carter: Does that three hours take in your cabinet committees as well?

Hon. Mr. Drury: Reports from cabinet committees.

The Acting Chairman: But not the sessions of the cabinet committees?

Hon. Mr. Drury: Oh, no, no.

Senator Carter: It is cabinet sessions I am talking about.

Hon. Mr. Drury: That is the full formal cabinet?

Senator Carter: Let me put it in another way. Perhaps I am not phrasing it right. Out of the average working day, the average working week, how much of that work week does the minister spend in his department, getting to know his department, to know the problems of his department; and how much of that time is spent talking about his department in cabinet?

Hon. Mr. Drury: I hope he is doing more than talking about his department in cabinet. This varies quite a bit between ministers. We have provision made for the meeting of a functional cabinet committee, every morning and every afternoon of the work week.

The Acting Chairman: But all ministers do not have to attend all those meetings?

Hon. Mr. Drury: That is correct.

Senator Carter: My question is based on personal experience, that when a minister spent much time in cabinet, he hardly knew his department at all. That applied to practically all ministers a few years ago. They could hardly discuss the problems in Parliament or in cabinet intelligently because they did not spend enough time in their departments to know what it was all about.

Senator Smith: I did not know you were formerly a member of the cabinet.

Senator Walker: He was a good member, too. I remember.

Hon. Mr. Drury: I have been around Ottawa for some time, in one guise or another, and despite Senator Forsey's worries I must say that the present cabinet is better instructed, both in its own departmental affairs and in the general policies of government, than any previous cabinet.

Senator Walker: It does not show it, does it?

Senator Forsey: Order.

Hon. Mr. Drury: Perhaps I laid myself open to that.

Senator Forsey: That is a matter of judgment.

Hon. Mr. Drury: I would remind those present, Mr. Chairman, that the problems are rather more difficult today than they were in the halcyon days of the past.

Senator Macnaughton: Much can be said in favour of a system of super and junior ministers. For example, the Minister of Agriculture has roughly 25 subsidiary acts to operate, one of them involving the Research Institute in the Department of Agriculture. That in itself is a huge affair, involving much money, time and detail. Surely, it would be a tremendous help to the Minister of Agriculture were he able to delegate just that section on research to some junior minister who could then do his own homework and advise the minister. That would be better than having the minister rely solely on the deputy minister. It seems to me that much can be said in favour of delegating this to a junior ministry

Hon. Mr. Drury: We have what Senator Forsey calls the germ of this in the Department of the Secretary of State, where there is a junior minister sharing the duties, whereas in terms of the statute the responsibility continues to vest in the Secretary of State, although he has someone to help him. This is perhaps a refinement of the system of parliamentary secretaries. Generally, it would be an improvement on the operations of the parliamentary secretary system.

The Acting Chairman: There is no doubt about that.

Hon. Mr. Drury: Under the prerogative there is no limit to the number of ministers without portfolio who could be appointed to do just that, as, indeed, the present minister assisting the Secretary of State is. He will be given rather a more precise designation and a series of duties. Under this act he will be called instead a minister of state.

Senator Macnaughton: The idea is to give authority to a man who has the judgment and the power to make decisions.

Hon. Mr. Drury: That is correct.

Senator Macnaughton: Hence he would assist a super-minister.

The Acting Chairman: Are there any other questions, honourable senators?

Senator Flynn: Mr. Chairman, the minister has said that he is going to ask the Senate to relinquish its responsibilities somewhat. I do not want the Senate to relinquish its responsibilities in any way. Therefore, I would move an amendment to clause 18 of the bill. I have a formal amendment which you can read, if you wish, Mr. Chairman. The effect of the amendment is to add the words "the Senate" wherever they are needed, and it means simply that the Order in Council will have to be approved by a resolution of the Senate and the House of Commons.

The Acting Chairman: I assume honourable senators have before them a copy of Bill C-207, and will bear in mind the wording of clause 18, subclauses (1) and (2). Senator Flynn's amendment reads as follows:

> 18. (1) An Order in Council authorizing the issuance of a proclamation under section 14 or 16 shall not be made until the proposed text of the Order in Council has been laid before the Senate and the House of Commons by a member of the Queen's Privy Council for Canada and the making of the Order in Council has been approved by a resolution of both Houses.
>
> (2) Where the proposed text of an Order in Council has been laid before the Senate and House of Commons pursuant to subsection (1), a motion in the Senate and House of Commons proposed by a member of the Queen's Privy Council for Canada in accordance with the rules of that House, praying that the making of the Order in Council be approved, shall be debated in each House for not more than seven hours, after which time the question shall be decided in accordance with the rules of each House.

Senator Flynn: Incidentally, Mr. Chairman, I hardly think the Senate would require seven hours time for debate, but I did not alter that because I did not wish to complicate the text any more than it is.

The Acting Chairman: This will be the first time we have had a time limit fixed for the Senate. There is another problem, however, in that the Queen's Privy Council for Canada would have to submit the resolution to the Senate.

Senator Flynn: The Leader of the Government in the Senate is a member of the Privy Council.

The Acting Chairman: There are times when the Leader of the Government in the Senate is not a member of the Privy Council. That does present a problem. There are at all times in the Senate other members of the Privy Council who are not members of the Government.

Senator Flynn: It does not mention "of the Government". It is curious. It says, "member of the Queen's Privy Council for Canada". That could mean any Privy Councillor.

Senator Forsey: Surely there is a personage who is called the Leader of the Government in the Senate who is a member of the ministry, is there not?

The Acting Chairman: There is no question about the present situation.

Senator Forsey: But is it not necessary now? Formerly you could have a situation where the Leader of the Senate was not a member of the cabinet, as was the case with Senator Aseltine; but I thought that now the Leader of the Senate had to be a member of the cabinet.

Hon. Mr. Drury: If I may interject, Mr. Chairman, under the Rules of the House of Commons the particular phrase "a member of the Queen's Privy Council for Canada" means a member of the ministry. Resolutions, amendments and so on can be moved only by a member of the Queen's Privy Council for Canada. That does not include members of the Queen's Privy Council on the opposition side or ex-members of the ministry.

Senator Flynn: If this were the only objection, Mr. Minister, I would be willing to move an amendment to change the text to meet that situation. However, I think we could vote on the principle and, if need be, we could amend this amendment.

The Acting Chairman: Is there any further discussion on Senator Flynn's amendment?

Senator Carter: I should like to ask Senator Flynn if the principle involved in his amendment applies only to clause 18(1)?

Senator Flynn: No, Senator Carter, it applies to both of the subclauses in clause 18.

Senator Carter: Once you have approved the principle there, it follows.

Senator Flynn: The idea of section 2 is to limit the debate. A question could be raised, but I do not mind. It is the question of principle only that I am concerned with.

Senator Carter: Well, I do not see the principle that because the house wants to debate it for seven hours, the Senate should want to debate it at all.

Senator Flynn: I would be satisfied to amend only section 1.

Senator Burchill: Well this is a matter of the organization of the house of Commons, and it is their business.

Senator Flynn: Well, as I say, I do not mind. We could put only "by resolution of the Senate and the House of Commons," in section 1 and leave section 2 as it is, because it concerns the House.

Senator Forsey: We would still have the opportunity to debate it under our own rules.

Senator Martin: I would like to point out in regard to this matter, and this is not my only reason for the intervention, but there is a practical consideration, and that is that an

amendment to the bill at this time would, of course, mean its going back to the House of Commons. I agree that that is certainly our right and our privilege. But as Leader of the Government in the Senate, I have to think of our time-table. We have to think of some of the other difficulties that attend this matter, for example the long delay in having this measure passed in the other place which of course was not our fault, but that is nevertheless a very pertinent fact. Nevertheless, I put my argument on the basis of principle. As Senator Burchill has just observed, this is a matter which essentially concerns the organization of the ministry and it involves a possible vote of confidence in the ministry. While both houses may express a vote of confidence, only one house by its vote can affect the tenure of the executive, and I think that this provision is in consequence quite a proper one and surely in keeping with our concept and our practice of responsible government. Moreover, there is ample precedent for one house giving to another house powers that it is prepared in particular situations not to exercise. The delegation by one house of Parliament to another is not new in our system.

Senator Flynn: It happened only once, I guess.

Senator Martin: There are at least two cases that I know of. In 1963 we had the Divorce Act, when the House of Commons gave to the Senate exclusive authority to legislat in divorce matters. The important point is that we should not be precluded from passing an enactment in which that delegation is provided, and that is now, of course, provided for in this bill. For these reasons I would be opposed to this amendment.

Senator Flynn: In reply let me say this; the delegation of the powers from the House of Commons to the Senate in matters of divorce was to rid the House of Commons of a very burdensome job, whereas here it would not be difficult to pass a simple resolution. My second point is that if we approve of the creation of a Department of the Environment, I do not see why we should not be called upon to approve the creation of a ministry of state for specified purposes.

The Acting Chairman: Are there any other observations on this, honourable senators?

Senator Carter: Question!

The Acting Chairman: Will those who are in favour of the amendment, please raise their hands?

Three in favour.

Will those opposed to the amendment, please raise their hands?

Four opposed.

I declare the amendment lost.

Are there any other questions arising out of this bill which any senator cares to raise while the Minister is still with us?

Senator Flynn: No. We hope for the best.

The Acting Chairman: Shall I report the bill without amendment?

Some hon. Senators: Agreed.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 30

WEDNESDAY, JUNE 16, 1971

Fifth Proceedings on Bill S-9,

intituled:

"An Act to amend the Copyright Act"

(Witnesses:—See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Aird,	Haig
Beaubien	Hayden
Benidickson	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28)
Grosart	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the Motion of the Honourable Senator Urquhart, seconded by the Honourable Senator Cook, for the second reading of the Bill S-9, intituled: "An Act to amend the Copyright Act".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

Minutes of Proceedings

Wednesday, June 16, 1971

(33)

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

Bill S-9, "An Act to amend the Copyright Act".

Present: The Honourable Senators Hayden (*Chairman*), Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Grosart, Haig, Isnor, Lang, Macnaughton, Molson and Sullivan. (15)

Present but not of the Committee: The Honourable Senator Lafond. (1)

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

WITNESSES:

(*Sound Recording Licences (SRL) Limited):*

(*Canadian Recording Manufacturers' Association*):

Mr. Yves Fortier, Counsel;

Mr. Paul Amos, Counsel;

Mr. Fraser C. Jamieson, President (SRL);

Mr. F. T. Wilmot, President (CRMA).

At 12.15 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, June 16, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-9, to amend the Copyright Act, met this day at 9.30 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, we continue our hearings on Bill S-9. We have before us this morning the representatives of Sound Recording Licences (SRL) Limited, represented by Mr. Yves Fortier, their counsel. He will now present the other members of his panel.

Mr. Yves Fortier, Counsel, Sound Recording Licences (SRL) Limited; Canadian Recording Manufacturers' Association: Mr. Chairman and honourable senators, I have on my right my partner and colleague, Mr. Paul Amos. To his immediate right is the president of Sound Recording Licences (SRL) Limited, Mr. Fraser C. Jamieson; and to his right is the president of the Canadian Record Manufacturers' Association, Mr. Fred. Wilmot. As i look around me, this could well be a joint meeting of the Senate and the Canadian Recording Manufacturers' Association.

Mr. Chairman, I have had the privilege of hearing presentations to your committee on Bill S-9 in the course of the last month; and I have also read the transcript of those hearings which I did not attend. It appeared to me, on listening to presentations and upon reading others, that you had been fed a great deal of irrelevant material. I say this with the greatest of respect for my learned friends who preceded me here, but I still say it.

I will attempt to stay in what you have called the main stream of this hearing, which is Bill S-9, as presently before you; and I will be very brief.

It appears to me, Mr. Chairman and honourable senators, that there are only four main points that need to be dealt with, and I will take them one by one. I certainly will not be reading from the brief, which has been in your hands for the last four weeks, I believe. I know that you have read through it. We have tried to make it as succinct as possible. We have tried to summarize the issues as we see them, and we are not going to go through the process of summarizing it again.

The four main points which I think you need to concern yourselves with, as you deal with Bill S-9, are, in my humble opinion, the following:

1. What are we dealing with? I am addressing myself now, I know, to honourable members of the Senate, some of whom are lawyers and businessmen, and I am sure that on none of you will be lost the fact that what we are dealing with is in fact an element of property. The Copyright Act deals with what has been referred to by the authors, over the years, as intellectual property, but property, nevertheless. It is property of the same kind as patent; it is property of the same kind as trade marks.

The Copyright Act is a very complex piece of legislation, even on the admission of those who have spoken before me, Mr. Chairman, on Bill S-9. I think it may be useful if, very briefly and very slowly, you and I looked at the Copyright Act. I do not know if you have been provided with copies. If not, since there are only some two or three sections I wish to deal with, I will summarize them for you.

I think it is useful, before we look at Bill S-9, to see what the Copyright Act says about copyright. Section 3(1) of the Canadian Copyright Act, which has been in existence since 1921, says that copyright means the sole right to produce or reproduce the work, or any substantial part thereof, in any material form whatsoever and to perform the work or any substantial part thereof. If I may stop there, this is what the definition of copyright is—one, the sole right to produce or reproduce work; and, two, the sole right to perform.

Now, what are we dealing with here? What is Bill S-9? Contrary to what has been suggested by some people, Bill S-9 is not legislation which is going to remove or going to do away with copyright in records. It is legislation which preserves the copyright in records but which, if I may use the word, dismembers the copyright because it removes the performing right.

What does the legislator say at the moment about the copyright which exists in records? Well, he says in section 4, subsection (3) of the act—and he said this in 1921:

> (3) Copyright shall subsist for the term hereinafter mentioned . . .

And I will deal with that later.

> (3) Copyright shall subsist . . . in records . . . in like manner as if such contrivances were musical, literary or dramatic works.

This was inserted in the original Copyright Act in 1921. At the same time as it was said for the purposes of the Canadian legislation in section 3(1) that copyright meant the sole right to produce or reproduce a work and the sole right to perform that work in public it also said that copyright "shall subsist . . . in records . . . in like manner as if such . . . were musical . . . works."

Bill S-9, as you are aware, honourable senators, deals with section 4, subsection (3), and it consecrates, if I may put it that way, or it recognizes that copyright shall continue to subsist in records. That is what the minister through whom the bill has been introduced is saying.

The minister is saying that copyright shall continue to subsist in records, but—and this is the nature of the amendment before you—he says in the new subsection (4) of section 4:

(4) Notwithstanding subsection (1) of section 3, for the purposes of this Act "copyright" means, in respect of any record, . . . the sole right to reproduce any such contrivance or any substantial part thereof in any material form.

I hope I have made my point clear. The legislator does not say we were wrong in 1921 to introduce protection in the Copyright Act for records. He says we were wrong in 1921 to introduce full protection as understood within the meaning of the Copyright Act of this and other countries. He says we were wrong to tie to the copyright the right of public performance. He is recognizing, honourable senators, that a record is worthy of some protection because he says that copyright shall subsist in records in like manner as if they were musical works. He recognizes that copyright will continue to subsist in records. He recognizes creativity. The copying right is not removed but, as I said earlier, the legislator is dismembering the copyright. In presenting this bill to you he says, "Let copyright in records subsist, but let there not be attached to this copyright the performing right."

At the risk of repeating myself, I would remind you of section 3(1) of the act: "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce"—that is, to preserve, and "the sole right to . . . perform". That is what is being removed here.

I submit that the legislator, or the minister here, in introducing Bill S-9 in the form in which he has introduced it is being illogical. You cannot dismember copyright. Either you wipe it out altogether or you do not. If, by his own admission, there is an element of creativity in a record, which is worthy of protection under the Copyright Act, then I say that that element of creativity should also entitle the author—the author of the contrivance or author of the record, which is a term well-known to those who deal in copyright—the element of creativity should entitle the author to full protection; not only to protection from reproduction; not only to protection from piracy; but also to protection from use of his work by others for profit.

I will be returning to this very shortly, but this is essentially what we are dealing with here. Under the Copyright Act as presently existing, and as would exist if Bill S-9 becomes law, we are dealing with the author of a record, and we are dealing with that element of copyright by which the legislator is saying the author of that record is entitled only to some but not complete protection.

The Chairman: Mr. Fortier, are you saying that Parliament cannot or should not dismember?

Mr. Fortier: I am saying, Mr. Chairman, that Parliament should not. I am saying that it is illogical for Parliament to say on the one hand that it recognizes that there is creativity here which is worthy of protection but, on the other hand, that this protection will not carry with it the protection which all other copyright has under the law. I realize full well that Parliament is supreme and that Parliament can dismember copyright, if it wishes. But I say that it should not.

Senator Grosart: Mr. Chairman, Mr. Fortier says that the act should not dismember copyright. Is the original author's or composer's performing right not already dismembered by the compulsory licence section?

Mr. Fortier: Quite the opposite, with respect, senator. Under the compulsory licence section of the act, section 19, there are, as you know, compulsory royalties which must be paid to the author or composer.

Senator Grosart: But it is a dismembering, because he ceases to have control of that right.

The Chairman: Dismembering does not involve losing control, does it?

Senator Grosart: That is the very point Mr. Fortier is making. The loss of control is the dismembering.

Mr. Fortier: I am afraid not.

Senator Grosart: If you cease to have the right to exercise control, that is a dismembering.

The Chairman: I did not take that as the point Mr. Fortier was trying to make.

Senator Grosart: I did.

Mr. Fortier: Perhaps I can attempt to answer the question, Senator Grosart. By dismemberment of the right I am saying that there are two elements to the copyright. On the one hand there is the element of protection from reproduction and on the other hand there is the element of compensation for public performance. The author or composer either under the terms of section 19 of the Copyright Act or under the terms of a non-compulsory licence still retains both elements of the copyright. He is still protected and compensated when there is a public performance of his work and he is still entitled to prevent others from producing or reproducing, except under the conditions set forth in the act.

Senator Grosart: But you say he ceases to have the right . . .

Mr. Fortier: He continues to have the right, but he is compensated for it.

Senator Grosart: What does "compulsory" mean? He is compelled by the statute to allow anybody to make a record.

Mr. Fortier: That is correct.

Senator Grosart: Once an original record has been made. If that is not dismembering of a right, I do not know what dismembering is. He is compelled. In other words, his right is completely taken away from him. He loses the right to say that record manufacturer "B" may or may not use his property.

Senator Cook: That is only limiting the right. It is not dismembering.

Mr. Fortier: For good and valuable consideration.

Senator Grosart: It depends how far you take the arm off.

The Chairman: Let us say the little finger.

Senator Grosart: You are introducing a new concept, that the record manufacturer now becomes the author. I suggest there is nothing in the Copyright Act that gives him that right. I suggest to you it does not make him the author.

Mr. Fortier: It may not be too, too important, but I wonder if I could direct your attention to section 10 of the Copyright Act with which you must be very familiar and which says:

> 10. The term for which copyright shall subsist in records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of such contrivance . . .

I did not invent the word; the legislators recognized in 1921 that the maker of a record was to be deemed to be the author of that record.

Senator Grosart: For the purpose of duration of copyright.

Mr. Fortier: Ditto with the author and composer.

Senator Grosart: The position of the author in the original author-composer sense has many other facets within the terms of copyright. That is my point, but it is not that important.

Senator Connolly (Ottawa West): This may not get us anywhere, but I wonder whether we could deal further with this point. You said that the author of a work because of copyright had the right to prevent performance by others for profit. Would you agree that he has even a further right and that is to prevent performance by others under any circumstances? For example, if the author of a musical work were to decide that a certain artist would probably perform the work very badly, I would assume that because of copyright the owner of that copyright or the author of the work could refuse to allow that artist to perform that work.

Mr. Fortier: It is a very pertinent question indeed, and I think there is an answer, Senator Connolly. Under the act as it exists today, unless, to use your words, "bad performance", is equivalent to infringement of copyright, then there is no discretion on the part of the author or composer to prevent that particular performer from recording or performing his work under the terms of section 19. This is what the Canadian statute says at the moment. But if that performance is tantamount to an infringement, because it is so bad—and that is a question of degree—then there could be an action for infringement and injunction.

Senator Connolly (Ottawa West): Is infringement the only remedy the author has?

Mr. Fortier: Under the terms of section 19 and the compulsory licence provisions, senator, once the work has been recorded—and to be recorded for the first time the consent of the author-composer is required—but afterwards under the terms of section 19 there is what Senator Grosart referred to as a compulsory licence provision and there is no discretion on the part of the author.

Senator Connolly (Ottawa West): But the action is for infringement. It is not in some other area. I suppose damages could arise in an action of this kind.

Mr. Fortier: Right.

The Chairman: Well, senator, you know the opening words in section 19 are:

> 19. (1) It shall not be deemed to be an infringement of copyright in any musical, literary or dramatic work for any person to make within Canada records, perforated rolls, or other contrivances . . .

So it would appear to take the ground away from any recourse the author might have in wanting to exercise a right of selection.

Senator Connolly (Ottawa West): Selection of performers?

The Chairman: Yes, of a performer.

Mr. Fortier: He could not select a performer because, as I said earlier, it is well settled, and I know Senator Grosart is familiar with this, that if the performer is performing the work so badly there could be an action for infringement since he could argue that this was not the rendition of his work.

Senator Connolly (Ottawa West): It might derogate from his property rights.

Mr. Fortier: That is right. The point I was trying to make is that even under the terms of section 19 where the control has been removed, the right to compensation is recognized and it flows from the public performance, that if a record manufacturer andor producer has made a record from an author's or composer's work and if he has applied for and has been granted a compulsory licence, then he must pay royalty to the author or composer under the terms of section 19. Consequently although control has been removed, compensation is recognized. That is the point on which I ended this first element of my presentation. The right is recognized, as it should be, indeed, in favour of the author or composer—that if his work is performed in public, he should be paid for it and he is being paid for it. The point I am making here is that S-9 is not only saying the record manufacturer cannot control but it is also saying that we are removing his right to be compensated where his work is used in public or performed in public.

Senator Connolly (Ottawa West): You are removing the record manufacturer's rights here?

Mr. Fortier: Yes, senator.

Senator Grosart: Would you say, Mr. Fortier, that section 19 takes away the special status given to the recordmaker in terms of its performing rights where the record is made under compulsory licence?

Mr. Fortier: We have argued that point, senator, before the Copyright Appear Board, and although, as you know, the Board does not publish the reasons for its decisions, I think it is implicit in the decision that such is not the case.

Senator Grosart: That is going very far in interpreting the effect of the Copyright Appeal Board's decision, particularly when the Copyright Appeal Board makes it very clear that it is not making a decision on that basis.

The Chairman: I do not think we need to make a decision on that basis either.

Senator Grosart: Would you read section 19, Mr. Fortier.

Mr. Fortier: Well, it is a very long section, senator.

Senator Grosart: The particular part that would appear to take away the special position respecting performing rights given to a record made under compulsory licence.

Mr. Fortier: With respect, senator, you will have to orient my eyes again, because I do not know where in the Copyright Act, whether in section 19 or in other sections, there is to be found such a provision.

Senator Grosart: It is the one that is generally referred to as possibly having that effect. You are well aware of it. You have argued it. You are aware of what I am speaking of. Would you read it?

Mr. Fortier: Respectfully, senator, no, I am not. This was my point before the Copyright Appeal Board, that there was no such subsection in section 19 which purported to remove the performing right in records.

Senator Grosart: Did someone suggest before the Copyright Appeal Board that there was?

Mr. Fortier: There were many things said before the Copyright Appeal Board.

Senator Grosart: I was not at the hearings of the Copyright Appeal Board. I am asking the question for information. Was there a particular wording in section 19 or elsewhere brought before the Copyright Appeal Board as possibly taking away the performing right from a record made under compulsory licence?

Mr. Fortier: Yes. Mr. John Mills, Q.C., counsel to CAPAC argued profusely and very eloquently that the whole of section 19 should be read as removing the performing right. However, if the board so found, it would not have granted an award. It was admitted that 99 per cent of the work before the Copyright Appeal Board were works produced under section 19. The only possible explanation of the decision of the board was that it did not retain that argument.

The Chairman: It seems to me that we are getting into an area which is not relevant. While a little is all right in order that anyone may have an opportunity to show his wide scope of reading and understanding, I think we should stay with the subject. Whatever the Copyright Appeal Board may have decided or did not decide is not an issue here, except that it has established a certain tariff.

Senator Grosart: As a matter of fact, Mr. Chairman, it probably goes to the heart of the discussion. If by any chance that interpretation, as given to the Copyright Appeal Board, was correct, this bill would not be necessary.

The Chairman: If any person feels that he has rights under the Copyright Act, in the form of the presentation that you suggest was made, he can go to the courts and assert them. They are not relevant to this discussion here.

Senator Grosart: I do not know what could be more relevant than an argument which might presume to make this bill unnecessary.

Mr. Fortier: If that were the submission, senator, as indeed was the point made by you and Senator Flynn two weeks ago, that the bill was unnecessary, I would agree with you.

Senator Grosart: I am not asking that. I am merely saying that surely we are talking about something that is the heart of this whole discussion.

The Chairman: You are suggesting that we should interpret these sections of the bill, come to a conclusion and act on that conclusion. I thought the courts were there to do the interpretation.

Senator Grosart: Yes, they are; but we are here to decide whether Bill S-9 is necessary.

The Chairman: No; we are here to decide whether or not it should be enacted.

Senator Grosart: Which is the same thing. The question of the compulsory licence is very much the heart of the whole discussion of the bill, and in other respects too, because the compulsory licence takes away from the composer-author, who is the one I am interested in, the right to control his performing right by usage. The composer-author wants to assert that right. If there was no compulsory licensing section he would be able to assert that right.

The Chairman: We are not dealing with the composer here.

Senator Grosart: But we are dealing with the effect on the composer and on other people.

The Chairman: I do not think we are.

Senator Grosart: Of course we are.

The Chairman: Of course, the fact that you say so does not make it so.

Senator Grosart: I am talking about the effect of the bill on a certain section of the public. Surely you cannot say to me that we are not dealing with the interests of a particular group.

The Chairman: All I am saying is that because you say that, it does not make it so.

Senator Grosart: I am asserting it. I do not need to make it so. If I want to speak for the interests of any particular group affected by a bill before the Senate, I am perfectly entitled to do so.

The Chairman: As long as it is relevant.

Senator Grosart: It is relevant, because they are affected.

The Chairman: I suggest that it is not relevant. If the committee thinks it is relevant, then we can go ahead with it.

Senator Cook: I do not think it is.

The Chairman: Do you want to vote on this matter?

Senator Grosart: No. If you want to rule that way, I will have to accept your rule. I hope you will take a look at it and decide why a member of the committee is not entitled to say that the effect of a bill on a certain group is relevant to the discussion.

The Chairman: That is not what I have said.

Senator Grosart: All right; I will let it go. I am prepared to leave the record as it stands.

The Chairman: So am I.

Senator Connolly (Ottawa West): For the purpose of the record, I would like you to correct a statement that I propose to make. I direct my attention to the bill itself, which says:

> copyright shall subsist . . . in records . . . and other contrivances . . . as if such contrivances were musical- . . . works.

Subsection 4, which is a new section, says:

> for the purposes of this act "copyright" means, in respect of any record . . . or other contrivance . . . the sole right to reproduce any such contrivance.

It does not seem to me that we are talking about performance. We are talking about the reproduction of a contrivance.

Mr. Fortier: You have read the two sections well, senator, but you have forgotten the first words of subsection 4:

> Notwithstanding subsection (1) of section 3.

That is the one that I read at the outset of my presentation.

Senator Connolly (Ottawa West): For the purposes of this subsection, would you mind reading section 3(1)? I hope I am not taking too much time on this, but it seems to me to be the key point.

Mr. Fortier: With respect, I would agree that this is the key point. It is the one that I attempted to make. Section 3(1) reads as follows:

> For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public;

Those are the relevant lines of subsection 1 which I wish to bring to your attention.

Senator Connolly (Ottawa West): To summarize section 1, copyright exists for the author in the right to produce or reproduce, and in the right to perform.

Mr. Fortier: Correct, senator.

Senator Connolly (Ottawa West): And by the bill before us it is stated that copyright shall subsist in records as if they were musical works. "Copyright" means, in respect to any record, the sole right to reproduce any such contrivance or record.

Mr. Fortier: This is what I referred to earlier as recognition by the legislator of an element of creativity in a record.

Senator Connolly (Ottawa West): By the record maker?

Mr. Fortier: Yes. This is for his protection. This is what copyright is all about. Copyright is recognition of creativity and protection of creativity. Copyright includes not only the right to prevent others from copying your work, but the right to prevent others from using your work for profit.

Senator Connolly (Ottawa West): This is the point that was made before. You were not here at the meeting, when we heard from the CLC?

Mr. Fortier: No, I was not, but I have read the transcript.

Senator Connolly (Ottawa West): They said there was a copyright in the record manufacturer, and in addition they said the artists he employed to perform also had a right, not in the work but in the performance.

Mr. Fortier: This is a theory to which we subscribe, while we make the following two points. First . . .

The Chairman: Just one minute, Mr. Fortier. We are now wandering, are we not, in another direction.

Senator Connolly (Ottawa West): I hope not.

Mr. Fortier: I will be dealing with that.

Senator Connolly (Ottawa West): If we are wandering, then let us not pursue it.

The Chairman: Our narrow point is the taking away of the right to produce, because the word "produce" is not reproduced in subsection (4) of the bill.

Senator Connolly (Ottawa West): No, that is right.

The Chairman: You do find it in section 3(1) of the act in the definition of copyright. I understood the point Mr. Fortier was making was that this amounts to a dismemberment of the copyright, but the amendment is preceded by the language "notwithstanding subsection (1) of section 3", so whatever appears in subsection 3(1), which Mr. Fortier read, that is what copyright is intended to mean as and when and if this bill becomes law, and it relates only to "reproduced" not to "produced".

Senator Connolly (Ottawa West): Not to "produced", to "reproduced"; that is right.

Mr. Fortier: And not to "perform".

The Chairman: And not to "perform".

Senator Connolly (Ottawa West): In other words, it is copying a production.

Mr. Fortier: What is called the performing right, which flows from copyright under all legislations where copyright in records is recognized. I will be coming to your point about the performer's right; should I say, in the performance embodied in the record.

Senator Connolly (Ottawa West): I am not really interested in that, because I think have made their case. I think we should direct ourselves to your problem, which has to do with the making of the record.

Mr. Fortier: That is correct. I think you have opened the door very naturally to my second point, having attempted to make the first one. My second point is: why should there be copyright in a record? The question has been put by honourable senators. It has been suggested to you by people who have preceded me here that the record manufacturer was nothing but a presser. I have seen hands used in this way, denoting pressing, a number of times.

You referred to the presentation by Mr. Dodge of the CLC and his associates. Let me start developing this point by telling you that I am not aware of anything that has happened since 1921, when the Copyright Act was enacted in Canada, which would justify the legislator today saying: "That creativity, which we recognized in 1921 was worthy of protection under the terms of the Copyright Act, no longer exists. Consequently the copyright in the record should not include the performing right. Records were made in 1921; records are made 50 years later in 1971. However" . . .

The Chairman: Mr. Fortier, just stop there. You say nothing has been said. We have had evidence before us when the people making statements have been singing in a high key as to the cost, and putting that forward as a factor supporting this legislation.

Mr. Fortier: The cost to whom?

The Chairman: The cost to them of having to pay a tariff to SRL.

Mr. Fortier: You mean the poor broadcasters?

The Chairman: Yes.

Mr. Fortier: I was going to end the sentence by saying nothing has happened with respect to the record itself,

except of course that the mechanics have developed and they are now more refined and more sophisticated, but there is a new element that has been introduced since 1921, which is broadcasting; that has happened since 1921. The only purpose, the only possible purpose, of Bill S-9 is to allow the broadcasters, commercial and public—and I will have something to say about the CBC very briefly—to use the record, to sell time before a record is played and after a record is played; to sell it, to make profit from the use they make of our records. You have asked the question, "Can they afford?" I know that Mr. Estey last week said—and I took his words down—that it was an earthshaking emergency for broadcasters. He was referring to the tariff of 0.15 per cent of their income.

Senator Connolly (Ottawa West): With deference, Mr. Chairman, when we get into the question of cost are we not getting into the problem of irrelevancy here? Should we not direct our attention to whether or not there is property? Is that not our main purpose, and is that not the purpose of this bill?

The Chairman: All I was saying when Mr. Fortier was developing his argument was that a further point has been developed before us, and it has to do with the question of the tariff that has to be paid.

Senator Connolly (Ottawa West): It has great weight.

The Chairman: We have to give some regard to it, even if it is to dismiss the point. We may say the cost is negligible for the benefit obtained, or we may say it is not relevant to the issue, that we should resolve the issue quite apart from the question of cost and let the cost fall into its proper place. We were told last time about all the money and increasing funds made from fees that have been paid. Mr. Fortier, have you any figures to show how much the broadcasting business has improved dollarwise over the same period of time?

Mr. Fortier: Yes, I do. I would like to submit, though, that I am in full agreement with Senator Connolly's point, that this is completely irrelevant to the consideration of Bill S-9. I submit that it should not influence your consideration in one way or another.

Since that argument has been used against our clients, may I quote very briefly from an authority no other than your colleagues on the Special Senate Committee on Mass Media, which was chaired by Senator Davey. In Volume I of the report, at page 57, under the heading "Economics of Broadcasting", this committee of the Senate said:

> These revenues . . .

of Canada's television and radio stations . . .

> have increased enormously in the past decade or so. Net advertising revenues in the TV industry have grown from $8.6 million in 1954 to about $118 million in 1968—an increase of 1,272 per cent!

The Chairman: We have to give some regard to it, even if it is to dismiss the point. We may say the cost is negligible for the benefit obtained, or we may say it is not relevant to the issue, that we should resolve the issue quite apart from the question of cost and let the cost fall into its proper place. We were told last time about all the money and increasing funds made from fees that have been paid. Mr. Fortier, have you any figures to show how much the braodcasting business has improved dollarwise over the same period of time?

Mr. Fortier: Yes, I do. I would like to submit, though, that I am in full agreement with Senator Connolly's point, that this is completely irrelevant to the consideration of Bill S-9. I submit that it should not influence your consideration in one way or another.

Senator Haig: Not all from the use of records though.

The Chairman: Not just from playing records.

Mr. Fortier: No. That is not my submission.

> Radio revenues almost tripled between 1954 and 1968.

At page 62 Senator Davey's committee said:

> The other thing to note is how wondrously profitable some broadcasting operations can be. The largest revenue-group of TV stations, for instance, earned a before-tax profit (one quity) of 98.5 per cent in 1964. At that rate, even after taxes, shareholders would recover their entire investment in two years!

Senator Moslon: Is he including the CBC there?

Mr. Fortier: I am afraid he is not, Senator Molson. I think that was a loss of $45 million last year.

Senator Molson: Not the real loss. It was much greater than that. That was the book loss.

Mr. Fortier: He goes on to say:

> In most other industries, that kind of margin would be considered fabulous.

Finally, in Volume II of the Davey Report there is, Mr. Chairman, the last table, on pages 571 and 572. It is a table showing the total operating revenue, the total operating expenses and the net operating profit, of the privately owned radio and television stations in the broadcasting industry for the years 1965 to 1969. We see that in radio the net operating profit between those two years has gone from $7 million in 1965 to $14 million in 1969.

Senator Burchill: The small radio stations afford a very meagre profit.

Mr. Fortier: That is an excellent point, senator. This is why you will have noticed that, in the award of the Copyright Appeal Board, there is a provision made for those radio stations with gross income of less than $100,000, being charged a licence fee of $1 a year. This was not the decision of the board. This was a submission by my clients before the board, that in respect of the tariff which they had filed, it should not apply to those stations with a gross income of less than $100,000. So we recognized your point, senator.

Senator Cook: Would it be fair to say that both the major contenders before the committee are doing all right, both the record industry and the others.

Mr. Fortier: I think you would be most fair, senator.

The Chairman: There is no risk of insolvency in either.

Mr. Fortier: I think it would be most fair. We are most fortunate in Canada in having a quasi judicial tribunal such as the Copyright Appeal Board to protect the public interest and decide, as it has since 1935 whether the argument of "biting the hand that feeds you" is a valid one.

Senator Cook: They decide as to quantum—if the right should exist.

Mr. Fortier: That is correct.

Senator Haig: I would ask Mr. Fortier to compare the rate of profits made by radio and television companies. Can he say that the record companies have made further progress than that?

Mr. Fortier: I can say that record companies have made progress. The figures were referred to, as I recall, by Mr. Estey two weeks ago, senator, and which we are not disputing.

So, Mr. Chairman and honourable senators, why is a record worthy of protection? As I have indicated, it appears to me that nothing has happened since 1921 which would make a record today less worthy of protection than it was in 1921. Why protection under the terms of the Copyright Act? Mr. Estey, my learned friend and very good friend, I may add, said to you, two weeks ago, that there were no judicial authorities for the proposition that a performing right in record was justified from the "protection" point of view.

My friend Mr. Estey was in error. May I please direct you to page 2 of our brief, wherein we quote a very short passage from the leading case, the *Gramophone Company Limited vs. Stephen Cawardine*, which was decided in England in 1934. Mr. Justice Maugham in that case, after finding, under the terms of legislation similar to that which we have in Canada, that the copyright which existed in a record was one which carried with it a performing right, said this, obviously because of arguments made to him by the respondent:

> ...I see no injustice or unfairness which is likely to arise from my construction of the section. On the other hand, I can see considerable objection, from that standpoint, to the view that persons may obtain, without doing anything more than buying a record, the advantage of the work, skill and labour expended by the makers of gramophone records for the purposes of a public performance.

It has been suggested to me that it is unfair that the user of a record should pay because he is really not using someone else's property. So, after finding in this case that there was public performance which accompanied the copyright in a record, this is what he found, that there was work, there was skill and there was labour expended by the makers of gramophone records, and that this work, this skill and this labour made the maker of the record entitled to compensation when his work was used for profit.

These, Mr. Chairman and honourable senators, are the three elements which we find in any work which is given protection under the Copyright Act. We find skill, we find labour, which combined together, give that property, intellectual in kind, a protection recognized by the legislator.

Senator Grosart: Mr. Fortier, before you go on, is that not a case involving a composition which was in the public domain, so there was no question whatsoever of prior ownership of the performing right?

Mr. Fortier: Of course, as indeed I am well aware, it was a work which was in the public domain but, with respect, senator, there is no distinction which is made in the judgment, as to whether the work is in the public domain or not, and I do not see that is makes any difference.

Senator Connolly (Ottawa West): What is the year?

Mr. Fortier: 1934.

Senator Grosart: It makes a great deal of difference. I just call it to your attention because you had not mentioned it was a work in the public domain.

Mr. Fortier: We were dealing with the record, Mr. Chairman and honourable senators. Mr. Justice Maugham was going on and was dealing with the record and he said, with respect to that record, that it was a performing right and it was fair that there should be a performing right.

It is very difficult, it seems to me, to come before this august body and attempt to convince you that the producer of a record is infusing an input of creativity whenever he makes a contrivance.

You will recall, honourable senators, the evidence adduced before you by Mr. Stephen Stewart, Director General of the International Federation of the Phonographic Industry. He said, on this very point, that the copyright legislation the world over recognized different kinds of creativity. All creativity is not necessarily a stroke of genius. He brought to the attention of the committee, for example, the fact that the translator of a work was given protection under the terms of the Copyright Act and that there had never been any suggestion that the translator of a work should not continue to be protected under the terms of the Copyright Act. He drew a parallel between the producer of a record and the translator of a work, whose creativity certainly is not as great as the creativity of the author of the work but who is entitled to protection.

I make the same submission to you today. I submit that the producer of a record, the man who brings the artist into the studio, the man who provides the arrangements in a musical sense for the recording of a particular piece of music, the man who uses, with his own experience, the 16 sound tracks which he has to adjust and on which he has to work for days and days before he can produce a record which can be pressed in a final and definite fashion—I say that with respect to that man the element of creativity that man brings to the end product is just as great as that of the author or composer and just as great as that of the performer, Senator Conolly, because we subscribe to the "trinity theory", as it has been referred to.

Senator Connolly (Ottawa West): It is theologically sound.

Mr. Fortier: Theologically and, I suggest, also "fairly" sound. It is sound that it should be recognized that for a record to be made there must be an author andor composer; there must be a performer; there must be a record producer. Without any one of those three elements you will not have a record.

Senator Connolly (Ottawa West): You say that each one of these three has a property right?

Mr. Fortier: I say, senator, that under our law as it exists today only two of them have property rights. The author or composer and the record producers. The performer does not under our Canadian Copyright Act have a property right recognized by the act. We say, and there is evidence before you to this effect, that the performer should be entitled to share in the royalties which will be paid to us by the users of our records.

Senator Connolly (Ottawa West): That is a matter outside this bill.

Mr. Fortier: With respect, senator, I think it has relevance because it has been said here that there has been no deal between the record producers and the performers, and

that is true. There has been no deal. But three months ago there was a firm offer made to the Canadian Union of Performing Artists. It was a voluntary offer on our part, and with respect to division of the royalties it was identical to that which obtains in England. It was a 50-50 proposition which we were making to the performers, and I have it on good authority that the only reason why the deal has not been finalized at the moment is that as between the different unions who are members of the Canadian Union of Performing Artists there was no agreement as to how it should be divided. That is the only reason there has been no agreement yet. But there will be.

So I say that, without the record producer, the author or composer would not derive any royalties, obviously, from the sale of records.

The Chairman: Obviously, Mr. Fortier, if you did not have the vehicle of records, there would be a limit to the number of live performances as compared with the number of performances by the use of records. Therefore, with respect to the composer, artist and author of musical works, there is a greatly increased potential range of revenue for him.

Mr. Fortier: Yes, indeed, Mr. Chairman. I agree with you. It would be unthinkable today in 1971 that broadcasters could dream of bringing into the studio live performers and pay them the way live performers would expect to be paid. Broadcasters admittedly—and it is in evidence before the Copyright Appeal Board—use records to an extent as high as 70 per cent of the time. Those stations referred to as the top 40 stations you listen to on your car radio or in your home on occasion, not always by choice, use records for profit up to 70 per cent of the air time, but, as I have said, they could not dream of bringing live performers into their studios and pay them the way they would expect to be paid. So your point is indeed well taken.

Senator Grosart: Mr. Fortier, you have made the point that there is an element of creativity in the making of a record and that that element should be protected. That is a very good point. Have you not also made the point that it is already protected, regardless of any change in the Copyright Act and regardless of this bill? That creativity is in the making of a record and, regardless of this bill or anything else, that remains fully protected. The creativity is in the record and that right is still recognized, notwithstanding this bill or anything else. So you are really arguing against yourself. The right is already there in the creativity, in the making of the record, in the thing, and the copyright in the thing is undisturbed in any way by anything we are discussing here. Is that not right?

Mr. Fortier: With respect, Senator Grosart, that is wrong indeed.

Senator Grosart: Why is it wrong?

Mr. Fortier: Because copyright in the record is not respected in any way, as you say. Quite the contrary. Copyright in the record is now defined as meaning only the right to prevent reproduction and it excludes the right to control public performance of the record.

Senator Grosart: I agree, but the right to prevent reproduction of the thing created is still there, and that is one aspect of copyright, surely.

Mr. Fortier: What we are dealing with here, senator, is the right to use for profit. That is what we are dealing with. The minister is saying that he is removing from the Copyright Act the obligation which now exists under the act that anyone who uses in public for profit the work of a record producer—in other words, a record—must compensate fairly and equitably the maker of that record. But the legislator is saying, "no". He says, "No matter if there is any compensation which should be paid; what I am saying now is that in future it will be used for profit by broadcasters. They will not have to pay for it".

I say that that is unfair. That is a dismemberment of the copyright as we know it, as they know it in England, as they know it in the jurisdictions of most major countries today and as they are going to know it in the United States, because there is a bill, as in evidence before you, before Congress in the United States which was introduced in February of this year which recognizes the copyright in records with the right of the public performance attached to it.

Senator Cook: Mr. Chairman, we all recognize that if this bill is passed it will result in a grave interference with what Mr. Fortier and SRL consider are their rights. I think we need hardly go any further on that point.

The Chairman: I think you are right, Senator Cook.

Senator Grosart: I agree that if this bill is passed it will take away from the record companies a source of revenue which they claim to have under the act as it exists. I am not arguing that. The point that seems to be lost in this discussion, however, is that the record companies live by and profit by the statutory compulsory access to the performing right. The author has no control over that. The record companies have the compulsory right to it. That is why the composer or author says, "If I am going to be forced to give that to you, then take out section 19 altogether." Would you be happy, Mr. Fortier, if section 19 were to come out altogether and you had to deal directly with the author or composer?

Senator Cook: Surely that is another point altogether.

Senator Grosart: It is very much to the point.

The Chairman: Senator Grosart, have you given thought to the possibility that a substitute for what now exists in statutory form might be that you would have to go to the Copyright Appeal Board to fix what the tariff would be?

Senator Grosart: Yes, of course, and no composer or author would ever object to going before the Copyright Appeal Board.

The Chairman: This again is a parallel line of argument. Because the rights of composers might be said to be affected adversely by the compulsory licensing, then this bill should pass or should not pass, either one. But I do not think that is the argument. The argument may be that this bill does not go far enough. That may be your point. But it is not an answer to say, "Don't permit these people to retain a right which they have because the authors and composers or unfairly dealt with under the section of the Copyright Act itself." There would be some affirmative action by them if that is their point.

Senator Grosart: It is true, and I think every one agrees, that the whole Copyright Act is in need of revision. It goes back to 1921, as Mr. Fortier has said, and it is out of date in many ways.

The Chairman: That may be a good reason for not dealing piecemeal with this. At the moment, while I have not finalized my feeling on this, I feel that the Copyright Act as it stands has certainly reached the stage where there should be wholesale revision.

Senator Grosart: I would agree with that, but I would not agree that this is an argument for not dealing piecemeal. We have scores of bills before us each session which deal piecemeal with revisions of existing acts. It is a necessary way of doing it.

The Chairman: But we are always told the great urgency which makes it necessary to deal piecemeal with such acts, but here we are told that the great urgency is the tremendous increase in cost, and that has been dissipated by the decision of the Copyright Appeal Board.

Senator Grosart: But there is a principle involved here and it is that principle I am speaking to. We must always remember that the composer author, the original owner of the property which is being dealt with, has had his rights to negotiate the use of that taken away by statute.

The Chairman: I thought we had decided a few moments ago that this was getting beyond the stage of relevancy and that you accepted that.

Senator Grosart: Well, if you want to rule again . . .

The Chairman: I am not ruling again.

Senator Grosart: Well, if you want to invoke that ruling in connection with this which I agree is another aspect of it, but is one which I think is vital because the record companies are asking that this bill be not passed so that they can exercise certain rights which they have not exercised for many years. That in itself is not a point. The composer author says they should not have this right as long as it does not derive by contractual negotiations from the original owner, and that is the whole point, and that is why the composer authors would support this bill. They say the record companies are taking advantage, and quite properly so, of the compulsory licence. I asked Mr. Fortier would he be happy to have section 19 taken out of the Copyright Act and be in a position where you negotiate the right to make that record with the original author-composer.

The Chairman: Mr. Fortier can protect himself. I do not regard the question as being relevant. If he wants to volunteer an answer, I am not going to shut him off. But I do respect him as being a very good lawyer.

Senator Cook: It may confuse some other members of the committee too, Mr. Chairman.

Mr. Fortier: As Senator Grosart knows, we already negotiate with the author composer in respect of the first record.

Senator Grosart: Not "we". What percentage of the records we are dealing with are under compulsory licence? What proportion of the records distributed by SRL members in Canada come under compulsory licencing?

Mr. Fortier: More than 90 per cent.

Senator Grosart: This is what we are dealing with, Mr. Chairman, and that is why I say it is highly relevant. The records we are dealing with are under compulsory licence.

The Chairman: Well, you have made your point now for the second time as to the relevancy, and I have said that I do not think it is relevant. I offered to have the view of the committee canvassed and you said it was not necessary. I repeat the offer.

Senator Grosart: You may have to rule against me again.

The Chairman: Not "again". I am just calling your attention to the fact that a ruling was made.

Senator Grosart: Well, you may have to call my attention to it again because I intend to assert my right to ask questions if I think they are relevant, and I expect you will assert your right to rule whether they are relevant or not.

The Chairman: Not my right, my duty.

Senator Grosart: Both.

Senator Molson: I would like to ask Mr. Fortier why this matter has taken 50 years to come to a head. Why have not the record companies exercised this right that they claim that they have? I don't think in fact that they claim they have the right; I think it is there. But why have they delayed 50 years before worrying about the royalties which might accrue in the course of performing records?

Mr. Fortier: Well, Senator Molson, I think there are possibly three answers to your question. The first is that the performance in public of records—and I think by "public" here you have to understand it is almost exclusively radio stations, so let us say we are dealing with radio stations—has only reached the intensity which you and I know exists today since the end of the second world war. This is one of the reasons. Up to that time there was not the extensive public use in Canada for profit made of records. You and I will recall that bands were performing live much more often until 15 or 20 years ago than they do today, and when you say they were performing live, that means not only on stage but also on radio. That is one answer, Senator Molson. Another answer stems from the fact that I will have to admit that amongst the eight major record manufacturers in Canada, there are six which are subsidiaries of American companies and until a few years ago there was very little furor in the United States for the inclusion in the copyright legislation of a copyright in records. It is only in recent years that there has been clamour for the recognition by Congress in the United States of this right, and it is only very recently that there has been an indication from one of the committees of the United States Senate that this right would be recognized in the very near future. Consequently I have to admit that the fact that it did not exist in the United States had some bearing on the fact it was not exercised in Canada.

Senator Cook: Did you say that it would be recognized or it might be recognized?

Mr. Fortier: That it would be recognized. It is presently in a bill before a United States Senate committee. There is a recommendation by a Senate committee, and recommendations by a Senate committee there are as weighty as they are here.

Senator Connolly (Ottawa West): Flattery will get you nowhere.

Mr. Fortier: This point should be recognized.

Senator Grosart: In fairness, perhaps you would agree that there was a bill approved by the committee of the

House of Representatives which did not include the right, and that bill was not passed. This occurred a couple of years ago.

Mr. Fortier: That is correct.

Senator Grosart: Would you say, in connection with the bill that is coming from the Senate committee, that it might not become law?

Mr. Fortier: All I can say is that it has come out of a Senate committee with the exact wording in the proposed legislation, that the copyright in records shall include the performing right.

Senator Molson: Getting back to the question of frequent or common performances, what are the reasons for the 50-year delay?

Mr. Fortier: There is another answer also, senator, which may be of immediate concern to your colleague on your right. In Newfoundland that right was recognized as recently as 1941. One of the few things that Newfoundland lost when it joined Confederation in 1948 was this performing right in records.

Senator Cook: They became more sophisticated.

Senator Molson: There must have been many records made there prior to 1941. I wonder what the dollar loss to Newfoundland has been.

Mr. Fortier: I will not venture a guess. However, it is interesting to note that it did exist in Newfoundland. It also existed to a certain extent in Canada in respect of transcription programs, with which you must be familiar. We refer to it in our brief. At the bottom of page 14 we say:

> It is often stated that record producers have never exercised their performing rights in Canada. This is not true. Prior to the introduction of tapes, transcription services provided 16" 33 rpm discs which were only permitted to be used by subscribing broadcasters.

These transcription services were in fact an exercise by record manufacturers of the performing right in records. This was done until we did away with transcription services about 15 years ago. In the meantime, SRL has been formed.

This may not be a complete answer, Senator Molson, but as you are well aware there has never been any attempt by record manufacturers to collect public performance fees in respect of past public performance.

The Chairman: The next sentence seems to be pertinent to Senator Molson's question.

Mr. Fortier: Yes. The Canadian Talent Library is a division of Standard Broadcasting Corporation, which was represented by Mr. Estey, has exercised its performing right, as we say in our brief, in a very active manner for the last six or seven years. Is that approximately the period, Senator Grosart?

Senator Grosart: Yes.

Mr. Fortier: The Canadian Talent Library is a division of one of the largest broadcasting companies in Canada, and, I might say, one of the very good ones.

The Chairman: And it produces records.

Mr. Fortier: And it produces records. It leases its records to radio stations across Canada for a fee. On its records is written, "No right to broadcast this record unless public performance fees have been paid," or words to that effect. So the very people today, who with author-composers, are in favour of Bill S-9 have in fact been enforcing the performing right in records for some years.

Senator Grosart: They have really been enforcing the basic copyright in supplying the record. If my information is correct, they have not been collecting performing right fees.

Mr. Fortier: They are charged for the broadcasting.

Senator Grosart: They are not performing right fees. They cannot collect performing right fees unless they have a tariff before the Copyright Appeal Board.

Mr. Fortier: They are being compensated for the use made of their record. That is the way I understand it.

The Chairman: For the use in public of their record.

Senator Grosart: But that is a very different thing from collecting a performing right fee.

The Chairman: However you slice it, Senator Grosart, the fact still remains that in order to be able to use for broadcasting purposes records produced by the Canadian Talent Library, you have to pay money.

Senator Grosart: Any radio station can go out and buy a record for $2. The $2 payment gives them the right to publicly perform. Any radio station can buy a record for $1 or 59 cents and play it. Is that not so, Mr. Fortier?

Mr. Fortier: Yes. We even give away some of our records.

Senator Grosart: Was it 6,000 records that you gave away last year to CBC alone?

Mr. Fortier: There are many records given away.

Senator Grosart: I think somewhere I saw that figure. You are so anxious to get public performance, that you gave away 6,000 to the CBC.

The Chairman: That has been said so often that we do not need the weight of your statement to add to the strength of the evidence.

Senator Grosart: I do not know whether we need it, but I suggest that I have the right to make a comment.

Mr. Fortier: I was speaking about the Canadian Talent Library. I said it was owned by Standard Broadcasting. It is also pertinent to note that the Canadian Association of Broadcasters have recently formed a recording company called Astra Records Ltd. In their publicity material they say that the reason why Astra Records Ltd. has been formed is to provide insurance against SRL. Astra Records has produced to our knowledge one record to date. The label on the record also indicates that performing right royalties have to be paid if that record is to be used in public.

Again, broadcasters are acknowledging that there is such a thing as a performing right. If their property is being used in public for profit, they should be paid for it.

Senator Molson: That is an extension of the answer to my question. I was asking about time. In a great deal of what we are allowed to do by law there are prescriptive times; there are times after which we cannot do things. If I do not

put a fence across my field and it is used consistently by you in driving your car, it then becomes a public right-of-way after, I think, seven years. What about the time element in a right such as this? We are talking about a term of 50 years. Is this without any term of prescription as to the type of right?

Mr. Fortier: The tariffs are annual. Under the terms of the Copyright Act a performing right society, CAPAC, BMI, and now SRL, must apply every year to the Copyright Appeal Board for the approval of their tariff. Perhaps another element in your question would go to the term of the copyright. As you said, it is 50 years from the making of the original contrivance. The meaning of this is that after 50 years the work in question becomes, as Senator Grosart said earlier, part of the public domain. There can be no royalties owing to the producer of a record which is in the public domain. Therefore these works are not submitted to the Copyright Appeal Board in yearly presentations made by the Performing Rights Society.

Clearly, as I said earlier, there could be no question of retroactivity. We are not claiming for the use which may have been made in previous years. We are only claiming at the moment, for example, with respect to 1971. We will make an application at the end of this year, in conformity with the act, for 1972. We will have to appear again before the Copyright Appeal Board, which will deal once again with quantum.

Senator Molson: Yes, but you are claiming a right which was granted 50 years ago and has not been exercised.

Mr. Fortier: No, there is no element of prescription in the picture today. I would defer to my senior colleague, the Chairman, if he feels differently.

Senator Connolly (Ottawa West): In effect you are saying that the copyright, by law, is given a life of 50 years.

The Chairman: It is the life of the author plus 50 years.

Mr. Fortier: No, not in the case of a record. We have to look at section 10.

Senator Connolly (Ottawa West): A record is 50 years, since it is a thing that does not die.

The Chairman: The life is 50 years from the making of the original plate.

Senator Connolly (Ottawa West): That is what I understood.

Mr. Fortier: This is really all we are dealing with when we speak of creativity. I told you I would come back to section 10. It provides that the owner of the original plate, that means the first record producer who cuts the record, as they say in the trade, who has the recording studio, hires the performers, makes the arrangement in the studio, brings in this input of creativity which we submit, as the legislator has recognized, is worthy of protection.

To my knowledge this has never been argued anywhere, even before this committee, that at this juncture, that is the time when the first record is made, there is not a high element of creativity introduced. Under the terms of section 10 this is when the author happens. It is of the essence of copyright that there must be an author. La loi sur les droits d'auteurs. There must be an "auteur"; there must be an author. However, section 10 provides that with respect to records the first man is the author. All the others who press records from a tape made by the author have no more rights than the original one. All the rights flow from the author, in the same way that the author of a book assigns his rights to a publisher and the creator of the patent assigns his rights to users of the patent. The producer who made the record in the studio originally, wherever that may be in the world—music, as you know, is international—the United States, England, France or Canada, is the author of the record and he assigns to others the right to make records from that tape.

The records which are made from that original tape are entitled to protection under the terms of the act. The records made from that tape are entitled to protection in the same way that an assignee of a patent is entitled to protection under the terms of the Patent Act.

Senator Connolly (Ottawa West): This bill provides that protection, though.

The Chairman: No, this bill would remove it.

Mr. Fortier: It removes an integral element of the copyright. Copyright means not only the right to prevent reproduction, as you and I . . .

Senator Connolly (Ottawa West): Let us get it straight; perhaps I am horribly confused. As I understand it, this bill protects your right to prevent the record being copied.

Mr. Fortier: That is correct. That right can only be given to a copyrighted work.

Senator Connolly (Ottawa West): I assume that you have a copyright in that originally pressed record and no one can produce that contrivance.

Mr. Fortier: No one can reproduce it.

Senator Connolly (Ottawa West): Reproduce it; all right, no one can reproduce it or copy it.

Mr. Fortier: That is correct.

Senator Connolly (Ottawa West): Without infringing on your rights. However, you complain that you should also have the right to control the performance of whatever copies of the original are made.

Mr. Fortier: Yes, senator. Copyright means, and this is provided by section 3(1), not only the right to reproduce, but the right to perform.

Senator Connolly (Ottawa West): That is right; you say that the performing right given you by section 3 should also flow through.

Mr. Fortier: Should continue to flow through, as it does in respect of all other copyrighted work.

Senator Cook: The performing right has now become much more valuable than the right of reproduction.

Mr. Fortier: That is a very important point. Last year in the United States in excess of $100 million was lost by record manufacturers because of piracy, dubbing, illegal reproduction of records.

Senator Connolly (Ottawa West): In whole or in part.

Mr. Fortier: In whole or in part.

Senator Connolly (Ottawa West): That is what you mean by dubbing.

Mr. Fortier: Yes. This supplied the impetus to the United States Congress to bring in legislation earlier this year. Senator Grosart knows that that legislation has now granted a limited copyright to the record producer, the right to prevent reproduction.

Senator Cook: We already have that here.

The Chairman: We even have the performing right here.

Mr. Fortier: It is a moot point as to which is more important. They are equally important; this is why both the right to reproduction and the right to public performance flow at the bottom of the pyramid from the copyright in any work. Whether it be by author, composer or translator, all copyrighted work comprises the sole right to reproduction and the sole right to perform in public.

Now the minister is suggesting to you in respect of records that we close our eyes to what copyright really means and write into our law that copyright in respect of records only means the sole right to reproduce, not the sole right to perform.

Senator Cook: That is an interesting figure, $100 million estimated loss as a result of piracy in the United States.

Mr. Fortier: In the United States in 1970.

Senator Cook: Which means that some well-known records, such as . . .

Senator Connolly (Ottawa West): "Hello Dolly!"

Senator Cook: Yes, "Hello Dolly!" is recorded by a very well-known company, then taken by another record manufacturer.

Mr. Fortier: These are fly-by-night operators.

Senator Cook: This is where you obtain the figure of $100 million?

Mr. Fortier: That is correct; they dub the music by using a small recording machine. They press this new record and put on a label.

Senator Cook: There was no protection against that?

Mr. Fortier: There was no protection. There now is in the United States.

Senator Grosart: As there is here.

Mr. Fortier: As there is here, and always has been since 1921.

Senator Connolly (Ottawa West): Are you saying that you want to live by the present act, and more particularly section 3, which gives you a performing right?

Mr. Fortier: Yes, I am saying that.

Senator Connolly (Ottawa West): In other words, this bill takes the performing right away, and therefore deprives you of a property right which your client has in the contrivance he makes?

Mr. Fortier: I could not have put it any better. That is correct.

The Chairman: Have you another point, Mr. Fortier? I think we have shaken this one to pieces.

Mr. Fortier: I do. Perhaps I might end that point by reminding you that we have extended an invitation to members of this committee to attend in a recording studio. I do not know whether that letter has been communicated to you.

The Chairman: It has been distributed.

Mr. Fortier: It has been distributed to the members of the committee?

The Chairman: Yes.

Mr. Fortier: I am reiterating this offer. It seems to me that the only way you can convincingly have demonstrated to you the input of creativity, work, skill and labour—to use the words of Mr. Justice Maugham in the *Cawardine* case—which is expended by the record producer, is if you came into a recording studio and saw what the record producer does in producing a record.

A few years ago, in 1967, there was a book published entitled *Ring Resounding*. It is the history of the English Decca company's mammoth venture in recording Wagner's "Ring" complete for the first time. It took the producer of that record eight years to produce the record. I know Senator Grosart is very familiar with it.

Senator Connolly (Ottawa West): Was it a single record?

Mr. Fortier: It was 14 L.Ps in all.

Senator Connolly (Ottawa West): Two-side L.P.s?

Mr. Fortier: Yes, two-side L.Ps.

Senator Connolly (Ottawa West): Twenty-eight sides?

Mr. Fortier: Twenty-eight sides, yes. You could argue that it does not take eight years to produce, say, "Hello Dolly".

Senator Cook: Or "Itsie-Bitsie-Witsie".

Mr. Fortier: No, it does not. I suggest to you, however, that it takes an element of creativity. I said earlier there was a whole range to creativity. There can be a good book and a bad book. There can be a useful patent and a less useful patent. I think this is what we are dealing with here. The moment there is an element of creativity there is intellectual property, and it should be protected. Whether it is a record that is eight years in the making, spending millions and millions of dollars in producing it, or one made in eight hours in a recording studio, there is still an element of creativity; it should be protected, there should be copyright, and copyright includes public performing right.

Senator Carter: Extending this line of argument, would you not eventually get down to the technician who controls the knob having a part in the creativity, and someone who puts something here instead of someone else having a part in the creativity? Where would you stop?

Mr. Fortier: Not any more than I would recognize, for example, that the person to whom the author of a book may have dictated it was entitled to a copyright. If I, the record producer, employ a technician, he is working for me, but his input is part of the total input that goes to constitute the copyright vested in me, the producer. I think with respect, I would not carry it that far.

Senator Cook: Really, are not the producers the shareholders of the company, and in the final analysis they own the record?

Mr. Fortier: Yes.

Senator Cook: What do they have to do with it being creative? They get their dividends, smoke cigars and so on.

Mr. Fortier: I am sorry that I lost this point on you, Senator Cook.

Senator Grosart: They create capital.

Senator Cook: In the final analysis, the shareholders of the company own the record.

Mr. Fortier: Whether we are dealing with a company which is a producer or whether we are dealing with an individual, with respect it does not make any difference, because the law of the Copyright Act, no more than the Companies Act, does not make that sort of distinction; the corporate veil is respected.

Senator Cook: But it is the person who creates the originality who is entitled to the copyright.

Mr. Fortier: That is what the producer of a record does, whether he is employed by a company or whether he is an independent producer.

Senator Cook: He does not get it. The shareholders of the company get the royalty.

The Chairman: But you have a statutory author under section 10.

Mr. Fortier: If you look at section 10 you have the complete answer, I suggest, to your query.

The Chairman: You have to use imagination and some creativity to understand this.

Senator Grosart: Mr. Fortier, when we discuss the question that has just been raised, as to how far you proliferate the exercise of the performing right, would you say the situation at the moment in practice in Canada is that the exercise of the performing right in respect to receipt of royalties is limited to the original creator, and that you and others, performers, who may wish to share in the performing right are all users?

Mr. Fortier: No, I would strongly disagree with that. Your statement is doing away with the following very pertinent proposition. You are dealing with two different types of property. You are dealing with two different works. There is embodied in a record the work of the author composer, but there is also in the end product the work of the record producer, which includes the work of the author composer. Those are two different works, both protected equally under the Copyright Act.

Senator Grosart: Would you not agree that the performing right, which is what I am talking about, as asserted in the record, is secondary to and derivative from the original author composer?

Mr. Fortier: If you are making the proposition that without the author composer there would be no record, I agree with you. But I draw your attention to the fact that no distinction is made in the Canadian Copyright Act as to a primary performing right or a secondary performing right. There is no distinction found anywhere in the act, which to me is authority for the proposition I make that, since the legislators recognized that both were worthy of protection, they should both continue to be worthy of protection.

In the same way that the record producer has never said, and never will say, that the author composer should not be indemnified for the work he has created, I would hope that the author composer would realize that without the record producer his property rights would not be compensated, because there would be no public performance of his work on radio stations, on television stations, in dance halls, juke boxes and so on.

The Chairman: Let us say it would be limited.

Mr. Fortier: It would be very much limited.

Senator Grosart: What you say would be correct unless section 19(3) is read the way some people read it. Perhaps I should put it on the record, because it deals specifically with the performing right that may or may not subsist. Subsection (3) reads:

> For the purposes of subsection (1) . . .

. . . which is the one that grants the compulsory statutory licence . . .

> a musical, literary or dramatic work shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.

I am not going to argue this point, but merely point out that it may well be that subsection (3) takes the record completely out of the category in which you want to put it, as having, in a compulsory record, an inherent right.

The Chairman: In what category do you say Mr. Fortier wants to put it?

Senator Grosart: He wants to put it in the category of a musical, literary or dramatic work.

The Chairman: The statute says that.

Senator Grosart: Of course it does; that is exactly what I said. In section 19 (1) the statute says this; in 19(3) it appears to take it away.

The Chairman: You misunderstood the importance . . .

Senator Grosart: Let me finish my sentence, Mr. Chairman.

The Chairman: I know, but I have to deal with this. You are making a statement as to the effect of subsection (3) of section 19. What I say is that you have to go back and look at what the copyright is that is given. As to the record maker, it is as if it were a musical performance.

Senator Grosart: Perhaps Mr. Fortier might argue that. I am surprised that the chairman is arguing it. I am merely saying . . .

Mr. Fortier: I think he is only repeating what I said earlier.

Senator Grosart: It may be he is, but I say I am surprised to find the chairman arguing on that point.

The Chairman: It is unusual to find you surprised.

Senator Grosart: I say that section 19(3) may take it out of the category of a musical work as defined in section 19(1) which is the compulsory licensing section which, as I say, is the heart of the whole argument.

Mr. Fortier: Senator Grosart, it is . . .

Senator Grosart: I am not going to argue.

Mr. Fortier: May I be allowed a brief right of reply, Mr. Chairman?

All that section 19(3) says is that you cannot make a record from a record. That is all it says.

Senator Grosart: I do not agree that that is what it says, and others do not.

Mr. Fortier: Mr. Chairman, we dealt very briefly—and it was said that it was totally irrelevant—with the matter of money. I would very much appreciate an opportunity of saying a few words about money, since the main impetus of the presentation of Bill S-9 in the Senate has been that there was going to be a great sum of money which was going to flow out of Canada. I repeat that this is totally irrelevant, but since the point has been made, may I deal very briefly with Annex M? You have had distributed to you this morning a revision of Annex M which, in the top right-hand corner bears the words "Annex M (Revised)". Originally, in preparing this brief, we had failed to make a distinction between the records made in Canada—that is, Canadian recordings—and records made in other countries. If you look at Annex M you will see that the flowing, the ebbing away of large sums of money, mainly to the United States, is nothing but a red herring and it is not—I repeat, it is not—based on facts.

May I ask you to follow me through the first column of this Annex M? It refers to that portion of the revenue dollar of SRL which will be retained in Canada because it is in respect of Canadian recordings. May I remind honourable senators that since January, 1970, because of a decision of the Canadian Radio Television Commission, there need be, by law now, 30 per cent Canadian content over braodcasting stations in Canada? So, when we are dealing with recordings as a whole, we should bear in mind the fact that, included in those recordings which are used by broadcasters in Canada, will be a minimum of 30 per cent of the total use made by radio stations of records; and that in respect of this 30 per cent the whole of the revenue dollar accruing to SRL, in virtue of the decision of the Copyright Appeal Board, will remain in Canada. This is what the first column indicates.

In respect of foreign recordings . . .

Senator Grosart: Excuse me, Mr. Fortier, before you go on. At the present time, what percentage of the recordings of the SRL group is Canadian?

Mr. Fortier: What we are dealing with, senator, is what is played on the air, because that is the basis on which the royalties are paid.

Senator Grosart: I am asking you what percentage . . .

Mr. Fortier: 30 per cent—at least 30 per cent.

Senator Grosart: 30 per cent of the records now produced by the SRL group? That is what I am asking you.

Mr. Fortier: I am sorry, senator. The answer is less than 10 per cent.

Senator Grosart: So we are dealing with less than 10 per cent.

Mr. Fortier: No, we are not, senator. We are dealing with at least 30 per cent, because that is the use, the minimum use which must be made today, in virtue of that decision of the CRTC which came into effect on January 18, 1971—that in broadcasting, radio stations in Canada must now, for a minimum of 30 per cent of the time, offer Canadian recordings.

Senator Grosart: Yes, but this does not mean that 30 per cent of the SRL group recording will be Canadian.

Mr. Fortier: I think we are arguing at cross-purposes. I am saying that the tariff is based on use made by radio stations and I am saying that now, by law, radio stations have to use Canadian content recordings for at least 30 per cent of the time. So that column represents a minimum of 30 per cent of all the dollars which will accrue to SRL under the tariff approved by the Board, and it has to be, by law.

Senator Grosart: Oh yes, I agree.

Mr. Fortier: May I open a parenthesis, senator? 30 per cent is an absolute minimum. It is going to be a great deal more, because you and I know that there are two native recording industries—I almost said "two nations," but I do not want to get into a political or constitutional argument here. There are two recording industries in Canada. There is the Quebec, the French recording industry, and there is the English-Canadian recording industry.

In Quebec, the evidence before the Copyright Appeal Board in April was that in excess of 75 per cent of the recordings made in Quebec, the French recordings, are actually produced in studios in the Province of Quebec, by French-Canadian producers; and over the air, on the broadcasting stations in the Province of Quebec, there is thus a minimum of 75 per cent of records, which are records made in Canada, to wit, in Quebec. So that 30 per cent total picture, absolute picture, is a bare minimum. I think in reality we are dealing with—no, I am not going even to venture a percentage, because I think it would be quite misleading and I can err. I am saying that we are dealing in fact with more than 30 per cent.

The Chairman: It may well be 50 per cent?

Mr. Fortier: I would not wish to hazard a guess.

The Chairman: Very well.

Senator Grosart: Whatever it may be, the SRL has not contributed very much to it, in the past.

Mr. Fortier: The SRL was not in existence in the past.

Senator Grosart: I say the SRL group of companies has not been conspicuous in their promotion of Canadian content recordings.

Mr. Fortier: You have heard some grumblings from some Canadian producers, which I think are eloquent in themselves. May I make one point, though, Senator Grosart? I certainly do not wish to enter into an argument. The evidence before the Copyright Appeal Board is itself very eloquent. There is, as you know now, an obligation on the part of broadcasters to use Canadian records. Prior to this obligation being decreed by the CRTC, Canadian records, senator, were produced, but they were not played by the stations. They were not played by the stations because the radio stations were more interested in competing with the American music which flowed over the border, than they were in themselves promoting Canadian records. So the Gordon Lightfoots, the Anne Murrays, the Ginette Renods and the Jean-Pierre Ferlands, and so on, were being recorded yesterday, but they were not being given any air play because the radio stations were not obliged to give them air play. Now that they are obliged to give them air

play, the radio stations are screaming for Canadian records.

Senator Grosart: I am very glad that is so. But you say that 70 per cent of the records played on the air in Quebec are Canadian-produced.

Mr. Fortier: That is correct.

Senator Grosart: So it is not quite true to say that these Canadian-produced records, or Canadian-content records, have not been performed. As a matter of fact, they have been performed in Quebec. What you are saying is correct for the rest of Canada, but it is not a correct statement for Quebec over the last five to ten years.

Mr. Fortier: Now, honourable senators, with respect to foreign recordings—that is, recordings by the big American or English ogres—will you please follow me through the last column of Annex M? You see that the effect of the distribution pattern of $1 is as follows. There is a 12½ per cent administration charge. That is self-evident. There is included 10 per cent of the royalties which will be earmarked for music bursaries and scholarships. This and the other items which are recited following this form the basis of the offer, Mr. Chairman, which has been made to the Canadian Union of Performing Artists.

Twenty-five per cent of the remaining amount, that is, 25 per cent of the net, will then be turned over to this union voluntarily by the record producer, because the record producer recognizes the input of the performer and recognizes that the performer contributes to the actual production of a record. So 25 per cent will be paid over to those unions.

Fifteen per cent will then be paid to the performers who are under contract with SRL members. These can only be Canadian performers. Fifteen per cent of the net will then go into a fund for additional Canadian recordings to meet the increased needs of the Canadian broadcasting stations.

So that, Mr. Chairman, leaves then 35 per cent of the original dollar to be shared by members of SRL. That 35 per cent of the net represents 30.62 cents. As I said earlier in respect of Canadian recordings, all of this money remains in Canada and in respect of foreign recordings there is no more than 50 per cent of this 30 cents, in other words, approximately 15 cents, which will be shared with foreign copyright owners. And again this is in evidence before the Copyright Appeal Board.

This is the first time that I have had occasion to say so, but may I say that even in respect of the 15 cents, because of the purport or the intent of the impetus of the presentation of Bill S-9 before the Senate, we advised our clients that they should contact their parent companies in the United States, England and Holland and obtain from them a waiver of this remittance of 50 per cent of the remaining 30 cents. Whether or not this is relevant, I should like to put on record the fact that our clients have obtained from their parent companies a waiver along those lines. Thus, we are assured that the revenue dollar, which will accrue to SRL in respect of performance in public by broadcasting stations and other users of our work, will remain in Canada and will be shared equally between the performers and the record producers in the way in which it is recited here in Annex M.

Senator Grosart: Incidentally, Mr. Fortier, I must congratulate you on this because obviously it means a complete change in your existing contracts.

Mr. Fortier: It means an amendment to the existing contracts, yes.

Senator Grosart: Your existing contracts would call for a remittance of 50 per cent of gross.

Mr. Fortier: With respect, senator, no. It was 50 per cent of net. The contracts filed before the Copyright Appeal Board indicate 50 per cent of net.

Senator Grosart: But not this kind of net. I am talking about the old existing contracts.

Mr. Fortier: The old contracts filed before the Copyright Appeal Board indicate that 50 per cent of net is to be shared between the parent company and the subsidiary.

Senator Grosart: How was that net defined?

Mr. Fortier: Net is not defined.

Senator Grosart: What proportion would have gone under the existing contracts?

Mr. Fortier: Fifty per cent.

Senator Grosart: I mean of gross. What per cent of gross would that 50 per cent of net have been? I am just interested. That is all. I am not being critical.

Mr. Fortier: Clearly that was not evidence allowed before the Copyright Appeal Board, because Mr. Justice Thurlow said, I think rightly, that this was not relevant to the matter which was being considered before the Board. I would answer that the contracts were quite clear. They spoke to 50 per cent which had to be remitted to the foreign copyright owner, being the parent company in most instances. That is, 50 per cent of the net amount which was received by the Canadian subsidiary. Now, if you look at Annex M, senator, you will see that any sum of money which a member of SRL will receive cannot exceed 30 cents. So we are talking of 15 cents today just as we were at the time of the hearing before the Copyright Appeal

Senator Grosart: I do not want to get too involved in this, but actually, you would have been receiving more than the 30 cents.

Mr. Fortier: Not the members, senator.

Senator Grosart: But your receipt—the moneys paid for the exercise of the right.

Mr. Fortier: But it is not SRL which is paying for the foreign copyright owners. It is the members of SRL—the same way as it is not the authors and the composers in the United States who receive the money from the publishers over here. They receive the money from the performing rights societies, from CAPAC and BMI.

Senator Grosart: I was just interested to see how generous you had been. I should have liked to compare the 15 cents with what it was previously just to congratulate you on your surge of generosity.

Mr. Fortier: For which I thank you.

Senator Grosart: In connection with the Canadian recordings you will make, will there be any inflow into Canada from foreign performing rights royalties?

Mr. Fortier: Definitely. As you know, these are reciprocal arrangements under the terms of international conventions, with which I am sure you are just as familiar as I.

Senator Grosart: Is there a mechanism by which there will be an automatic inflow to Canada?

Mr. Fortier: There is reciprocity between those countries where the performing rights are recognized by law.

Senator Grosart: But not necessarily reciprocity between parent companies and their subsidiaries.

Mr. Fortier: I see what you mean. No, not necessarily.

Senator Grosart: At the moment there is no mechanism by which there will be an inflow to Canadians from the use of the performing rights of Canadian records abroad.

Mr. Fortier: I had missed your point. I see.

Senator Grosart: It is a very important point.

Mr. Fortier: Yes, it is indeed. I would not want to err here, but I think that mechanism exists in most of the contracts, if not all of the contracts which were filed before the Board by the eight major companies. It is a reciprocal arrangement. If, for example, a Canadian recording of a Deutsche Grammophon work is played in Holland, then there is mechanism for division between the parent company and the subsidiary of the performing right royalties which accrue in Holland. Absolutely.

Senator Grosart: So this reciprocity would continue, would it, in spite of this very generous decision of the foreign owners in your group not to receive any part of the money from Canada?

Mr. Fortier: These are the indications which have been given by the parent companies, yes.

Senator Grosart: You say, then, that, percentagewise, there would be an adequate flow back into Canada of performing right royalties from the use of a Canadian-made record by your group of companies abroad.

Mr. Fortier: Yes, I would say that, senator.

Senator Connolly (Ottawa West): Mr. Fortier, you said, I believe, that all the profits from the performing right royalties from radio stations are going to be held in Canada by this group of companies. I suppose this does open up quite an area for questioning, but what other source of revenue have these companies in addition to the performing rights of these records on the air?

Mr. Fortier: The obvious one is from the sale of records for private use.

Senator Connolly (Ottawa West): Is that fairly substantial?

Mr. Fortier: I am not going to venture an opinion that it is substantial, or more substantial or less substantial. There are figures which have been produced before this committee by one of my predecessors which indicate that the income from the sale of records at the retail level is approximately $100 million. Now what percentage of this is retained by the retailer I am not sure.

Senator Connolly (Ottawa West): You have to work the mark-up off.

Mr. Fortier: My instructions are that we are dealing with a $50 million a year business approximately.

Senator Connolly (Ottawa West): In other words, it is profitable for a foreign company to operate here. If it were not possible for foreign companies to get a reasonable return on their investment in Canada we would lose a record industry which would be to the disadvantage of Canada.

Mr. Fortier: Again, many of the artists who are popular—as I said earlier music is international and I do not think I would get any argument on that—"The Rolling Stones," and if I may mention in the same breath—

Senator Connolly (Ottawa West): The only ones I know are "The Irish Rovers".

Mr. Fortier: "The Irish Rovers," "Mozart," "Beethoven"—if I may use them in the same sentence. These are all just as much part of our music as they are of the music of England and Germany.

Senator Connolly (Ottawa West): I hope they get "The Irish Rovers" in England.

Senator Haig: Mr. Fortier, as part of your brief you include a letter from Mr. Basford, dated October 29, 1968, to Mr. Harrison, President, Sound Recording Licences Limited. In the fourth paragraph of that letter, Mr. Basford says:

> I wish to express my serious concern about this application, and to inform you that I consider it not to be in the public interest.

What is your answer to that? What is the reasoning behind it?

Mr. Fortier: The reasoning is provided in the next sentence. He says: (1) that that section has never been used in Canada and (2) the Royal Commission on Patents, Copyright, Trademarks and Industrial Designs concluded that the manufacturer's performing right in broadcasting and records, etcetera, should be abolished. I think it was in this context that the Honourable Mr. Basford was telling us that it was not in the public interest. This is the Ilsley Commission report which I am sure you are familiar with which in four sentences reproduced on page 17 of our brief which you have in your hands at the moment dealt with the performing right in records. You will see those four sentences at the bottom of page 17 and top of page 18. It is of interest to note that they referred to the United Kingdom experience because in the United Kingdom there had been published prior to the Ilsley Commission report a report of a Royal Commission chaired by Mr. Justice Gregory—it was called the Gregory Committee Report—and that report concluded that the performing right in records should be retained, but that report preliminarily stated, and it is the preliminaries that the Ilsley Commission dealt with, that there had been problems encountered in England with the exercise of the performing right. But these problems were encountered prior to the setting up in England of a performing rights tribunal such as we have in Canada, because the performers' unions and the musicians' unions were influencing the record manufacturers and record producers in preventing radio stations from giving an unlimited air-play to their records. You are familiar with the concept of needle-time? In England not only does the performing right in a record mean equitable compensation to the owner of the work, it also means the right vested in the owner or the copyright to restrict unlimited use of the records over the air. And this is one of the elements which is submitted to the Performing Right Tribunal. For example, in the Isle of Man case in England

it was ruled that copyright in a record meant not only the right to prevent reproduction, and the right to enforce public performance royalties, but also the right to restrict needle-time, because one of the main complaints of record producers and record manufacturers with respect to air-play which is given to their records is that too much uncontrolled air-play can kill a record and kill the sale of a record. In England this was recognized.

Senator Connolly (Ottawa West): A case of overexposure.

Mr. Fortier: Yes, overexposure. What they call "turn-table hits". These records "don't move", if I may use the colloquial expression, in the stores, but they fill up two, three or four minutes every hour on the radio station. The radio station uses it for profit but it does not mean sales so far as the record producer is concerned.

Senator Haig: Well, we have already heard that this is the only way in which a record company can sell its records, that is by the public hearing it on the air.

Mr. Fortier: Yes, you have heard evidence to the contrary also.

Senator Haig: When I used to buy records, I went into the little booth and put the record on the turn-table and listened. But now you hear a record from a radio station, and you get the "Top Ten" each week. Does that not greatly improve the sales of the records?

Mr. Fortier: Do you know what percentage of records produced in Canada are played over the air? Less than 10 per cent of all the records which SRL produce will be played on the air. This is a discussion which I would love to continue with you which goes to quantum, because I discussed this for four weeks before the Copyright Appeal Board. I am not disputing that there is an advantage derived by members of SRL from the air-play that is given to some of their records.

Senator Haig: There must be if you give the records to the radio stations.

Mr. Fortier: I am not disputing that; but surely you will agree with me, senator, that this is a question of quantum. This is why we have the Copyright Appeal Board which every year is called upon to decide who derives the most advantage. Is it the radio station by having access to our complete repertoire? Is it the radio station from having access for a pittance to what occupies in some instances up to 70 per cent of their air time? Or is it the record company which is definitely selling some records as a result of the promotion given to those records over the radio?

There is here an argument which was made ad nauseum before the Copyright Appeal Board. The board obviously found that radio stations derived more of an advantage than record producers because it said there should be a tariff.

My friends on the other side argued until they were blue in the face, after I had become blue arguing the opposite picture, that there was a trade-off. The board did not say there was a trade-off. The Copyright Appeal Board said there should be payments, there should be just compensation.

Are record sales affected by the air-play given to records? The answer is, "Yes". Some records are quite definitely affected by the air play given to records. However, it is not the sole means of promotion.

Senator Haig: The record companies, including SRL, do not lose by the playing of your record on the air.

Mr. Fortier: In some circumstances, yes, we do lose.

Senator Haig: Then the record cannot be very good.

Mr. Fortier: I am satisfied that some record companies can definitely lose money becase of overexposure given to some of their records by radio stations. Allow me to quote a statement made by the President of the Canadian Association of Broadcasters in April, 1971. The statement came right in the middle of the hearing before the board. The Canadian Association of Broadcasters argued against the tariff. Their lawyer put the argument which you are putting now, that record producers were biting the hand that fed them, that there was a trade-off. They even argued that in effect record producers should be paying broadcasting stations because they were deriving more of a monetary advantage. Mr. McGregor, the immediate post President of the Canadian Association of Broadcasters, said in the middle of the hearing and I am quoting from a clipping in the Ottawa *Journal*—that:

> Canadian performers are suffering from overexposure because of the recent increase in Canadian content on radio and television, W. D. McGregor, President of the Canadian Association of Broadcasters said Sunday night.

There is another element which you have to bear in mind, senator, which is that once Decca, Warner Brothers or Deutsche Grammophon are given a record, they are not assured that it will be played. There was evidence before the board of thousands of records which remained in the vaults or libraries of radio stations and were never played.

Senator Haig: How would you sell them to the public?

Mr. Fortier: That is exactly my point. We have other means of promotion. We have promotion in record shops, in newspapers, in magazines. We have promotion in a number of other outlets which are available to us.

My submission before the board was that not one radio station in Canada—and I make that statement without any reservation at all—could live today without records. Not one radio station could live without records.

Senator Haig: Could your record companies live without radio stations?

Mr. Fortier: Definitely. Absolutely; because there are two instances of countries where it happened. It happened in Australia and in Germany. This evidence was given to you by the members of the International Federation of the Phonographic Industry. I was sitting behind either you or Senator Connolly when either you or he expressed surprise when Mr. Stewart said before this committee that if there was no air play given to records, record sales would increase.

I stand by that proposition. Speaking for myself, if I could not hear my favourite music by flicking a dial, I would run to the record shop so that I could have access to that music in my home whenever I wanted it, or access to that music on the beach whenever I inserted a cassette in my little machine.

The argument could be made that sales of records would increase if there were no use made of records by radio stations, for the simple reason that music is a commodity with which you and I cannot do without.

Senator Haig: I can do without it.

Mr. Fortier: All types of music?

Senator Haig: No; I withdraw that statement.

Mr. Fortier: please remember that Bill S-9 does not make any distinction between different types of music.

Senator Grosart: Is there any intention on the part of SRL to restrict needle time?

Mr. Fortier: No, there is not.

Senator Grosart: Have you ever attempted to restrict it?

Mr. Fortier: We never have.

Senator Connolly (Ottawa West): Is there not a questionable kind of policy? I do not know much about the television and radio business, but it seems to me that one of the major problems with American television, is that stars become overexposed. As a result, they have less and less air time and appear on shows periodically. Do you not kill your product or maim it?

Mr. Fortier: For some records, yes. The evidence before the board on that point was that a new artist, or new record air played will promote sales, but in the case of an established artist or an old record, air play will not promote sales.

Senator Connolly (Ottawa West): From the point of view of the Canadian performer, it seems to me to be a pretty important decision, because relatively speaking we have not that many Canadian performers.

Mr. Fortier: At the moment, no, we do not.

Senator Connolly (Ottawa West): If you overexpose a record by a Canadian performer, you may in time do damage to that performer, apart from the value of the property to the company from that record. Conceivably you might get the public to the point where they are fed up.

The Chairman: That is, of course, an observation. It may or may not be relative to the question that we have to decide. I think it was put forward by Mr. Fortier as an answer to a question of Senator Haig as to what was the relative contribution by the broadcasting and records industry when records were supplied to broadcasters. We had evidence which suggested that broadcasting companies were doing a great favour to the record industry. At one time Senator Cook was prompted to make the remark, which I think perhaps he would now regard as being not the greatest remark he ever made, that record companies were biting the hand that fed them. We have had a lot more evidence since then.

Senator Carter: Regarding the revenue dollar, how much of it would be profit from sales? Is it from sales?

Mr. Fortier: No. This revenue dollar is exclusively from public performance rights.

Senator Carter: Not including sales?

Mr. Fortier: No. Finally, on the matter of dollars and cents may I remind the committee that we originally asked from the commercial broadcasters 2.6 per cent of their gross income. The award of the Copyright Appeal Board, after a four weeks hearing which included a series of witnesses, adduced I should add, by the applicant, SRL, with no broadcaster appearing to testify and assist the board in reaching its decision, was 0.15 per cent. Translated into dollars over a year this means approximately $200,000.

Senator Connolly (Ottawa West): Two hundred thousand spread over all the radio stations of Canada?

Mr. Fortier: Yes.

Senator Connolly (Ottawa West): And the television stations of Canada?

Mr. Fortier: yes.

Senator Connolly (Ottawa West): I suppose it is pretty hard to say how much it would cost each station, but how many such stations used it?

The Chairman: All stations with earnings of less than $100,000 are eliminated.

Mr. Fortier: There are 339 radio stations in Canada. Since no broadcaster appeared before the board to adduce evidence as to the extent of use, we had to monitor a sample of radio stations throughout Canada. The figures obtained from this monitoring experience were filed with the board. They showed that the 16 representative stations in our submission used our music to an extent varying from 14 per cent to approximately 72 per cent. The CBC was low; one of their stations had 14 per cent or 12 per cent. One top 40 station, I think it was CHUM in Toronto, used our products for more than 70 per cent of the time they were on the air.

The answer to your question, how is it divided, would be found by making a calculation, Senator Connolly, of figures contained in a booklet issued each year by the Dominion Bureau of Statistics. One such publication, showing by categories the revenues of Canadian radio stations, was filed with the board. I would be happy to provide you with a copy so that you could make the calculation.

Included in the $200,000 is a $30,000 payment by the CBC. Therefore, the figure is $170,000 per year as far as the commercial boradcasters are concerned.

Senator Desruisseaux: All this gives me concern; are you fighting only for principles?

Mr. Fortier: No, senator; we are not fighting only for principles.

Senator Desruisseaux: Would you be ready to use that $200,000 as a basis for the years to come?

Mr. Fortier: If there were approaches made by broadcasters to SRL, such as are made, as you probably know, senator, in European countries, in order that, one, the right be recognized once and for all; two, that they would indicate to the minister that Bill S-9, which favours them and them alone, should be withdrawn; and, three, that we could see an indication of a reasonable sum of money being offered, then quite definitely.

Senator Desruisseaux: What do you term a reasonable sum of money?

Mr. Fortier: This would be a subject for negotiation, senator, surely. We have taken the attitude from the start and have even approached some broadcasters and lawyers representing them, seeking to effect a settlement. We never expected to receive 2.6 per cent, any more than when

Senator Macnaughton or any other lawyer takes a damage action for $100,000 they expect to be awarded $100,000. A little bargaining room must be left.

Senator Macnaughton: Oh, yes, I do.

Mr. Fortier: We have never had one of those cases together, senator.

Senator Molson: That is what you tell the client.

Mr. Fortier: Exactly, but with negotiations; the door is open. I will go even further than that, Senator Desruisseaux. In so far as the CBC is concerned, we are cognizant of the fact that it is a drain on the Canadian taxpayer. They were subsidized to the extent of some $45 million last year, I believe, by you, me and others. The door has been open for many months. You asked me what I considered to be reasonable. In so far as the CBC is concerned, we would entertain a nominal fee.

Senator Desruisseaux: How could you justify that when the others would be treated differently?

Mr. Fortier: Commercial broadcasters are in business to make money. If they are making money with my product, they should compensate me. The CBC, as we all know, is not in business to make money.

Senator Desruisseaux: May I ask you what percentage of the stations make money?

Senator Haig: Over $100,000.

Senator Desruisseaux: Yes, over $100,000.

Mr. Fortier: We have the figures here.

Senator Desruisseaux: Yes, and there are more recent figures.

Mr. Fortier: I have here the DBS figures, Senator Connolly, if you are interested. The operating revenues of privately-owned radio stations in 1969 varied from $100,000 to over $1-12 million. There were 14 stations in Canada which had total operating revenue in excess of $1-12 million in 1969; 15 were between $1 million and $1-12 million; 15 were between $750,000 and $1 million.

Senator Desruisseaux: What is the percentage? I thought it was approximately 25 per cent?

Mr. Fortier: I find it difficult to arrive at a percentage from these figures.

Last week my friend Mr. Estey was asked what had happened to the CAPAC tariff in the course of the last 20 years since they were awarded a percentage of the gross income of radio stations. He did not have the answer at his fingertips. In 1952 CAPAC's rate as approved by the board in respect of commercial radio stations was 1.75 per cent. Today it is 1.85 per cent, representing an increase of only .1 per cent awarded by the board over a period of almost 20 years. May we translate this into dollars now?

Senator Desruisseaux: It does not matter.

Mr. Fortier: I would like to put it on the record for the benefit of you and Senator Grosart. in 1952 the revenues which CAPAC derived from commercial broadcasting amounted to $317,000. In 1969, the radio revenue amounted to $2 million. Why that increase?

Senator Desruisseaux: We all know it is the same as in the record companies. You are telling the story of the world when you say that.

Mr. Fortier: I am glad to note you would like to see record companies treated in the same way as radio companies. They should be paid for the use made of their property.

Senator Connolly (Ottawa West): What is CAPAC?

Mr. Fortier: CAPAC is the performing rights society, which comprises the authors and composers in Canada.

Senator Haig: Who assign this right to CAPAC?

Mr. Fortier: To this society.

Senator Haig: And also BMI.

Mr. Fortier: That is right. BMI and CAPAC share between themselves the authors and composers in Canada. Again on this point—I would not raise it if my opponents had not done so before this committee as well as before the Copyright Appeal Board—it has been said that all these dollars are flowing into the United States. May I bring to your attention the fact that by the assessment of the Canadian Association of Broadcasters, in a document they filed before the Copyright Appeal Board, they estimated that of the $5 million which the commercial broadcasters today pay to CAPAC and BMI, in excess of 80 per cent is channelled through CAPAC and BMI to the United States. What is the expression? What is sauce for the goose is sance for the gander. This is the Canadian Association of Broadcasters saying that already . . .

Senator Desruisseaux: Maybe they should be looked at too.

Mr. Fortier: That is certainly not the essence of my plea.

Let me end on this note, because I have already taken much to much time, honourable senators. I think that Bill S-9 is a bad bill. It proposes legislation that should never be introduced by any government. You will have noticed that clause 2 of the bill makes the effect of the bill retroactive to January 1, 1971. In effect, the Bill S-9 becomes law, the award that the Copyright Appeal Board has rendred, after a hearing which lasted, as I said earlier, in excess of four weeks, after all parties were given their day in court, so to speak, would be wiped out altogether. This would be an intrusion, in my humble submission, by the legislative arm of the Canadian Parliament into what by law since 1935 has been entrusted to this quasi judicial body which is called the Copyright Appeal Board.

There is another element that I think should be brought to your attention. It has happened only in the course of the last 10 days. There is a new court now in existence in Canada, as you are all well aware, called the Federal Court. It came into being on June 1, 1971. Section 28 of the Federal Court Act provides now for an appeal to the appellate division of the Federal Court from a decision of an administrative tribunal such as the Copyright Appeal Baord. May I put on record and bring to the attention of honourable senators, that 10 days ago counsel for the Canadian Association of Broadcasters filed an application before the Federal Court, under section 28, in order to obtain an extension of the delay for appealing the decision of the Copyright Appeal Board. In effect, the Canadian Association of Broadcasters, the CAB, has put this matter—I do not want to strain the meaning of the word, but I

will use it in the way in which I mean it, which is very loosely—sub judice; they have sought to refer the award of the Copyright Appeal Board to the Federal Court.

The Chairman: What you are suggesting is that they have selected their forum.

Mr. Fortier: They have made their bed, yes. I should be totally and completely fair to the Canadian Association of Broadcasters. One of the reasons for making this application, which is recited in the motion, is that Bill S-9 is presently pending, and they say they should not be called upon to pay SRL the tariff, which as you certainly know comes into effect on July 1 only; it is a six-month tariff which was approved by the Copyright Appeal Board. Again a submission we made to the board at the conclusion of the hearing was that, since this was a new performing rights society, any award should not be retroactive to January 1, and radio stations in Canada should have the discretion of deciding whether they wish to use our records or not.

Senator Connolly (Ottawa West): Bill S-9 would, in effect, wash out the decision of the Copyright Appeal Board.

Mr. Fortier: Completely for this year, and it would prevent us from going before the Copyright Appeal Board in the future.

Senator Connolly (Ottawa West): On performing rights.

Mr. Fortier: That is right. I think from a purely legal point of view this is bad law. It is retroactive legislation. It is taking away a right that has existed since 1935 to go to a body which has been set up to protect the public interest. As was said by Mr. Stephen Stewart from London, England, three weeks ago, Canada was the first country in the world to set up a performing right tribunal and many other countries followed suit, and Canada would be the first country in the world to do away, in respect of records, with the performing right tribunal.

Senator Desruisseaux: Would this reasoning that we have had on this bill reasonably extend to performing rights in sports and other fields, such as football, hockey and baseball performers?

Mr. Fortier: No. The amending legislation deals only with records.

Senator Desruisseaux: They do have sound.

Mr. Fortier: Yes, but it has to be a record or other mechanical contrivance by means of which sound may be reproduced.

Senator Connolly (Ottawa West): Suppose they have a record made of a live performance.

Mr. Fortier: That could be interpreted as being a literary or dramatic performance.

Senator Desruisseaux: It is any contrivance by means of which sound may be mechanically reproduced. A film is that.

The Chairman: That is right. What you ordinarily have is a live performance.

Mr. Fortier: A film is protected under another section.

The Chairman: You have a live performance when there is a broadcast or television showing of a hockey, baseball or football game, so there is no record involved.

Senator Haig: The baseball and hockey performance is protected by the owner of the NFL and so on, so it does not appear in this at all.

The Chairman: No.

Senator Grosart: There is no compulsory licensing.

Mr. Fortier: No, you cannot force a professional player to play for free.

The Chairman: Is there anything further?

Mr. Fortier: No, Mr. Chairman. May I thank you on my own behalf and on behalf of our clients who are here today for your patience. I am very sorry I have taken up so much of your time.

The Chairman: Well, we asked a lot of questions.

Mr. Fortier: I have enjoyed it, and I hope I have been able to answer all your questions.

The Chairman: Thank you very much.

Senator Grosart: Mr. Chairman, I should like to bring one matter to the attention of the committee and ask Mr. Fortier to comment on it. I sometimes read a trade publication called *Variety*, which is said to be the bible of show business. In the issue of June 9, 1971, I read the following, which I think is relevant, subject to your ruling, Mr. Chairman. It is dated Toronto, June 8, and says:

> With permission recently granted them to charge broadcasters across the country a performance fee, Canadian-based disk manufacturers are moving full swing ahead to hike album prices.
>
> Companies withheld a price increase in line with that which took place recently in the U.S. pending federal government approval of their demands. Latter originally were made 32 months ago. They took the position among themselves at that time that increased prices might offend and prejudice their case for a performance fee.

I skip two paragraphs, in which they detail some of the increases. The last paragraph reads, in part:

> Of the disk manufacturers, 95 per cent are foreign owned and are under orders from head office to release a certain number of records over a certain length of time whether the market can bear it or not.

That is a quotation. I am not saying that that is a fact, but I would appreciate your comment. Have you seen it?

Mr. Fortier: What is the source?

Senator Grosart: "Variety".

Mr. Fortier: Who wrote it?

Senator Grosart: I do not know.

Mr. Fortier: I am informed of this for the first time, senator, so I have no comment.

Senator Grosart: So am I. I just happened to see it. Perhaps some of your principals might wish to see it.

The Chairman: Let us put it this way. If Mr. Fortier, after investigating and studying it, decides that there is anything he wishes to submit, he could write in to us.

Mr. Fortier: Yes, Mr. Chairman.

The Chairman: Honourable senators, this concludes the hearing today.

Senator Macnaughton: Mr. Chairman, I would like to take the opportunity of congratulating this very able attorney. Whether he is right or wrong, his presentation was extremely good.

Senator Grosart: Hear, hear.

The Chairman: That is what we expect from Mr. Fortier.

Senator Macnaughton: Yes, but we do not always get it from others.

The Chairman: Honourable senators, we have given an appointment to the minister for next Wednesday morning, the date being the date that was suggested by him. I mentioned that so that it could not be concluded that we had delayed hearing him until that date. We were offered his appointments, that he would not be available between June 2 and June 22. We had commitments for two of our weeks, so we said we would offer him June 23, and asked him to tell us, in any event, whether that was acceptable or not. The answer was that it was acceptable. So the minister will appear next week. If Mr. Fortier wishes to attend, he is perfectly entitled to, and if he wishes to make any reply to any of the submissions he would have an opportunity to do so. You can use your own judgment, Mr. Fortier.

Mr. Fortier: Thank you very much, Mr. Chairman. I should bring to the attention of the committee that on Wednesday next the Canadian Association of Broadcasters is going to be responsible for my attendance before the appellate division of the federal court on this very matter. Possibly you will be sitting at 9.30?

The Chairman: Yes. You will have until a quarter to eleven.

Senator Burchill: Did we not have the minister here one day on this bill?

The Chairman: No, senator.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 31

WEDNESDAY, JUNE 23, 1971

Sixth and Final Proceedings on Bill S-9,

intituled:

"An Act to amend the Copyright Act"

REPORT OF THE COMMITTEE

(Witnesses—See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Aird	Haig
Beaubien	Hayden
Benidickson	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28).
Grosart	

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 30, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the Motion of the Honourable Senator Urquhart, seconded by the Honourable Senator Cook, for the second reading of the Bill S-9, intituled: "An Act to amend the Copyright Act".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

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

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, June 23, 1971

(34)

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

Bill S-9, "An Act to amend the Copyright Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Croll, Flynn, Gelinas, Giguère, Grosart, Haig, Hays, Isnor, Lang, Macnaughton, Martin, Sullivan and Walker.—(21)

Present but not of the Committee: The Honourable Senators Lafond and McDonald. (2)

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

WITNESSES:

Department of Consumer and Corporate Affairs:

The Honourable Ron Basford, Minister;

Mr. A.M. Laidlaw, Q.C., Commissioner of Patents.

Sound Recording Licences (SRL) Limited:

Mr. L. Yves Fortier, Counsel.

At 10.30 a.m. the Minister withdrew.

The Honourable Senator Beaubien moved that the Bill be reported now without amendment. The question being put, the Committee divided as follows:

YEAS—7

NAYS—3

The Motion was declared *Carried.*

At 11.50 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, June 23, 1971

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-9, intituled: "An Act to amend the Copyright Act", has in obedience to the order of reference of March 30, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Minutes of Proceedings

Wednesday, June 23, 1971

(24)

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

Bill S-9, "An Act to amend the Copyright Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Croll, Flynn, Gelinas, Giguère, Grosart, Haig, Hays, Isnor, Lang, Macnaughton, Martin, Sullivan and Walker.—(21)

Present but not of the Committee: The Honourable Senators Lafond and McDonald.—(2)

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

WITNESSES:

Department of Consumer and Corporate Affairs:

The Honourable Ron Basford, Minister.

Mr. A.M. Laidlaw, Q.C., Commissioner of Patents.

Sound Recording Licences (CRIA Letter).

Mr. L. Yves Fortier, Counsel.

At 10.30 a.m. the Minister withdrew.

The Honourable Senator Beaubien moved that the Bill be reported now without amendment. The question being put, the Committee divided as follows:

YEAS—7

NAYS—1

The Motion was declared Carried.

At 11.30 a.m. the Committee proceeded to the next order of business.

ATTEST:

Patricia A. Precourt
Clerk of the Senate Committees

Report of the Committee

Wednesday, June 23, 1971

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-9, intituled: "An Act to amend the Copyright Act", has in obedience to the order of reference of March 30, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, June 23, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-9, to amend the Copyright Act, met this day at 9.30 a.m. to give further consideration to the bill.

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

The Chairman: Honourable senators, I call the meeting to order.

We propose to consider first this morning Bill S-9, and we fixed this date so that we might hear the Minister, Mr. Basford, who is here. Mr. Laidlaw, Commissioner of Patents is with him.

The floor is yours, Mr. Minister.

The Honourable Ron Basford, Minister of Consumer and Corporate Affairs: Mr. Chairman and honourable senators, thank you for allowing me the opportunity to appear before you as a member of the Government on this bill, which is a Government bill, and thank you for arranging this meeting. Your schedule and mine for the month of June is very full, and I appreciate your courtesy in arranging a mutually convenient time for my appearance.

I and the officials in the Department, and particularly in the Copyright Branch, have been following the deliberations of this committee with considerable interest.

As I have mentioned and as you already know, this is a Government sponsored bill, the purpose of which is to remove from the Copyright Act any doubts as to the meaning of the "rights" or the alleged rights that record manufacturers might have to royalties from the public performance of their records.

The Government's position which I wish to reiterate this morning was clearly stated by Senator Urquhart when he introduced and sponsored the bill in the Senate, and I should like to take this opportunity of thanking him for explaining so ably the necessity and the purpose of this enactment. It is not my intention this morning to repeat what he has already said in his opening statement, or what has already been said in detail by some of the witnesses before you. However, I should like, if I may, to refer to some of the presentations to this committee on behalf of SRL Limited in which it was argued that the principal ground for this type of copyright was covered by the question "What are we dealing with?" and, "Why should there be copyright in a record?"

With respect to the first question asked by SRL it was claimed that since the right of performance in a record had been embedded in our legislation since 1921, that right should not now be dismembered. The Government and I, do not accept this argument. The present legislation was copied from the English statute of 1919, and no one at that time realized what was being provided. The manufacture of records was then only in its infancy; broadcasting stations were just on the verge of development; tapes did not even exist. It was the age of the player piano, and no one could foresee the tremendous technological changes that lay ahead and that have since occurred.

Mr. Fortier's comments regarding dismemberment of copyright should, I suggest, be read in the light of conditions existing in 1921. Any Canadian legislature in those days that could have foreseen the future would not, I am certain, have permitted a performing right in sound recordings to exist. As you know, that right was never even claimed until two years ago in Canada.

With respect to the question as to why should there be copyright in records, I quite agree that there is some degree of creativity in assembling groups of performers and musicians to produce a sound recording. But I do not agree that this type of creativity is entitled to copyright in the public performance of that sound recording. The record manufacturers are, of course, entitled to protection against copying or piracy of their recordings, but they have this protection under the act and this protection is maintained even after the enactment of Bill S-9. That, in the Government's view, is all to which they are entitled, and I shall come back to this point later.

More importantly, the Government has not in any way—and this is something I want to make clear this morning because I understand that certain suggestions have been made informally to the committee—withdrawn its views with respect to the passage of this bill. As minister responsible for Bill S-9, I do not treat lightly the judgment, for example, of the Economic Council of Canada which was received subsequently to the introduction of Bill S-9, or the findings of the Ilsley Commission, both of which urged this withdrawal of "rights" provided in the old Copyright Act of 1924, and still extant, for record manufacturers to claim fees for the performance of their recordings in public.

The point I wish to make is that in spite of the suggestion that has been made to the committee, in spite of the findings of the Copyright Appeal Board, it is still the view of the Government that Bill S-9 now before the committee should be passed.

May I be permitted, Mr. Chairman, to draw your attention and that of honourable senators to what I view as certain important considerations. I shall be very brief and will then subject myself to whatever questioning that honourable senators have. As has been made clear in

evidence before you, 95 per cent of the record manufacturers, through this performing right society known as Sound Recording Licences (SRL) Limited, are subsidiaries of, or associated with, foreign firms, in very large measure American firms. The American principals of the SRL group do not have the right in the United States that their Canadian subsidiaries are now demanding and trying to exercise in Canada. Through the tariff that was accorded to them in the recent decision of the Copyright Appeal Board.

What is not available to the record manufacturers in the United States is apparently regarded as necessary in Canada. What is not available to the foreign parents is claimed in Canada. Surely this is an anomalous position for us in Canada to find ourselves in, and surely it is an inequitable one from the point of view of Canadian users of records.

Another point I would like to make is that Bill S-9 has nothing to do with performers in the usual sense of the word. Argument before you, I suggest, has been somewhat confusing, in my opinion, and has served to confuse this issue about performers and the rights of performers. "Rights" of artists, of performers and musicians to royalties for their performance is entirely a separate matter, entirely separate from the considerations of Bill S-9 and the "right" of the record manufacturer.

The planning group which I established within the department to study the recommendations of the Economic Council of Canada on copyright is even now considering the "rights" of performers and what "rights" should be accorded to them under a revised Copyright Act. Performers' "rights" have no part in the bill before you.

You will recall, Mr. Chairman, the appearance before you of Mr. William Dodge, Secretary Treasurer of the CLC, who was spokesman for the various performers', actors', and musicians' groups for which he spoke. He was against the enactment of this bill. He was relying on arrangements between SRL—and I underline and put in quotation marks the word "arrangements" and the performers whereby SRL would share its royalties from performing rights' fees with the performers. To quote his words "A bird in the hand is better than one in the bush." But counsel for SRL, in the presentation before you on Wednesday two weeks ago on behalf of SRL, made it perfectly clear that no legal contract—and I emphasize this—exists between SRL and the performers' union. Counsel stated that SRL "made a voluntary offer three months ago to the Canadian Union of Performing Artists to divide royalties received 50 per cent with the performers".

It was further admitted there was non-consummation of this proposal, as there was no agreement as to how the royalties were to be divided amongst the various performing unions and performers. If performers need or deserve—and I emphasize this, Mr. Chairman—a performing right, as may well be the case, the provision of it indirectly, through the grace and favour of the record manufacturers, is a most uncertain and inefficient way to achieve it.

Bill S-9 does not deal with performers. It deals with record manufacturers and their claims to "rights" additional to those already available to them through the sale of their records. If we as legislators, or as a Government or as a Parliament, are to write into the law some performing right for performers, artists, and musicians other than that for the authors and composers, I think we should do it in a straightforward way when the Copyright Act is before the Senate by way of a general revision of that Act rather than this roundabout and indirect and almost back door method of some private arrangement or agreement between the artists, performers and the record manufacturers.

The next point that I would like to make, Mr. Chairman, is that there has been, I submit, another element of confusion introduced into these hearings. It amounts to this: if CAPAC and BMI, the two Canadian performing right societies, are entitled to royalties for performances, why should not the record manufacturers be entitled to enjoy the same right? The answer to that is very simple, it seems to me. CAPAC and BMI represent the true creators of music: the composer and the author. Further, the composer and the author have no other means available to them to obtain rewards for their creative activities. Their rewards can only come through public performance of their works.

Let us, then, not be confused with what properly belongs to creators, and the rights of the record manufacturers whose whole business depends upon the original creativity of authors and composers.

Again, I think I should mention, merely for you to keep in mind, that in so far as the vast majority of SRL shareholders are concerned, master records are not manufactured in Canada. The masters of original tapes are imported. Our record manufacturers make the copies. There is, I am sure you will agree, a difference in that situation. If creative activity is embodied in a recording, that creative activity is carried out in large measure outside this country, and we should not provide fees for the "creations" of foreign record manufacturers.

Lastly, I have heard remarks to the effect that the Copyright Appeal Board awarded only a minimum tariff to SRL—and this is the point I opened with—and therefore there is nothing to be concerned about; there is no urgent need for this legislation. I can only disagree with that suggestion.

As you are aware, I received a report from the Copyright Appeal Board setting out the tariff and I would like to read into the record a statement from that report. It is as follows:

> A large part of the time of the hearing was devoted to the question raised in item 6 respecting the quantum of the fees to be set and a number of important aspects of the matter were raised and discussed. The board is of the view that rates of the levels demanded by the tariffs as filed would present an undue increase in a single year in the operating costs of the users of records and that if the fees were ever to reach such levels they should do so slowly enough to enable the users to adjust to them over a period years.

I suggest, Mr. Chairman, there is a clear inference here that if this bill is not enacted, the fees demanded by SRL, and probably awarded, will rise increasingly. If steps are not now taken it is unlikely that appropriate steps will ever be taken.

It has been said to me that this matter could be allowed to stand until the entire Copyright Act is revised. That, of course, I would very much like to do, and this is what I endeavoured to do two years ago by having the SRL group

agree not to try to claim a tariff until we had before Parliament a complete revision of the Copyright Act. But this is a complex subject and a complete revision may well be two years or more away. The "rights" enjoyed by the record manufacturers would by that time, if they rare enforced now, be firmly entrenched; and I suggest, Mr. Chairman, that the time to act on this matter, if there is any time to act, is now.

I think in that sense there is urgency that the Parliament of Canada deal with Bill S-9 and pass it.

I now refer briefly to the point raised by Senator Grosart. Most of the record manufacturers are associated with music publishing houses, and through these publishing companies those that are in that position now enjoy a share in the CAPAC and BMI distribution of royalties to other composers and publishers.

Finally, I raise a further point which causes me concern. If the right of public performance in recordings is not disallowed, some of the foreign principals of Canadian subsidiaries will, through these subsidiaries gain access to the books of Canadian broadcasting firms. This will come about through their auditing of royalties which would be due to them through the SRL tariff. This, I submit, Mr. Chairman, could be a matter for very serious concern, as some of those same foreign principals are in the broadcasting business in Canada. You would be, through this mechanism, running the risk of allowing the principals of the recording manufacturers, in auditing the books of their radio broadcasting competitors, to see what their competitors in the broadcasting business are doing. That seems to me to be a rather serious matter.

I am, of course, open to any examination or cross-examination that you or honourable members may wish. However, my purpose here this morning, in spite of the ruling of the Copyright Appeal Board and the evidence that you have had, is to wage you on behalf of the Government to send back to your colleagues a recommendation that this bill be enacted.

The Chairman: Mr. Minister, when do you expect the new Copyright Act to be available?

Hon. Mr. Basford: Of course, when I was first sworn in as a minister I asked when would we receive the report of the Economic Council. I was assured it would be presented within a matter of months. It was two years before I received it, early last spring.

I had set up an interdepartmental committee within the Government to consider various copyright matters. I have a review committee working in the department considering the recommendations of the Council. They have not yet made recommendations to me, nor I to the Government.

It may be at least a year before any legislation sees the light of day. It could even be longer, because it is a complex problem. Even the Council could not find answers to many of the problems. I also know that many of those who have made representations have difficulty finding answers. This relates not only to this question but to the whole field of photocopying and the technological changes that have taken place.

A revision of the Copyright Act, in frankness, does not enjoy the highest priority with Members of Parliament. This is often the difficulty in passing legislation through Parliament, and usually the reason why some of these acts are so out of date.

The Chairman: We have heard evidence that at least 23 or 24 developed countries in the world, including England, have a performing right. Have you any comment?

I bring this to your attention because you said if any country in the world was faced with a situation such as we have in Canada now they would vote to eliminate any performing right. I notice that these countries do have this performing right. Most of them have had it for some time; England since 1911.

Do you wish to comment or to revise your statement in any way?

Hon. Mr. Basford: No, I do not. In spite of the fact that England has had a performing right in the hands of the record manufacturer for those years you have mentioned, the Ilsley Commission, which examined the law and the practice in this country and many others, recommended that Canada should not copy it. The Gregory Report in England recommended that the right be continued but only because it had been in existence and they would not remove it. They recommended procedures to deal with the right where there had been problems. The Economic Council of Canada, again considering both the United Kingdom and foreign jurisdictions and trying to work out what should be the law in Canada, came to the same conclusion as the Ilsley Commission, that the path taken by England in 1911 as you suggest, or 1919 when the legislation was enacted, is not one we should follow.

If we wish to consider foreign examples we should possibly look south of the border. I am no expert in entertainment nor in copyright, but I would think that here is the biggest entertainment market in the world, the United States, where no such right exists. Although I was assured over two years ago that the United States intended to grant this right, it still has not been given. There is a bill before the Senate, but I suspect there are more bills not passed by the Senate than are passed. This has been a suggestion in the United States for many years, but they still have not accorded this right in Congress.

The biggest entertainment market in the world does not grant this right to the manufacturers, who have developed into very healthy companies and profitable enterprises without it. Why then should we, a small country with a much smaller entertainment budget and with basically foreign manufacturers, accord a right that their parent country has not yet given them?

Senator Connolly (Ottawa West): Do I understand that in the United States Senate there is a bill which will give a performing right?

Hon. Mr. Basford: There is a bill before the Senate, but I think some of your other witnesses would be more expert in this than I. The purpose of the bill is to accord a performing right to the manufacturer. There is no such right at the moment in the United States and I do not believe that we should precede them in this area. This is one area in which we should not endeavour to lead the United States.

The Chairman: The evidence before us is that a bill was referred to a committee of the Senate of the United States. That committee has reported favourably to the Senate, which has not yet dealt with the bill.

Hon. Mr. Basford: My point is that the committee was given this information and senators were almost invited to draw the inference that it was imminent that there would be such a right in the United States. I wish to make it clear that I was assured two and one-half years ago that the Americans would very soon accord this right. However, two and one-half years later the bill has not been dealt with by the Senate. It has been reported to the Senate, but I do not think we can take it for granted that the Americans will accord a performing right to record manufacturers.

Senator Walker: How many years has it been in the hopper? How long ago was it reported by the committee?

Mr. A. M. Laidlaw, Q.C., Commissioner of Patents: The latest information, which we received from officials in the United States Copyright Office, is that there is little hope for a long time that this bill will be enacted in the United States Congress.

Senator Cook: Your point is that the creative effort takes place in the United States and why should this country, where it does not take place, take that step.

Senator Walker: Perhaps you could answer my question: How long has it been since the bill was reported to the Senate by the committee?

Mr. Laidlaw: I believe two years, and then that bill was dropped and another presented to a Senate committee. That committee presented this bill, I believe, last January. However, I may be wrong in that.

Senator Walker: Did they again report favourably?

Mr. Laidlaw: The committee did, sir, yes.

Senator Walker: In the current session of Congress?

Mr. Laidlaw: Yes. However, as I say, the officials I spoke with are pessimistic as to its chances of passing.

Senator Macnaughton: You mean that there are several other bills which have priority; it does not necessarily indicate opposition to this bill.

Mr. Laidlaw: Yes, but they are in difficulties in the United States. They want a performing right in the record, but that involves the juke box industry.

Senator Hays: What would it cost the Canadian listener in dollars?

The Chairman: This year?

Senator Hays: Well, in any one year.

The Chairman: The fees are only established for a year.

Senator Hays: What would be the cost? What are these people going to receive, these four firms?

Hon. Mr. Basford: It is set out in the decision I have read. Approximately $200,000.

The Chairman: We have had evidence to show it would amount to about $200,000.

Hon. Mr. Basford: Yes.

Senator Beaubien: That would go to the American firms.

The Chairman: Any person in Canada who qualified.

Senator Connolly (Ottawa West): On the question of quantum, I take it the $200,000 is not the quantum that would disturb you, Mr. Minister. I take it what you are anticipating here is a great inflation in that amount over the years?

Hon. Mr. Basford: I think we are dealing first with a question of principle that is totally divorced from quantum. Reading the record, I take it that is really the view of this committee.

Senator Flynn: That is not the way the sponsor introduced the bill. Quantum was the only reason. I agree that Senator Connolly may have given you a good explanation, but that is what the sponsor of the bill said when he introduced the bill; it was a question of quantum.

Hon. Mr. Basford: It is also a question of principle. I think Senator Urquhart made that clear. We, along with the Ilsley Commission and the Economic Council, do not think this is a kind of right that should be recognized in copyright. The other principle is this: if there is to be assistance to performers, to musicians and artists, this is an indirect way of doing it and the wrong way of doing it. If we want to put in the Copyright Act the right to the performer, the musician, that is something that would be before this Parliament in a year or two in the revision of the Copyright Act. It should not be done via this sort of ex gratia system by which the record manufacturers out of their great generosity slice in the musicians for a little voluntary payment.

One has to look at quantum. Certainly when this first came up quantum was considerably higher than the Copyright Appeal Board awarded, and could have gone to $5 million. I should not comment on the decision of the Copyright Appeal Board. They reduced that considerably, as is obvious. One can always see that these fees are increased year by year, and they could be considerably more than $200,000. One is concerned with the principle of who has a performing right and who has not. It is my position that manufacturer, while he is entitled to protection against copying, which he obviously should have and which right he only recently obtained in the United States, should not have a performing right.

Senator Connolly (Ottawa West): Mr. Minister, I do not say this because I have any interest. I never heard about this problem before it came before the committee, so I want you to understand that. One of the things that has been pressed upon us here, although perhaps not in these words, is that the people who make these records have a property right under the present law, and the effect of this law is to deprive them of that property right. It is a valuable property right, I would think, because they have fought very hard for it. I think it would be helpful to the committee if you could address yourself to that point. It would certainly help me. Could you address yourself to the point why this property right should be taken away from them?

Hon. Mr. Basford: I think this discussion of property right somewhat confuses us, because we talk in language that is often not really very applicable. I think the better approach to use is that adopted by the Economic Council, that surely you embody these kinds of rights in legislation, not from a point of view of a property right but from a point of view of incentive. Do you want invention, do you want initiative, in terms of patents, for example? Do you want performance in Canada? You use your intellectual

property law as a means of intellectual incentives, and you do not speak of them as property rights. I do not know whether the committee has heard from the Economic Council or its staff. It might be useful to do so, and have them expound a good deal more clearly and ably than I.

The Chairman: Who would you suggest, Mr. Minister?

Hon. Mr. Basford: The chairman.

The Chairman: Mr. Laidlaw?

Hon. Mr. Basford: Or Mr. McQueen, who is no longer with the council but who was when they published their report. Parliament accords certain rights through a patent act or a copyright act or a trademarks act, but it does so for the purposes of incentives, to generate a certain kind of activity. I do not think that this will generate that kind of activity. If we want an incentive to performers, let us put into the act a performing right society for performers, not for manufacturers, who surely are producing articles for sale.

Senator Connolly (Ottawa West): I am the devil's advocate here when I say this. I am saying it for the purpose of finding out what is in your mind. I wonder if that argument does not rebound against you, because if you protect the position of the record manufacturer—and the way they have put it is that they have a property right here—are you not also encouraging innovation, incentive to produce better things, improvements in the quality of the article they produce, by giving them a performing right? I do not say I am in favour of the performing right. I want to find out what side I should be on.

Hon. Mr. Basford: I do not think you are doing that, with respect. There is argument that no such right exists. I am not making this argument this morning. This is not a court of law, but there are those that allege that there is no such right. The purpose of Bill S-9 is to make that very clear, that there is no performing right. If there is a right, it certainly had not been exercised up until two years ago.

Senator Connolly (Ottawa West): If it is a right, it is one that is created by statute. It is not perhaps an inherent right. At least, it is recognized by statute now.

Hon. Mr. Basford: The point I wanted to make was that it had not heretofore been exercised in this country up until two years ago. Therefore, if it were such a valuable right it might well have been exercised a good deal earlier.

Senator Connolly (Ottawa West): I suppose it has become more valuable over a period of time because of the use to which these articles have been put, namely the development of television and radio, and other song distributing devices such as public address systems and the like.

Senator Lang: Mr. Minister, we have heard arguments here emanating largely from two competing private interests. How would you interpret the effect of this bill on the public interest as opposed to those private interests, and to what extent does it affect the public interest?

Hon. Mr. Basford: I think the public interest is such that this is a charge on the broadcasting business which has to be passed on to the ultimate consumer, either in advertising costs or in some other way.

There is that public interest. There is the public interest in maintaining a viable broadcasting system, a viable private broadcasting system. One should avoid putting a cost to them, if one can; a cost which one does not think is justified. There is the public interest of the taxpayer, in terms of the levy against the CBC, of course, which is almost a conflicting interest. The taxpayers have to pay that levy, and that to me is a public interest.

I think it confuses the issue, in terms of support for the artistic community in Canada and support for musicians and performers, because I do not think that is the issue in this bill. It is not the issue here, although it is alleged it is. It is put forward by the manufacturers that this is almost a philanthropic effort on their part to assist performers in this country; and I think that is not right, and I think it confuses the issue to have such a "right" and such an arrangement.

The Chairman: Mr. Minister . . .

Hon. Mr. Basford: You asked about the public interest, senator. In terms of legislation, this whole issue of copyright in intellectual property will be before Parliament within a year or two. It seems to me that that will be the time to make that decision, and that up until that time the status quo should be maintained. That really is the position of the Government.

The Chairman: Now are you ready for a question, Mr. Minister?

Hon. Mr. Basford: Yes.

The Chairman: Do you think that it should be part of Government policy, in order to reduce the costs of broadcasters, that you take away an existing right which has been written and entrenched in a statute of Canada for as many years as this right has been entrenched.

Hon. Mr. Basford: About which there is some argument as to whether the "right" exists and which "right" has never been exercised.

The Chairman: I assume, for purposes of my question to you, and I assume by reason of the fact that the Government is before us with a bill to take away that right, that the assumption is that it is a right that exists at the present time by statute. I am making those assumptions.

I am trying to confine this thing, as you will see I tried during the course of the hearing here if you read the record, and to get away from the question of quantum. If you are saying we must keep down or reduce the costs of the broadcasters, then we are incorporating that as a principle in the legislation and, even if you take away existing rights, you justify it on the basis of quantum. I would rather go to the other side of the question. I tried to get the broadcasters, when they were here, to address themselves to the question: Is there anything inherent in a copyright or a performing right in a record; is there an element there, that carries with it, or could be said to carry with it, the right to be recognized as copyright?

How you present that, I do not know; but, after all, the Economic Council faced up to it and made a report and surely they should be able to tell us how they distinguished those elements. Were they influenced only by quantum; were they influenced by the notion that inherently there is no element in the nature of a performing right in a record which should be recognized under copyright legislation?

Hon. Mr. Basford: It was the law, surely. These are statutary rights that exist only by reason of a statute. Surely

that was the position of the Council, and surely that was the position of the Ilsley Commission.

The Chairman: I am not sure it was, Mr. Minister, but we are entitled to disagree on that question. They sort of disqualified themselves, in my reading of the report, by indicating that they really did not pose as being experts on the question of copyright law. It was quite an intricate subject. You referred to Chief Justice Ilsley's report, which also supported the idea that there should not be a performing right in records. But Chief Justice Ilsley based his report on the Gregory Commission.

The Gregory Commission was a commission headed by Mr. Justice Gregory, in England, which sat around 1952. They ended their hearings by recommending that the performance right be continued, in a different form. In other words, it was continued in itself rather than being treated as though it were a musical work.

Hon. Mr. Basford: I am not Mr. Justice Gregory, but I understand the surmise is, and it is made clear in the report, that this was because there was a right that was already being exercised, and they made recommendations by which the exercise of that right should be very rigidly controlled.

The Chairman: Wait a minute now; let us stop there.

Hon. Mr. Basford: I do not think we can accept the Gregory Report and ignore the Ilsley Report. I do not quite see the logic of that. The Ilsley Report is the Canadian one.

The Chairman: Mr. Minister, sometimes you see what you want to see.

Hon. Mr. Basford: This is general, and it may be true of both of us, I think.

The Chairman: It may be true about me, too. It may be a principle on which I operate—and I would expect certainly that you would double that in spades.

So far as the Ilsley Report is concerned, it was based on the Gregory Report. The Gregory Report came to a different conclusion, but when we were hearing evidence here we were told that they put great restrictions in the Gregory Report. The restrictions they put on the performing rights were these . . .

Senator Connolly (Ottawa West): Mr. Chairman, are you quoting Chief Justice Ilsley now?

The Chairman: No, I am quoting from a well-recognized textbook, Copinger and Skone James on *Copyright*, published by Sweet and Maxwell, London, 1965. I think that Mr. Laidlaw is thoroughly familiar with this; it is a recognized textbook.

This is what it says on restrictions on performing rights:

> (816) Restriction on performing rights.
>
> As already mentioned representations were made before the 1952 Copyright Committee that the performing right in sound recordings should be restricted. Accordingly it is provided in subsection (7) of section 12 of the Copyright Act of 1956 that the copyright in a sound recording is not infringed by its performance at any premises where persons reside or sleep, as part of the amenities provided exclusively or mainly for residents or inmates, or if it is performed as part of the activities of, or for the benefit of, a club, society or other organization, which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare. It is, however, provided that the exemption of premises where persons reside or sleep shall not apply, if a special charge is made for admission to the part of the premises where the recording is to be heard. It is also provided that the exemption shall not apply in the case of an organization, if a charge is made for admission to the place where the recording is to be heard and any of the proceeds of the charge are applied otherwise than for the purposes of the organization.

All I am saying is that while you may in a general way talk about restrictions, these are the kinds of restrictions that were imposed. That is all I am pointing out, so it is idle to put forward is a sound argument that, yes, in England, they continued the copyright in records, with restrictions. We have to know the nature of those restrictions. I do not think those restrictions put any restriction on the merit of a copyright as such, but it is the use of it and where they may collect fees for it.

Senator Connolly (Ottawa West): The inference from that, I take it, is that in a performance on radio or television or over a PA system, where there is a charge for admission to the premises where it is used, there is a performing right.

Hon. Mr. Basford: Yes.

Senator Cook: Is it not so that in England the performers themselves get a large portion of this performing fee?

The Chairman: I think that is by agreement.

Senator Cook: It was recognized by the Gregory Commission that that was the existing state of affairs when they made their report, that they still get a large portion of the fees which the record manufacturers collect from the players.

The Chairman: Yes. It was also stated before the commission that the musicians' unions were exercising pressures to cut down on the playing of records so as to have more live performances. All these things came out, but when all the evidence was sifted this was the result.

Senator Connolly (Ottawa West): The practical effect of what you have read, Mr. Chairman, seems to be that for all practical purposes what has been contended for here by the record manufacturers is what they already have in England. However, they have not got it in the United States, and at the moment there does not seem to be much prospect of their getting it there.

The Chairman: What they may or may not do in the United States could not be used by us as any basis to say we should either continue or discontinue copyright.

Senator Cook: The point is, Mr. Chairman, that if they are not doing it themselves, then why should we do it. If what they are trying to protect is United States manufacturers, then I think that is substantial.

Senator Hays: Mr. Chairman, we have been dealing with this bill for months. Although I have not been at all the meetings I have read the evidence. It seems to me that laws are made to work for people. In 1911 you could have

ridden a horse and buggy on the 401; today you would not be allowed to do so. I do not think that the manufacturers are going to give one nickel back to the performers, if I know business people. Business people keep what they get. It is then reflected in what the shareholders get.

I wish to go on record now as supporting this bill. We have dealt with it for a long time and we are now merely delaying it. It is time we reported the bill. In my opinion, the Government is correct. It is not going to make music any better by not having Bill S-9. Just as a farm boy, I think we should report the bill. I think it is common sense.

The Chairman: What was that additional qualification? You are just a simple farm boy?

Senator Hays: I think we should dispose of this matter.

Senator Beaubien: Perhaps we could have a motion, Mr. Chairman.

Senator Flynn: Mr. Chairman, there is still one point with respect to the statement made by the minister that I wish to have clarified. I am sorry if this delay bothers my good friend Senator Beaubien, but he can wait another few minutes.

The minister seemed to indicate that he intended to amend the Copyright Act eventually in order to give recognition to performers' rights which at the present time are not recognized in the act. The amounts of money paid to CAPAC and BMI are paid under agreements, but not because of any rights contained in the act. Did I understand the minister to say that when the Copyright Act is reviewed this aspect will be considered?

Hon. Mr. Basford: It will be considered. I want to be very careful in not making a commitment at this point. What I said was this, and I will read it again, senator, just so we are clear:

> The planning group which I have set up to study the recommendations of the Economic Council of Canada on Copyright is even now considering "rights" of performers. Performers' "rights" have no part in the Bill before you.

The Economic Council of Canada recommended against both the public performing right of the manufacturer and the right ot the musician, but we are not bound by the Economic Council's recommendation. We can accept it or reject it. We are examining it.

Undoubtedly, when the legislation is before Parliament, the artistic community will be coming to Parliament and saying, "If the bill says there is no right, we are here to say there should be a right given to the performer." What I am saying is that I think the legislature should deal with incentive or lack of incentive to performers in a straightforward and direct way in the Copyright Act, and not in this indirect way by allowing the copyright fee to the manufacturer who, out of the generosity of his heart, may give something to the performers with no legal obligation whatever to do so.

The arrangement between the manufacturers and the artists is not consummated. It could be torn up one week after this bill is given royal assent, so far as I read the situation. This committee has made certain representations to the effect that the manufacturers want to help the performers, but there is no obligation upon them to do so. There is no contract or anything of that sort.

Senator Flynn: But what you said, I think, implies support for the recognition of the rights of the musician or performer, eventually.

Hon. Mr. Basford: I wish to be very careful on this point. I am indicating neither support for nor rejection of such recognition. I simply have not formed a view on this matter. I am not being coy with you either when I say so. I just do not have a view.

Senator Flynn: I accept that. Do you not agree, then, that the whole problem of performers' rights or musicians' rights, is tied to the problem of producers' rights? I am not speaking merely of manufacturers of records but of producers of records. It is all tied together.

Senator Beaubien: No, no.

Hon. Mr. Basford: No, I do not think it is. I think they are quite different.

Senator Flynn: You think they are different?

Hon. Mr. Basford: Yes.

Senator Beaubien: Sure.

Senator Flynn: In some countries they have tied those rights together. The law has considered this as a package.

Senator Beaubien: No, they are different.

Senator Flynn: Senator Beaubien says no, but I have other information.

Senator Beaubien: I do not know what other countries you mean, but they are totally different things.

Senator Flynn: If you do not know the countries, then why say no when I say they exist in other countries?

Senator Beaubien: You said they were tied together, and I am saying no to that; afterwards you mentioned the other countries.

Senator Flynn: I suggest to you, Mr. Minister, that there is a relationship between the performers' rights, or musicians' rights, and the producers' rights. I insist on the word "producers"' because the preparation of a record involves much more than simply the stamping of the record. I was wondering why the Government had not brought the whole problem before Parliament rather than simply dealing with only one aspect of it and promising that it would deal with the rest in a few years.

Hon. Mr. Basford: The reason for that is that we had asked the Economic Council to consider the whole question of property rights in intellectual property and to report on that to the Government. While that report was in the course of preparation, before it had been submitted to the Government, SRL endeavoured to exercise an alleged right under the copyright that it had never exercised before. I suggested to SRL that they wait until the report of the Economic Council was published and we knew what their recommendations were. They accepted my suggestion and waited for two years. Then they stopped waiting. We had introduced this bill two years ago and had then withdrawn it, because we did not want this right established immediately before a revision of the Copyright Act.

Senator Flynn: Well, whether you take it away in principle or take it away in practice, it amounts to the same thing.

The Chairman: May I make this comment, Mr. Minister? As I understand what we are doing here, it is not that we are establishing a right. If we support the bill we will be taking away a right. If we do not support the bill we will be maintaining a right.

Hon. Mr. Basford: I am not sure that that is entirely correct. What we are trying to do is define what copyright means in respect of records.

The Chairman: But it is already defined in the statute at the present time.

Hon. Mr. Basford: Well, there has been a good deal of argument on both sides, and this committee has heard both sides.

The Chairman: Yes, the committee has heard both sides.

Hon. Mr. Basford: I take it the Chairman, having heard both sides, has made up his mind on the legal argument.

The Chairman: You are wrong in your taking.

Senator Benidickson: Mr. Minister, in your basic statement which you read and in the context of reference to the SRL representations, and I think in the context of references to the report of the Economic Council, I think you twice used the words "tariff" and "low tariff". What kind of tariffs were you talking about? Customs tariffs?

Hon. Mr. Basbord: No, the tariff under the Copyright Act. The Fee that is approved by the Copyright Act is called a tariff. It could well be called a fee or a tariff.

Senator Connolly (Ottawa West): A royalty.

Hon. Mr. Basford: A royalty, yes.

Senator Cook: Mr. Chairman, speaking on behalf of the fishing interests I am prepared to go along with this bill.

Senator Hays: I move that we report the bill.

Senator Beaubien: I second that.

The Chairman: In view of what the committee approved of in procedures at the last meeting, and you can overrule me if you wish, but I did offer Mr. Fortier when he was here at the last meeting a right of reply. I told him that the minister was coming to the next meeting and I invited him to attend if he wished. I said that since he was in the position of being the only one on one side, and everybody else with the exception of one or two being on the other side, if he had anything further we would give him an opportunity to reply. I did make that offer to Mr. Fortier. Senator Hays, who was not at that meeting, is now proposing a resolution which would withdraw that offer.

Senator Hays: I will withdraw my motion.

Senator Benidickson: I heard the offer. I remember that.

Senator Hays: I certainly think we should hear him.

The Chairman: When we get to that stage we can have a discussion if there is a motion, or we can have a discussion without a motion.

Before we do that, Mr. Minister, is there anything more that you would like to add at this time?

Hon. Mr. Basford: No. Mr. Laidlaw may want to go back to your question about the Gregory report or the IIsley report.

The Chairman: He has the floor if he wishes it.

Mr. Laidlaw: Thank you, Mr. Chairman. I happened to be the secretary to the IIsley Commission under the late Chief Justice IIsley and the late Guy Favreau the third member being Mr. William Buchanan, who was then Chairman of the Tariff Board, and when the subject of the right of performance in recordings came up, the Gregory report was carefully studied. Mr. Fortier was perfectly correct in his testimony—

Senator Connolly (Ottawa West): Would you speak a little louder?

Mr. Laidlaw: I am sorry. Mr. Fortier in his testimony before this committee mentioned that there were various reasons. There were difficulties in England between the various performers' unions and the record manufacturers, and Chief Justice IIsley did not want this type of thing to be repeated in Canada. However, that was only one of the reasons why Chief Justice IIsley advised in his report that this right, if it existed, should be removed. During the discussion—and in this regard I am afraid you will just have to believe me—the members of that commission were very reluctant to add what they called neighbouring rights or secondary rights to the original concept of copyright. They considered that there were enough rights in the Copyright Act already, and the prime purpose of the Copyright Act was to protect the original composer and author, and no-one else should be added along the line. That was the basis for the recommendations of the IIsley Commission.

The Chairman: Mr. Minister, if you wish to remain while Mr. Fortier is making his reply that is all right, but should you have other appointments I am sure the committee will see that you are well protected even though you are not physically present.

Senator Grosart: Mr. Chairman, the minister might like the right of reply to Mr. Fortier's remarks.

The Chairman: Well, we could go on.

Senator Grosart: I thought you might offer it to him.

The Chairman: Knowing the views you have expressed so far, Senator Grosart, and how close they are to the minister's, I am sure his rights would be well protected by you in his absence.

Senator Grosart: I, do not intend to give evidence, Mr. Chairman.

The Chairman: Or express opinions?

Senator Grosart: Express opinions, yes, but not give evidence.

Hon. Mr. Basford: Thank you very much, Mr. Chairman and honourable senators.

The Chairman: Thank you. Mr. Fortier, have you anything you would like to add?

Mr. Yves Fortier, Counsel, Sound Recording Licences (SRL) Limited: Yes, I do, Mr. Chairman.

The Chairman: You understand, Mr. Fortier, that what you are doing now is exercising a right of reply, and you should not repeat except where it is incidental to the reply.

Mr. Fortier: Yes, I understand, Mr. Chairman, and I wish to thank you and the members of the committee for allowing me to reply to the minister's brief. I will attempt to be brief. I took some notes as the minister was speaking and I think I can address myself succinctly to the points which he has put forth. I think the first point he put forth was that the fact that this is a Government bill and he was urging that the Government sponsored legislation be adopted as is. The second point which I think the honourable minister put forth was no one realized in 1921 what was being introduced in section 4(3) of the Copyright Act. I took this note: "Any legislature which could have foreseen what did happen would not have passed such legislation."

With this I respectfully disagree. I think the evidence before this committee, Mr. Chairman and honourable senators, is that the trend in the world is not to do away with this right, but rather to recognize this right. I respectfully submit that the minister is in error when he stated that today, given the development of radio and given the development of record manufacturers, no legislature in its right mind would recognize a performing right in a record. There is evidence before you that in Australia and in Japan in the last five years this performing right in recordings has been recognized.

May I also remind the honourable senators that in so far as the United States is concerned—and here I bow to the superior knowledge of Mr. Laidlaw, but I think that it is worth correcting a statement which was made—what has happened there in recent months is the following: in February of this year there was enacted a bill which recognized a copyright in records to the extent of preventing reproduction of records. In other words, it protected the record manufacturers against piracy. If we look to the most recent development in the field of copyright with respect to records in the United States we see that as recently as February of this year both the House of Representatives and the Senate passed a bill affording a limited protection to record manufacturers. So the trend, even in the United States, the "mother country" in the case of many members of SRL, is not negative as the minister stated. The trend is in favour of protecting a performer's right in records.

Senator Benidickson: Would you just describe what the United States has done? What is the extent of this protection you talk about?

Mr. Fortier: The extent of this protection I am speaking of, senator, is exactly what we find now in Bill S-9. In other words, section 4(3) of the Canadian Copyright Act as amended would give protection to record manufacturers against dubbing or piracy of their records.

Senator Connolly (Ottawa West): Or use of their records.

Mr. Fortier: No, against dubbing or . . .

The Chairman: —copying.

Mr. Fortier: That is right. That is one point. The second point, and this one was mentioned by the minister, is the fact that again as recently as early this year—Mr. Laidlaw said January, and I am sure he is correct—a Senate Committee in the United States has reported that not only the right against copying be granted to record producers, but also that the performing right in records be recognized in the United States. Two years ago the honourable Mr. Basford was given an indication that in the United States there would be such legislation, but at that time there was no Senate committee which had reported to the Senate. Today there is. It is a recent development, and it is one which should be appreciated and which should be looked at also in the light of what has happened with respect to protection against copying.

If you look, gentlemen, to the United States—and much weight seems to be given to the fact that of the eight member companies of SRL, six are subsidiaries of the United States corporations—in the United States this right is not being removed; this right is on its way to being recognized. The Minister did not forecast and I am not going to forecast when the performing right is going to be enshrined in the United States copyright laws, but I can say that the trend seems to indicate that there is a growing movement in the United States in favour of the recognition of a performing right in records, and that a competent and habilitated body of the United States Senate aided and abetted by members of the Copyright Office of the United States—and I think this is very important—has published this unanimous report that there should be a copyright in records, a performing right in records.

Senator Connolly (Ottawa West): You say this report supported the establishment of a performing right in the United States; that this has been contained in a report from the United States Copyright Office?

Mr. Fortier: No. I say the United States Copyright Office has assisted a Senate committee which is deliberating, and I can produce and file before this committee statements from members of the United States Copyright Office and employees of the United States Copyright Office where they have gone on record as favouring the recognition of a performing right in records.

Senator Benidickson: Surely that is the opposite to what Mr. Laidlaw has said.

Mr. Fortier: Well, I do not think Mr. Laidlaw took any position.

Senator Benidickson: He said that his information from the copyright people in the United States was that this recommendation of the United States Senate Committee was not likely to carry.

Mr. Fortier: That was Mr. Laidlaw's testimony. My information is to the contrary.

Senator Walker: It is all *obiter dicta*. Neither one of you really knows.

Mr. Fortier: Very much so. It is rather like when a lawyer tells a client that he cannot lose.

The Chairman: You except lawyers from that category, Senator Walker?

Senator Walker: I except you.

Senator Grosart: Mr. Fortier, would you not agree that over the last 20 years the subject of revision of the Copyright Act has been almost continuously before Congress, that there have been bills actually passed by one house which did not recommend the recognition of a performing right in records, and which did not become law, and that this process of attempting to revise the Copyright Act has been going on for 20 years? Would you not agree that bills supported and sponsored by the Registrar of Copyright, to

give him his correct title, have not passed Congress? Is not that pretty well the picture?

Mr. Fortier: I cannot just say yes or no to your statement, senator, with respect.

Senator Grosart: I was so sure that you would have studied the history of copyright in the United States.

Mr. Fortier: That is why I cannot agree fully with you. Let me say this: there has indeed been continuous study over the course of many years in the field of copyright particularly with respect to records in the United States. I think that this shows that this is not a matter which should be treated lightly with a seemingly innocuous piece of legislation which at one stroke of the pen removes in Canada a right which has been recognized for 50 years. I agree with that part of your statement. I think that Canada should give as much consideration to the matter of copyright in records as has been given in the United States, and I think this is not given a complete and full consideration in the enactment of Bill S-9. This right is so important that for many years in the United States it has been studied and examined and reported upon.

However, may I also say this: there has never to my knowledge been a bill which has originated in the Senate and which has gone through the committee stages in the United States Senate, and which has been reported on, where the clear precise and definite recognition of a performing right in records was mentioned. Your information may be different, but mine is to the effect that there has never been one so clear and precise as this one, so I say that all this talk for many years in the United States has produced a concensus among a committee of the senators.

Senator Grosart: You say your information is that there has never been a bill from the Senate in which the question of a performing right in records has been "mentioned". May I suggest that you are quite wrong in that because there have been several bills in which it has been mentioned.

Mr. Fortier: Yes, mentioned, but there has not been any bill in which it has been stated in the legislation that there shall exist a performing right in records.

Senator Grosart: That is exactly my point, because what has happened in the other bill was that they have rejected that.

Mr. Fortier: Thank you for pleading my case, senator.

The Chairman: That is the end of that part of it, because we get pros and cons.

Senator Grosart: Surely that is what we are here for, to get pros and cons.

The Chairman: Have we not had enough of them?

Some Hon. Senators: Yes.

An Hon. Senator: We just do not want to be conned.

Mr. Fortier: The next point which I think the minister made before this committee, Mr. Chairman, was that there was some type of creativity in the manufacturing or producing of a record which was deserving of protection, and he mentioned that Bill S-9 in fact continued to recognize this creativity. My answer to that, Mr. Chairman, and I will not repeat what I said before you last week, is that creativity under the terms of the Copyright Act is translated in a copyright, un droit d'auteur. Creativity under the terms of the Copyright Act is not translated in one facet of a copyright; creativity can only spell copyright, and copyright means both protection agains reproduction and protection against use being made of your property by someone else for profit without compensation. And so if the minister recognizes that there is a creativity put into the record by the record producer, and that this creativity is deserving of protection under the Copyright Act, I repeat the point which I attempted to make before this committee last week, that this creativity should be translated into a full copyright and not a dismembered copyright.

Senator Benidickson: I should like to question that. I did not get that impression from what the minister said. I thought he said the very opposite, that there was not creativity in the actual production of a record.

The Chairman: He even referred to the Economic Council report in which they said that there was some input of creativity.

Mr. Fortier: His very words were that there is some type of creativity, and I would stake my presence here on the minister's using those words. Would you agree, Mr. Laidlaw?

Senator Cook: I was just going to say that surely copyright is a statutory right, and therefore copyright means what Parliament says it means.

The Chairman: It means what you give.

Mr. Fortier: I cannot dispute that. Parliament, both in Canada and the United Kingdom, and in other legislation where there is a copyright in records, has always said that copyright shall mean protection against copying, and against use by others without just and equitable compensation.

Senator Connolly (Ottawa West): Would you address yourself to the question of public interest? The minister said basically that the reason why this right is being modified, and withdrawn in the case of performing rights, is because he believes it will serve the public interest to do so.

Mr. Fortier: He gave three reasons.

Senator Connolly (Ottawa West): He did not expand on that. He said to us, "you had better ask the Economic Council." Perhaps we should do that. But would you like to say what you think about this?

Mr. Fortier: Yes, senator. I noted your question and also the minister's answers. He gave three reasons. I think senator Lang asked, "Where does the public interest lie?" He gave a three-pronged answer. He said that advertising costs charged by broadcasters will have to be increased, and that is not in the public interest. I think I leave you to conclude whether or not it is in the public interest that advertising costs should be increased because of the levy of 0.15 per cent on the commercial broadcasters.

Senator Beaubien: But you do not know what that will be.

Mr. Fortier: Yes, we do.

Senator Beaubien: Perhaps today, but not tomorrow.

The Chairman: You will have to wait until next year until the Copyright Appeal Board sets the tariff again. So it is speculation either way.

Senator Beaubien: It will give the CBC a chance to approach us for a bigger deficit. I am against it.

Mr. Fortier: So far as the CBC is concerned, the minister said that the taxpayers will have to bear an increased burden. Unfortunately, you were not here last week when I pointed out on behalf of my clients, the record manufacturers, that they were quite conscious of the fact that the CBC was a drain on the Canadian taxpayer, and that it was the avowed intention stated publicly before this committee of SRL to accept a nominal fee by the CBC in exchange for the granting by SRL to a licence which would allow the SRL and its affiliated stations across Canada to use, as they do today, our records. The award of the Copyright Appeal Board in respect to the CBC at the moment is $15,000 a year.

I repeat, I do not think that $15,000 a year, in the light of the deficit last year—was it $47 million?

Senator Beaubien: $183 million, plus interest.

Mr. Fortier: Then I should increase the nominal fee! I repeat, we cannot honestly say that the protection of the public interest means that the CBC should not be called upon to pay $15,000 a year for use of my product.

The Chairman: What you are really saying is that this should not be looked at on the basis of quatum, but on what is inherent in whatever right there is in a record.

Mr. Fortier: I have always taken that attitude, senator. Since the minister and other people have spoken so much about quantum, I feel that I should address my mind to it. The third argument of the minister as to why this existing right was against the public interest was—I do not have his exact words, but I translated it as "the poor broadcasters". I do not think it is valid to come before this committee and say that commercial broadcasters in Canada cannot afford to pay a tariff to the record producers. I do not accept that statement.

Senator Burchill: The radio station in our small community made representations to me violently opposed to the bill because it will increase their expenses, which they cannot afford.

The Chairman: What is the total of their revenue?

Senator Beaubien: They are for the bill, not against it.

Senator Burchill: Yes, they are for the bill.

Mr. Fortier: SRL recognizes that. It is in evidence before this committee that SRL said publicly before the Copyright Appeal Board during the month of April, while these hearings on the tariff were going on, that it withdrew its application for a tariff in respect of those poor little radio stations in Canada which had a gross income of less than $100,000. Without knowing which radio station you are referring to, I would be prepared to guess that the broadcaster which made these representations to you fits into this category and has a nominal $1 licence to pay to SRL at the moment. We are conscious of the fact that there are radio stations which cannot afford to pay a tariff, but there are those that are.

Senator Cook: Would it not be a case of "Come into my parlour, said the spider to the fly."?

Senator Connolly (Ottawa West): You are operating on the principle that the public interest has to be taken into account in your operation?

Mr. Fortier: Absolutely. If you speak about public interest, I think you must recognize that we have in Canada a body which was set up to do just that, to protect the public interest. I refer to the Copyright Appeal Board. Canada was the first country in the world to set up a performing right tribunal. Why was it set up? It was because of exaggeration by CAPEC—BMI did not exist in those days—in the fees which they were extracting from the users of their music. In 1935 the Parliament of the day passed an amendment to the Copyright Act and said that in future the authors and composers would not be able to decide what they will charge to the users of their music. They would have to go before a quasi-judicial administrative tribunal, which would protect the public interest.

This is what any performing right society has had to do since 1935. This is what CAPEC has done for the last 30 years. This is what BMI has done since it was created, and this is what SRL has been obliged to do since it was set up.

There is a body in Canada which was set up to protect the public interest. We have been before that body, and that body has said: "The public interest will be protected if your fee is lowered from 2.6 per cent to 0.15 per cent." We are not complaining. We are satisfied about that.

My full answer to your question, Senator Connolly, is that the three reasons given by the minister are, I submit with the greatest respect, not valid, and that he should have referred to this tribunal which exists in Canada and which has been set up to protect the public interest.

On that point I will close by referring to a question by Senator Lang: Does not Bill S-9 settle a debate between two commercial interests? My submission is that it does that and nothing else, and it settles it in favour of the broadcasters and against the record manufacturers. I think it is not the role of Parliament to take a stand between two commercial interests. This is basically what we are dealing with.

Senator Connolly (Ottawa West): Why should not Parliament do this? I am trying to elicit information from you for the benefit of the committee. Why should not Parliament decide what is in the public interest? I put it to you, Mr. Fortier, that when you say you will not charge any more than one dollar for a licence to a station making less than $15,000 a year you are doing that because it is in the public interest. However, you do it so that this bill can be withdrawn and you can show your sense of responsibility. Who is in charge of the public interest or who should be the judge of it?

Mr. Fortier: The Government decided many years ago that the public interest should be the concern of the Copyright Appeal Board, which I think should continue.

The Chairman: We must take the position that certainly if a statutory right exists Parliament at any time can deal with it for any reason. Whether it will receive public support depends on the reasons and their justification.

Mr. Fortier's argument could only go as far as to say that Parliament has the right to amend and withdraw existing

or to grant additional rights. However, the question of justification is another matter. Mr. Fortier's argument is that we should not do it on a basis of resolving in favour of one commercial interest against another. That is why we have continued this inquiry on the basis of what is inherent in the right. Is there something that should be maintained?

I do not think it is a solid argument to say that because we are resolving a difference between two commercial groups we cannot act. Maybe you should say we should not act. However, Parliament has the authority to act and it is not departing from its role in doing this.

Senator Beaubien: As a layman sees it, if I buy a record . . .

The Chairman: A sophisticated layman, senator.

Senator Beaubien: As a layman I can buy a record and play it; that is why I bought it. However, if I happen to own a broadcasting station and put it on the air I would be charged for broadcasting it.

Do you argue that if I buy a book and quote it on radio the author is entitled to be paid a fee?

Mr. Fortier: As one layman to another, this is exactly -hat copyright is all about.

Senator Beaubien: No; if I buy a book and wish to read it that is what I bought it for.

The Chairman: But you cannot read it to the public without paying a licence fee or royalty. That is the law.

Senator Beaubien: I think it is all wrong.

The Chairman: Yes, but it is the law.

Senator Beaubien: It will not be the law when you pass this bill.

Senator Haig: Mr. Fortier indicated that the CBC will pay $15,000 for the next six months.

Mr. Fortier: That is correct.

Senator Haig: Which amounts to $30,000 a year.

Mr. Fortier: But we have to go back for 1972.

Senator Haig: If this bill is not passed and the copyright fee or tariff is in force, the CBC will pay $15,000 for the next six months, rather than the SRL request, which amounted to $900,000.

Mr. Fortier: Do I need to address myself to Senator Beaubien's comment? Again I consider this to be the essence of copyright.

The Chairman: I do not think you need to do more than that; Senator Beaubien says it is bad law.

Mr. Fortier: Bill S-9 is bad law.

The Chairman: No, the copyright.

Senator Beaubien: Bill S-9 is required because there is some doubt.

The Chairman: Even if Bill S-9 passes and you take a book and read it on radio you could be in trouble for royalty.

Mr. Fortier: I am selling you my property to use in your home for 95 cents. If I knew that you were going to use my property to make money, which is what broadcasters do by the use of a record, I would charge you more than 95 cents for that record.

Senator Beaubien: No, you have been paying in some cases for people to play your records.

Mr. Fortier: That is absolutely true in the case of some records, but not of our whole repertoire.

Senator Beaubien: The music has become popular simply because it has been broadcast so much.

The Chairman: The argument may be as good as your book argument, which was wrecked.

Senator Hays: If we continue this exercise on Bill S-9 it will take the manufacturers 10 months to catch up to the fees received by Mr. Fortier.

Senator Connolly (Ottawa West): In the course of the minister's presentation he spoke of the problem of encouragement, improvement, invention and development of technology. I asked him, simply to clarify that point, if a performing right is allowed to continue as it is under the present law, surely the improvement of the quality and character of productions would be encouraged. The producers would be encouraged to that end by receiving these fees and royalties. Have you anything to say with regard to that?

Mr. Fortier: No, except that I agree with your statement, senator.

Senator Connolly (Ottawa West): It is not a statement; it is a question.

Mr. Fortier: I agree with the substance of your question. I answer in the affirmative. I attempted to make the point last week that because of the recent CRTC regulations there was an increased need by broadcasters for Canadian content records. The only manner in which Canadian content records can be produced by record manufacturers in Canada at the moment is by increased access to funds such as those which would flow from an SRL tariff.

This is not a complete answer, but it is one of the answers. You will recall that the division of the royalties involved three categories. One is to encourage the development of Canadian artists, for which 30 per cent of the SRL dollar would be ear-marked. Another was to encourage the recording of Canadian content pieces. On that point, Mr. Chairman, may I be allowed to say further to Senator Hays' comment that the manufacturers, if he knows them, will not give one nickel to the performers—

Senator Hays: Of this amount.

Mr. Fortier: With respect, senator, there is evidence before the committee to the effect that in all countries where the performing right in records is recognized and enforced and performers do not have their own separate and independent right, there is a division of the royalties between the record producers and the performers. It cannot be otherwise.

I agree with the point made by the minister that at the moment there is not a contract. It is true we do not have a valid contract. We have made an offer to the Canadian

Performing Artists' Union. There is a dispute between the members of the Union as to how the money should be divided between themselves. This happens not only amongst unions, but amongst corporations on occasion. I can only go so far as to say we have made an offer, which we will not withdraw. Even if the offer is not accepted we will pay 50 cents of every dollar we receive into a fund which will be available for the performers, because we, the record producers, recognize that without the performers we cannot cut or produce a record. The argument which I made last week was that there were three integral parts of the record. It is easy for the minister to say that the record manufacturers depend on the creativity of authors and composers, but it is conversely true also that the authors and composers, in order to get their royalties, depend on the creativity of the record producers. If we do not produce records, the authors and composers are only going to have to sell sheet music; and, as Senator Grosart well knows, they do not make that much money by selling sheet music. They have to get their works on record, so you have a triology.

Senator Cook: They have to get them played over the air.

Mr. Fortier: And, in some instances, get them played over the air. But there is an assurance, and it cannot be otherwise, and the history worldwide, senator, is that when the record producers have received money from users of their records, they have shared that money with the performers. We have said it; we have offered it. Mr. Dodge has come before this committee and has said, "Yes, we have received the offer but because of differences between unions we have not been able to accept it yet." I know what Mr. Doge told me privately, but I do not wish to go any farther. I repeat the assurance which I have given, that this is not anything novel; this is normal. In the field of copyright, if the record producer is granted a royalty, he shares that royalty with the performers. We are not obliged to do it under the law, but we are going to do it.

Senator Grosart: Mr. Fortier, I am sure you are aware that the statement made by the minister is that the performer may be entitled to some part of the performing right but this should be dealt with separately, and it should not be derivative or at the mercy of the record manufacturer.

The Chairman: The minister did not say that.

Senator Grosart: He did.

The Chairman: What the minister said was that this was one of the factors that the committee reviewing that had been asked to look into. The minister was very careful, he said he was not committing himself one way or the other. He said that two or three times. It will be a subject matter for consideration.

Senator Grosart: Yes. He certainly enunciated it as a principle under discussion in respect to the revision of the Copyright Act. I am sure, Mr. Fortier, you did not intend the mislead the committee when you made a statement, which I paraphrase, that the "only way" in which the funds can be obtained by the record companies to supply the records required for the 30 per cent Canadian content, would be by access to such additional sources of funds as the performing right in the record.

Mr. Fortier: If I said that was the only way, I made a mistake.

Senator Grosart: I think you did say it was the only way.

Mr. Fortier: I thank you for correcting me.

Senator Grosart: I presume you did not intend to mislead, because I am sure you are aware that there are hundreds, perhaps thousands, of Canadian records that have been made profitably and are being used to supply that 30 per cent Canadian content, without access to any performing right.

Mr. Fortier: I am also aware that, before the CRTC regulations in January 1971, there were hundreds of Canadians records which were made by these very people who belong to SRL, but the broadcasters were not using them, because they were not able to compete with the American records; and the Canadian broadcasters, although they wave the Canadian flag, are very conscious of the fact that they can sell their time mainly when they play American records. That is one thing that has not been said before this committee.

Senator Grosart: The obvious answer, Mr. Fortier, I think you will agree, is that the companies comprising SRL probably did, certainly did, less and have done less than any other group of companies which could be put together, to assist in the Canadian content in records.

Mr. Fortier: This is as wrong a statement as I have heard before this committee.

Senator Grosart: Will you tell us, then, what percentage of all the records distributed, say in the last year, by the SRL group of companies was made in Canada?

Mr. Fortier: The figure which I gave last week was under 10 per cent, and I still stand by it.

Senator Hays: When did you make the offer to the performing artists?

Mr. Fortier: The original offer was made two years ago. Thank you for asking the question. There was a deal which was made two years ago with the Canadian Performing Artists' Union of Artists. That is when the SRL first filed a tariff, but you will recall that that tariff was withdrawn when the Bill S-9—which was then Bill S-20—was dropped. So that particular agreement was never enforced.

When we filed the new tariff in 1970, we renewed our offer to the performers and their unions, in the fall of 1970. I wish to stress that we have been in constant communication over the years with Mr. William Dodge, the secretary-general of the CLC, who is chairman of this Performing Artists' Union council or committee, so this offer in fact has always been before the unions.

Senator Hays: What were you giving them before?

Mr. Fortier: That is a very good question. We were not giving them 50 per cent. We were offering, then, as I recall, 35 per cent. Yes, we were offering 35 per cent. In view of recent evolution in the United Kingdom, particularly, and in some European countries, of a 50-50 division, within the last two years we offered 50 per cent.

Senator Hays: In the last three or four years, how much have you given the performing artists?

Mr. Fortier: Unfortunately, we have not received anything from the broadcasters, so of course have not given anything to the artists.

Senator Hays: You have not given anything?

The Chairman: This was a sharing of any royalties they might get.

Mr. Fortier: The tariff only takes effect on the 1st July, next week, senator.

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

The Chairman: Just one second. Mr. Fortier, are you through?

Mr. Fortier: I would make one last comment, if I may, senator, before the axe falls. If, as the minister says, we are dealing here with a question of principle, then I say that you have the opportunity in this committee of preserving the principle.

The principle is that there should be no performing right in records. May I recommend to this committee, and may I strongly suggest, very respectfully and with much humility, that you confirm the principle which the minister has put forward, and remove the copyright in records. But, for goodness' sake, please recognize the principle that, if someone who is managing a commercial concern, a commercial interest, such as a broadcasting station in Canada, uses records which have been paid for by others, that person should be obliged to compensate the owner of that property. And do as has been done in other countries, and recognize that the record producer, although he may not have a performing right in his record, should be entitled to just and equitable remuneration for the use which is made by others for profit—I stress "for profit"—of his property.

This can be done by amending Bill S-9, recognizing the principle that there should be no performing right in records, but leaving to the Copyright Appeal Board the obligation of deciding, on a year to year basis, what is the just and equitable compensation that should be paid to the record producers when people in Canada use their property for profit.

That is done in some European countries, Mr. Chairman, and I would be very happy to submit to you a text of such an amendment. I would be very sad if this bill were reported without amendment.

Senator Connolly (Ottawa West): Have you not got this proposal which you are making in the present law?

Mr. Fortier: No, senator. At the moment in the present law there is a performing right, and the performing right is translated into compensation.

Senator Connolly (Ottawa West): I am sorry.

Mr. Fortier: I would be very sorry if this committee reported to the Senate favourably, or whatever words are used in parliamentary jargon, without having accepted SRL's offer to visit a recording studio and seeing for yourselves the element of creativity, or the work, labour, and skill, to use in the words of Lord Justice Maugham in the *Cawardine* case in the United Kingdom. What is the element of creativity? What is the input of creativity which goes into the making of a record? If you think that a musician walks into a recording studio with a sheet of music and then steps up to a microphone and records a performance you are wrong. The record producer is an essential creator of that record. I would be very sorry to see the day when the Canadian Parliament would say that you can create something in Canada, but you are not protected. In most countries in the world today if you create something like a record you are entitled to be compensated if someone uses your property. If you write a book and someone reads that book in public, then that person is using your property and you should be compensated for it. There can be difference between the author of a book or the assigner of a patent and the producer of a record.

I would urge you, Mr. Chairman and members of the committee, not to report this bill to the Senate, but rather to continue your deliberations, and possibly report it with the amendment which I have suggested.

Senator Benidickson: Do you want to put on record your proposed amendment?

Mr. Fortier: Yes, I do, senator, and I would be glad to draft it.

Senator Benidickson: It is not drafted?

Mr. Fortier: I do not have it with me this morning.

The Chairman: Is that your submission now?

Mr. Fortier: Yes, it is.

The Chairman: Thank you very much, Mr. Fortier.

The committee has two courses. One is to deliberate further, and the other is to abruptly terminate the hearings with a motion to report the bill without amendment. The question is which course does the committee take?

Senator Connolly (Ottawa West): I wonder whether we should hear from the Economic Council?

The Chairman: The minister suggested that. We could hear from the Economic Council on Monday or Tuesday.

Senator Connolly (Ottawa West): Yes. We do not have to do it today. At least, I do not see any purpose in reporting this bill that quickly. Whether the minister had suggested it or not, Mr. Chairman, I was going to ask that it be considered by the committee. I do not have any motive other than to try to get some answers on this question of public interest.

The Chairman: The first question is: Does the committee favour calling some officials from the Economic Council to answer questions?

Senator Beaubien: I would say no.

The Chairman: Will those who are in favour of hearing the Economic Council please raise their hands? Those who are opposed? The majority decision is that we do not hear from the Economic Council.

Senator Hays: I move that we report the bill.

Senator Beaubien: I second that.

Senator Haig: Mr. Chairman, before the vote is taken I want it recorded that I am not voting on this.

The Chairman: We have a motion to report the bill. Those in favour of that please raise your hand? Contrary? The motion is carried.

The committee proceeded to the next order of business.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 32

WEDNESDAY, JUNE 23, 1971

Complete Proceedings on Bill C-219,

intituled:

"An Act to establish the Canada Development Corporation"

REPORT OF THE COMMITTEE

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Aird	Grosart
Beaubien	Haig
Benidickson	Hayden
Blois	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis—(28).

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, June 23, 1971:

"Pursuant to the Order, the Senate resumed to debate on the motion of the Honourable Senator Hayden, seconded by the Honourable Senator Fournier (*de Lanaudière*), for second reading of the Bill C-219, intituled: "An Act to establish the Canada Development Corporation".

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

The Bill was then read the second time, on division.

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

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, June 23, 1971.
(35)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 11.50 a.m. to consider the following Bill:

Bill C-219, "An Act to establish the Canada Development Corporation".

Present: The Honourable Senators Hayden (*Chairman*), Benidickson, Burchill, Carter, Connolly (*Ottawa West*), Cook, Croll, Gélinas, Giguère, Hays, Lang and Sullivan.—(12)

Present but not of the Committee: The Honourable Senator McDonald.—(1)

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

WITNESSES:

Canadian Chamber of Commerce:
Mr. E. H. Peck, Vice-Chairman,
Public Finance and Taxation Committee;
Mr. H. J. Hemens, Q.C.,
Legal Counsel;
Mr. W. J. McNally, Manager,
Government Relations Department.
Mr. D. J. Gibson, Manager,
Policy Department.

At 12.15 p.m. the Committee adjourned.

2.15 p.m.
(36)

At 2.15 p.m. the Committee resumed.

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Benidickson, Carter, Cook, Croll, Gélinas, Giguère, Martin and Sullivan.—(10)

Present but not of the Committee: The Honourable Senator McDonald.—(1)

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

WITNESSES:

Department of Finance:
Mr. W. A. Kennett, Director,
Capital Markets Division;
Mr. R. B. Love,
Legal Advisor;
Mr. W. D. Lennox,
Accounting Consultant.

Upon Motion it was *Resolved* to report the said Bill without amendment.

At 2.40 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, June 23, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-219, intituled: "An Act to establish the Canada Development Corporation", has in obedience to the order of reference of June 22, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

24021—2½

Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, June 23, 1971

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-219, to establish the Canada Development Corporation, met this day at 11.50 a.m. to give consideration to the bill.

The Chairman: Honourable senators, we will now resume our hearing and proceed with Bill C-219. The Canadian Chamber of Commerce is represented, and we have told them that we will hear them first. They made representations in the House of Commons committee, and many of those representations were accepted in one form or another and were incorporated in the bill.

Senator Benidickson: On that point, Mr. Chairman, I have a copy of the bill as passed by the House of Commons. I have compared it to the bill on first reading in the House of Commons, and I cannot find anywhere an underlining to indicate an amendment. Therefore it must simply be an elimination of certain things.

The Chairman: We can ask that question. The committee would be interested in any representations that the witnesses wish to make on points where the bill does not suit them. I do not want to know where they think the bill has been adapted, or where the explanations are such that they meet their points. We take that as fait accompli.

From the Canadian Chamber of Commerce we have Mr. E. H. Peck, Vice-Chairman, Public Finance and Taxation Committee; Mr. H. J. Hemens, Q.C., who has been before us on many occasions; Mr. W. J. McNally, Manager, Government Relations Department; and Mr. D. J. Gibson, Manager, Policy Department. Mr. Peck, you may proceed.

Mr. E. H. Peck, Vice-Chairman, Public Finance and Taxation Committee, Canadian Chamber of Commerce: Mr. Chairman and honourable senators, we learned only last week that we would be appearing today. In a letter which the Executive Council of the chamber sent to Senator Hayden we pointed out that we did not really have the time to present another brief. We therefore simply made some comments in a letter. If it is in order, Mr. Chairman, I would like to read that letter.

The Chairman: Go ahead.

Mr. Peck: The letter reads as follows:

Dear Senator Hayden:

The Executive Council of The Canadian Chamber of Commerce appreciate the opportunity of appearing before your Committee to present the Chamber's views concerning Bill C-219, an Act to establish The Canada Development Corporation.

As there has not been sufficient time since the Bill was passed by the House of Commons for preparation of a new Brief on this proposed legislation, I am appending to this letter copies of the Chamber's submissions to the House of Commons Committee on Finance, Trade and Economic Affairs. A number of copies of this letter and above-mentioned attachments are also being delivered to the Clerk of your Committee for distribution to its individual members.

The present position of the Chamber on the Canada Development Corporation was stated quite clearly in the Introduction on page 5 of the appended Brief. It was explained on the same page of the Brief, that these submissions by the Chamber on Bill C-219 are being made on the conviction that the government fully intends to proceed with this project, as well as with the desire to help achieve legislation which will be as clearly understood and soundly practical as possible.

Following hearings and study of numerous submissions by interested parties, the House of Commons Committee referred to presented a report recommending a number of amendments. These amendments, and no others, were incorporated in the Bill as passed by the House of Commons on June 9, 1971. While many of the points raised in the Chamber's submission were given consideration in the deliberations of the said Commons Committee, very few amendments to the Bill were, in fact, made. Nevertheless, we would like to submit to your Committee a short commentary on some of the major contentions and recommendations contained in the Chamber's earlier submissions on the Bill. These will be discussed under the same headings as in our original Brief.

INVESTMENT POLICY

Although there was considerable discussion of Clauses 7 and 6 of the Bill, which cover the objects and powers of the Company, no amendments thereto were recommended by the said Commons Committee. In his comments on this subject during the third reading debate in the House of Commons, Mr. P. M. Mahoney (Parliamentary Secretary to the Minister of Finance) was reported on page 6390 of *Hansard* for June 4 to have said:

"The objects of the CDC are deliberately broad. Restrictive terms would hamper the CDC's mandate to fulfill its purpose as set out in the Bill. The directors must be free to establish new policies to meet new situations. *In this respect the CDC will be on all fours with other successful Canadian corporations.*"

(Emphasis Added)

He went on to say:

"Much has been said in and out of Parliament about the danger of conflicts between the national interest and profitability. Others seem to feel that the two are irreconcilable. The government rejects that contention..." The Chamber maintains that, in this respect, the CDC will, in fact, not be "on all fours" with other Canadian corporations. We still content that CDC directors, *if they are indeed to remain independent from government influence,* should be provided with more specific guidance as to objects and investment policy than is included in the Bill.

OPERATING CONTROL

In its Brief, on pages 9 to 11, the Chamber discussed this subject as it relates to CDC subsidiary holdings, and we submit that our recommendations, in this regard, are still appropriate. In its subsequent letter to the Chairman of the said Commons Committee, copy appended hereto, the Chamber commented on the matter of government control of the CDC itself. This was debated at some length on pages 24 to 27 and 35 to 37 of Issue No. 45 of the Minutes of Proceedings and Evidence of the said Commons Committee for May 27.

On page 6391 of the June 4 House of Commons *Hansard,* Mr. P. M. Mahoney is reported to have said:

"Some critics of the CDC concept believe that any government participation in the corporation will be synonymous with interference in its operation. The best protection against such interference is a strong and independent Board of Directors chosen from the private sector. The Bill explicitly contemplates their independence. I am confident that as soon as the CDC is incorporated a strong Board will be readily formed and will assert its independence."

The Chamber contends that if the CDC is to be on "all fours" with corporate practice in the private sector, the directors will, nevertheless, be subject to government control and policy influence as the Bill now stands. In our view, this will be so at the outset, as well as in the event that the government's voting interest is some day reduced to only 10 per cent.

In commenting on the Chamber's reference in its appended letter to Section 4(2)(i) of Schedule I, on page 34 of the Bill, Mr. Mahoney pointed out (page 25 of Issue No. 45, Minutes of Proceedings and Evidence of said Commons Committee) that the wording of this particular paragraph is identical with the wording of a related paragraph in the Schedule to the Canada Corporations Act dealing with constrained share companies. This is quite true. In the case of constrained share companies the paragraph is necessary to prevent groups of associated non-residents or non-citizens, but not Canadian residents or citizens, from obtaining a voting influence. On the other hand, the paragraph in Bill C-219 prevents associated groups of any and all shareholders from effectively combining to outvote the government's nominee (the Minister of Finance) at meetings.

In the practical corporate world, a 10 per cent holding sometimes is sufficient to ensure control of a company. However, a shareholder group may be formed to outvote the previously controlling block, or a take-over bid may succeed in obtaining effective or ful control. With a limit of 3 per cent of outstanding voting shares permitted to be held by a single shareholder and his associates, clearly there can never be an effective challenge of the government's ultimate control of the CDC. Undoubtedly this is as it should be.

I would like to interject here, Mr. Chairman, that the Chamber is not averse to the 3 per cent limit, which in our view should be more to prevent others from gaining control than to permit the Government to dictate policy.

Again, in practice, it is usual and proper for the controlling shareholder or group to be very much involved in policy making and very much concerned in the process of electing directors and electing or appointing senior executive officers. We do not believe that as the Bill now stands, the CDC can be much different as regards these matters than holding companies in the private sector.

It is not the Chamber's desire to comment further on this situation except to say that, unless it is to be clearly stated otherwise in the Bill, we must believe that it is the government's real intention to retain a firm control over CDC policies and activities. This conclusion would help explain the lack of precision in the objects section. In this connection we do appreciate the likelihood that it will be a good many years before the government's 100 per cent voting interest can be reduced through offerings to the public.

At this point, Mr. Chairman, I would like to reiterate the recommendations of this section on investment policy, which appear at page 9 of our brief. Our recommendations are:

—That a concise and unequivocal statement of CDC investment policy and its role in ensuring Canadian control of the Canadian economy be included in the Bill.

—That such a statement of policy include provisions limiting CDC investments to profitable or potentially profitable and sound situations.

—That the CDC's freedom from government direction be clearly stated in the Bill.

Senator Benidickson: That relates to the paragraphs immediately above taken from the Australian Industry Development Corporation Act, 1970. I think that should be on the record because it more clearly illustrates the objects.

Mr. Peck: Yes sir; we do refer in our commentary in the brief to certain provisions in the bill which established the Australian Industry Development Corporation.

Senator Benidickson: Would you care to read those paragraphs?

Mr. Peck: I shall read those three clauses from the Australian Act:

> The Corporation shall pursue a policy directed to securing, to the greatest extent practicable, participation by Australian residents in the ownership of the capital and in the control of companies to which it provides assistance.
>
> The Corporation shall act in accordance with sound business principles and shall not provide assistance in relation to a particular company unless it is satisfied that the company will operate on a profitable basis.
>
> In the exercise of its powers the Corporation is not subject to direction by or on behalf of the Commonwealth.

Senator Croll: Do you think the second clause means a great deal? I would love to be in that position.

The Chairman: It is similar to provisions included in a will which we refer to as the pious wishes of the testator.

Senator Croll: Do you remember we always termed those motherhood clauses?

Mr. Peck: If I may, Mr. Chairman, I will comment on that. There has been some debate on this matter of policy and perhaps an inconsistency between objectives. It has been argued that there is a possibility that the CDC might become involved in investments which would be profitable only in the very long term or, conceivably, might be only in the national interest and not profitable at all. I know that the bill does mention the word "profitable".

Senator Burchill: Would that not be a matter of judgment on the part of the directors?

Mr. Peck: I have to admit that is true.

Senator Cook: Some of the provincial governments have been involved in unprofitable ventures.

The Chairman: I am a little concerned with respect to the statement in the brief. The statute does provide guidelines which are, no matter how hard it may be to harness them, the national interest and a degree of profitability.

Senator Beaubien: Only a degree.

The Chairman: Another way of expressing it would be that they will act in accordance with sound business practices and will not give assistance in relation to a particular company unless it appears that the company will operate on a profitable basis. Nothing requires the directors of this company to guarantee the profitability, but it must appear that there is a reasonable expectation in the minds of men skilful and knowledgeable in the field that there will be profit.

Therefore, it appears to me that the bill provides exactly what you say. Clause 2 sets forth the purpose of the act, as follows:

> The purpose of this Act is to establish a corporation that will help develop and maintain strong Canadian controlled and managed corporations in the private sector of the economy and will give Canadians greater opportunities to invest and participate in the economic development of Canada.

The very points we are discussing are inherent in those purposes. It is different language, but the same description of intent.

Senator Cook: The reference to the private sector excludes the post office.

The Chairman: I am not sure; we may find that it will become a private business operation one day. Let us hope.

Senator Benidickson: There is nothing in the bill as specific as the third clause the witness read from the Australian act, which states:

> In the exercise of its powers the Corporation is not subject to direction by or on behalf of the Commonwealth.

That is very clear; we have had statements of ministers, but not a statute.

The Chairman: Clause 6, dealing with the objects of the company, provides that they shall be carried out in anticipation of profit and in the best interests of the shareholders as a whole.

Senator Benidickson: That was not my point. The Australian clause provides that the Crown shall not interfere and the witnesses told us that according to business experience it is quite likely that for many years the Crown will have 100 per cent of the shareholdings. At the minimum it will hold 10 per cent, which will likely provide effective influence in the operation and directions to the directors.

The Chairman: Senator Benidickson, there appears to be an anomaly there. Shareholders own the company. Because for a period of time these shareholders may be the Government of Canada, you suggest that they should deny themselves their right as shareholders. It is their money.

Senator Benidickson: I am not saying that at all. I am saying that if I were a director of a company I would be quite respectful to the shareholders.

The Chairman: Yes, or you would not be there very long.

Senator Benidickson: The shareholders in this case are likely to be the Government, and that will probably be so for some time. It would be very influential as a shareholder, even if it is reduced to a 10 per cent holding.

The Chairman: As shareholders should be.

Senator Benidickson: That is right.

Senator Cook: As a matter of law the Government could not veto actions by the directors.

The Chairman: No.

Mr. H. J. Hemens, Q.C., Counsel, Canadian Chamber of Commerce: That may be subject to question. First of all, as a matter of law the Government can always amend the statute. That is point number one.

Senator Cook: Parliament can.

The Chairman: Parliament can, not the Government.

Mr. Hemens: Thank you very much. The second point is that, in respect of any amendment of the charter, the Letters Patent, the views of Parliament, the approval of Parliament has to be obtained; so if the directors have proposed something which requires supplementary letters patent, or their equivalent, Parliament clearly can veto it. It is not quite as clear, with respect, sir, as it seems.

Senator Cook: If you put in the act that Parliament could not veto, then at the next opportunity Parliament would change that act. You cannot stop Parliament.

Mr. Hemens: That is quite true. We are just pointing out some of the confusions there. May I take a moment on some of the confusions? Senator Hayden referred to clause 2. Reference was made a little earlier by Senator Croll to motherhood, and if ever I saw a definition of "motherhood" there it is in clause 2.

With respect to clause 6 we have the confusion, to me at least, that clause 6(1)(c) requires the company to invest in shares or securities related to the economic interests of Canada. This is a function of the directors.

The Chairman: When you say that it requires, let us get our language straight. These are the objects of the company. In the operation of the company, the directors determine the course of action.

Mr. Hemens: That is right.

The Chairman: And the areas in which they venture and the areas in which they do not venture.

Mr. Hemens: That is correct, sir.

The Chairman: So because clause 6(1)(c) may read with any interpretation that you want to give it, it does not mean that the directors must carry out the intent of paragraph (c).

Mr. Hemens: No, but it does mean that they cannot do anything which is in conflict with that paragraph (c).

The Chairman: Why should they?

Mr. Hemens: Because they may not know what are the economic interests of Canada.

The Chairman: Then they should not be directors—and we have the power to fire them. Is not that right?

Mr. Hemens: That is very good. The only difficulty is that, from time to time and, on occasion, even in parliament, there are different views as to what are the economic interests of Canada in a particular matter. I suggest to you that this is a problem which may require some clarification. If you look at paragraph (d).

The Chairman: If you think it does, what do you suggest?

Mr. Hemens: That is a very good question.

The Chairman: It certainly is. It is easy to take away, but I want to know what do you suggest would be better language?

Mr. Hemens: I think what we have suggested, senator, is more specific references, more specific statements of objects, more specific statements of policy, set out in our brief.

Senator Hays: What page do you have those on?

Mr. Hemens: We have references to this under "Investment Policy", starting on page 6 and running through to page 9. As a matter of fact, Mr. Peck read those recommendations a few moments ago.

The Chairman: Do you agree, in relation to your reference on page 9, that there should be incorporated into this bill the third item that you quote from the Australian Industrial Development Corporation Act, that in the exercise of its powers the corporation—that is the CDC here—is not subject to direction by or on behalf of the Commonwealth. Would you agree to that going into this bill?

Mr. Hemens: Speaking on behalf of the chamber . . .

The Chairman: Yes?

Mr. Hemens: And without reference to personal views . . .

The Chairman: Yes?

Mr. Hemens: That is what we stated, sir.

The Chairman: What you are saying in effect is that the Commonwealth, it is all right for it to put its money in but it cannot go where its money is going.

Mr. Hemens: It has a right to persuade the directors to the extent of its holdings in the corporation, just as in any other corporation.

The Chairman: That means by firing them?

Mr. Hemens: That means by firing them, yes.

The Chairman: They have the power to fire them.

Senator Benidickson: The directors have power under this bill to elect some other directors—which is not usual. Usually, the shareholders elect the directors.

The Chairman: You are mistaken, senator, may I say, with all due respect. Under this bill we provide for a minimum of 18 directors and a maximum of 21. So long as the Government has 50 per cent or more of the voting shares, it can nominate I think it is the Deputy Minister of Trade and Commerce and the Deputy Minister of Finance.

Senator Benidickson: Ex officio.

The Chairman: They are ex officio directors in that period, but they have no vote and they get no remuneration. As to the rest of the directors, the shareholder, the Government of Canada, is entitled to designate four or, if it does not designate them, it just takes its chances at an annual meeting, which is not much of a chance, and it could elect the whole board. There is power in the bill under which a director may be removed at any time.

Senator Benidickson: By the board of directors.

The Chairman: Yes.

Senator Benidickson: Which is normally done by shareholders.

The Chairman: Well, this is different, and this is to make absolutely sure that the directors adhere to the policy and the guidelines laid down in the bill. If they do not, out they go.

Mr. Hemens: May I speak to that, senator? That is a very unusual provision. The shareholders elect the directors, the shareholders having elected the directors, four-fifths of the directors then fire the directors they do not like.

Senator Benidickson: Yes. I have never heard of that before.

Mr. Hemens: I have never heard of anything of this nature.

The Chairman: It may be you will hear more of it in the future.

Mr. Hemens: We say that this is a corporation which will be on all fours with other corporations—

Senator Beaubien: That is the point.

Mr. Hemens: —and then we say it is going to have special powers.

The Chairman: Wait a minute now. We do not say that this is a corporation which is going to be on all fours with others. We provide certain powers for this corporation that you may not find elsewhere. We do give them special powers.

Mr. Hemens: Yes, you do.

Senator Benidickson: There is a clause with respect to C.D.C., that the Canada Corporations Act will not apply.

The Chairman: No. There is a clause which says that there are certain exclusions from Part I of the Canada Corporations Act, but all the other provisions in Part I apply.

Senator Benidickson: I was referring to the exclusions.

The Chairman: They exclude certain features. I can tell you one of them. If the ancillary powers in the Canada Corporations Act apply, this corporation might have a right to join in amalgamations. That is one of the sections which is excluded. But you will find that the section is repeated almost word for word as an ancillary power, except that the words "other than an amalgamation" are put in to make the change. You will find many instances where they have excluded sections of the Canada Corporations Act but they have repeated sections that, to a very great extent, are the same.

Senator Benidickson: They put them back in again.

The Chairman: Except that they put in qualifications that were not in. I would say the qualitications are by way of restriction.

Mr. Hemens: May I make a comment, senator? You say that, with the exception of the exclusions, the Canada Corporations Act provisions apply. That is true, but they apply to the company "with such modification as circumstances require". I have not the foggiest notion what that means, and I would challenge anyone to interpret it.

The Chairman: I think one of the things it means is that this is a special act company, and yet you can change the character of the company by supplementary Letters Patent. That is a modification.

Mr. Hemens: Which applies to the utilization of the provisions of the Canada Corporations Act?

The Chairman: Yes, so as to make it applicable. It was an oddity until the power was created whereby you could amend a company incorporated by statute by supplementary Letters Patent under the Canada Corporations Act. I think this is one of the things they have in mind. We will have the departmental officials here and maybe they can pick out other instances.

Mr. Hemens: It is an extremely broad provision favouring the directors. It may be useful, I do not know; but, on the other hand, it may be difficult.

The Chairman: Well, let us put it this way, that if we are dealing with the giving of legislative powers in statutes, our inclination is to be very exact. We are governed by the purposes of the bill and sometimes we had representations made that the purpose of the bill did not lend itself to being so exact, and in that event we would broaden it out. Maybe this is the type of bill, having regard to the purposes, where there should be a broad scope. They should not have to get on the telephone to the Minister of Finance to find out whether or not they should invest certain moneys. I would expect they would

consult him from time to time, if they needed some money by way of a loan, and there is provision for loaning moneys, on terms that he may dictate. But would you have to ask, "Do I have a broad power to do certain things?" In talking to the Minister of Finance I would not say, "Do you want me to do this?". I think the position the minister would take would be, "Yes, you have authority." He would ask you what you were going to do with the money, and then he could decide whether or not he was going to lend it to you. It certainly inhibits the exercise of investment policy to have to get on the telephone all the time to find out, "Can I do this?". You cannot say to the market, "Just hold that position or, if you are going to do anything, go down until I decide whether I should do this or not." You have to take advantage of situations as they arise and, therefore, you need broader powers. I am sorry, I cut in. Go ahead.

Mr. Hemens: I think I have finished, senator.

Mr. Peck: Mr. Chairman, I would like to point out what we are trying to point up here, and we did discuss this in our brief at pages 6 and 7, where we make the point that we believe there is a conflict between the objectives of national interests and seeking the most profitable investments. We simply discussed this point. We feel that without more specific direction the directors could perhaps have a hard time resolving this conflict in some instances. Again we are...

The Chairman: Well, if you will stop right there, please. Supposing it is a resource industry. The development of resource industries, I think you would agree, would be in the national interest.

Mr. Peck: Yes.

The Chairman: So, then, the next question I address myself to...

Senator Benidickson: Well, it could be a flop, as happened in Manitoba.

The Chairman: Yes, but this bill does not guarantee things. They have to make a decision as to whether it is profitable or not.

Senator Benidickson: And the Quebec flops of Crown companies that have been developing resources.

Senator Cook: In sponsoring the bill, Mr. Chairman, you made the point quite clear that with good luck and good management the company may have some hope of success.

The Chairman: Having money alone is not going to make this thing operate well. The key to the whole thing is the management and its direction. You make the best selections you can; you ride herd on them, but no one can guarantee. That is why I made the suggestion the other day that I thought that in dealing with resource industries maybe they should move in at a higher level. For instance, when they get to the stage where the feasibility studies have been completed, and they know that if they get into production it is normal and reasonable to expect that it will be profitable, and yet, even at that stage, there is tremendous difficulty in finding large quantities of money. I could cite so many illustrations of that that I have been through. The enterprise would become profitable more immediately than if you went into the forest in the northland and did all the original work. It may be in the national interests to do it, and it may ultimately be profitable, but the board of directors of CDC will have to say: "Are we going to go in so early?"

Senator Cook: And even when the private sector reaches that stage there is still lots of money lost, so you have to have good luck.

Mr. Hemens: With respect, senator, I think you have pointed up the conflict for the board of directors as between the national interests and profitability. It may well be in the national interest to do something immediately and it may be that that something, in the judgment of the directors, would not be profitable.

The Chairman: Then, they cannot do it.

Senator Hays: They cannot do it.

Mr. Hemens: I hope you are right.

Senator Beaubien: I think they would probably do it.

Mr. Hemens: Clause 6(1) states:

> ...and shall be carried out in anticipation of profit and in the best interests of the shareholders as a whole.

Senator Hays: That would be dollars, would it not?

Mr. Hemens: I would hope it might be, yes.

The Chairman: The purpose refers you to the national interest, and the only word you are using that I did not feel I could accept was that there was a conflict between national interests and profitability. I do not think there is a conflict. I would say that exercising your judgment to harness the two of them will require considerable know-how and judgment, but I do not think there is a conflict where one is repugnant to the other.

Mr. Hemens: No, but in particular cases you might have this conflict.

The Chairman: Maybe the directors in those particular cases would have some judgment in the matter that might even coincide with your judgment.

Mr. Hemens: They might have.

Senator Hays: They might even ask the Chamber of Commerce about it.

Mr. Peck: Mr. Chairman, I wonder if I might read the summary on page 1 of our brief in this matter?

The Chairman: Yes.

Mr. Peck: I might just read that because it goes to the problem we are discussing. It reads:

> It is contended that the proposed CDC policy to promote greater Canadian control of its economy

while, at the same time, to maximize economic return may lead to conflicts between these objectives. Foreign, and particularly U.S., interests are willing to pay a premium for shares of Canadian companies in the raw materials and technology fields. Therefore, in order to avoid paying excessive prices for such interests in open bidding, the CDC will have to become involved in joint ventures with foreign concerns. Government policy with respect to foreign ownership remains to be enunciated and a great deal of public uncertainty exists in this regard.

The Chairman: If you would stop right there, please: The budget that just came down deals with one of these questions and the ability of U.S. investors to be able to pay a premium, because in the United States the great complaint—and, Senators Hays, you will remember this was discussed before our White Paper committee—was that the investor in the United States who borrowed money for the purchase of shares could write off the interest. The budget now provides for that, so that has been equalized. With respect to the other aspects, I do not think anyone is saying that there cannot be conflict or repugnancy between national interest and profitability, but the bill says both must exist in the opinion of the board, so I would assume, and I think we have a right to assume, that if there is a conflict between the two aspects and you cannot fit them together, then, you do not do it.

Mr. Peck: The other point which bothered us—and this is why we quoted Mr. Mahoney on the subject—is the fact that he mentioned that the best protection against such interference as Government interference was a strong and independent board of directors.

We find this difficult to understand, because we feel that, as the bill stands, the Government itself would have this controlling function, and the directors, without more specific objects spelled out in the bill would have to refer back to the Government on what Government policy might be or in connection with matters of national interest. Therefore it would not be an independent board of directors. That is a question that we find puzzling.

The Chairman: Do you think that there are not enough public men in Canada who would take on the job of directorship in connection with such an important operation as this, that they would not be prepared to assert independence when they knew that that was a concept of their job?

Senator Benidickson: Several of our financial journals have suggested that it would be difficult to get people to take on the job.

The Chairman: But I do not agree with that.

Mr. Peck: I do not necessarily agree with that, either. Undoubtedly it would be possible to set up a board of directors. However, it would be very much easier for a board of directors to function effectively if their terms of reference were spelled out more clearly.

Senator Burchill: It will be a difficult job for a director of this corporation to steer a course between the national interest and profitability. I am thinking of the big enterprise on Cape Breton, Nova Scotia. Money has been put into it by the provincial government, and it is a profitable enterprise. However, would the directors have been justified in buying stock in that concern before?

The Chairman: Perhaps not. That was a delayed reaction. However, that does not condemn or support the bill.

Senator Burchill: No, but it shows the difficulty that exists in following a course between profitability and the national interest.

The Chairman: When the Government of Nova Scotia put money into it, they had a purpose for doing so. They hoped that it would be profitable and that it would provide development for the area.

Senator Hays: The terms of reference were a little different than those that are here.

Mr. Peck: Continuing with my letter, we say:

LEGISLATIVE CONSISTENCY

We maintain that the comments and recommendations under this heading, on pages 11 to 14 and page 20 of the appended Brief, are still valid. In particular, we would like to draw attention to the second point made in the Chamber's appended letter to the said Commons Committee. This refers to Section 20(3) of the Bill and the confusing element which in our view would be introduced into the existing body of law on the subject of when a person is "ordinarily resident in Canada". As mentioned in that letter, this matter was discussed by your Committee on January 27, 1971, with reference to the Investment Companies Act.

MARKETABILITY OF SHARES

In the Chamber's view, the amendments to the original Section 16 of the Bill will do little to improve marketability of CDC shares, when and if they are issued to the public, as claimed by Mr. Mahoney (page 6391 of the House of Commons Hansard for June 4). We submit that the complications and uncertainties of the Bill's provisions as discussed on pages 14 to 16 of the attached Brief will constitute serious inhibitions to satisfactory marketability. It is our contention that adoption of the recommendations on page 16 of the attached Brief would alleviate the problems outlined. However, we admit that these will not have to be faced until a public offering of CDC shares is actually contemplated. When and if this happens, it will always be possible to amend the Act should the problems referred to prove insurmountable.

GOVERNMENT PARTICIPATION

No significant amendments have been made to this part of the Bill. We contend that the procedure of CDC redemption of government-owned common shares at net asset value, and their re-issue to the public at a marketable price, may not be possible to put into effect. In our view this can be done only

> when and if a market can be made at a price equal to or greater than net asset value. Yet, the market prices of closed-end investment and holding company shares in Canada, over the years, have been consistently at substantial discount from net asset values. Perhaps the CDC will be so successful in establishing an earnings and growth record that such a discount in the case of its common share prices will be eliminated. If it is not, then it would be likely that shares should never be issued to the public. The Chamber's discussions and recommendations on pages 17 to 19 of the appended Brief were made in an effort to point out this problem and assist in its solution.

I do not think that I need touch on the heading "Certain Technical Aspects". They were covered in the appendix to our brief. We mention in that paragraph that a number of amendments were made which we had actually recommended. That completes what we have submitted to you, sir.

The Chairman: To summarize the points that you are raising, they go to the more general scope in language of the objects and purposes of the bill. You think that it should be more specific. You feel also that the directors should be independent of the influence of the Government of Canada, and you realize that to do that we would have to redefine what are the rights of shareholders.

It is conceivable that at some stage we might get a bill in form and with limitations that even the Government would not put money into it. The Government could always revert to the present system, like the Cape Breton Development Corporation in the Maritimes. The Minister of Finance is the responsible minister. They can provide capital funds at the direction of the board of directors, but that has to meet certain tests and requirements as being a proper thing for regional development. Alternatively, the Government could guarantee.

That course is always open to the Government. The CDC introduced the extra feature to try to create a vehicle which at some stage might be attractive for public investment; to create it in such a way that nobody could get control, and there could be no grouping for purposes of getting control; in other words, to try to keep it in the public domain.

True, that cannot happen as long as the Government is a substantial shareholder. But conceivably, if this vehicle works the way they want it to, they may be able to withdraw a substantial part of their money some day—although for a long period of time I made my own assessment of what I thought about this as a public investment. However, Rome was not built in a day. Have you anything else to add?

Mr. Hemens: The Minister of Finance, when speaking to the House of Commons committee, referred to the:

> fairly tenuous position controlling a corporation of 10 per cent, if there really is dissatisfaction at the way the corporation is running.

He then went on to say that if the directors were messing things up, and were being supported by the Government 10 per cent, it would become very difficult because the other shareholders will mobilize or somebody will mobilize them.

This is not feasible under the act, because of the definition of "associates".

The Chairman: The only way that could be done effectively would be at an annual meeting.

Mr. Hemens: So long as there is in the judgment of the directors an arrangement between two shareholders there is an association and therefore a forced sale.

The Chairman: But if the shareholders feel the directors are not taking a proper stand they do not have to go further, they can nominate.

Mr. Hemens: The definition of "associates" raises a problem.

The Chairman: I know it is not easy; that only means an associate in the event of pooling of shares to be more effective.

Mr. Hemens: No, sir, it does not. That is what bothers me. Section 4(2)(i) of Schedule I of Bill C-219 reads as follows:

> (i) both shareholders are parties to an agreement or arrangement, a purpose of which, in the opinion of the Board of Directors, is to require the shareholders to act in concert with respect to their interest in the company;

That effectively overcomes any possibility of mobilization of shareholders in respect of directors. I suggest that should be considered.

The Chairman: Are you suggesting that if I decided to put on a proxy fight I could not go out and solicit proxies from all the shareholders?

Mr. Hemens: I do not think you could.

The Chairman: I can go and ask them to give me their proxies.

Mr. Hemens: I do not think you could; that would be an arrangement with another shareholder.

The Chairman: Is it? It depends on what I say.

Mr. Hemens: It is in the opinion of the directors.

The Chairman: Oh, yes; then there would be a lawsuit.

Mr. Hemens: That is correct.

Senator Benidickson: At page 5 of the brief the following appears:

> It is generally known that the Chamber has not favoured the formation of the Canada Development Corporation. In fact, its Policy Statement on this subject in September, 1970..

Which is not long ago. It continues:

> was as follows:
>
> It has not been demonstrated that the Canada Development Corporation fulfills an economic need

in Canada at the present time or that its proposed methods of financing or operating are practicable. (It can be questioned that there is an entrepreneurial gap or a gap in our capital market and, if there are such gaps, that the Canada Development Corporation is the best way of closing the gaps.) It is submitted that a full exploration should be conducted into the use of fiscal policy to encourage savings and their investment by Canadians in Canadian equity securities. The Chamber, therefore, is of the view that the Canada Development Corporation should not be proceeded with.

My observation is that you now take the stand that the Government is determined to have this bill passed and you question the usefulness of repeating your strong statement of last fall. You went further and were helpful in suggestions as to simply patching up the bill, but you kind of went chicken on your basic objection, in my opinion.

I wonder why that developed?

Senator Hays: It is similar to the capital gains tax.

Mr. Peck: We attempted to point out in the brief that the Chamber of Commerce has a procedure for developing policy, which flows through democratic processes from chambers throughout the country. The executive council could not make another statement on policy at this stage without conflicting with the usual procedures.

Senator Benidickson: Yes, but as the chairman has pointed out, this reference to the use of the fiscal weapons was utilized quite effectively on Friday night with respect to foreign investment in allowing interest to be charged as expense.

The Chairman: I would think that is the case in other parts of the budget. I have not made a particular analysis of it as yet.

Senator Benidickson: At the same time I rather agree with the fall statement that some of the faults could be remedied better by fiscal methods than by handing over a quarter of a billion dollars in the first instance. It will certainly be a group very largely influenced by the mandarins around Parliament Hill. I think the private sector could have done these things. If they had not done them properly the Government, by changing ts fiscal and company laws, could have solved some of the problems.

Mr. Hemens: It has taken us approximately 20 years to convince the Minister of Finance of the necessity for the interest provision in the budget.

The Chairman: That is right; the fiscal policy sometimes is a slow, tedious and persistent effort that culminates years later. I know for instance in 1948-1949, the spearhead being Senator Euler and his chief lieutenant the chairman of this committee, that we were fighting for two measures and were voted down in the Senate every time. We thought that the prohibition against the manufacture and sale of oleomargarine in Canada was wrong and invalid. We finally put an innocent motion on the Order Paper asking that the constitutionality of that statute be referred to the Supreme Court of Canada. It was referred and declared invalid, the decision being upheld by the Privy Council.

The second effort that Senator Euler put forward was against a sales tax on margarine. He argued that there was no sales tax on butter and that therefore there should not be one on margarine. It is a nutritious item of food and serves a useful purpose. Now it comes in the budget this time, 20 years later. That fits right into the pattern.

Maybe that is one of the answers. If you want some immediate economic growth you just cannot afford to wait that long. You must try something in the meantime.

Mr. Hemens: That would be dangerous.

The Chairman: We will adjourn until 2.15 p.m.

The committee adjourned.

—The committee resumed at 2.15 p.m.

The Chairman: Honourable senators, this afternoon we have before us representatives from the Department of Finance: Mr. W. A. Kennett, Director, Capital Markets Division; Mr. R. B. Love, Legal Advisor; and Mr. W. D. Lennox, Accounting Consultant. How many of them we will need to call on, in addition to Mr. Kennett, will depend on the nature of the questions. There has been a rather lengthy airing of the provisions of the bill. With that in mind, and without restricting your eloquence, Mr. Kennett, you can make an opening statement on this bill.

Mr. W. A. Kennett, Director, Capital Markets Division, Department of Finance: Mr. Chairman, thank you very much. Honourable senators, this bill was first introduced into the house last January. It has been much discussed. It has been in the public limelight off and on for something like eight years. You had an excellent presentation of the technical aspects of this bill in your chairman's aspects of this bill in your chairman's introduction of the bill in the Senate. There is very little, if anything, I can add to that technical presentation. It was very complete and it represented quite a remarkable grasp of this rather complicated legislation. At least, it is complicated from my point of view, not being a corporation lawyer.

A number of amendments were made in the House of Commons when the bill was before committee. Many of them were rather small, tidying up amendments.

Senator Benidickson: How are those amendments shown? I was saying this morning that usually there is an underlining in the final bill that is sent to the Senate, and we compare that with the bill as introduced for first reading. Then we have an idea as to what the amendments are. I checked this morning and I could not see any underlining or any explanatory notes to indicate what changes were made as a result of the discussion in the House of Commons Finance Committee.

The Chairman: I understand that the underlining is done where the amendments are amendments in relation to a basic act. This is the same bill and it underwent

some treatment in committee, but when it comes out of committee it comes out in the form in which it leaves the committee and there is no underlining in those circumstances. I checked with our Law Clerk and he tells me that is right. That is why there is no underlining here.

Senator Benidickson: Could we hear what amendments were made to the original bill as presented on first reading?

Mr. Kennett: Mr. Chairman, we do have a copy of the bill where the amendments are underlined.

Senator Benidickson: I went to Distribution and the copy of the bill they gave me is perfectly plain. There is nothing to indicate what changes were made between the first presentation of the bill, and the final passing at third reading stage.

The Chairman: For your comfort and information, Senator Benidickson, here is a special copy of the bill with such underlining shown.

Senator Benidickson: Thank you, Mr. Chairman. That is satisfactory. I see the underlining.

Mr. Kennett: You can flip through the pages, senator, and see what in fact was done. This will be better than going through these amendments, as many of them are highly technical.

The Chairman: Mr. Kennett, there are but one or two things I see that might require some explanation. I am thinking of the submission made by the Canadian Chamber of Commerce. They thought the duties and responsibilities of the directors were not specific enough. They thought the powers were too broadly stated. Those were two of the main points they made. The third one was the position of the Government as the major shareholder, influencing the decisions of the board. Have you any comment on those three points?

Mr. Kennett: My understanding is—and I am speaking as an official, I want that to be quite clear.

The Chairman: That is right. In the case of any question that smacks of policy, do not answer it.

Mr. Kennett: Thank you. My understanding is that the objects of the bill are intentionally broad. They are broad because this is a statutory corporation. They are broad because it is intended that this corporation will have a long life and will want to be able to act in changing circumstances. They are broad to give the board of directors the power it will need, through time, to act in response to particular situations. On the other hand, efforts have been made to make the objects sufficiently specific, in their philosophy, in the direction in which they go, to give some guidance to the board of directors.

It would be difficult to recruit the kind of directors that would be required to make this corporation a successful corporation, if they were confined and restrained unduly. To get the right kind of people, who will take the difficult kinds of decisions which were discussed in this committee this morning, it is necessary to give them some flexibility in their operations. The general drift of this corporation is quite clear in the objects and powers of the corporation.

Senator Cook: The best thing for the Government would be to appoint the members of the Senate Committee on Banking, Trade and Commerce as the first directors, and then it would be sure to be successful!

Senator Beaubien: It cannot help but succeed then.

The Chairman: They have some experience in the responsibilities and also in the criticism.

Senator Cook: I do not think this is going to give the directors wisdom if they have not got it when they are appointed.

The Chairman: This is something we do not control.

Senator Cook: I hope I am not being too premature. I move that we report the bill without amendment.

Senator Benidickson: I want to indicate that I have lived with this bill for quite a little while. I was a member of the cabinet when the concept was first developed. At that time I think the emphasis was on buying back Canada, and it seemed to be a pretty substantial undertaking. This bill in little ways resembles that original concept. I still think it is riddled with ambiguities. I do not propose to ask these witnesses in detail about some of these points.

I think the timing is bad, because from the beginning, eight years ago, when I was associated with the concept, it had a very definite relationship with policy in respect to foreign ownership in Canada.

Before we dealt with this bill—which the Government did not consider too urgent for eight years—we should have had the Honourable Mr. Gray's report—he has been working on it for some time—as to Government policy on this matter of foreign investment and what to do about it.

Mr. Chairman, rather than go into detail on the clauses of the bill, I may have a few words to say on third reading in the chamber.

The Chairman: This bill has had ample study in the Senate, even before it came to this Committee. I am not saying that because I dealt with it as sponsor. We did elaborate and develop all the aspects of the bill, so I would say there is no feature that is not known.

Senator Beaubien: There is not much to add.

The Chairman: On the question of repatriation that you are speaking about.

Senator Benidickson: There is nothing on that here.

The Chairman: There is nothing in this bill which makes any declaration of policy with respect to repatriation.

Senator Benidickson: That is right.

The Chairman: I would say that the powers of investment are such that they could invest in shares of a

company which is non-resident owned. It is difficult to restrict investment policy. If the terms are national interest and profitability, there may be non-resident ownership of a Canadian enterprise that would be a very valuable thing to acquire.

Senator Benidickson: That is not presented by the bill.

The Chairman: No, it is not presented.

Senator Benidickson: I am saying that over the years it is no longer the main point of emphasis in the concept of the Canada Development Corporation.

The Chairman: That is right.

Senator Croll: I support this bill, but one thing did arise. There is a provision for directors to appoint directors.

The Chairman: It is the usual provision where, if there is a vacancy and as long as there is a quorum, the remaining directors may appoint directors.

Senator Benidickson: I was not sure in reading that section. That is page 8.

Senator Croll: That is not the normal corporate practice.

The Chairman: It is.

Senator Beaubien: During the year, yes. At the end of the year the shareholders elect a board of directors.

Senator Croll: I know.

The Chairman: Senator, the Canada Corporations Act uses the word "elect" where we heretofore used to talk about appointing for the balance of the term.

Senator Croll: That is right.

The Chairman: They use the word "elect", so you use the language of the statute.

Senator Benidickson: But there is no reference to "balance of term". It does sometimes happen that a director is appointed for the remaining portion of another director's term, and then the shareholders are the ones who elect the directors for the next term.

The Chairman: All it says, senator, on page 8, section 12(4) is:

> The directors may from time to time appoint any other person as a director, either to fill a casual vacancy or as an addition to the Board, but the total number of directors, subject to section 41, shall not at any time exceed the maximum number fixed under section 11.

That is a minimum of 18 or a maximum of 21.

Senator Beaubien: They could only act, then if there was a vacancy either in the total number or if someone fell out who had already been appointed.

The Chairman: That is right.

Senator Beaubien: That is the normal practice in business. At the end of the year all the people who are directors would have to be re-elected or reappointed.

The Chairman: That is right. When you are elected a director you are only a director until your successor is appointed.

Senator Croll: All right.

The Chairman: Senator Cook, do you have any other questions?

Senator Cook: No.

The Chairman: I have noted what your motion is. Senator Gélinas?

Senator Gélinas: I support the bill.

The Chairman: Senator Carter?

Senator Carter: No.

The Chairman: Senator Sullivan?

Senator Sullivan: No questions.

Senator Benidickson: Mr. Chairman...

The Chairman: We have heard from you.

Senator Benidickson: May I speak again?

The Chairman: Yes.

Senator Benidickson: What is the situation with respect to voting for preferred stock? It is optional, is it not, that the board can decide whether to allow voting privileges on the preferred stock or not allow voting privileges on the preferred stock?

The Chairman: That is put a little differently, senator. I think the provisions in the bill are that preferred shares may be issued in series. One series, if the directors so determine, may carry voting privileges in certain events, that is, if there is default in payment of dividends, et cetera; but they may also be issued without any voting rights. This depends on whatever the conditions are that are attached to them. Section 18(2) states:

> In the absence of other provisions on that behalf in the by-laws, the preferred shares of the company do not carry voting rights.

But remember that a preferred share that carries a voting right in any circumstances is, for the purposes of this bill, a voting share. Regardless of whatever restriction and everything else in the bill, it is in the category of a voting share.

Senator Croll: Will you stop talking this bill out?

The Chairman: I am so anxious that each senator should fully understand that, when he asks a question, that I do not want him to feel that the chairman has been..

Senator Benidickson: We are very careful, Mr. Chairman. We do not often have the free benefit of your counsel.

Senator Croll: The emphasis was on the "free".

The Chairman: It is free in the sense that I do not get any more than the rest of you. Before I put this motion, Mr. Kennett, is there anything more that you wish to say?

Mr. Kennett: No, sir.

The Chairman: Mr. Love?

Mr. Love: No, sir.

The Chairman: Mr. Lennox?

Mr. Lennox: No.

The Chairman: We have a motion to report this bill without amendment. Those in favour? Contrary?

Motion carried.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 33

WEDNESDAY, JUNE 23, 1971

Complete Proceedings on Bill C-239,

intituled:

"An Act to amend the Prairie Grain Advance Payments Act"

REPORT OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

24158—1

THE STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Aird	Haig
Beaubien	Hayden
Benidickson	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Smith
Desruisseaux	Sullivan
Everett	Walker
Gélinas	Welch
Giguère	White
Grosart	Willis—(29).

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, June 23, 1971:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Argue, seconded by the Honourable Senator Lafond, for the second reading of the Bill C-239, intituled: "An Act to amend the Prairie Grain Advance Payments Act".

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

24158—1½

Minutes of Proceedings

Tuesday, June 29, 1971.

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider the following Bill:

Bill C-239 "An Act to amend the Prairie Grain Advance Payments Act".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Burchill, Giguère, Haig, Macnaughton and Molson—(8).

Present, but not of the Committee: The Honourable Senator Lafond—(1).

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

WITNESSES:

Department of Industry, Trade and Commerce:

Mr. W. E. Jarvis, Co-ordinator, Grains Group;

Mr. N. A. O'Connell, Executive Secretary, Grains Group.

Upon motion it was Resolved to report the said Bill without amendment.

At 10:10 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Tuesday, June 29, 1971.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-239, intituled: "An Act to amend the Prairie Grain Advance Payments Act", has in obedience to the order of reference of June 23, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

Minutes of Proceedings

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, June 29, 1971

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-239, to amend the Prairie Grain Advance Payments Act, met this day at 9.30 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, this morning we are dealing with Bill C-239, and we have here to explain it Mr. W. E. Jarvis, Co-ordinator, and Mr. N. A. O'Connell, Executive Secretary, the Grains Group, Department of Industry, Trade and Commerce. Mr. Jarvis will make the opening statement.

Mr. W. E. Jarvis, Co-ordinator, Grains Group, Department of Industry, Trade and Commerce: Mr. Chairman and honourable senators, this bill contains relatively minor amendments to the Prairie Grain Advance Payments Act. The primary purpose of the act is to give producers the opportunity to receive advance payments at the beginning of the crop year, on grains which they will deliver to the Canadian Wheat Board. The amendments continue the pursuit of that objective, but some changes are involved.

The most important change is that wheat, oats and barley will be given more equal treatment. In the past the maximum loan was $6,000—as it continues to be—but that maximum could only be had by taking an advance on wheat. With these amendments, if a producer has enough oats or barley and has sufficient quota and marketing opportunities available to him, he will be able to get a maximum on either oats or barley as well. The rate of advance per bushel is set in the statute now at $1 for wheat, 70 cents for barley and 40 cents for oats. This bill provides for a rate to be established at the beginning of each crop year, but specifies that it must be in an amount approximately two-thirds of the initial price for the grade of grain which will be in the largest volume in the forthcoming year. So it is geared to adapt itself from year to year to the actual quality situation of the crop.

The Chairman: I notice that the bill is to come into force on August 1. That is a significant date, is it not?

Mr. Jarvis: Yes, that is the beginning of the crop year, and we are most anxious to have the bill in effect at that time, if possible.

The Chairman: Is the initial price you talked about the basis for determining the advance?

Mr. Jarvis: That is correct.

The Chairman: It is determined on that basis.

Mr. Jarvis: That is right. All the machinery for the new year comes into effect on that date.

With respect to repayment, rather than paying back an amount which is different from the rate of advance per bushel as it now is in the act, the new provisions will make the rate of repayment exactly the same as the rate of advance. Moreover, the amount of advance will be geared to an individual's marketing opportunity. He must have the quota opportunity available to him to get the advance. These two things combine to give much greater certainty that the advance which is given at the beginning of the crop year, shortly after August 1 in most cases, will be repaid completely during the year.

The Chairman: What is the rate of advance, for instance, for barley?

Mr. Jarvis: That will be set later, but it looks as though it will be in the area of 60 to 65 cents a bushel, as of August 1 this year; and then they can repay it at the same rate.

The Chairman: But you mentioned the figure of 70 cents for barley. What was that figure?

Mr. Jarvis: That is what is in the act now. This bill would have the effect of replacing it with an amount to be set each year.

The Chairman: The amount you mentioned, 60 to 65 cents, would be the total amount of advance in respect of barley, then.

Mr. Jarvis: Yes, it will be an amount per bushel determined at the beginning of the year, and it will also be determined by acre. If the quota opportunity for barley looks like 12 bushels and the man has been assigned 50 acres for the delivery of barley, then it is an arithmetical calculation of 50 acres, 12 bushels and 60 cents, if that is the figure, so long as he has the grain on hand.

The Chairman: Is this advance paid by instalments? That is what I had in mind when I asked the question about rates.

Mr. Jarvis: Normally, producers come in at the beginning of the year to take out advances. Although an increasing proportion of the producers come in, only a certain proportion take out advances. Those who do normally take the advance in one action. There is nothing to prevent their coming back, and some do take advances

early in the year and then come back for more a little later.

I should like to comment briefly on two other points. Two situations are dealt with in this bill which previously had been left to separate legislation. The first is in respect of advances for the drying of grain in years of very difficult harvesting conditions, when there is a lot of grain to dry. There has been legislation from time to time to provide advances against the cost of drying. These are included in the bill on the basis of a provision for Governor-in-Council action. The second is that there is a similar provision for advances in an unharvested year. Both these depend on the Governor in Council taking action in a year in which these kinds of measures are required.

Mr. Chairman, in summary those are the main provisions of Bill C-239.

Senator Macnaughton: Mr. Jarvis, who has the right to fix the rate?

Mr. Jarvis: The Governor in Council finally sets it each year, prior to August 1.

Senator Macnaughton: Which means, in effect, the Wheat Board.

Mr. Jarvis: Well, the Wheat Board administers it so they will certainly be involved in recommendations and will certainly give their advice as to what is going to be the largest volume grade associated with it, but then the cabinet would decide on the actual rate.

The Chairman: Which minister who made the recommendation?

Mr. Jarvis: I am not sure, just at the moment.

Senator Haig: It would be the minister who answers for the Canadian Wheat Board, surely.

Mr. Jarvis: That is the practice, yes.

Senator Haig: The Wheat Board will have to give you the mechanics of this whole thing, the quota system and what the producers intend to produce. They will set what they think will be the ceiling price of that grain.

Mr. Jarvis: That is right. Indeed, they administer it.

Senator Smith: This bill does not spell that out, though. It is in the act which this bill amends.

Mr. Jarvis: That is right, except that the act does not say that the Canadian Wheat Board shall administer it. That is by arrangement. That is the machinery we use.

Senator Burchill: What is the basis of the price on which the advance is made?

Mr. Jarvis: The price is the initial price which is set for the total of the crop year on the basis of the Lakehead price or the price at Vancouver. For example, in the forthcoming year it has been indicated that the initial price on No. 1 C.W. wheat at the Lakehead will be $1.46. This bill provides that the cash advance shall be in an amount approximating two-thirds of the initial price and relating to the largest volume grade. We anticipate that No. 1 C.W. will be the largest. Therefore, approximately two-thirds of $1.46 will be the rate for wheat.

Senator Burchill: But this advance is available before seeding.

Mr. Jarvis: No. It is renewed as of August 1. So far as this bill and the Canadian Wheat Board are concerned, the new year starts on August 1.

Senator Burchill: Then the initial price is fixed before that.

Mr. Jarvis: Yes. The initial price is set before August 1 for that crop year.

Senator Smith: It is a forecast arrangement made to the best of the knowledge of the Wheat Board and other advisers. It is a kind of determination of what they think the price is going to be. They make that and call it the initial price. Then, as the crop year progresses, they make a final settlement. I know that in many years when there has been more they have paid that extra final price, but has there ever been a crop year in which the initial price was more than the final settlement?

Mr. Jarvis: That has happened on two or three occasions, but it has been a rare occurrence. There was a pool on oats early in the 1960s when that happened. There was a pool on wheat in 1968-69, when there was a loss, and I believe in that same year there was a loss in barley.

Senator Smith: What happens to the particular farmer, if there is a loss, in relationship to the Wheat Board?

Mr. Jarvis: Well, he has received his initial payment and the Canadian Wheat Board has provided over the years that the Government picks up any losses on pools.

Senator Smith: This does not happen very often?

Mr. Jarvis: It has not happened very often.

Senator Smith: Just once in a while. In parts of the country where they are not familiar with or very well informed about western agriculture, the general feeling is that the farmers have been heavily subsidized over the years.

The Chairman: I notice that when the question arose as to who the minister was, you referred us to the original act. In that act, section 15 reads as follows:

> 15. As soon as practicable after receiving requests therefor from the Board, the Minister of Finance shall out of the Consolidated Revenue Fund pay to the Board
>
> (a) interest charges paid or payable by the Board with respect to money borrowed by it or advanced on its behalf for the purposes of this Act, and
>
> (b) amounts of advance payments outstanding at the time of default, to the extent that the Board has not been reimbursed therefor after default.

"The Board" there is the Wheat Board, so, in connection with the financing arrangements, first of all you have to go to the Minister of Finance and then he has to go to the Consolidated Revenue Fund.

Mr. Jarvis: This is an important provision in this bill because these are interest-free cash advances, and unless a loan goes into default, as the bill provides, there is no interest charge. Also if he pays in cash rather than in grain, the bill provides that he shall pay interest.

The Chairman: The Wheat Board handles the wheat, barley and oats?

Mr. Jarvis: That is right.

The Chairman: And it is the vehicle through which the sales are made?

Mr. Jarvis: That is right.

The Chairman: Therefore, the Wheat Board can receive the proceeds of the sale, and all it has to do is look at the ledger and see if "John Jones", for whom they have sold and whom they have credited with a certain quantity of wheat, oats or barley, owes so much in respect of advances. So they can do all the arithmetic themselves, can they not?

Mr. Jarvis: Yes, Mr. Chairman, it is a very straightforward mechanism in the sense that every producer has a permit book and, if he gets an advance, it is recorded in this book, and with every delivery there is an offset against that. It is a very straightforward method.

The Chairman: He would never get more than a net amount of money. It would always be less what he owes?

Mr. Jarvis: That is correct.

The Chairman: Are there any other questions?

Senator Beaubien: Mr. Chairman, I move that we report the bill without amendment.

The Chairman: Is the committee satisfied with the explanations we have had?

Shall I report the bill without amendment?

Hon. Senators: Agreed.

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 34

WEDNESDAY, SEPTEMBER 15, 1971

First Proceedings on Bill S-22,

intituled:

"An Act to incorporate United Bank of Canada"

(Witnesses—See Minutes of Proceedings)

24160—1

THE STANDING SENATE COMMITTEE ON
BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Aird	Haig
Beaubien	Hayden
Benidickson	Hays
Burchill	Isnor
Carter	Kinley
Choquette	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Molson
Croll	Smith
Desruisseaux	Sullivan
Everett	Walker
Gélinas	Welch
Giguère	White
Grosart	Willis–(28)

Ex officio members: Flynn and Martin

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, June 15, 1971:

"Pursuant to the Order of the Day, the Honourable Senator Robichaud, P.C., moved, seconded by the Honourable Senator Macnaughton, P.C., that the Bill S-22, intituled: "An Act to incorporate United Bank of Canada", be read the second time.

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

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Minutes of Proceedings

Wednesday, September 15, 1971.
(38)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider the following Bill:

Bill S-22, "An Act to incorporate United Bank of Canada".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Desruisseaux, Everett, Haig Lang, Molson, Smith, Sullivan, Walker and Welch–(16).

Present, but not of the Committee: The Honourable Senators Laird and Robichauc–(2).

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

Upon motion of the Honourable Senator Molson it was Resolved that, unless and until otherwise ordered by the Committee, 800 copies in English and 300 copies in French of all proceedings of this Committee be printed.

WITNESSES:

Mr. B. V. Levinter, Q.C., Counsel,
United Bank of Canada;

Mr. W. E. Scott,
Inspector General of Banks;

Mr. A. S. Goldberg, Counsel,
United Trust Company.

At 11:10 a.m. the Committee deferred consideration of Bill S-22 to a later date and then proceeded *in camera.*

At 11:50 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, September 15, 1971.

The Standing Senate Committee on Banking. Trade and Commerce, to which was referred Bill S-22, to incorporate United Bank of Canada, met this day at 9.30 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, I call the meeting to order. We have before us this morning Bill S-22, an Act to incorporate United Bank of Canada.

I suggest that before we proceed with the hearing on this bill we pass a general resolution to print all proceedings of this commitee, unless in a particular case we decide not to. There seems to be some confusion, although I thought the understanding was clear that all proceedings would be printed unless we made the decision otherwise. A resolution in our *Minutes of Proceedings* of today would clarify the situation. Is that agreed?

Hon. Senators: Agreed.

The Chairman: We have appearing before us those proposing the incorporation. Mr. B. V. Levinter, Q.C., is appearing as counsel, I believe. Also Mr. G. R. Dryden is appearing as counsel.

As I understand it, the provisional directors are also present, and I expect that counsel for the applicants will introduce them.

The United Trust Company is also appearing, I think on the point of protesting against the name; and we expect the Inspector General of banks to be here.

Mr. Levinter and Mr. Dryden, both of you are appearing as counsel. Who is going to make the initial presentation?

Mr. B. V. Levinter, Q.C., Counsel: I am, Mr. Chairman.

Mr. G. R. Dryden, Counsel: I had not understood that I was appearing as counsel, senator.

The Chairman: Your name appears on the list as counsel; that is all I know, but I did not create the list.

Will you proceed, Mr. Levinter, and give us a summary of the purposes of this bill?

Mr. B. V. Levinter: Mr. Chairman and honourable senators, I come before you as the representative of the provisional Board of Directors of the proposed United Bank of Canada; and at the outset, may I thank you on behalf of the members of the provisional board for the opportunity of appearing before you. I know you have pressing problems constantly before you, so vital to the wellbeing and interests of our nation.

You may ask how the idea for a new bank was first conceived. The idea was first engendered roughly a year ago, when the Honourable Walter Gordon addressed a group of Jewish people, suggesting to them that they had failed to take part in the field of banking in Canada, although they had been most active in every other aspect of Canadian life. I considered his remarks, for undoubtedly they were the truth; but his remarks applied equally to many other ethnic groups which represent a considerable and significant portion of the Canadian population.

Canada is a great country, made up of at least 23 different ethnic groups, including people of French origin, Anglo Saxon origin, and the many others who make up the rich mosaic of Canada today.

A cosmopolitan bank representative of all people in this country was thus conceived; a bank which at this crucial stage in our country's development would provide involvement, dialogue and communication with all people, and which would take into account the basic needs, and hopes, of people at all levels of Canadian society.

Meaningful involvement, dialogue and communication must start at the top—the Board of Directors—because it is here that every philosophy and direction of an organization is established. It is from the board that the organization is established. It is from the board that the organization acquires its character, its beliefs, its prejudices and approval in the business society. Thus, in this aspect it is our fervent desire to cope with the needs of all peoples in this country with the United Bank of Canada.

We believe a new chartered bank should come into being under a board representative of all Canadians and their growing needs. Ours will be such a board; ours will be such a bank. At the present time the provisional board is made up of a director from our French-Canadian community, a director from our Polish community, a director from our Italian community, and two directors from our Jewish community, namely, my father and myself. May I introduce to you our directors: Dr. Gerald LaSalle from Sherbrooke, Quebec; Mr. Zenon Gutkowski from Toronto; Mr. A. J. Pianosi from Sudbury; my father and myself.

Perhaps, honourable senators, I might give you a brief breakdown of the background of the various provisional directors. Firstly, may I mention Dr. Gerald LaSalle. In 1940 he obtained his MD at Laval University. In 1941 he went into the practice of general medicine at Ansonville in Ontario. In 1944 he was a member of the Royal Canadian Army Medical Corps. In 1946 he returned to the practice of general medicine, in Montreal. In 1952 he became the assistant medical director of the Royal Victoria Hospital in Montreal. In 1953 he became the director of Montreal University Hospital and a director of the Montreal Hospital Council. In 1955 he was the founder and director of the Superior Institute of

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Hospital Administration at the University of Montreal and Professor of hospital administration at the University of Montreal. In 1956 he was the founder and first executive director of the Quebec Hospital Association. In 1961 he became the Registrar of the College of Physicians and Surgeons of the Province of Quebec. In 1963 he became a member of the Board of the Excellence Life Insurance Company, in Montreal. In 1964 he was the Dean of the faculty of medicine at the University of Sherbrooke and the executive director of the University Hospital, executive director of the Health Services Centre and a Governor of the College of Physicians and Surgeons of the Province of Quebec. In 1968 he became vice-president in charge of medical affairs at the University of Sherbrooke. In 1969 he became an honorary colonel in the 8th Medical Army Corps.

Mr. Pianosi is president of Norite Builders Limited in Sudbury and president of Pianosi Brothers Construction Company in Toronto. He has been active in Sudbury all his life, firstly in the groceteria business and then in the building and real estate business. He was born in Copper Cliff, where he has since resided. He was educated at Copper Cliff Public School, St. Michael's College School and served in the Canadian armed forces from 1941 to 1946. He is a life member of the Royal Canadian Legion. He serves on the Board of Regents of the University of Sudbury. He is a director of the Montessori Club of Sudbury; a director of the Sudbury & District Boys Home. He is a trustee of the Italian Society in Copper Cliff and a former Vice-president of the Sudbury District Progressive Conservative Party.

Mr. Gutkowski was born in Lodz, Poland, on August 22, 1930. He became a landed Canadian immigrant in 1949 and was granted Canadian citizenship in 1954. He became a chartered accountant in 1959 and from 1960 to 1963 successfully completed the course in Commerce and Finance at the University of Toronto. From 1960 to the present he has been a lecturer in accounting and auditing in the Certified General Accountants' Association of Ontario. From 1960 to 1966 he was an instructor with the chartered accountants course at Queen's University in the School of Business at Kingston. He was an instructor at the University of Toronto in the Department of Extension in 1960 and 1961. In 1961 and 1962 he was a class assistant in the faculty of commerce at the University of Toronto, in the Department of Political Economy. From 1959 to 1960 he was a business assessor for the Department of National Revenue. From 1957 to 1969 he was a director, the treasurer and the manager of the St. Stanislaus' Parish (Toronto) Credit Union Limited and increased their assets under his managership from $950,000 to $10 million when he retired. From 1969, when he retired as president, he has been a director and first vice-president of this credit union.

My father was born in October of 1898 and, as some of you may know, graduated from Osgoode Hall Law School in 1921, and has practised as a barrister and solicitor ever since. He was appointed Queen's Counsel in 1936; he has served three terms as a Bencher of the Law Society of Upper Canada, is presently a Life Bencher of the Law Society of Upper Canada and is a director of the International Academy of Trial Lawyers, of which there are only three members in Canada. He heads the firm of Levinter, Dryden, Bliss, Maxwell & Hart.

The last member of the board is myself. I am also a partner of the firm of Levinter, Dryden, Bliss, Maxwell & Hart. I was born in Toronto and attended Upper Canada College, Weston and Oakwood Collegiates and the Ontario Agricultural College in Guelph, from which I graduated in 1947 with a Bachelor of Science in Agriculture (Animal Husbandry). I then attended Osgoode Hall, was called to the Bar in 1952 and joined the firm in which my father was a senior partner. I was subsequently appointed a Queen's Counsel. I am a member of the Advocates' Society and the International Academy of Trial Lawyers.

One of the best decisions I ever made was to marry the former Marion Fischer, granddaughter of the late T. Stewart Lyon, one-time editor of the *Globe*, and later chairman of Ontario Hydro. We have four marvellous children, of whom we are eminently proud.

At this time may I note that our banking system was modelled after that which developed and which was still developing in the middle 19th century, in England, then the greatest mercantile power in the world. The system was the branch system, the advantages of which were many. To mention a few: there was the ability to harness scarce resources so as to take deposits from one community for use in the development of another. There was the ability of an enterprise to attract persons of talent, develop specialist expertise, to go before the world with the implication that "We are a Canadian bank, we are a great bank, and we deal wherever in the world the business of banking and the business of Canada takes us."

The system was excellent, but the needs of Canada are changing. The provisional board has a regional concept. Our concept is to set up advisory boards within different areas of Canada. These boards will be composed of local people who are familiar with local needs. It is hoped that within guidelines and controls set up by the permanent board of the bank, and management, these boards will run their branches within their regions and be, to as great an extent as possible, autonomous.

A further concept relates to what has been said before as to how our banking industry grew; that is, by taking funds from one area of the country for the development of other areas within Canada. Our concept is that, as much as feasible, loans shall be made in areas in proportion to the deposits which the area has contributed, so that this money will be available for the development of areas in which these deposits have been made. This, of course, has its limitations. Firstly, there is the availability of proper loans in specific areas. Secondly, one must follow good business practice. Thirdly, one must practise good banking practice; and, fourthly, the welfare of the bank as a whole as management conceives it. This we believe merits your consideration with regard to our charter. That is our regional concept.

A further consideration for the granting of the charter is that we believe in further competition in the banking industry. The demand for financial services is increasing at a rapid rate. It is in the public interest that we have more competition in banking; another bank to service Canadians and Canadian business. The banking industry is well regulated and controlled by the Government by way of the Bank Act and the Inspector General of Banking. Depositors are protected by the Canadian Depositors Insurance Corporation.

Banking is a profitable industry now operating to full capacity. We are in fact asking for a charter to compete in an industry where demand exceeds supply. The averate rate of return on equity after

tax has increased from 8.92 per cent in 1963 to 11.82 per cent in 1971, as calculated by the Canadian Bankers' Association.

A new well organized bank cannot help but stimulate the Canadian economy, if only through a new approach to solving financial problems. The bank sees as its major role that of solving customers' problems. It will establish and maintain leadership in this field through the following: firstly, a constant awareness and reassessment of consumer wants and needs; secondly, a continual reappraisal of all aspects of its operation with a view to improving performance; thirdly, an unbiased appraisal of any new technological developments that may be used to improve management efficiency; fourthly, a willingness to accept the problems which inevitably arise from a drive for growth and profits; fifthly, an approach that looks for opportunities rather than problems in any given situation; and, sixthly, and very important, a strong social commitment.

As regards financing for the new bank, our first move was to hire the firm of Chartec Limited to survey the investment community with respect to the raising of capital. Chartec was provided with four guidelines. Firstly, ownership of the bank was to be held as widely as possibly by as many Canadians as possible. Secondly, the bank was to have an initial capital of at least $20 million. Thirdly, the provincial directors were in no way to control the bank financially. And, fourthly, Chartec and its members were to have no financial interest in the actual sale of the shares.

Senator Connolly (Ottawa West): What is Chartec?

Mr. B. V. Levinter: Chartec is composed of Mr. Dennis Dwyer, Mr. Robert Wilson, and Mr. Bernard Charest. They are located in Montreal and are financial consultants. Mr. Dwyer has had a great deal of experience in the marketing of securities. Mr. Wilson has had a great deal of experience in institutional buying, and Mr. Charest has had a great deal of experience in management of investment funds. They came to us very highly recommended.

We are pleased to advise that on the basis of their investigations, which we have very closely examined, we are assured that upon receipt of the charter the bank will be able to raise at least $20 million.

May I now discuss the topic of management? We admit that we were very concerned at first about our ability to attract bankers with the qualities, commitments and senior banking level expertise required to start and operate a bank on an on-going basis under our philosophy. Any doubts that we might have had have certainly been dispelled. To date we have had numerous inquiries at all levels regarding possible employment, and we are pleased to advise that we have a commitment from a senior Canadian banker to join our board and become president and chief executive officer if and when we are granted a charter. We have tentatively reviewed our manpower policies and requirements with him, and we can assure you that our organization will be manned with bankers who are wholly professional and wholly Canadian.

Our priorities during the first year will be to hire and train personnel, the establishment of uniform systems, methods and procedures, and formalization of the personnel, credit, administration and marketing functions. At the same time we will be laying out the operating manuals–routine procedures and bank forms required to provide the day-to-day basis of the banking services available through chartered banks today.

Our prime objective is to develop a solid basis from which the bank can build and expand. This task will involve considerable detailed work in the areas of manpower planning, compensation, employment, training, public relations, accounting, management information systems, control, capital budgeting, profit planning and analysis, purchasing, premises, service mix, pricing, advertising, market research, liquidity management, consumer loans, commercial loans, et cetera, and in some stages will of necessity overlap with our branch expansion program.

We will establish branches as soon as it is practicable in the key commercial sectors of Canada. The exact locations and priorities are, of course, a decision for management. We are also aware of the tremendous role Canadian banks play in the international financial markets, and we intend to move in this direction from a solid Canadian base by establishing strong correspondent bank relationships, and thereby evolving a reputation for soundness and integrity in the international money market, and ultimately establish representative offices abroad and expand by whatever means are available and appropriate in the future.

Therefore, in summing up my submission may I say to you the following. It is in the public interest that this application to Parliament for the charter for the United Bank of Canada should be granted. The applicants have proceeded as carefully and as responsibly as they could with every aspect of the matter, and we shall continue to do so.

Enlarging to some extent on why I say it is in the public interest, may I say it is in the public interest that we have more competition in Canadian banking. Particularly, we should have a new national bank to compete with the others. It is in the public interest, quite apart from the aspect of competition, that we have another bank to serve Canadians and Canadian business, by broadening the credit-granting base; that is, taking money into financial institutions to broaden the credit base.

Senator Beaubien: Mr. Chairman, may I ask the witness a question? Do you know any country that has more banks to serve its population than Canada? Though you do not seem to think this committee knows very much about banking, we have gone into this subject quite fully, I believe, and I do not think there is a committee in this country that knows more about banking than this one. When you talk of broadening the base, do you know any country that has anything like as many banks that serve the population as this country?

Mr. B. V. Levinter: Senator, if you are referring to branches, that is one thing. When it comes to banks, there are many.

Senator Beaubien: What serves the public? It is the branches. If you are in any town in Canada there may be four different banks you can go to. They may be branches, but they are there.

Mr. B. V. Levinter: With respect, I submit that there are nine banks in this country.

Senator Beaubien: How many branches, and how many branches per bank?

Mr. B. V. Levinter: There are a great number of branches, but you have nine banks competing with one another. There are many branches.

The Chairman: I am wondering why you draw the distinction between banks and branches. The branches are the tools, are they not?

Mr. B. V. Levinter: Yes, sir.

The Chairman: You are proposing to have branches?

Mr. B. V. Levinter: Yes, of course.

The Chairman: Therefore, there must be some virtue and some need in order to operate a bank in having branches to serve people.

Mr. B. V. Levinter: Unquestionably. Of course, I agree with the branch system completely. It is the same as with car manufacturers. If there are five manufacturers of cars, they may have thousands of dealerships, but the fact remains that there are only five makes of cars competing with one another. That is my only point.

The Chairman: But all the banks have the same product, do they not—that is, money?

Mr. B. V. Levinter: That is very true, sir.

Senator Molson: The head office, I presume, will be Toronto?

Mr. B. V. Levinter: Yes, sir.

Senator Molson: I suppose the first branch would be in Toronto. How many branches is it contemplated to open initially?

Mr. B. V. Levinter: Establishing branches is expensive.

Senator Molson: I know that very well. I just want to know what your plans are initially. Are you going to start with one branch, five branches, ten branches? What is the contemplated number?

Mr. B. V. Levinter: What I, as a member of the board, would like to see is five branches opened—in Montreal, Toronto, Winnipeg, Calgary and Vancouver. I would think the first priorities would be Toronto and Montreal, and I would hope they would open almost simultaneously. Then, as management considers it advisable—and we must rely on our experienced management—I would like to see branches open in these other centres as quickly as is reasonable.

Senator Molson: You are talking of raising $20 million. How much of that would be capital and how much would be paid-in surplus?

Mr. B. V. Levinter: We anticipate forming shares at $5 a share. Subject again to what our investment counsellors and the people who will be marketing the stock advise, we are now working with a tentative figure of $25 per share, which would leave a $20 spread. This would be subject again to advice from the experts.

The Chairman: Mr. Levinter, at the beginning of your remarks you stressed the racial origins in connection with the establishment of this bank. In operation is it proposed that there be any direction of policy for loaning, for soliciting deposits, and so forth, on the basis of racial origins of people? What was the purpose of stressing racial origins in connection with this application?

Mr. B. V. Levinter: This is not stressed. It is no more important than any other of the aspects I have mentioned. It is submitted that various ethnic groups have not taken part in banking. I believe it is an acknowledged fact. This is one of the things that we want to accomplish, to give all people—and I stress all people—the opportunity to participate in banking at all levels. If one asks whether the purpose of the bank is only to look after specific European ethnic groups, the answer is no. The answer is that this bank is a bank of Canadians. We are all Canadians. I do not care what our ethnic background is, we are all Canadians. However, as banking has developed, many Canadians of various ethnic backgrounds have not had the opportunity to take part in, or they have not in any event taken an active part in, banking, so we conceived that this would create the vehicle.

Senator Connolly: Do you think the Scots have had the monopoly so far?

Mr. B. V. Levinter: I would prefer not to make any comment on that, senator.

The Chairman: Do you know how many of the various ethnic groups are presently shareholders of existing banks?

Mr. B. V. Levinter: No, sir, I do not.

The Chairman: So when you make the statement that they are not taking part, it is at best a surmise?

Mr. B. V. Levinter: Well, sir, it depends on the area of "taking part" we are discussing. I have no doubt that there are a number of ethnic groups that have investments in banks. For instance, I might have in my portfolio, as I did have, a certain amount of money in banks. What I am talking about in referring to "taking part" is being on the board, taking an active part in management, and in the operations of the bank. I am not talking about the investment sector.

The Chairman: Are there any other questions?

Senator Carter: In establishing this new bank are you trying to fill any gap that is not being filled by the present banking system, the nine banks? Will you have a different policy? Are your objectives in any way different from those of the existing banks?

Mr. B. V. Levinter: Our first and primary objective is to have a successful bank. Our second objective is related to social conscience. We cannot deal with the largest accounts, because we will not have enough money. We want to try to encourage and develop smaller businesses. Yes, I think that we will try to look at small business with more understanding, knowing the problems that small business has in getting operating capital to expand.

Senator Connolly: How would you have that kind of expertise of knowing what small business requirements are? Is this going to result from training?

Mr. B. V. Levinter: I am sorry, I did not hear the complete question.

Senator Connolly (Ottawa West): I will repeat it. You said that what you intended to do was look after the requirements primarily of small business, at least at the beginning. To do this you must have some expertise as to the requirements, the legitimate and reasonable requirements of small business. Where will you get that expertise? By Training?

Mr. B. V. Levinter: From training and from existing banking institutions. Our personnel will of necessity come from existing banking institutions. Our personnel will be trained but, yes, also in a training program we will also train in this direction, because this is the policy of the board, to look after small business and we will direct management to train themselves and become acquainted and make this a certain part of their service mix.

Senator Connolly (Ottawa West): Apart from the social aspects of this, are you satisfied that giving priority to the requirements of small business is going to be a good practice for a national bank in Canada to proceed upon? You will have to look for larger accounts and bigger businesses.

Mr. B. V. Levinter: Of course, sir, everything is relative. When I think of bigger accounts, I think of one groceteria chain that has a standing bank loan of $25 million. That is a groceteria chain. A thing like this is completely out of our realm. When I am talking of small business, I am talking of loans up to $100,000 or $125,000. May I please make this clear? I will not be taking part in the management. This will be left up to management. I have learned a lot about banking in the last year and I have learned a lot about mixes, and that you have to have a certain amount of money in one direction, a certain amount in another and a certain amount in another; but basically this has to be left up to them. They will have to have the proper mixes, the proper expertise, to follow through with our concepts. I believe that our management is so alert, so vital and so vigorous that they will accomplish this. I am very excited about management.

The Chairman: Mr. Levinter, at or about the time the present Bank Act was before Parliament, we had a rash of applications for bank charters. There were, possibly, four. Only one of them survived to the stage of getting into operation. I remember sitting here as chairman, with all the provisional directors of this bank sitting here, including the premier of the province, who undertook to answer all the questions that were asked of him. He prefaced each answer by saying, "That is a very important question and I am very glad you asked it," and then we would get a political speech. I can remember Wallace McCutcheon, who was a senator and a member of the committee and knowledgeable in banking, indicating the capital that was proposed for this bank in relation to the capital of existing banks, and the thing seemed to be at a fantastic level. However, it did get its feet on the ground and it did get an amount of capital and it is operating successfully, but in an area that is not as elevated as was pictured to us.

Now, of four, only one made the grade. Have you made any analysis as to why? Was the competition too strong? Was the difficulty of getting money too great?

Mr. B. V. Levinter: Sir, I have already been perhaps castigated once with regard to making certain statements which perhaps this committee already knows. Firstly, I know this committee is more intimate with the problems that made these various banks fail. I know that I would not be so presumptuous as to try to tell you these reasons. But, yes, we have made a study of them. I have my own very real views as to why these banks did not get off the ground. I have my views as to why the Bank of British Columbia only raised $13½ million. But I do not think that any one of them had our concepts, or that any one of them went into the project the way we have done.

If you would like me to expand on the reason why I think the Bank of Western Canada failed and why—Is Laurentide one of these you are referring to?

The Chairman: Yes, I think they did not pursue their application beyond the first time round.

Mr. B. V. Levinter: Yes, sir.

The Chairman: I think we have our own judgment on this, but there is a big difference between the hundreds of millions of dollars that, for instance, the Bank of Western Canada was going to establish as capital, and the amount they actually got.

Mr. B. V. Levinter: That is why I have said $20 million. I did not say forty, fifty or sixty million dollars. I would love to have forty or fifty million dollars. We have surveyed the market, and if you are interested in my expanding on the financial aspects of this to some extent, I will be delighted to do so. I also have Mr. Dwyer to tell you what we have done to survey the market. In view of our surveys, I think that we are being reasonably conservative in saying $20 million.

The Chairman: I do not think we need that, because there is a provision in the Bank Act, as honourable senators know, that even though a charter is granted, before the bank can start to operate it must get the consent of the Governor in Council. At that time, they must give an indication of the quantity of money they have subscribed for it, and if they have less than their authorized capital, then there is provision in the statute for reducing the amount of the authorized capital. So we can feel certain that the Governor in Council will not give consent unless he is satisfied at the time of application that it is a going concern. We have the Inspector General here, and we will hear from him on that.

Senator Cook: On that point, do I understand the witness to say that the bank will be selling shares for $25, $5 par value and $20 surplus? Is there talk about raising it to $100?

Mr. B. V. Levinter: No, sir, because all we would do is, perhaps, issue one million for $25. No, we would not. We would issue less than one million shares of stock; we would just take down from the treasury less than a million shares and the balance of the shares would remain in the treasury.

Senator Cook: Then the authorized capital would be only $5 million and the surplus would be $20 million?

Mr. B. V. Levinter: Yes.

Senator Carter: I would like to clear up something. I may have misunderstood the witness. His references seemed to imply that he had a concept of banking which is somewhat different from that of the present banks. Is that a correct interpretation?

Mr. B. V. Levinter: Our provisional board of management has, I think, a somewhat different concept. If I may just reiterate, it is the regional concept. In other words, we have considered that if deposits are made in, let us say, Nova Scotia, the money raised in Nova Scotia by way of deposit should first be made available–again, within guidelines–to people who need loans there and for the development of the Province of Nova Scotia, instead of bringing it down here for the development only of Ontario or only of Quebec.

Senator Carter: So that each branch bank will be, in effect, a sort of regional bank? Is that what you are saying?

Mr. B. V. Levinter: That is right. Subject, of course, to overall control and management at home. One cannot let it go hog wild.

Senator Molson: In that connection, the board of directors has certain responsibilities which they cannot delegate.

The Chairman: That is right. The directors of this bank will be dealing with money that has been invested by shareholders. Do you subscribe to the principle that they should follow the regional theory of investment, even though investment opportunities and earning capacity are greater in another area than where the money was raised?

Mr. B. V. Levinter: No, sir. I was talking strictly about deposits. We must remember that the overall concept must be the success of our bank. It has to be successful or otherwise every great concept and every social concept that we have will fail. Above all, we must make sure that our bank is strong. At the beginning it will be tough sledding. We will have to look for the very best areas in which to put the money. We owe a social duty to various regions, to help or facilitate the financing of industry in specific areas. I believe it is one of our social duties.

Senator Cook: I think the history of banking will show that most banks that tried the regional theory either failed or merged.

Mr. B. V. Levinter: That is the reason why we have a national concept. We have a national concept unquestionably. When we think of this bank, we think of Canada as a whole. As a matter of fact, I might say that the world is our market. We cannot even confine ourselves to Canada in looking at the prospects for the bank. We must look to the wellbeing of the bank anywhere in the world.

The Chairman: Except that in the beginning and for some time you would be a long way from the international markets.

Mr. B. V. Levinter: I am afraid so.

Senator Molson: Might I ask whether it is proposed in your by-laws, or through any other way, to limit the ethnic makeup of your board or management? How do you expect to perpetuate this situation which you are now starting with a provisional board, which no one can quarrel with? How do you expect that it will continue? Where do you think you will be in five or ten years, or in the future? Do you think you will be able to continue in this way?

Mr. B. V. Levinter: I do, from a practical point of view. Firstly, our goal is to have mass distribution of stock so that nobody has control of the bank.

Senator Molson: That is, on the market, at some stage?

Mr. B. V. Levinter: That is right. With vast control, and with nobody being able to control the bank, proxies generally will come to either the president or to the chairman of the board. The chairman of the board and the directors who have our concept now can guide the bank in the future.

There are so many things with which we will be faced. I appreciate that this is a problem, but we hope to be able to cope with it. I can only say "hope". That is our ambition.

Senator Molson: Presumably your board will be wider than the provisional board? Is it your idea that you would go to further ethnic groups, to try to make this as broad as possible?

Mr. B. V. Levinter: Yes. Not only ethnically. There should also be representation from both sexes, and from all age groups, so that the philosophies of all Canadians could be transmitted to the bank, that they may look after all segments of our population, the young and the old and the in between, the female and the male, the ethnic groups, everybody. That is our concept–Canada.

The Chairman: You would not forego the basic concept that applies to banking as well as to any other business, which is making money?

Mr. B. V. Levinter: I have tried to make it clear that, with all the idealism and with the greatest social conscience, if the bank does not make money it is all for naught. That is our primary goal.

The Chairman: How do you propose to assure yourself that there is not a movement at some time to take over the shares in the market? I do not mean a legitimate takeover. I mean the other kind of takeover that we read about. What in the way of checks or controls do you see are possible and practicable?

Mr. B. V. Levinter: Firstly, we have the Bank Act which, of course, limits ownership. In the first instance we are going to limit the amount of shares to be held by anybody. We are planning that an affidavit will be taken by subscribers of shares setting out in the affidavit the number of shares they hold on their own behalf or on behalf of others, and the bank, in the initial issue, will be able to control the amount that anyone holds in the first instance. With very widespread distribution, this is one check. But I suppose that other than the Bank Act there is really nothing that anybody can do.

The Chairman: Except that the big banks that exist today would not be as vulnerable to that situation, because it would take too much money. But in certain instances it might be very valuable to have an identifiable entity. If it does not cost too much money it might be very attractive at some stage.

Mr. B. V. Levinter: That is a very valid point. In the first instance I ran into a situation where I saw that a group was trying to use the Bank as a vehicle for its own purposes. I was very trusting. It took me about three weeks to catch on to what was going on, but it

took me about twenty minutes to solve the problem, which was to completely disassociate myself from the group. I know that we will be vexed with these problems. What you say is a very real fact. We cannot start any bigger. I do not know what else we can do. We can simply appreciate the situation and try to meet it when it occurs.

Senator Desruisseaux: Mr. Chairman, on a very minor point I have noted that the venerable father of the speaker for the group was born in 1891.

Mr. I. Levinter, Q.C., Provisional Director: Senator, I was born in 1898. I am not quite that ancient.

The Chairman: Senator Desruisseaux, I can tell you Mr. Levinter is still very alert.

Senator Desruisseaux: He was born in 1898, so that makes him 73. I had wondered whether the Bank Act would prohibit him, since we are following the Bank Act on the age limit of 75.

The Chairman: Yes, the limit is 75. There is a statutory prohibition at that time.

Senator Carter: Mr. Chairman, Mr. Levinter mentioned that one of the objectives of the new bank would be to help the small businessman in the various regions in which the new bank would have branches.

Mr. Levinter, I asked you earlier if you were trying to fill any special need or any gap that you felt existed in the present system. I think there is a gap, and the gap has to do with the small businessman you referred to. From my experience, the greatest need of the small businessman has been a need for working capital. He has not been very successful in getting it from the established banks. As a result he has had to fall back on government, but government is very reluctant to set up an agency for that purpose, because government does not wish to interfere with the free enterprise system or with the present banking system.

Have you any special ideas on how you are going to help these people? Do you expect to be more lenient with respect to working capital for small businessmen than the present banks are?

Mr. B. V. Levinter: Sir, I agree with everything that you have said. I do not think it is a question of leniency. It is a question of investigating situations and making decisions. It is far easier for a manager to say to Domtar, "Yes, you can have another million dollars," because, basically, that is not a decision. They get the million dollars. Head office is going to clap. The manager gets his interest rate and there is very little risk. But if this same manager has to put out 20 $50,000 loans to small businessmen, he has to make 40 different decisions. He is going to have to work. He is going to have to investigate and he is going to have to stand by his decisions.

The Chairman: Plus one more thing: he has to study his mix.

Mr. B. V. Levinter: Of course. I see, Mr. Chairman, you are very intimate with banking.

That is all true, Senator Carter, but we propose to deal with it in this way: we will make our managers work and we will make them make decisions. That is the point.

Senator Walker: Mr. Chairman, may I ask Mr. Levinter, whom I know very well and whose father is one of the greatest members of the bar in Ontario, whether in connection with his bank any capital commitments have been made so far?

Mr. B. V. Levinter: Well, sir, we have all as a matter of course qualified, but that is all we have done. We have qualified with the Bank Act.

Senator Walker: You have qualified with the Bank Act, but outside that there is no capital commitment?

Mr. B. V. Levinter: No, sir, not until the charter is obtained. We have surveyed a market, but when you say "actual commitments", we did not look for actual commitments. We wanted to come before you and know we could raise it.

Senator Walker: Have you any profit and loss projections made by your experts or by yourselves in conjunction with your experts?

Mr. B. V. Levinter: Yes, sir, I do. I do not have them with me today, but, from memory, the experts anticipate a dividend within about three years. Again, much will depend on how much money is raised and on how a thing like this snowballs. Maybe it will go to more than $20 million, but with $20 million we anticipate a dividend within about three years. Moreover, considering international financing, et cetera, and that will not be big for the first five years, we are hoping for around $400 million in assets.

That is about all that I can say. They have worked it out very carefully and have worked out their opening expenses, operating expenses, and training expenses and it is very expensive from the point of view that we have a high upper echelon, a high cost for administration, because we have to have all of the top people but yet few branches. So that, in the first instance, we are kind of top heavy, as a new bank would have to be, but our experts anticipate $400 million in assets in five years and to declare a dividend in three.

The Chairman: Mr. Levinter, I assume that you are familiar with section 10 as to the qualification that provisional directors must acquire in the way of subscribing for shares in their own right.

Mr. B. V. Levinter: Oh, yes, of course.

The Chairman: I would expect at some stage that would be satisfied before you would expect to get a charter.

Mr. B. V. Levinter: Oh, of course.

The Chairman: Yes.

Mr. B. V. Levinter: I can advise the committee that we have complied with the section for the subscription of shares as required under the Bank Act, and I would be glad to show anyone the subscriptions.

Senator Burchill: Mr. Levinter, I am bothered with one aspect of the regional concept you were discussing with Senator Carter. As an illustration, at one point you mentioned the province of Nova Scotia. You said that the outlay of loans in, say, one province would be governed to some extent at least by the deposits that came from that province. Is that what your idea was?

Mr. B. V. Levinter: No, sir. What I am saying is that it is not the outlay of loans on an overall concept, but that we think the province or region that has made deposits should have first call on their deposits for good industrial loans. I am only talking about deposits. I am not suggesting that if, in Nova Scotia, a good loan on the overall concept was available to the bank that the bank would not walk in and try to facilitate it. Of course it would.

Senator Burchill: Regardless of where the deposits came from?

Mr. B. V. Levinter: That is right, sir. In other words, it can only be done with a certain percentage of the funds. We want to do this as much as is feasible, but we must never overlook the overall concept of the bank as a whole. We must consider it as a bank—one bank.

Senator Lang: Mr. Levinter, did I understand you to say that you anticipate assets under administration of over $400 million within five years?

Mr. B. V. Levinter: That is what our proposed management has calculated.

Senator Lang: In other words, you anticipate taking $80 million a year on average on deposits.

Mr. B. V. Levinter: I do not know what type of progression they used, senator. I think the first year is going to be really rough, but they used a certain progression by studying statistics of banks that have opened with certain capital in the first instance, and then assuming reasonable growth they assumed that with our concepts, certain loyalties which we hope to establish in Canada among Canadians, that this was a reasonable anticipation.

Senator Lang: At $400 million what sort of capitalization would you have?

Mr. B. V. Levinter: Capitalization? Do you mean investor equity?

Senator Lang: Yes.

Mr. B. V. Levinter: We were anticipating at that time $20 million.

Senator Lang: With $400 million in assets?

Mr. B. V. Levinter: Now, of course, that does not necessarily mean deposits. When I talk assets I am talking overall money available. This can be from international markets or it can be from any place.

Senator Lang: What ratio does that give you in your assets to your capital?

Mr. B. V. Levinter: Twenty to one.

Senator Lang: Twenty to one?

Mr. B. V. Levinter: I think that that is pretty well in line with the present banks.

The Chairman: Are there any other questions?

Senator Molson: Mr. Levinter, have you or any of your people consulted with the Bank of British Columbia as to what their progress and problems have been in their brief history? I should think that would be very useful information.

Mr. B. V. Levinter: Management, no; financial consultants, yes.

Senator Molson: What about directors?

Mr. B. V. Levinter: No, not yet. We consider that the first thing we must do is to get a charter, and then, as the Chairman has indicated, the Inspector General of Banks and the Governor in Council will have to approve our operation. When we originally contemplated this bank we said the first thing to do was to obtain a charter and then the next thing would be to obtain management. Then the next thing we have to have is financing, and we have been taking it step by step.

Senator Connolly (Ottawa West): Can you get the second without the third?

Mr. B. V. Levinter: I do not think that one can get financing without the management. That is why we took it in that order.

Senator Connolly (Ottawa West): Who is going to finance the operation while it is under construction?

Mr. B. V. Levinter: I am.

The Chairman: Are there any other questions?

Thank you, Mr. Levinter. Do you have anybody else with you who wishes to make representations?

Mr. B. V. Levinter: No, sir.

The Chairman: Thank you very much.

Mr. Scott, would you please come forward?

Honourable senators, I do not need to introduce Mr. Scott who is the Inspector General of Banks. We have had him before us previously and now we will get the benefit of his views in relation to this application for a bank charter.

Mr. Scott, you have heard the evidence which has been given, and perhaps at the outset you would tell us what your function is and what your responsibility is in relation to getting the consent of the Governor in Council even after a charter has been approved. What requirements would you have to look for and be satisfied about?

Mr. W. E. Scott, Inspector General of Banks: The Bank Act itself sets forth certain specific requirements which must be met before the approval of the Governor in Council may be given. Now while it is not specifically provided for in the Act, presumably there is an opportunity to advise the Minister whether in the opinion of the Inspector General the project looks like a reasonable starter, and the Governor in Council is not obliged to give a certificate to commence business even though the specific requirements may have been met. There is what I might describe as a grey area there.

The Chairman: We have heard something about the philosophy behind this bank and something about its regional concept, but underneath it all they do have a concept which you would expect

every institution to have–that is to do the best they can so as to make money. Now you say the Governor in Council would look at–and this might rest on your advice to some extent–the feasibility of the operation in the light of what the people who are going to control and operate the bank have to say as to their plans. How far would you develop your study of that phase?

Mr. Scott: I am not sure I can be specific, Mr. Chairman. If one were of the opinion that at the contemplated date of opening for business there simply was not competent management, presumably one would express an opinion to that effect and then it would be up to the Governor in Council to decide whether to take the chance on whether that management would be forthcoming.

The Chairman: So you would take a look at the competence of the management?

Mr. Scott: Yes.

The Chairman: Anything else?

Mr. Scott: I do not think so.

The Chairman: You would endeavour to satisfy the statutory requirements?

Mr. Scott: Quite.

The Chairman: Now are you in a position to tell us or have you acquired the information in such a way that you cannot tell us what has been the annual rate of deposit received by the Bank of British Columbia since it started to operate?

Mr. Scott: It has now been open to the public for a little more than three years, and the last financial statement shows that its total resources are now slightly more than $150 million. It started with a capital slightly less than $13 million.

The Chairman: And as to its deposits, do you recall what they amount to?

Mr. Scott: The total deposits would be $150 million less $13 million which would be roughly $135 million or $137 million.

The Chairman: If you average that progressively, it means that they have been taking in about $35 million per year in deposits?

Mr. Scott: Yes, or perhaps a little more.

Senator Beaubien: Mr. Scott, how much capital do you think a new bank would have to raise before you could recommend to the Governor in Council to give them an operating certificate?

Mr. Scott: The Bank Act contains a minimum of $1 million subscribed. Presumably if Parliament had felt that some much larger amount was essential in all cases, a much higher figure would have been stipulated in the Act. But conceivably one might have a situation where if the capital raised had been set at a lower point and the plans of the bank were quite out of proportion to the capital, this would become a factor, but I do not think that one can rule out a bank with small capital provided the requirements of the Act have been met with if their plans are consistent with that capital. I would not want to at any rate.

The Chairman: Well, you would not expect plans leading to the establishment of a substantial number of branches and thinking in terms of the international money market as being a relevant consideration in relation to a capital of $1 million.

Mr. Scott: I agree with what Mr. Levinter said this morning that branch openings are expensive. If one were to contemplate a number of them within a limited period, it might erode a fair amount of the initial capital before the bank was paying its way.

Senator Connolly (Ottawa West): In other words you think it is prudent to proceed slowly.

Mr. Scott: Yes, although the rate might be influenced by the extent of capital raised. If you raise a lot of capital you can start more ambitiously than if you have a small amount of capital.

Senator Lang: Mr. Scott, are banks covered by the Canada Deposit Insurance?

Mr. Scott: Yes, they are automatically.

The Chairman: Under the Canada Deposit Insurance Corporation Act the depositor is protected in a limited way to $20,000.

Mr. Scott: Twenty thousand dollars per account, per institution.

Senator Connolly (Ottawa West): And the bank pays the premium, which is geared to the deposits.

The Chairman: It is not related to its capital.

Mr. Scott: It is related to the amount of deposits in the area which is insured, namely up to $20,000.

Senator Lang: Does that apply to branches? Could there be $20,000 coverage in a head office and $20,000 in a branch, for a total of $40,000?

Mr. Scott: No; the limit is effective on the total deposits in one institution. It does not matter if it is spread between a number of offices; there can be $20,000 in each institution.

Senator Lang: One bank would only have $20,000, no matter how many branches there were?

The Chairman: It is cumulative, up to $20,000.

Senator Connolly (Ottawa West): Mr. Chairman, there is always a problem for this committee and for any committee of Parliament in respect of applications such as this, because any Canadian can come here and make an application for a bank charter. Relying on what we hear from the witnesses, the applicants and the Inspector General of Banks. . .

The Chairman: But we can still say yes or no. The statute does not compel us to say yes.

Senator Connolly (Ottawa West): No, of course not; we have to use our judgment. Is it unfair to ask Mr. Scott, "Does the application in this case appear to be reasonable? "

Mr. Scott: At this point, Senator Connolly, it is very difficult for me to say that.

Senator Connolly (Ottawa West): Could I perhaps be a little more precise? At this point is it possible for anyone to say that any application is a reasonable application?

Mr. Scott: I think it is possible to say that people are proceeding in a reasonable fashion. I do not believe anyone can say in advance whether the outcome will be financially successful.

The Chairman: I do not think you can expect guarantees that the project will be successful.

Senator Connolly (Ottawa West): No, and I think the experience of this committee in respect of the four banks referred to earlier by the chairman was a good experience.

The Chairman: Yes.

Senator Connolly (Ottawa West): Those applications were only 25 per cent successful.

Mr. Scott: Of course, only one of them had a run at it.

Senator Molson: What about the Bank of Western Canada?

Mr. Scott: It never opened its doors.

Senator Molson: No, but it tried pretty hard for a while, did it not?

Mr. Scott: It was not a failure to generate business or operate successfully that caused it to cease.

Senator Walker: They were in a hurdle race. However, is this not a unique bank application, inasmuch as it is appealing to the ethnic groups, which are very powerful in Canada now? I believe there are approximately 300,000 or more Italians in Toronto. They like to have a say in their own banks and would like to have Italian directors and other persons interested in them. No one can say that the Jewish community is not very powerful financially and in population. The other ethnic groups must also be taken into consideration.

Is it not a harbinger of success if they could obtain the backing of these very large ethnic groups which, as I understand Mr. Levinter, they have in mind?

Senator Cook: Another way of putting it would be: Is there any reason to prevent this group from endeavouring to form the bank at the present moment?

Mr. Scott: From my point of view I do not care where they get the money, so long as they get enough to be successful.

Senator Molson: May I ask the Inspector General whether he agrees that there is a need, or a place for a bank such as the one proposed?

The Chairman: He may or may not wish to answer that question.

Senator Molson: I think the question as to a place for one is fair. If there is not a place, he could not possibly recommend the application. There must be a place; maybe not a need.

The Chairman: That would be an element for his consideration in advising his minister or the Governor in Council as to the feasibility. Maybe he will consider this in that sense; if there is not a place, it is not feasible.

Senator Molson: That is my point. I would like to ask him if he agrees that there is a place for another bank such as that proposed.

Mr. Scott: I might just mention, Senator Molson, that this Government and, I think, preceding governments have stated that it is government policy to encourage the formation of new banks. Therefore it would be inappropriate for me to suggest that that was wrong.

Senator Connolly (Ottawa West): We cannot ask you to comment on government policy.

Senator Molson: I do not ask for a comment on government policy but, as Inspector General of Banks and charged with the supervision of the banking system, I do not think it is an unfair question to ask him if there is a place in Canada for another bank. I think this committee takes the same view as the Government, that there is a place for properly set up banks. That was the view years ago when, as the chairman has said, one out of the four who came here was successful, two did not pursue it any further and the third raised the money, then backed away.

Senator Cook: One answer is that there is always room to talk.

The Chairman: It depends on who is pushing it. Senator Molson, maybe the witness can protect himself, but your question bothers me, as it puts him on the spot to answer by virtue of his position as Inspector General of Banks as to whether there is or is not a place for another bank.

Senator Lang: It is a question rather in the nature of public convenience and necessity, Mr. Chairman.

The Chairman: I am just giving the opportunity. You may not feel that you wish to answer that question, in which event I will not pursue it.

Mr. Scott: I am not sure of all the implications of the question. For example, is it to say that there is room for another bank and imply criticism in some way of the operations of the existing banks?

Senator Carter: Can we put it this way: one of the objectives of the Bank Act revision, as I recall it, is to increase competition among the existing nine banks. If competition is a good thing and we want more of it among the existing nine, is there any reason that there should not be ten, which would improve it further?

Mr. Scott: There have been ten.

The Chairman: We have had more than ten at times and they saw fit to merge.

Senator Molson: I think my question has now been answered.

Senator Connolly (Ottawa West): Under the provisions of the Bank Act it is open to a group of Canadians to apply for a charter regardless of the existing institutions. It is the right of a Canadian to do this and this group is exercising that right. They assumed a great deal of responsibility, but I suppose they take that risk when they

come to Parliament with their application. We do not necessarily endeavour to protect them, except withim the four corners of the Bank Act.

The Chairman: What you are not looking at, senator, is that banking is quite different from an industrial company. In an industrial company the people who want to get going on it put their money into it, but when you are establishing a bank you are dealing with depositors' money.

Senator Connolly (Ottawa West): That is precisely the point I was coming to, and perhaps this is a proper question to ask the Inspector General: Is there danger for the public here? In other words, by approving an application for a charter are we putting risks before the public that are unwarranted and undue? Is it in the public interest to consider a further application for a bank, and in particular in this case are the circumstances described by the applicants such as to warrant a conclusion that it is a reasonable risk to allow the public to assume? There are some protections. The Canada Deposit Insurance Corporation is protection for the depositors. The investor takes chances the same way the applicants would take their chances.

Mr. Scott: I am not sure how to answer your question. Under our system, of course, Parliament does accept a large measure of the initial responsibility in its judgment of the persons involved and their capacity to carry out their intention. There are countries where this decision is made by officials, perhaps equivalent to Letters Patent. It does not go through Parliament or Congress, or whatever. Under our system the initial responsibility lies with Parliament after it has informed itself as far as possible as to the capacity of the people to carry out their intention.

Senator Lang: Are banks the only charters left to Parliament now? Am I correct in that assumption?

The Chairman: Railways, telephones.

Senator Lang: We no longer have any other financial institutions such as life insurance companies, trust companies?

The Chairman: No. May I change the subject for a minute? The great concern I have, which I raised with Mr. Levinter and I was wondering how it concerns you, is the matter of security. We read a great deal nowadays about the establishment of fronts for operations that are not legal. There is no such suggestion in what I have said in relation to this application, but if we assume that a charter is granted and they commence to operate and there has been a very wide distribution of the shares, and the capital involved to move into the market and acquire those shares or control of them would be much less than of any other banking institution in Canada, is it part of your job to be on the alert to see if there is any such movement or would you look for it?

Mr. Scott: Yes, it is, and it was particularly with a view to the possibility of new bank proposals coming forward that the 10 per cent limitation on any one shareholder and his associates was written into the act in 1967. It is theoretically possible for people who are not associated in any way to get together and gain control of the stock of a bank, no one of them having more than 10 per cent, but if they are associated in any other common project such as being directors or officers, or whatnot, of any other corporation, then their holdings are pooled and they would run into the 10 per cent limitation. We would really have to worry about a group not associated in any other way, but combining for the first time in going after the stock of a bank. As the chairman has said, this danger is greater the smaller the amount of stock involved. We do watch the records. We get regular returns of the major shareholders in banks and we watch for possible associations.

The Chairman: I think it is almost impossible to lay down a line that you could follow with assurance that you would catch such a situation. You just have to keep checking.

Are there any other questions?

Senator Connolly (Ottawa West): How long has it been since there has been a bank failure in Canada?

Mr. Scott: The Home Bank in 1923.

Senator Connolly (Ottawa West): And have the safeguards which have been built into the Bank Act mitigated against the possibility of failure in your view?

Mr. Scott: Yes. For example, the setting up of the office of Inspector General of Banks, following the Home Bank failure, and also the provisions concerning the auditors of banks were greatly stiffened at that time.

The Chairman: I learned how not to run a bank when the Home Bank failed. One of my first duties in law was working with the man who was prosecuting the directors of the Home Bank. I am not sure that I ever learned how to run a bank, but I certainly learned how not to run a bank.

Senator Walker: Was that Mr. Tilley?

The Chairman: No, Mr. McCarthy.

Are there any other questions? I wanted to ask Mr. Scott a further question as to whether he sees any objection to the name United Bank, since we are about to hear from a person representing the United Trust Company in opposition to the use of that name.

Mr. Scott: There is no objection on the part of the Government to the name.

The Chairman: Thank you.

We now have Mr. Goldberg who is appearing on behalf of the United Trust Company.

Mr. A. S. Goldberg, Counsel, United Trust Company: Mr. Chairman, honourable senators, I am appearing on behalf of the United Trust Company which is an Ontario trust company having 30 branches in Ontario and approximately 30,000 depositors. The name of the company was changed to the United Trust Company as of September 1, 1970, and the company since that time has spent a great deal of money in expensive radio and newspaper advertising. We have no objection to the incorporation or the granting of a charter to the United Bank. Our objection to the proposed bill, however, is that the name United Bank may be confused with the name of United Trust Company.

Senator Connolly (Ottawa West): What is the exact name of your company?

Mr. Goldberg: United Trust Company.

Senator Connolly (Ottawa West): Of Canada?

Mr. Goldberg: No, just United Trust Company.

Senator Connolly (Ottawa West): And the name of the bank?

Mr. Goldberg: I believe it is the United Bank of Canada.

Senator Connolly (Ottawa West): We have the United Trust Company on the one hand, and you are in the trust company business which is aligned to banking, and on the other hand we have the United Bank of Canada, and you feel these two names will be confused.

Mr. Goldberg: Yes, I do, senator. Our submission is that if you look at the two names on two separate pieces of paper they may not look alike, but when you get into the question of advertising for depositors, the names United Trust and United Bank will be used. I cannot see the advertising geniuses at work trying to use the full names in each case. They use the catchiest phrase available, and our submission is that the public will likely be confused by the fact that the two names are so similar. It is unlike the case where you have the Bank of Montreal and the Montreal Trust Company, and other names like that, which I submit are just as confusing, but at that time the trust companies were not competing as directly with the banks for depositors as they are today. At the present time the banks are advertising for depositors and the trust companies are doing the same thing. They each announce different rates of interest and different chequing privileges. My submission is that if they use the name United Bank it will create confusion in the minds of the customers, and particularly so if one considers that the first branch of the United Bank is expected to be in Toronto and that the United Trust Company does have 15 branches there.

The problems have been foreseen by Parliament in terms of other matters, particularly in terms of the Trade Marks Act, section 7(b) of which says that no person:

> –shall direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

My submission is that the two names are likely to cause confusion. People have gone to court over similar names. I do not want to cite a whole series of cases, but there have been several cases dealing with names that are similar, particularly where companies are not competing directly but are in very closely allied lines, in which the courts have held that the names are so similar that the public would be confused. The whole purpose of section 7(b) is to avoid confusion of the public, and our problem is that we are very concerned that the public will be confused, that depositors will come into the United Bank and say, "You advertized 8 per cent credit on savings accounts, and yet you are only giving 7 per cent", and vice versa, they will come into the United Trust and be upset because of the United Bank's advertising.

Senator Haig: They would not make a deposit in the bank.

Mr. Goldberg: That is true. The problem is that at that time he has already been confused and has gone to the length of going into the bank.

The Chairman: He would still be looking for his 8 per cent, would he not?

Mr. Goldberg: Yes, he would.

The Chairman: So he would not leave his money with the bank.

Mr. Goldberg: That is true. My submission is that he would at least be enough confused to walk into the wrong place, and that is the problem we face and that we are concerned about. We are not saying we will end up on the losing side; maybe the United Bank advertising will do well for us.

The Chairman: He would quickly be unconfused if he were not going to get 8 per cent, would he not?

Mr. Goldberg: He would be. The problem is that he was confused by even having to go to the bank. I submit at that stage of the game he will be upset with perhaps both the United Bank and the United Trust. Mr. Levinter indicated to me earlier today that he had given deep consideration to the name. I submit that the name is not so unique or distinctive that it cannot be changed without hurting the bank, and I submit that the name should be changed.

The Chairman: Suppose they were using symbols and the United Bank had the symbol UB, following the lettering that the CNR is favouring now, and suppose the United Trust used the letters UT. Do you say that in that context there would be confusion?

Mr. Goldberg: Only if the symbols were very similar. If the symbols were similar, then the fact that they are two separate letters would not, I submit, unconfuse the public. This is what the courts have held.

The Chairman: Except that you are addressing yourself to confusion in the name.

Mr. Goldberg: Yes.

The Chairman: When you are talking about symbols, if the bank produced a symbol that would lead the public to think it was a trust company you would have an action quite independently, would you not?

Mr. Goldberg: Perhaps we might. What we are trying to do is head off the possibility of getting involved in that kind of action.

Senator Connolly (Ottawa West): Do you really think there is that kind of confusion in these days of mass advertising, between trust companies and banks? Take the Royal Trust and the Royal Bank. Does anybody confuse the facilities and the work of the Royal Bank with that of the Royal Trust?

The Chairman: I do not think so.

Senator Connolly (Ottawa West): Perhaps there was a day when that happened. When I think of a trust company I think of something altogether different from a bank.

Senator Burchill: There is the Montreal Trust and the Bank of Montreal.

Senator Connolly (Ottawa West): The witness used that as an example, and it is a good example.

Mr. Goldberg: I quite agree that you, senator, perhaps do not have any risk of confusion between trust companies and banks. I am talking about the common depositor who does not associate a trust company with the old trust facilities of looking after estates and real estate, but who looks at a trust company as a house where he can deposit his money. If you walk down Sparks Street, for instance, and take a look at the new Toronto-Dominion Bank and the new Montreal Trust, from outside one looks the same as the other. The names are different, but certainly in appearance each one looks like the other. The banks are starting to look more like the trust companies.

Senator Connolly (Ottawa West): Some banks look like steeples, but people do not go into them to go to church.

Senator Lang: Do the applicants have any other name that they would just as soon have as "United", like "Home"?

The Chairman: I do not feel strongly enough that there can be any confusion, and I therefore did not ask them the question, but if any senator wants to ask about it, that is perfectly all right.

Senator Walker: It is in the interests of each of them to keep themselves distinct, is it not?

Mr. Goldberg: It is. I am not suggesting that we are going to get any advantage, or that they are. My submission is that it will be confusing.

Senator Walker: Your symbols will be distinct too, so there would not be any opportunity for confusion, would there?

Mr. Goldberg: I think there is.

Senator Walker: Do you?

Mr. Goldberg: In terms of looking at the kinds of advertising that banks and trust companies do at the present time, particularly in looking for deposits, and with respect to other facilities, I can foresee the public just saying "United" for the United Bank or the United Trust, and I submit that for the unsophisticated members of the public there is a risk of confusion.

The Chairman: Are there any other questions?

Senator Lang: Mr. Chairman, may I, through you, direct a question to the applicants and ask them if there is any other name they would be equally happy with?

Mr. B. V. Levinter: When the name "United Bank" was formulated, we were familiar with the fact that back in 1970 the company of Mann & Martel had a company the United Trust. We were completely cognisant of what a bank is. There is a distinction between a bank and a trust company. We considered the name because we anticipate being national. The name "United" is a uniting of all communities. It was very important to our concept that all people would be together in a cosmopolitan way, and we would be a united Canada. I do not see how anyone could ever mistake a trust company for a bank. If someone is sufficiently sophisticated that they know they can get 8 per cent on a deposit, they are surely sufficiently sophisticated to know where to go to get it.

The Chairman: The only question at the moment is whether you have been thinking in terms of an alternative name. Your answer can be "Yes" or "No.".

Mr. B. V. Levinter: No, sir.

Senator Desruisseaux: You mentioned that you were going to operate in the Province of Quebec. I see you have incorporated only one name.

The Chairman: No, two names. There are two names in clause 5 of the bill.

Mr. B. V. Levinter: Banque Unie du Canada.

The Chairman: If there are no further questions there are certain determinations we should make. We may want to have a discussion. When the witnesses have retired we can discuss our views on this. Then I want to detain the committee perhaps for five or ten minutes, but no more, for an *in camera* discussion on Bill C-259, and the tax summary, just to tell you where we are at. Is that agreeable to the committee?

Hon. Senators: Agreed.

(*The committee hearing continued in camera*).

The committee adjourned.

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THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

No. 35

WEDNESDAY, SEPTEMBER 29, 1971

THURSDAY, SEPTEMBER 30, 1971

First Proceedings on:

"Summary of 1971 Tax Reform Legislation"

(Witnesses—See Minutes of Proceedings)

24156–1

THE STANDING SENATE COMMITTEE ON
BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Aird	Grosart
Beaubien	Haig
Blois	Hayden
Benidickson	Hays
Burchill	Isnor
Carter	Lang
Choquette	Macnaughton
Connolly (*Ottawa West*)	Molson
Cook	Smith
Croll	Sullivan
Desruisseaux	Walker
Everett	Welch
Gélinas	White
Giguère	Willis–(28)

Ex officio members: Flynn and Martin

(Quorum 7)

Orders of Reference

Extract from the Minutes of the Proceedings of the Senate, September 14, 1971:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator Denis, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and consider the Summary of 1971 Tax Reform Legislation, tabled this day, and any bills based on the Budget Resolutions in advance of the said bills coming before the Senate, and any other matters relating thereto; and

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

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

24156—1½

Minutes of Proceedings

Wednesday, September 29, 1971.
(39)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider: "Summary of 1971 Tax Reform Legislation".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Flynn, Gélinas, Haig, Lang, Macnaughton, Molson, Sullivan and Walker—(17).

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel and Mr. Alan J. Irving, Legal Advisor.

WITNESSES:

Mr. Arthur A. R. Scace, partner, law firm of McCarthy and McCarthy.
Mr. Stephen C. Smith, partner, law firm of McCarthy and McCarthy.

At 12:25 the Committee adjourned.

2:15 p.m.
(40)

At 2:15 the Committee resumed.

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Benidickson, Blois, Burchill, Carter, Connolly (*Ottawa West*), Cook, Flynn, Gélinas, Haig, Lang, Macnaughton, Molson, Sullivan and Walker—(17).

Present, but not of the Committee: The Honourable Senator Laird—(1).

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel and Mr. Alan J. Irving, Legal Advisor.

WITNESSES:

Mr. Arthur A. R. Scace;
Mr. Stephen C. Smith.

At 5:00 p.m. the Committee adjourned until Thursday, 30th September at 9:30 a.m.

Thursday, September 30, 1971.
(41)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to further consider:
"Summary of 1971 Tax Reform Legislation".

Present: The Honourable Senators Hayden (*Chairman*), Aird, Beaubien, Benidickson, Blois, Burchill, Carter, Choquette, Connolly (*Ottawa West*), Cook, Gélinas, Haig, Lang, Macnaughton, Molson, Smith, Sullivan and Walker—(18).

In attendance: The Hon. Lazarus Phillips, Chief Counsel; E. Russell Hopkins, Law Clerk and Parliamentary Counsel and Mr. Alan J. Irving, Legal Advisor.

WITNESSES:

Mr. Arthur A. R. Scace;
Mr. Stephen C. Smith.

Upon motion of the Honourable Senator Macnaughton, it was Resolved that the Leader of the Government in the Senate, on behalf of the Committee, request the Minister of Finance to submit to the Committee a list of the proposed amendments to be submitted by his Department respecting Bill C-259.

At 12:15 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

F. A. Jackson,
Clerk of the Senate.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, September 29, 1971.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to give consideration to the Summary of 1971 Tax Reform Legislation, and any bills based on the Budget Resolutions in advance of the said bills coming before the Senate, and any other matters relating thereto.

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

The Chairman: Honourable senators, I call the meeting to order. As you know, our purpose this morning is to commence the study of Bill C-259 and to indulge in a little of what I call the educational process of getting some background and understanding of it.

We have two gentlemen here to help us on our way in that regard. I will tell you briefly about them, and then I would like them to amplify on it.

A course of lectures was prepared at the request of and for the Law Society of Upper Canada, and you are looking at the gentlemen who did most of the work on that. A series of lectures was delivered to the members of the Law Society. I do not know how many were in attendance—perhaps 500 or so—and these are the men who did the major portion of the work in that regard. I feel this is the way we should begin in order to get some understanding of this bill. You are certainly not going to master all its details in one or two days, but at least when we go back over parts of it, when the briefs come in, you may be more familiar with and have a somewhat better understanding of it. That is the idea of these discussions.

I should tell you the allocation of headings today. We are going to start with the changes in personal tax, with which Mr. Stephen Smith will deal. Then we are going to consider capital gains, which is a very important subject and which has a great many ramifications. Mr. Arthur Scace is going to deal with that. We have an agenda beyond that, but capital gains is bound to take some time.

Senator Beaubien: We are going to sit this afternoon?

The Chairman: Yes, this afternoon and tomorrow morning. For those who might like to know when Lazarus Phillips is going to be here, I can tell you that he will be present in the morning. He said he would not miss these hearings for anything in the world. He is going to be chief counsel for the committee.

Senator Connolly: Mr. Chairman, this is a matter we will have to deal with only once, to make the procedures completely regular. What I note is that the two topics which we will be discussing this morning—namely, personal tax and capital gains—are the first two items in the Summary of 1971 Tax Reform Legislation, which was the basis of your motion in the Senate, and from there you go on to the legislation arising therefrom.

The Chairman: Yes, the selection is just coincidental, not deliberate. That is the order in which they appear in the summary.

Senator Connolly: They happen to be the first and second chapters of the summary.

The Chairman: Yes. The other thing I should say is that so far as questions are concerned, our two witnesses are prepared to accept questions at any time. That is the only way we can deal with it. We cannot just go ahead with a lecture for half an hour, or something like that, because there may be a question, the answer to which would help you right at the beginning to understand, so you are free to ask questions at any time.

Mr. Scace, is there a short statement you would like to make before Stephen Smith proceeds?

Mr. Arthur R. A. Scace, partner in the law firm of McCarthy & McCarthy: I think you have covered it very well, Mr. Chairman. We are certainly prepared to accept questions, but I do not give any undertaking that we can answer them. I think at this time, even three or four months after the bill has been introduced, nobody in the country has all the answers, and we are all struggling to try to get them.

I think you will all be aware that this is probably the most difficult piece of legislation that has ever been placed before Parliament. I am not an expert in these matters, and you may be able to find something that you think ranks with it. It is very complex, and necessarily so. As soon as a capital gains tax is imposed the ramifications of it necessarily involve a complex tax statute. You have probably heard a lot of criticism in the press and from various associations about its complexity, with people saying they cannot understand it. It is difficult, but I believe a lot of practitioners have now come to the conclusion that it may not be complex enough; that there are gaps, that there are things that should be in there and that are not. I believe it will get worse before it gets better.

If I may refer to the order in which we are dealing with the different subjects, I think it was fortutious that personal taxation came first and then capital gains. We just wanted to give you an initial rundown on the important but fairly minor changes in the personal field. Capital gains came next, because it is the keystone of the system.

With that, I would like to turn you over to Mr. Smith.

Mr. Stephen C. Smith, partner in the law firm of McCarthy & McCarthy: The remarks I have to make on the taxation of individuals and families are really just a brief summary of those areas. They are not a lecture that we prepared for

the Law Society, because we felt it was something people could read for themselves. These remarks are intended as a survey of the matters dealt with in chapter 1 of the Government's summary of Bill C-259, and put the other topics, which are much more important, in context.

Mr. Benson said that the changes in the bill as they affect individuals and families—and I am talking about individuals apart from their capacities as investors; I am not talking about their capital gains or their dividend incomes, but basically their employment incomes—the changes in those areas were intended, he said, to significantly reduce the tax burden on lower-income Canadians. This is done, first, by changes in the progressive rates; secondly, by higher personal exemptions; thirdly, by broader deductions for wage earners; fourthly, by the general income averaging provisions; and lastly, by broadening the tax base to include a number of types of receipts that have not before been included in income.

I will deal with the last point first, the ways in which the tax base has been enlarged. Arthur Scace will deal with the treatment of capital gains, but that is the first obvious enlargement of the tax base, the inclusion of one half of your capital gains in income.

Secondly, the dividend tax credit has been revised to require the inclusion in income of the credit—the gross-up and credit system—which is really intended to make that credit as progressive as the tax rates themselves.

The third major enlargement of the tax base is the requirement that fellowships, scholarships and bursaries be included in income. A $500 exemption applies there. Research grants are included where they exceed the expenses of doing the research incurred by the researcher (sections 56(1)(*n*) & (*o*)).

The fourth area that has been added is medicare contributions. The amount contributed on an employee's behalf to a public medicare plan by his employer is to be included in the employee's income (section 6(1)(*a*)). The same thing applies to adult training allowances, including benefits which may be paid under special programs to assist the textile and automotive industries, although the automotive industry one may be redundant by now (sections 56(1)(*m*) 56(1)(*a*)(vi) & 56(1)(*a*)(v).

Another area is unemployment insurance benefits. They now have to be included in income, but the employee is given the right to deduct his contributions to the plan (section 56(1)(*a*)(iv) & section 8(1)(*k*)).

Payments received under income maintenance are to be included where the plan is one to which the employer has contributed, but it is only the excess over the employee's own contributions that is taxed, not the total of the employer's and the employee's contributions.

Senator Connolly: Is that latter done separately? In other words, do you get the deduction as a deduction from general income, or do you get it in a specific category, in which you report the payments you get and then deduct from that? It may not matter.

Mr. Smith: It is clause 6(1)(*f*) of the bill.

Senator Connolly: It may be a detail we can deal with later.

Mr. Smith: As the clause reads, the amount that is to be included is the amount he is paid as a benefit out of the plan, but then he deducts what he has contributed from that benefit to get the portion of it that is taxable.

The Chairman: He reports the net, in other words.

Senator Connolly: It is sort of dealt with as a class benefit, a categorical benefit. I am sorry, I should not have asked that at this point.

Mr. Smith: The last inclusion in income that is new is really just a refinement of something that has been going on all along. That is the personal use of a company car. Under the present act the department has ascertained how much use of a car was in fact personal, what percentage of the use might be attributed to personal use, and has required the inclusion in income of that portion of the cost of providing the car. Under the tax reform bill, in clause 6(1) (*e*) and clause 6(2), there is a minimum taxable value set out. At least 1 per cent per month of the original cost of the car will be deemed to be a benefit to the employee, or one-third of the rental that the employer pays for the car if he leases it. That is the minimum. Nobody can report less than that amount of personal use as income. But it still leaves it open for the department to say that it should be half or 100 per cent, depending on the facts.

Incidentally, if on any of these points you would like the clause references, I have them in my notes. I do not know whether you want to be bothered with them all, but any that you would like to have I can give.

Senator Carter: If you would not mind reporting that, it could go on record. It might be useful to have later on.

Mr. Smith: I will see that the record has the references for the comments already made.

The Chairman: The comments that have already been made and are not annotated in that way will be dealt with when we get the typescript and they can included before the final printing.

Mr. Smith: The second category of changes I would like to deal with is the deductions in computing income that are new deductions or exclusions from income, which really amounts to the same thing. The first area is child care expenses, which is dealt with in section 63. This permits a taxpayer, usually the wife, to claim up to $500 per child who is under the age of 14, up to a maximum of $2,000 per family. The wife ordinarily claims it, but if the husband is a widower or divorced or separated and he has custody of the children, the husband can claim it. It can only be taken when the child care that is provided is necessary for the taxpayer to earn employment or business income. It can cover ordinary baby-sitting costs, day nursery care and limited amounts of board where it is paid to a school or camp, up to $15 per week per child for board.

Another limitation is that it cannot exceed two-thirds of the earned income of the parent who is making the deduction.

The second area is employment expenses. Every taxpayer who is employed will be entitled to a deduction of 3 per

cent of his employment income, up to $150 per year. That is introduced by section 8(1) (*a*). The thing to note is that the employee does not have to provide any receipts of expenses. It is like the standard medical deduction. He just claims it.

Senator Connolly: That is, every person receiving wages or salary is entitled to $150, whether he is in business or in the public service or in education?

Mr. Smith: It would not apply to somebody who is in business personally on his own account. It is intended to cover employees.

Senator Connolly: Employees in business, but it does cover public servants too?

Senator Benidickson: Not necessarily an architect; it could be a schoolteacher.

Mr. Smith: It is not available to salesmen who could otherwise claim expenses under the act; and it is not available to a member of the Senate or of the House of Commons.

The Chairman: And it is not available to a director, as a director.

Mr. Smith: That is right, because he would not be considered as being employed.

Senator Macnaughton: Be sure to put the reference in.

Mr. Smith: It is section 8(1) (*a*).

Senator Connolly: Do you intend to give the rationale for these changes? I suppose that generally they are thinking about situations where a man has to incur heavy expense, say to get to his work from his home?

Mr. Smith: I think it was implicit in many of the briefs, and in the White Paper itself, that employees as a class have felt hard done by because they cannot claim deductions, except those that the act specifically permits them to claim. These were very ungenerous. This is an attempt now to give some recognition to the fact that an employee in many cases has to travel to his job, he has to buy clothes, he has to buy in some cases tools and other things like that, that his employer does not provide. The employer could deduct them, where they are necessary for the job and he provides them, but in many cases he does not.

Senator Benidickson: This has been previously very narrow. It started with railway men and then it widened a little.

Senator Flynn: When it is a deduction of only $150 as a maximum, what about someone who earns a $20,000 salary? He may have greater expenses of the nature you have described. As Senator Connolly says, if he has heavy expenses for going to work, the $150 would not carry him very far.

Senator Connolly: From what I have seen a man who is in that category probably would have opportunities to get additional expense money. For example, if he had to take a trip out of Canada or out of his home city, this would be an expense against the firm. There would be things like that. I think this is primarily intended for rather personal expenses incurred in the earning of money.

Mr. Smith: Yes. It really means that if the employer did pay for them, they would be considered as a benefit to the employee and would be taxed anyway. It is a general concession to employees.

Mr. Scace: Senators will note the revenue effect of the proposal. It is not broken down completely, but the employment expense allowance, moving expenses and other deductions which are being talked about, will come to somewhere between $205 million and $285 million.

Mr. Smith: There are a lot of employees.

Senator Connolly: It covers everyone in the country except the self-employed.

Senator Molson: It does not matter whether he is receiving some expense allowances as well?

Senator Benidickson: That is the same as the Charitable Donations Act.

Senator Molson: You do not have to give to get!

The Chairman: No, the hand is out. That is a starter.

Senator Molson: Yes.

Mr. Smith: Another new kind of deduction for individuals is moving expenses. That is provided for in section 62. This is made available as a deduction to employees, self-employed persons, and full-time students, who are not otherwise reimbursed by someone for making a move. It is available as a deduction in the year of the move or the next following one. One limitation is that the new place of residence must be at least 25 miles closer to the new job location. Obviously, one does not want people moving from one side of Toronto to the other claiming that as a moving expense.

The Chairman: Or moving from one side of the street to the other.

Senator Beaubien: What about senators moving from Newfoundland to Ottawa?

The Chairman: You are dealing with a special category, senator.

Mr. Smith: The expenses defined include the cost of travel of the taxpayer and members of his household, their board and lodging while they are travelling, transportation and storage costs of their personal effects, the cost of cancelling a lease and the selling cost of their old residence. That is all in section 62(3).

Senator Molson: There is no limit on that?

Mr. Smith: No. Another category of expense deduction is not really a deduction but rather an exclusion from income. Ordinarily expenses of transportation, board and lodging may be required to be included in income. They broadened the scope of the deduction available to employees to cover employees who leave their ordinary residence for at least 36 hours for purposes of their work. The work site that they move to is to be a temporary one

where they could not reasonably be expected to maintain an establishment for their family and from which they could not reasonably be expected to return home every night.

Where your employer does reimburse you for, say, moving to a temporary assignment some distance away, ordinarily those personal expenses would be an inclusion in your income. He would pay you for your meals and board and you would ordinarily have to put that into your income. Section 6(6) provides that you do not have to include these amounts in your income. It is excluded from your income even though he has reimbursed you for them.

Senator Connolly: What is the check on that, in the event of employers absorbing inflated amounts on these items?

Mr. Smith: There is an overall check in the act on the employer trying to deduct unreasonable expenses. The other check is the purpose for which they are paid. They do not attempt to prescribe how luxurious a motel you put your employee up in.

Senator Benidickson: This is a loop-hole for a small corporation that is dominated by one individual. He could inflate his moving expenses as an employee of what is really his own corporation, could he not?

The Chairman: Except that even at the present time, under the existing law, the employer, if he pays out expenses of this kind, would be making a deduction, and he would have to support that deduction as being a reasonable amount. That still exists. The point is that under the bill the employee does not have to include the amount of money that he is paid. That is excluded from his income. Heretofore it had to be included in his income on the theory of the income tax department that if there is a deduction or exclusion then somewhere else the person who gets it will have to take it as income and pay taxes.

Senator Burchill: Under the existing law, does not the individual, if he includes that in his income, put an expense item on the other side to counteract it?

The Chairman: But he would not have an expense item relating to that particular thing, because the money would have been provided by his employer.

Mr. Smith: The employer would deduct the expense.

Senator Flynn: There is a difference between travelling and living expenses. Travelling expenses for other persons and employees could be deducted before. Is the living allowance to be included?

Senator Carter: I am not quite clear on that. Is that not a double exclusion, because a company writes it off as an expense and the receiver does not include it in income?

The Chairman: Is it not a kind of benefit that should be counted as income in the hands of the employee?

Senator Connolly: Obviously not.

Senator Beaubien: The receiver has to pay it out.

Senator Benidickson: It should not be, unless it is padded.

Mr. Smith: The evil they are trying to get at is the employee who perhaps can live modestly while he is in his own home, but all of a sudden he is sent off to a distant job site and he is put up in a hotel and eats all his meals in a restaurant. That is much more expensive living than when he is at home. Yet that benefit would have to be included in his income, and he would be left with less after-tax income than he would have had he just stayed at home.

Senator Connolly: Yes. It is quite an administrative load for the department to carry, but they have been carrying it up until now. I suppose they have their ways of dealing with it.

Mr. Smith: There are limitations on it. He cannot be expected to set up his own household in another place for as long as he is there, and he cannot be expected to return to his home. So they are thinking of job sites that are out in the bush, and that sort of thing.

Senator Molson: Before we completely get away from moving expenses, section 62(3), I see that item (*e*) includes the selling costs in respect of the sale of his old residence. How would you define that? Would that be his loss or only commission?

Senator Connolly: Commission.

Senator Molson: What about his loss?

Mr. Smith: I think that is the cost of selling the house, the agent's commission, legal fees, and that sort of thing.

Senator Connolly: And any survey, if he has to provide it.

Senator Molson: Is that defined? Could the selling costs include the loss on the house where an employee has been married for 12 months and then moved again? He certainly sustains a loss.

Mr. Scace: Generally now, and under the bill, that is a personal loss. Under the bill it will probably be the principal residence.

Senator Molson: And any capital gains.

Mr. Scace: That is right. There is provision, both in the jurisprudence and the interpretation bulletin published by the Department of National Revenue, where you have employers who enter into arrangements with their employees to reimburse them for any loss up to a fair market value, and so on. That is not considered to be a gain if they are reimbursed when they are forced to move. It must be assumed that will continue, but generally a loss on your house is a non-deductible capital loss.

Senator Cook: In theory, you have lost whether you have sold it or not. When you have sold it you have established a loss.

Mr. Smith: That is right.

The Chairman: But they could not directly allow a loss on the sale of a principal residence when they are not taxing the gain.

Senator Flynn: They can. That all depends. If you sell because you want to live in an apartment, that is not the same thing as if you move to another location where you have to work. There is a distinction there. I am not too sure that a capital loss on a person's residence, resulting

from the obligation to move for reasons of employment, should not be a deductible expense. If he makes a gain, then that may be taxable; I do not know. Can you do it as often as you want?

The Chairman: There is a limit. You cannot get yourself in the business of acquiring and selling principal residences, so-called.

Senator Flynn: If he makes a capital loss, one has to remember that the department would have to offset his moving and other expenses, such as the commission to the agent, legal fees, and so on. You would consider the whole transaction.

The Chairman: Senator Flynn, there is some relief recognized at the present time, because usually, certainly in the larger corporations, when an employee is asked to move as a term of his employment and he owns a house, then, if he cannot sell it readily, his employer will take his house over and pay the employee the fair market value. Then, if the employer makes any more on the subsequent sale of the house, the employer will pay the employee that additional amount.

Senator Flynn: I am merely suggesting that the wording may be wide enough to allow the inclusion of that kind of loss, and, if there is a gain, it would have to be diminished by the other expenses applicable, such as moving expenses, legal fees and so on.

The Chairman: In my opinion the wording in section 62(3) of the bill is not broad enough in its reference to the selling cost in respect of the sale of the old residence. If you wanted to cover that, I think you would have to do it specifically.

Senator Connolly: It would be a little different from the scheme of the act, if it were done, because of the treatment in respect of capital gains in connection with principal residences.

The Chairman: That is right.

Senator Flynn: It is not the same thing.

Senator Molson: In my opinion the wording in subparagraph (*d*) is different in that it would suggest that the selling cost there is a narrow definition of commissions, fees, and so on. The other refers to the cost to him.

The Chairman: Of cancelling the lease?

Senator Molson: Yes. They would probably have worded it differently. If there had seen any intention regarding a loss on the house it probably would have been the cost to him in respect of the sale.

Senator Flynn: Can we not note that there is a difference and, possibly, that the act should make it between the case where you are forced to sell for reasons of employment and the other case where you sell because you want to?

The Chairman: That is a point we might very well note, and it is now noted in the record. When we come to the stage of questioning witnesses or departmental representatives this point will come up and it will arise again when you are considering your summation. The point is made now.

Senator Beaubien: Agreed.

Mr. Smith: If I may move on to the next major change, it concerns retirement plans of various sorts. As you know, there are registered pension plans to which the employer contributes and the employees may contribute, depending upon the plan. There are deferred profit-sharing plans to which the employer contributes. Then there are registered retirement savings plans to which individuals may contribute, where each individual has his own plan.

The upper limits on the deductible contributions to those plans have been substantially increased. In the case of registered pension plans the upper limit was $1,500 by the employer and $1,500 by the employee. Those limits have been increased to $2,500. In the case of deferred profit-sharing plans, to which the employer contributes, the limit there has likewise been increased to $2,500. Contributions by individuals to registered retirement savings plans have been boosted from $2,500 to $4,000.

Any taxpayer who has accumulated funds in an existing plan may still apply the old section 36 averaging provisions to remove his contributions. After the new system starts, any payments out of such plans out of post 1971 contributions will be treated under the new averaging provisions, which I will come to in a few moments.

In the case of registered retirement savings plans, in section 146 the new act repeals the previous flat rate of 15 per cent which applied to amounts paid upon the death of the individual. These payments are now going to be treated as a return of premiums and will be included in the taxpayer's income unless he elects to purchase an income averaging annuity with the money he receives out of the plan or unless he elects to transfer the payment to another plan or to a registered pension plan.

The Chairman: If he just takes the money, then it is income.

Mr. Smith: That is right.

Senator Connolly: In that year?

Mr. Smith: Oh, yes.

Senator Connolly: The year in which he gets it.

Mr. Smith: The general averaging provisions would apply, but they, of course, are not as broad as the purchase of an income averaging annuity which, virtually, defers the whole thing. Neither are they as broad as putting it into another plan, which has the same effect.

Senator Connolly: You are talking about registered plans, generally, here.

Mr. Smith: Yes.

Senator Connolly: Is there any change in the opportunity that is available to a professional individual, for example, in respect of his retirement savings plan?

Mr. Smith: That is what I was just referring to.

Senator Connolly: That is included in all of this?

Mr. Smith: I was referring specifically to registered retirement savings plans.

Senator Connolly: I see.

Mr. Smith: In that case you enter into an agreement with a trust company or an insurance company, or an organization such as that, and that organization usually effects the registration for you.

Senator Connolly: And the limit there was formerly $2,500 but has now been increased to $4,000.

Mr. Smith: Yes.

Senator Connolly: Under the present system, if you belong to a plan other than a registered retirement savings plan, about which we are talking, by how much is the total contribution reduced?

Mr. Smith: It is reduced by $1,500. All they have done in this respect is to increase the upper limits on contributions. Otherwise they have left the schemes of the various registered plans exactly the same.

Senator Haig: It is taken as a deduction.

Mr. Smith: Yes.

Senator Connolly: If you invest it, it becomes a deduction from your income that year.

Mr. Smith: Yes. You have to pay it to the plan.

Senator Connolly: Part of my interest in this stems from the fact that this whole matter has come up a number of times in the past. I remember that Senator Beaubien referred to this particularly in connection with the retirement plan of senators. We had quite a discussion on the whole question.

The Chairman: Senator Beaubien, you are being accused of something here!

Mr. Smith: They have also applied new investment restrictions. I believe the department discovered that many taxpayers were perhaps taking unfair advantage of the contributions, particularly to registered retirement savings plans, by investing the, for example, in the preferred shares of their own company. As a result, in the future there will be restrictions on the types of investment that such a plan may allow for, and most notable in that regard is a restriction on the foreign investments that they may make. There used to be no restrictions on retirement savings plans. They are now brought under the same sort of restrictions the registered pension plans are under. The foreign investment restriction which used to apply to registered pension plans has been changed. It used to be based on the percentage of foreign income rather than the cost of the investments. It is now going to be not more than 10 per cent of the cost base of your investments which may be foreign investments.

Mr. Benson issued a press release on that subject early in July. That release helped to explain the provisions in the act. Incidentally, they are set out in sections 205 and 207.

Senator Connolly: Mr. Chairman, this is going to be a very complicated part of the bill. Perhaps Mr. Smith could give us comparative examples in respect of the present act and the proposed measure. Perhaps he could give us an example of what would happen under the present act and an example of what will apply under the proposed bill.

The Chairman: In relation to what?

Senator Connolly: In relation to the very point he has just been talking about.

The Chairman: Yes.

Mr. Smith: What pension plans could do under the present act was to invest a very large percentage of the funds paid into the plan in foreign investments, provided that those foreign investments as a total did not produce more than 10 per cent of their total income. Now it would be very easy to buy American growth equities which paid little or no dividends, the type that sell at a very high multiple and provide a very low yield.

The Chairman: Reaching for a capital gain?

Mr. Smith: Yes, and put those into a plan and perhaps have 50 per cent of your assets producing less than 10 per cent of your income. Now you are going to be limited to 10 per cent of the value going into the plan, the original cost of the investments. So you will not have the opportunity to put such a large percentage of your funds in foreign investments.

The Chairman: I wonder whether they are not missing an opportunity for capital gain in those situations now that they are bringing in a capital gains tax. The idea of stopping this in the first place I presume was because untaxed capital gains were being made. But now since they are being taxed, what is the reason for making the change?

Senator Beaubien: To keep the money in Canada.

Senator Connolly: I think Senator Beaubien has put his finger on the point. Probably the rationale behind this is to encourage investment in Canada.

Mr. Smith: Not only that, but having increased the upper limits there would now be a lot more money going into these plans and the effect would be quite substantial if it all flowed out of the country.

Senator Connolly: What do you mean by "increasing the upper limits"? Is it simply because the plans have more money?

Mr. Smith: No. An individual can now contribute $1,500 more per year to such plans, and similarly for registered pension plans.

Senator Connolly: It suggests a trend towards nationalism in investment.

Mr. Smith: The next major topic deals with changes in the deductions allowed from income to compute taxable income. The first group deals with changes in personal exemptions. A single taxpayer under clause 109(1)(*c*) will be able to deduct $1,500, instead of the $1,000 which he can deduct at the present time. In the case of a married taxpayer the exemption will be increased from $2,000 to $2,850. But where the wife's income is over $250 per year, the husband has to reduce his exemption for her—which in fact amounts to $1,350—by $1 for every $1 of her

income. So if she had an income of $1,600 or more, he would lose the exemption.

The Chairman: He would be a single man for tax purposes?

Mr. Smith: Yes. The people who are to be treated as married for the purposes of getting this exemptions have been expanded to a widow or widower where such person is supporting a brother, a child or other relative of that sort living in his house. But he does not get the exemption for a dependent child at the same time. He gets one or the other.

Senator Connolly: Is the relationship the test, or is the fact of living in the house the test?

Mr. Smith: Both.

Senator Connolly: Is there any legislation on the relationship? For example, what is the situation in the case of a grandfather or an aged aunt or an aged uncle? Perhaps, Mr. Chairman, it is unnecessary to ask these questions.

Mr. Smith: It would be somebody who was wholly dependent for support and who was connected through blood relationship, marriage or adoption with the taxpayer.

Senator Connolly: That is almost the whole scope of relationship, is it not?

Mr. Smith: In the same way the married exemption is reduced for the wife's income, so the exemption here would be reduced by the dependant's income. The present exemptions for dependent children are retained at their present amounts, that is $300 for children under 16 and $550 for a child 16 years and over. The income of the dependant is treated in a similar fashion to the income of a spouse in that it reduces the exemption gradually. There is a $1 reduction for every $2 of the dependant's income in excess of $1,000, and where you are entitled to the $550 exemption, it is one for one. Furthermore there is an increased exemption for certain taxpayers over the age of 65, or for people who are blind or who are confined to a wheelchair. The exemption is increased to $650. The guaranteed income supplement under clause 110(1)(*f*) is going to be exempt as well.

Senator Connolly: That is exempt from tax; it is not a deduction. These are anomalies we should take note of, Mr. Chairman. It is strange that they should be exempt when they include unemployment insurance benefits and things of that sort. In this case they are going to exclude payments made for guaranteed income supplement.

Senator Cook: But they would not be liable for tax if they were going to get the guaranteed supplement anyway. They have to prove need to get the supplement so I do not see how it could be regarded as taxable anyway.

The Chairman: But while proving the need and even while there might be need it could be that the income would still be up to the limit of the exemptions.

Senator Cook: But surely that would be very small.

Mr. Scace: If you had the old age security of $950 or $1,000, or whatever it is, but your point is that it would have to be up around $500 before you would become taxable as a single person.

Senator Cook: But when you get to age 65 you get another $500 there.

Mr. Smith: There have also been changes in the treatment of charitable deductions. The maximum deduction has been increased from 10 per cent to 20 per cent of income. The one-year carry forward of charitable deductions is retained and the existing $100 standard deduction in lieu of providing receipts is retained as well.

The Chairman: That is clause 110(1)(*a*).

Senator Connolly: Is that a percentage of net rather than gross income?

Mr. Smith: That is income.

Senator Connolly: Taxable income?

Senator Molson: Income of the taxpayer.

Mr. Smith: It is a deduction in computing your income, so you would be talking about income before these deductions.

Senator Molson: Are not some of these provisions wider, such as those for amateur athletic associations and the United Nations agencies?

Mr. Smith: Yes. Clause 110(8)(*b*) is the national amateur athletic associations. They are treated as a charity for the first time. Various Olympic organizations have been set up to support Olympic sport. Up to now they have not been qualified under the usual legal definition of "charity."

Senator Flynn: Should not political parties be treated as charitable organizations?

Senator Cook: Educational.

Senator Molson: Welfare.

Mr. Smith: The old treatment of medical expenses has been retained with certain exceptions. The contributions of an employer to a public medical care plan have been included in the employee's income. Medical expenses are defined to include the care of the taxpayer and his family, anything paid to an institution for the physically or medically handicapped. That is clause 110(1)(c)(vi).

Senator Connolly: Mr. Smith, in connection with charitable donations, does the department under the new bill still retain the right to rule what type of organization qualifies?

Mr. Smith: Oh, yes.

Senator Connolly: That is undisturbed?

Mr. Smith: Yes. The only real change is to bring in this category of amateur athletic associations.

Senator Connolly: They still have to register.

Mr. Smith: They still have to qualify under one of the various categories.

Mr. Scace: In the case of revocation of registration of a charity there are administrative provisions for appeal which were not in the previous act.

Senator Flynn: I wish to mention that I was not exactly joking when I referred to political parties. The Chamber of Commerce, meeting now in Quebec, has recommended that contributions to political parties be allowed as deductions from income.

The Chairman: Senator Flynn, you will be able to raise that question personally with the Chamber of Commerce here next Wednesday.

Senator Flynn: Now that everyone is covered by Medicare, I understand that expenses which are not covered will be deductible from income, but is there a certain percentage that has to be attained before the deduction applies?

Mr. Smith: Yes; it is the same system.

Senator Flynn: Three per cent?

Mr. Smith: Yes.

Senator Flynn: How will the taxpayer with Medicare ever reach 3 per cent?

Mr. Smith: Well, that is right. If he pays premiums to a private health service plan which applies in addition to Medicare, those are deemed to be medical expenses which he could deduct. However, he is not entitled to deduct any kind of medical expenses for which he is reimbursed by any plan.

Senator Connolly: He does not receive it twice.

Mr. Smith: No, that is right.

Senator Flynn: Previously, even if he received payment from a private insurance company, he could deduct?

Mr. Smith: He could deduct the premiums. He pays, but he cannot deduct the benefits they pay for him, the indemnity.

Senator Flynn: So that this provision is now more or less insignificant.

Mr. Smith: I suppose the rationale for it is that the Government is picking up most of the Medicare expense, or a large portion of it, so they do not want to double up on it.

Senator Flynn: I suggest that the minimum should not be applicable with the new system. Any amount spent above what is paid by Medicare or any additional insurance that a taxpayer has should be deductible directly.

The Chairman: Do you mean that you spend and there is no reimbursement?

Senator Flynn: Yes.

Senator Gelinas: Dental treatments are included, so that you can exceed that 3 per cent.

Senator Flynn: Occasionally; not very often.

Mr. Smith: Another major change is the whole field of income averaging. There was a considerable amount of criticism in various briefs to the effect that taxpayers should be given generous averaging provisions to spread income where they have peak earnings years followed by lower earnings years. There are two kinds of averaging. One is usually termed general averaging. It applies to all taxpayers automatically and applies each year. It will be assessed by the Government's computer facilities, so the taxpayer does not have to worry about it in his return. He reports his income and they run his return through their program. If it shows that he is entitled to a refund because of this averaging provision, then he is given a credit. That applies where income in a particular year is 20 per cent more than the average of the preceding four years and 10 per cent more than the immediately preceding year. There are provisions to cover those who are just entering the labour force to give them an averaging base and so on.

Senator Lang: What clause is that?

The Chairman: That is clause 118. That is what you term the automatic?

Mr. Smith: That is the automatic general averaging. The more interesting one, really, is what is usually termed forward averaging. That is the provision in clause 61, which will be of most help to taxpayers who have a very high income in one year. Clause 61 permits the taxpayer to spread his income by taking any amount of his income and buying an income-averaging annuity from an institution. He is given a deduction for the premium he pays for the annuity under certain limitations. To qualify he must purchase that annuity within 60 days of the end of the year.

The annuity can be issued by any company authorized to carry on that business, either federally or provincially. It must be issued for a single lump sum premium, and the first annuity payment must commence within 10 months of the purchase of the contract, so that it will be in the year following the year for which the deduction is claimed at the latest. The contract must provide at least one annual payment; it could be any number during the year. The annuity must be for life and with or without a guaranteed term, which cannot exceed 15 years. It could be simply for a guaranteed term not in excess of 15 years. In any case, the guaranteed term cannot go beyond the individual's 85th birthday, but there is no limit on how short a term the annuity must have. It could, for example, be three annual payments, if you like.

The Chairman: The taxpayer settles the amount of money that would otherwise be income, he wants to use this to buy an income annuity and then he gets it back when the income annuity starts paying off. He can really call the tune on that, and he gets a deduction for the premium that he pays, the lump sum in one year, is that right?

Mr. Smith: That is right.

Senator Connolly: In the year in which he pays it, but in that year he will also get an annuity payment.

Mr. Smith: That is right.

The Chairman: Well, the income he gets on that income annuity will be income.

Senator Beaubien: It will be taxable.

Senator Connolly: Would an example of this be an artist or an athlete who all of a sudden receives a terrific windfall in the way of either an increase in salary or proceeds from the sale of some pictures, or something of that nature?

Mr. Smith: I will give you an example. They are set out in section 61. I have a list here of all the different things that would qualify: Taxable capital gains minus your allowable capital losses; income from the production of a literary, dramatic, musical or artistic work; income from activities as an athlete, musician or public entertainer; a single payment received from a superannuation or pension plan, such as a return of contributions or payment on death; a payment on retirement in recognition of long service; a single payment out of a deferred profit-sharing plan on retirement or withdrawal or death; a payment under a death benefit plan for employees; return of premiums from a retirement savings plan upon the death of the annuitant; proceeds from the disposition of depreciable property. That is an important one. A taxpayer who owns a building individually, and who would suffer recapture or a depreciation on the sale, can in effect use his recapture, which would otherwise be income, to purchase the annuity. Then there are the proceeds of the sale of the goodwill of a business; proceeds from the sale of inventory or accounts receivable on termination of a business; and the benefits under a stock option plan.

All of the averaging provisions in the act that used to apply to those types of payments are washed out completely in favour of this income averaging annuity. For example, the treatment of stock option profits in section 85A is repealed in favour of this. There are transitional provisions which allow people to pick up their present options under Section 85A, but after the transitional period is over they will have to use the stock option profits to purchase income averaging annuities in order to avoid being taxed on them.

The Chairman: The attraction of a stock option as such was watered down considerably a few years ago. Before that it was quite beneficial, and now there is really some reinstatement here if you want to use the income that would otherwise be taxable to generate an income annuity.

Mr. Smith: The averaging is perhaps more generous. You can spread it further into the future than you could under the old section 85A: that is, looking at your previous three years average tax rate.

Senator Molson: In the case of a stock option the profit is not realized by the individual. He would have some difficulty paying for the annuity unless he took up the stock and sold it.

The Chairman: He would have to sell it, yes.

Mr. Smith: It is not until he exercises the option that he is taxed.

Senator Molson: He would have to sell it right away.

Mr. Smith: Yes.

Senator Connolly: And if he did not sell it, it would be considered as part of his income.

Mr. Smith: He would have to sell enough of the stock to get an amount equal to what otherwise would be taxable. He would still have some stock left.

Senator Molson: It takes away some of the general purposes of stock options.

The Chairman: You mean the acquisition and the holding?

Senator Molson: Yes.

Senator Beaubien: It is better than it was.

The Chairman: Yes.

Senator Connolly: Mr. Chairman, could we consider that a little further? Senator Molson has raised some good points. Suppose, for the sake of argument, a man becomes entitled to, say, 10,000 shares of stock which is worth, say, $2 a share, and he is given the certificates and he holds the 10,000 shares; he does not liquidate anything. Is he allowed to hold those shares in his portfolio as a capital asset to be disposed of in due course?

Mr. Smith: Well, say the value of the stock, when he exercises his option and buys it from the company, is the $2 a share, as you mentioned, but his option price was $1, which means on 10,000 shares he has a $10,000 stock option profit which the act would require him to include in his income, now he can pay the tax on that or he can buy a $10,000 income averaging annuity and spread it into the future. Where he gets the cash to buy the income averaging annuity is his problem, but obviously if he does not have the cash he will have to sell part of the stock.

Senator Connolly: That is a good explanation to have on the record. The other question I would like to ask is this: I notice that some of these payments or realizations that you mentioned occur on death and they become income. Normally, I think, under the Succession Duty Act or the Estate Tax Act on death, say, a lump sum payment out of an annuity arrangement would be a capital asset for the purposes of the estate or succession duty tax. I take it it is because the estate tax is being done away with that it now becomes income. Is that so?

Mr. Smith: No; it was always income subject to the averaging provisions that were in Section 36 of the act. Those averaging provisions are now being repealed in favour of these averaging provisions which are, in the case of the income averaging annuity, perhaps more flexible than section 36 was, but as far as inclusion in the estate is concerned, it would be the net estate after debts, including the income taxes payable by the deceased up to the date of death, that would be subject to estate tax.

Senator Connolly: I am just wondering what happens in the case of a widow whose husband's estate, as a result of his death, is entitled to a lump sum payment, say, of $20,000. That has heretofore been an asset of the estate which became taxable for succession duty purposes. I am right so far, am I?

Mr. Smith: Yes.

Senator Connolly: It was never considered to have been part of his income for the year in which he died. I think you pay succession duty on it and it is a death benefit. It just adds to the capital value of the estate.

Senator Flynn: If it is in respect of an insurance policy, I agree with you. Suppose it was as a result of an annuity.

Mr. Smith: Well, what happened under the present act was that you had an exemption from income tax for cer-

tain death benefits up to $10,000, and the balance of the benefit would be taxed to the estate, and that income tax would be a debt of the estate which would be deductible in computing the taxable value of the estate for estate tax purposes, so that whatever estate tax might apply on the estate would apply in that aspect as well. There are in the Estate Tax Act quite extensive exemptions for benefits for the surviving spouse, either outright or by way of a life interest or annuity, so that there was a fair amount of scope for deferring tax until the wife's or husband's death, as the case may be.

Mr. Scace: What you are thinking of, senator, might be that if you have an annual pension, they would capitalize that pension. That would clearly be an asset of the estate.

Senator Connolly: Yes, they do that.

Mr. Scace: But the other situation, I think, is the net amount after you pay the income tax liability.

Senator Molson: In the case of an artist or athlete, and so on, he can get it spread over 15 years.

Mr. Smith: Or his lifetime.

Senator Molson: Or the difference between?

Mr. Smith: The maximum term would be an annuity for life with a guaranteed term of 15 years.

Senator Molson: Not less than 15 years.

Mr. Smith: I am just talking about a guarantee, but it can be a life annuity, if you like.

Senator Molson: Presumably he has a career, whether as a musician or an athlete, of some years, so in fact year by year he could continue this process. Supposing you took the minimum time of 15 years, and say he had a 15-year career, he could in fact have an annuity spread out in the end over 30 years, could he not?

Mr. Smith: The maximum term would be an annuity spread over his entire life, if he survived the maximum guarantee period.

Senator Molson: But a minimum of 30 years in that case, if he did it year by year for 15 years?

Mr. Smith: Yes.

Senator Molson: And he could avoid the tax other than the annuity all the way through. The amount he received as an annuity when the payment started is what he would be paying tax on.

The Chairman: That is right.

Senator Molson: That, of course, would be increasing as he kept on buying new ones.

The Chairman: Of course, you must remember that it would then be a carry, the incidence of tax would be levied on what his overall income was in that year, and it might be that when he stops earning the high income that hockey players and musicians may earn his rate would be less and he would pay less tax.

Senator Haig: He gets the premium as a deduction.

The Chairman: He gets the premium as a deduction.

Senator Haig: In the year in which he buys the annuity.

The Chairman: That is right.

Senator Haig: And when the annuity payment is made it is income, and he pays tax on it.

The Chairman: That is right.

Senator Connolly: It is spread, so it is reduced.

Senator Molson: I was worrying about some of these little chaps like Bobby Orr, and so on, and wondering how they were going to make ends meet.

Senator Flynn: You should know something about that.

Senator Molson: Not Bobby Orr, unfortunately.

Senator Flynn: What about winning a sweepstake? That would be a capital gain.

Senator Beaubien: That is a windfall.

Mr. Smith: I think that is treated as a windfall.

The Chairman: That is treated as a prize, I think, in the language used in the statute, is it not?

Mr. Smith: They exempt the gain on a prize won in a lottery. I guess a sweepstake is a lottery.

Senator Gelinas: No tax at all.

Senator Molson: What about grants from the Canada Council and other bodies of that sort?

Mr. Smith: Earlier I mentioned scholarships, fellowships and research grants.

Senator Molson: I referred to grants. You see, you have been specific so far. Are grants in general included? Prizes?

Mr. Smith: Not unless they can be tied to—

Senator Molson: There is a bank that gives $50,000 every year in prizes. Is that taxable?

Mr. Smith: The Nobel Prize, for example, is not, I think, covered.

Senator Beaubien: That would not be taxable?

Mr. Smith: I do not think so; not the Nobel Prize or something of that sort.

Senator Connolly: The $50,000 Royal Bank award every year is never given to the same person twice.

The Chairman: What is the basis for it? An educational grant?

Senator Connolly: Eminence generally, excellence.

Senator Beaubien: Cardinal Léger got it one year.

Senator Molson: There are several of that sort.

Mr. Smith: I think paragraphs (o) and (n) of clause 56(1) are relevant.

Senator Molson: "—research or any similar work". That is specific again.

Mr. Smith: Clause 56(1)(*n*) though says "in a field of endeavour ordinarily carried on by the taxpayer".

Senator Molson: No.

The Chairman: "—or a prize for achievement in a field of endeavour".

Mr. Scace: This comes into the capital gains area, but really what you have with the new bill are three categories. First there are items which are clearly income, and always were income. Then there are items which are entitled to capital gains treatment. Then there seems to be a third category which is exempt. It seems to be exempt because in order to have a capital gain there must be a disposition, so if an amount is received that does not arise by a disposition, it seems to go completely untaxed. One example I can think of is a gambling gain. In some cases gambling gains were income under the old act, but generally they were not.

Mr. Smith: Casual gambling.

Mr. Scace: Casual gambling. It seems to me that there might be that kind of thing in that exempt category. Certainly it has to be interpreted.

Senator Connolly: There is no specific provision for windfalls in either the old act or the new bill.

Mr. Scace: That is right.

Mr. Smith: Before we get on to capital gains, which is far more interesting than these topics, I will make one or two comments about the changes in the rate structure. Basically, they have made it one rate instead of all the bits and pieces that we have now. The old age security tax, social development tax, the three per cent surtax, the tax on foreign investment income, and so on are all swept into one rate structure. The way provincial taxes are calculated has been changed too. Under the present act there is a deduction in respect of provincial taxes. Now provincial taxes will be calculated as a percentage of the total federal tax instead of by the abatement from the basic tax system. The standard rate of provincial tax will be 30 per cent of total federal tax, but I think any province has the freedom to raise that. The result of the new rate schedule would be a combined federal and provincial rate that peaks at 61.1 per cent on income over $60,000. That should be compared with the net present peak rate of 82.4 per cent which cut in at $400,000.

Senator Connolly: Perhaps I might ask a question here about the 30 per cent provincial tax. This is not a taxation question. Is it proposed that that 30 per cent will be paid out of the federal treasury to the provinces?

Mr. Smith: Oh yes, I think the federal Government will still be the collecting agent.

Senator Connolly: It will be the collecting agent for that 30 per cent?

Mr. Smith: Yes.

Senator Connolly: Which will be refunded to the province.

Mr. Smith: One thing to keep in mind is that the rate structure set out in the bill is just the federal rate. To get the true rate 30 per cent of the federal rate has to be tacked on to that.

The Chairman: So your overall would be whatever the rate in the bill produces plus 30 per cent of that.

Senator Beaubien: Quebec gets 50 per cent now.

The Chairman: The provinces can add any amount to that; that is their privilege.

Senator Cook: There are certain advantages in being a hippie!

Mr. Scace: On that last question I think the bill is confusing, because if you look at the rates under the present act and go to, say, $24,000 or $25,000, the marginal rate there is 50 per cent. If you go to the bill, the marginal rate is 39 per cent. We have really got a nice reduction in tax and what you have to do is—

Senator Beaubien: Add on a third.

Mr. Scace: Yes, 30 per cent is added to the 39 and produces 50.7 per cent. That is your rate at the margin for a province levying a 30 per cent tax. But it is not clear, looking just at the rates in the bill.

The Chairman: But if you take that 61 per cent rate in the bill, there may be some deception in that rate, because if you want to get the overall rate—

Mr. Scace: The top rate in the bill is 47 per cent and if you take 30 per cent of that it gets you up to the 61.1 per cent.

The Chairman: Yes. Are there any other questions you wish to ask on this subject before we change?

Senator Connolly: Mr. Chairman, there is one idea which occurs to me. For the first time this morning we have had the introduction of the term "marginal rate". This is going to come up very often in our hearings. I wonder whether Mr. Smith would like to give a definition, for the record, of a "marginal rate", so that we will know clearly what we are talking about?

Mr. Smith: As you know, the act, in setting out the rates, starts with the level of income. For example, if you turn to the act, section 117(1)(*a*) starts off by saying that the tax is 17 per cent of the amount taxable if the amount taxable does not exceed $500. Than in (*b*) it moves on and says that the tax is $85 plus 18 per cent of the amount by which the amount taxable exceeds $500 and does not exceed $1,000. The marginal rate at that level is the 18 per cent that applies between $500 and $1,000. If you step up to, say, someone earning in excess of $24,000, once he has hit $24,000 his marginal rate becomes the rate that applies on the next bracket, and that bracket is between $24,000 and $39,000 and the rate set there is 39 per cent plus 30 per cent provincial tax.

Senator Connolly: In other words, in the table the tax on $24,000 is specifically set out?

Mr. Scace: Right.

Senator Connolly: Then, when he gets over that, into the other bracket, the percentage of the other bracket is the marginal rate?

Mr. Scace: Yes.

Senator Connolly: That is what I wanted to see on the record.

Mr. Scace: If someone says he is at a marginal rate of, say. 50 per cent, that means he is earning between $24,000 and $39,000.

Senator Lang: Are the rules with respect to general averaging confined to income, or are there averaging provisions with respect to capital gains?

Mr. Smith: The forward averaging provisions apply to capital gains as well. Half of your taxable capital gains, half of your gross gains, which would otherwise be included in your income—that can be used to purchase an income averaging annuity.

The Chairman: Because that part of it is income.

Senator Lang: Is there some place in this bill that says that part is income?

Mr. Smith: I think that is a good place for Mr. Scace to start.

The Chairman: Honourable senators, we move now into the area of capital gains. Mr. Scace is going to develop that subject. It is a subject that will take some time and it is important, so we should make sure we understand it as we go along.

First, there will be a brief recess, ten minutes.

(*A short recess*)

The Chairman: Honourable senators, we shall now consider the second heading, which is capital gains. Mr. Arthur Scace will take us through that. It will be fairly lengthy. It is the keystone of the bill and I think it is important that we should get as good a grasp of it as we can.

Senator Beaubien: Do you expect to sit this afternoon?

The Chairman: Yes. In checking with some of the senators during the break, I reached the opinion that we should adjourn at 12.30 and come back at 2.15. I thought we might go through until 5 o'clock in the afternoon. I now call upon Mr. Scace.

Mr. Scace: Capital gains is reasonably complex. I would like to start out by giving a very brief summary of the main aspects of the legislation and we will then go into the details.

Senators, you are probably familiar with most of the main aspects. The basic proposition is that one-half of all capital gains will be included in income and taxed at normal personal or corporate rates depending upon whether they are received by an individual or by a corporation. Conversely one-half of any capital loss will become deductible and the basic rule is that it is deductible against one-half of capital gains.

The half inclusion of a capital gain is called the taxable capital gain, and the deductible portion of a capital loss is called the allowable capital loss. We will be using those words throughout.

In addition to being able to deduct an allowable capital loss against taxable capital gains during a year, an individual, and only an individual, can deduct $1,000 of allowable capital losses against his other income in the year.

In addition to this, there will be a one-year carry-back and an unlimited carry-forward of allowable capital losses against taxable capital gains; and in the case of an individual you also get the $1,000 deduction against other income.

Generally, capital gains will become taxable and losses deductible upon the sale of an asset or the disposition of an asset—we will talk about that a little later; it is a very lengthy definition—upon emigration from Canada, ceasing to be a resident of Canada, and upon the making of a gift or at death. Those are the principal ways that gains and losses are realized.

In certain instances there is a tax-free roll-over or exemption from capital gains tax. The main one, I suggest, is the exemption on gift and bequests between spouses, provided that you qualify within the rules.

There are also certain other exemptions, in particular amalgamations, the incorporation of a company, the transfer of assets to a partnership, or partnership assets to a company, and so on. We will touch on these later on.

There is an exemption for principal residence. This has been given quite a bit of press coverage. The exemption is for the principal residence plus up to one acre of subjacent and adjacent land.

Personal property will not be taxed unless the sale price of the property exceeds $1,000.

Another rule is that assets which would have been taxable in full under the old act will continue to be taxable in full under the new act and will not be entitled to capital gains treatment. One senator was mentioning this at the break. The most common instance would probably be land. In most cases now, if you dispose of land, unless there has been a very lenghty period of retention or it has been an income-producing property, most people seem to get taxed on the gain. If you are taxed under the present act, you will continue to be taxed under the new act at full rates, and you will not be entitled to capital gains treatment.

Finally—and we will deal with this at some length—there are special rules for determining the cost of an asset both before and after valuation day, specifically to get us into the new system and over the transition.

Very briefly, that is the summary of the main elements of the bill. We would now like to show you how these come out in practice, explain what the detailed legislation says, and perhaps draw your attention to certain anomalies or short-falls in the bill which we hope will be corrected. The Department of Finance is aware of many of these short-falls and we suspect that they will be dealt with in the amending legislation. However, we will touch on this.

The starting point for capital gains, and for calculating all income under the act, is section 3. Perhaps we could go through section 3. The income of a taxpayer for the taxation year is the income determined by the following rules:

Subparagraph (*a*) says that you calculate the amount of your income from employment, business and property, other than a taxable capital gain. Essentially that is the rule that we have now.

You do not get to capital gains until you reach paragraph (*b*), which is reasonably complicated. It says that you determine the amount, if any, of the aggregate of taxable capital gains—that is one-half of the gain—for the year from dispositions of property other than listed personal property—that gets special treatment—plus the taxable net gain from dispositions of listed personal property.

There you bring in taxable capital gains plus the taxable net gain from listed personal property.

Section (*b*) also says that you take your capital gains plus the taxable net gain and subtract the allowable capital losses.

Subparagraph (*c*) then permits you to make certain deductions. Subparagraph (*d*) goes on to permit various losses from an office, employment, business or property.

We then pick up capital gains again in subparagraph (*e*). Subparagraph (*e*) basically gives you the deduction, in the case of an individual, of $1,000 against other income.

It says that you determine the amount if any by which the remainder calculated to that point exceeds the lesser of either the difference between allowable capital losses and capital gains where you are in a loss position, or $1,000 if you are an individual, and that is your income.

To show you how this works out, we have put this diagram on the board.

Coming down this column here—E.I. means employment income. This means taxable capital gains and allowable capital losses. 3(*b*) is the net amount, that is, the amount by which taxable capital gains exceeds allowable capital losses.

3(*e*) is the additional deduction equal to the lesser of either your loss position on capital transactions or $1,000.

So we come to No. 1. Let us take a man who has employment income of $10,000, taxable capital gains of $5,000, and allowable capital losses of $2,000. Under 3(*b*) you determine the net amount of your gain, which is $5,000 minus $2,000. So the inclusion under subparagraph (*b*) is $3,000.

You then go down to (*e*), which says that you can deduct the lesser of the amount by which your losses exceed your gains, which is zero, or $1,000. So you get a nil deduction under 3(*e*) because you are in a positive position. So you end up with income of $13,000.

Coming down here, it is slightly different. The taxable capital gains are $2,000, the allowable capital losses are $5,000. Therefore under subparagraph (*b*) you do not have a positive amount. Therefore there is nothing included. Your losses exceed your gains.

You come down to subparagraph (*e*) which says the lesser of losses, which would be the net losses, which would be $3,000 or $1,000. So you get your $1,000, or an income of $9,000.

Senator Beaubien: To go back to No. 1, is half your capital gain taxable on this?

Mr. Scace: That is right. By definition the taxable capital gain is half the amount of the gain. We would have had a capital gain of $10,000; and similarly on losses—the losses would have been $4,000.

Senator Aird: Would you go to column 2 again and describe the application of 3(*e*) as related to the negative factor of a $3,000 loss?

Mr. Scace: We have a situation here where allowable capital losses have exceeded our taxable capital gains by $3,000. The basic rule is that allowable capital losses can be deducted against taxable capital gains, so that gives us a net amount of $3,000. We have really taken $2,000 off there. The second rule is that where you are in that sort of negative capital position, $1,000 in any year of allowable capital losses can be applied against other income. That is what 3(*e*) says. You can deduct the lesser of either your loss position of $3,000, which was not applied against taxable gains, or $1,000. So it is the lesser of the $3,000 or the $1,000. We take the $1,000 and we end up with $9,000.

Senator Carter: What about the other $2,000? Do you deduct that in subsequent years?

Mr. Scace: We will come to that a little later. We will complicate it in order to show you how it works. You have a net of $3,000 on losses. You take $1,000 off. You now have $2,000 still that has not been deducted. We will show you how that gets deducted in future years. That is running ahead a little bit at this moment, however.

Now, columns (3) and (4) do not add a great deal. Here you can see $4,000 taxable capital gains; $5,000 of losses; you are in a net $1,000 loss position. There is no inclusion under 3(*b*) because of that. Here it is the lesser of your loss position of one or $1,000, so you end up with $9,000.

The Chairman: Mr. Scace, I think we had better have that chart to which you are referring included as part of the record. It would simplify following what you have been saying.

Mr. Scace: Yes, and we could simply refer to these columns (1), (2), (3) and (4).

(*The table follows*)

TABLE I

	(1)	(2)	(3)	(4)
E.I.	$10,000	$10,000	$10,000	$10,000
T.C.G.	5,000	2,000	4,000	4,500
A.C.L.	2,000	5,000	5,000	5,000
3 (b)	3,000	nil	nil	nil
3 (e)	nil	1,000	1,000	500
I.	$13,000	$ 9,000	$ 9,000	$ 9,500

Mr. Scace: Now, in column (4), just as a slight wrinkle on what we have said, here you have taxable capital gains worth $4,500. You have an allowable capital loss of $5,000. The net loss position would be $500, and there would be no inclusion because of the loss. How much do you deduct? It

is the lesser of your net loss position of $500 or $1,000 and you get your $500 deduction and you come out with $9,500.

So in case (4) and in case (3) you have used up your net loss position all in the same year.

Very briefly and basically that is all section 3 says. It is relatively simple. There is one problem from a technical point of view which has been brought to the attention of the Department. I do not know whether they are going to do anything about it, but some of the language in section 3 is a bit vague and could do with some clarification. For example, section 3 uses the words "determine the amount by which the remainder, determined under" previous paragraphs exceeds this and that. I think it is reasonably clear what they are intending, namely, that you add various things and then you deduct various things. But the use of the language is vague. "Determine the amount by which the remainder" and so on does not make it entirely clear. It seems to some of us that it might be open to some misinterpretation.

The Chairman: The same word is being used in different contexts and with different connotations, I agree. For example, the word "determine" is being tossed around in different contexts and with different meanings. It would appear that there would be an editing job done on the language.

Mr. Scace: It is not serious, but some clarification might be helpful.

The Chairman: Yes.

Mr. Scace: Leaving section 3, we go on to subdivision (*c*), which starts with section 38 and then goes on to section 55. Subject to a few exceptions, most of the law on capital gains is found in sections 38 to 55. Now, to determine what a capital gain or a capital loss is for the purpose of the act, you start with section 39. If I may paraphrase it, section 39 says that a capital gain is something that would not have been taxed either under the old act. The same applies to capital losses. So the net result is that a capital gain is something that was entitled to a capital gains treatment—that is, no tax under the old act. Again the same applies to a capital loss.

As one senator remarked, this has the result that all of the old law and the old distinctions, very imprecise as they were, between what was capital and what was income still stay with us and we will be litigating them for the next ten years, or until we get tax reform again. The only difference is that rather than fighting about no tax versus full tax we are now talking about half tax versus full tax. So the differential has been reduced.

Another aspect which was raised very briefly this morning is the possibility that certain things may be exempt.

Senator Connolly: Do you mind my interrupting, Mr. Scace? On the last point, have you any suggestion to make which would clarify the position that you criticize? I take it that the burden of the criticism—and it seems to me justified—is that it brings into the new law the whole of the old law on what was a capital gain and what was income.

Mr. Scace: I am not sure that I levelled that as a criticism, Senator Connolly. As a lawyer I think I am probably quite happy about it.

Senator Lang: Senator Connolly should be, too.

Mr. Scace: The cure for it seems to be unpalatable, however. That is to say, that any gain, from whatever source, should be considered income and fully taxed is not too palatable. As soon as you want to give some type of income—and here it is capital gains—preferential treatment, you have to distinguish, and this is probably as good a way as any. If you are complaining, you may be complaining of the imprecision of the old jurisprudence, but I have no cure apart from that.

Senator Cook: The practical effect of this is that in the future we will all be pleading capital gains.

The Chairman: Yes, in other words, you would try to identify whatever you have as a capital gain.

Senator Cook: Otherwise you pay the full tax. In the future we will be pleading capital gains whereas at the moment we are saying we do not want to plead capital gains.

The Chairman: You still measure the capital gain or not under whatever the jurisprudence is now.

Senator Connolly: All the old decisions are still going to be brought to bear.

Senator Beaubien: We just cannot get the lawyers out of business.

The Chairman: We need to do a little, you know.

Mr. Scace: Well, there is the possibility here that the national revenue may not be quite as severe as they were, in that previously they had to assess or they were not going to get any tax, whereas now they may say that if you accept the capital gains treatment they will not push you on and try to get the full inclusion. Similarly, the courts, to the extent that they do not have to follow precedent, may back away from some of the harsher decisions of previous years.

In order to have a capital gain, apart from what we have just talked about, you must have a disposition. It seems to us that there are certain types of receipts which are realized without a disposition. Earlier this morning I mentioned gambling gains. Perhaps Senator Molson's idea of the Nobel Prizes or the Royal Bank awards and things of that sort would come in here.

The Chairman: And grants.

Senator Beaubien: When you say "disposition", do you mean a sale?

Mr. Scace: the word "disposition" is defined at great length. It certainly includes sales, but it includes a great many other things as well. We will come to that later.

Senator Beaubien: So long as you get rid of it somehow. That is the point.

Mr. Scace: So long as you get rid of it somehow, that is right.

The Chairman: Yes.

Mr. Scace: That is what a capital gain is. You then go to section 38 which defines the taxable capital gain as being one-half of the amount and the allowable capital loss as being one-half of any loss.

In addition there are certain items of property which are excluded from the capital gains provisions. There are three of these. The first one is eligible capital property. We will be talking about that later today or tomorrow. Basically, eligible capital property is goodwill or other nothings. I think you are all aware that there was a class of expenses which were not currently deductible and were not entitled to capital cost allowance treatment and they became known as nothings. They are now called eligible capital property and get special treatment.

The second exclusion from capital gains are amounts receivable for resource properties, and the third one is life insurance policies. Capital gains tax will not apply to life insurance policies.

In the case of a capital loss, those three exclusions are equally applicable, and in addition you cannot get a capital loss from the sale of depreciable property. That is explicable because you already have in the act and will have in the bill provisions whereby if you sell depreciable property for less than your undepreciated capital cost you will get a terminal loss and therefore there is no need for capital loss treatment of depreciable property.

The Chairman: Terminal loss means that the sale would have to exhaust that class in order that you might have a terminal loss.

Mr. Scace: That is right. Let us take one asset—the senator is being more sophisticated than I am in talking about classes—but if you just take one item or if you purchase a depreciable asset for $100, then you are entitled on a depreciable asset to take capital cost allowance on it, at a specific rate. Let us say it was a building, then you would be entitled to 5 per cent per year on a diminishing balance basis. So, after a number of years you could get down to where you had taken $50 in capital cost allowance and at that point in time the remaining balance of $50 which is called undepreciated capital cost—the remaining amount from which you can take capital cost—or is the UCC if we can use a short form.

If you then sell that asset for less than the undepreciated capital cost, you are entitled to what is called a terminal loss. Let us say you sold it for $20, you would have a terminal loss of $30, the rationale being that the depreciation rates or the capital cost allowance rates were not sufficiently generous to allow for the depreciation of the asset and therefore you would get a write-off when you actually sell it.

Senator Connolly: In that case when you sell it for $20 you have taken a $30 loss.

Mr. Scace: Yes.

The Chairman: Which you deduct.

Senator Connolly: Then that $30 is an ACL, is it?

Mr. Scace: No; as I say under capital cost treatment it is not an allowable capital cost because you have specific provisions dealing with losses on depreciable property called terminal losses where you sell for less than the undepreciated capital cost.

The Chairman: It is deducted from what might otherwise be income.

Mr. Scace: Yes.

Senator Connolly: That is right. You get credit for it.

Mr. Scace: That is right.

Senator Connolly: Do you mind if I use an example here. Let us suppose for the sake of argument that you buy a piece of equipment such as a computer where the time over which you depreciate it is 15 years and, in fact, it becomes obsolete in 5 years. Now let us say that following your example you have written it down to the $50 level from $100. Then it is sold for scrap. I take it then that the owner of that equipment who had to sell it for scrap does not complain about the fact that the depreciable life of that equipment was too short. He simply gets the benefit at the end in the form of a terminal loss.

The Chairman: The terminal loss provision scales up his write-off.

Mr. Scace: This works very fairly, and there is no complaint. The exemption from capital losses for depreciable property is quite legitimate and quite fair because of this rationale.

Senator Lang: This is the same as the law is now.

Mr. Scace: That is right. The only problem is that the terminal loss provisions are really found in the existing regulations and as I think you are very much aware we have not seen the regulations under the new bill, so we can only assume that they will be the same in this particular area. All indications are to that effect.

Now, in computing the gain, there is really no problem here. The computation of the gain is found in section 40 (1) of the bill, and basically what you do to calculate it is to take the proceeds of the disposition—that is a defined term—and in this case we can say you take your sale price and substract from that your adjusted cost base plus your sales expenses.

Let me give you an example. If I have an asset which costs me $50 and I sell it for $100. Under the new bill you can say the $50 is my cost. However, we will complicate it in a few minutes. They refer to the adjusted cost base which is a defined term and certain amounts must be added to and substracted from your original cost to come up with the adjusted cost base. So, here is your sale price minus your adjusted cost base minus the expenses of sale, and let us say that those expenses amount to $5. This would give you a net capital gain of $45. To calculate your capital loss, you just reverse that procedure. If we take it here where you come up with a gain of $45, of course the taxable capital gain is only one-half of that.

Senator Lang: So we do not need recapture any more.

Mr. Scace: Yes, we will need recapture and we will still have it.

The Chairman: You can have recapture and capital gain.

Mr. Scace: We are going to have recapture.

Senator Lang: One on top of the other?

Mr. Scace: That is right.

Senator Molson: We are going to have everything.

The Chairman: From soup to nuts.

Mr. Scace: Now, moving along, here you have an asset which you purchased for $100 as original cost, and you depreciate it by $50 of capital cost allowance over the years, and you then have an undepreciated capital cost of $50.

You then go to the reverse of Senator Connolly's example in that we have an asset which has appreciated. In fact, you would wonder why it would be depreciable property. In any event you sell it for $160 and in that case the difference between $50 and $100 will be recaptured and will be includable in income in full. The difference between $100 and $160 is $60 which will be a capital gain, but it will be entitled to preferential treatment and only half of it will be included in income so you will pay on $50 plus $30 which is $80.

Senator Connolly: It is very simple when you have an explanation, but try to read that in the act.

The Chairman: It may now be more intelligible when you read the act.

Mr. Scace: I think that is all we can hope to do. You have to study these provisions on your own, but if someone gives you an indication before you start of what they are trying to say it makes it a little easier.

The Chairman: You can only tell the judge also, but it helps.

Senator Lang: Are we certain that this act does exclude the difference between $50 and $100 from capital gains tax?

Mr. Scace: I am satisfied of that. It excludes it from capital gains tax because capital gain is measured as the difference between selling price or proceeds of disposition and adjusted cost base.

Senator Lang: So we are back at Section 3?

Mr. Scace: Yes. To get the doubling up which I think you have in mind the definition would have to say undepreciated capital cost.

Senator Carter: Is the present law different from that?

Mr. Scace: The present law is exactly the same for the $50.

Senator Carter: But the capital gains is contained in the new law.

Senator Flynn: There is no change in what would otherwise be considered as capital gains but is presently taxable. Is this based on practice rather than the principle of the present legislation?

Mr. Scace: There is nothing in the present legislation. Section 3 of the current act provides that tax is paid on income and, apart from certain specific items, it is not defined. We can only go to the cases in the jurisprudence, of which there are literally thousands.

Senator Flynn: Your conclusion is that the new text does not change this principle, even if it is implied in the present legislation?

Mr. Scace: If I understand your question correctly, yes.

Senator Flynn: I mean, it is not explicit that this kind of capital gain should be considered as income; the sale of houses is considered as having created an income, rather than a capital gain?

Mr. Scace: That is right.

Senator Flynn: And it goes on in the same way, which is why it will be taxed in its entirety and not subject to the 50 per cent deduction provided for the new capital gains taxed under the new legislation?

Senator Beaubien: There is a big difference between the present act and this, with depreciation allowance of $60 and a sale for $160, a full tax of $110 is paid today.

Senator Flynn: Not necessarily.

The Chairman: No, if you are in a business, all of it is income; if it is a capital gain transaction under our present law, then the capital gain part of it would not be taxable.

Senator Beaubien: If I own a building for which I paid $100,000 and depreciate it over the years by $50,000 and sell it for $160,000, which is the example there—

The Chairman: The recapture is only the depreciation which comes into the income.

Mr. Scace: You bring $50 in; the $60 would be a capital gain which is not taxable. The rationale is the same now, except now half of the $60 becomes taxable.

Senator Beaubien: I see; I was wrong.

Senator Flynn: In other words, they do not want you to gain by having the new capital gains tax.

Mr. Scace: You will be worse off because of the capital gains tax system; there is no question about that.

Senator Walker: In other words, the actual capital gain is taxed at 50 per cent but the recaptured depreciation is taxed at 100 per cent.

Mr. Scace: That is right. There are a great many special rules in section 40. I do not intend to go through each and every one in detail. I would like to draw your attention to one or two of them, however. The first is that where the taxpayer is a corporation he cannot claim a capital loss, or an allowable capital loss, where the property is disposed of by the corporation to either a parent company, a subsidiary company or a sister corporation, if there is no loss on such a transfer.

Another rule is that no loss or gain results from the disposition of a chance to win a prize or a right to receive an amount as a prize in connection with a lottery. You might note that there is no definition of a lottery in the bill; I am not sure what a lottery is, to be honest about it. It might be helpful if such a definition were given.

The Chairman: Except that defining very often limits. If there the word "lottery" was undefined it would take on whatever the custom of the trade has been, and might have a broader meaning than would be written in by definition. We must think of that.

Senator Molson: I note the term "lottery scheme" is used, which sounds rather more sinister than just a lottery.

The Chairman: The word lottery would be broadened by stating any scheme which approximates a lottery.

Under paragraph (*e*) where the taxpayer is a corporation and cannot create a capital loss, how does that relate to the fair market value? If a corporation sold to another corporation that it controlled at the fair market value at the time of the sale and the fair market value was less than the cost?

Mr. Scace: So that even by doing it at fair market value there was a real loss?

The Chairman: Yes.

Mr. Scace: I think Section 40(2)(*e*) prevents the deduction of that loss.

The Chairman: That is right; certainly under the law as it is at the present time it was always safe to proceed on the basis of the fair market value.

Mr. Scace: That is right and we will come into this later, senator. However, one of the problems as we see it under the new bill is that in non-arm's length transactions the scope permitted for transferring assets, which may have very valid and legitimate business reasons, is very much diminished because they have to pass at fair market value. There are some exclusions, but they are much curtailed under the new act, so that will be a problem.

Senator Lang: Does "controlled" have the same definition as under the old act?

Mr. Scace: Yes sir; 50 per cent, plus one.

Another concept contained in Section 40(2)(*g*) is that of a superficial loss. It provides that there will be no deduction. That type of loss is defined in Section 54(i) as the loss from a disposition of a property in any case where the same or identical property—that "same or identical property" becomes "substituted property"—was acquired during the period beginning 30 days before the disposition and ending 30 days after the disposition by the taxpayer, his spouse or a corporation controlled by the taxpayer and at the end of the period the substituted property was still owned.

The Chairman: Does this situation not prevail in the United States, where tax losses are created at the end of December by sales and the property is repurchased in January?

Mr. Scace: That is correct. To take a very simple example, suppose I own 10 shares of ABC Company and my purchase price was $100, and the market has declined to $50. On the other hand, I have another asset which behaves in completely the reverse way. I have a purchase price again of $100 but a current value of $150. For good business reasons I sell this asset and make a $50 capital gain and a $25 taxable capital gain—over here I am in a loss position. I do not want to pay tax on the $25 gain, and I do not really want to get rid of that stock—I want to keep it in the family—so what I can do is transfer this asset to my wife at $50 and that would show as a $50 capital loss and an allowable capital loss of $25.

The Chairman: Do you not mean an allowable taxable gain?

Mr. Scace: No, I have a loss on this side which, apart from the superficial loss rules, would be an offset and I would not pay any tax on that and this asset is still in the family.

The Chairman: That is an allowable taxable gain?

Mr. Scace: No, I had a loss on this side.

Senator Beaubien: But you would not get it back.

Mr. Scace: That is a wise observation. It is generally true of my wife.

Senator Beaubien: It would be a loss all right.

The Chairman: That is a personal loss.

Senator Connolly: So you neutralize the tax?

Mr. Scace: That is what you would be intending to do, but you cannot get a deduction for a superficial loss and, by the definition, that would include a sale to your wife. You do not get that $25 allowable capital loss. You are stuck with the $25 capital gain.

Senator Connolly: Even if you do not repurchase from your wife you do not get it?

Mr. Scace: Not if she owns it at the end of the period. That is the rationale. That is not too serious in most cases because what happens is that the wife has paid $50 for it, and her adjusted cost base is increased by the amount of the loss so that, in effect, her cost base will be the $50 that she paid to her husband plus the amount of the loss which gets her back up to the $100. If she then sells it later on—a true disposition and not within the family, so to speak—for a loss she will get that loss.

Senator Walker: There is no point in doing it, then, is there?

Mr. Scace: No, there is no point with this definition. All countries imposing a capital gains tax have this type of provision. I have not done a thorough study on it, but the provision that we have in the bill is probably less severe than most other taxing statutes. For instance, you would seem to be able to avoid it possibly by selling to a child, or to a company owned by your wife.

Senator Beaubien: What would be the situation if you just sold it on the open market and bought it back on January 1?

Mr. Scace: That would be a problem too because you have this 60-day period—a 30-day period on either side. For example, if we take the day you sell it you cannot re-acquire it within a 30-day period. You are just rolling it over and they will not allow it.

Senator Beaubien: You would have to wait 31 days.

Mr. Scace: Yes, that is right, and that puts you at risk in the market.

Senator Beaubien: It is good for the broker.

Mr. Scace: These superficial loss rules will not apply in the case of an emigrating resident when a departure tax is imposed. It will not apply in the case of death; it will not apply to certain trusts and also in one or two other more specific situations.

There is a problem with the definition of a superficial loss, and it might be possible for the Senate to draw the department's attention to it. They may be aware of it, but it seems to us that you could have a problem where the saving of taxes was not an issue at all. In other words, you are just acting as a normal prudent investor or businessman.

Let us take an example. Suppose a taxpayer owns 100 shares of a company stock which he purchased at a price of $50 each, and then subsequently the market price goes up to $100, say, by December 4, and he then purchases another 100 shares at $100. He now has 100 shares which he purchased at $50 each, and another 100 shares which he purchased at $100 each. Now, assume that during December the market collapses and the price declines from $100 to $20, and on December 26, which is within this 30-day period, he sells half of his shares, namely, 100 shares, at $20—

Senator Beaubien: What a trader!

Mr. Scace: I do not know about that. It seems to me on the second transaction he has incurred a real loss of some amount. If it is his first purchase it is a real loss of at least $30, and if it is the second purchase there would be a real loss of $80. The act provides for averaging the cost, but apart from that situation he would seem to be within the definition of a superficial loss, and he would get no deduction for his loss. As we said, it is conceivable that if you sell to your wife she gets to add the amount of the loss to her purchase price, but it appears that in this particular situation he gets no deduction for his superficial loss and he cannot add it to anything either. You could get a true inequity in that particular instance.

Senator Connolly: There would be no correction for that under the draft act we now have except perhaps at the discretion of the official who would say: "This is a legitimate transaction which you have undertaken." The first example you gave was a devised operation.

The Chairman: There is one way of curing it, I suppose. If you establish a real loss, and if it is not recognized as an allowable capital loss, the act should go on to provide that in those circumstances you would be entitled to add it to your cost.

Mr. Scace: That is the intention of the legislation, Senator Hayden, but it just does not work in this one funny instance.

The Chairman: I think we should have a look at it.

Senator Cook: Just before you go on, Mr. Scace. I would like to go back to one of your earlier examples. The wife got the depreciated stock at $50 and then you worked out what she would pay. What was that again? I missed that.

Mr. Scace: The amount of the superficial loss incurred by the husband. We assumed this is an asset that he sold to his wife at a loss and the amount of his loss was $50. He has sold the property at fair market value to his wife for $50 and she has an acquisition cost of $50, but the act goes on to provide that except in this one instance which I have just given you the amount of the superficial loss—that is, the $50—can be added to the transferee's or the acquirer's cost base.

The Chairman: To the wife's cost base.

Mr. Scace: Yes, the wife's cost base in this example, so that would bring her up to a cost base of $100 which is the same as what the husband had. In other words, there is no penalty. She is put right back in the same position as her husband was in, so it is eminently fair.

Another special rule is that you cannot get a deduction for a loss from the disposition of property where the proceeds are compensation for property unlawfully taken, or compensation for property destroyed, and any amounts payable under a policy of insurance in respect of loss or destruction. Probably the most important one here is the latter. There is no loss if the proceeds of insurance are not sufficient to cover the cost of the property. In other words, you cannot get a deduction for a casualty loss on insurance. I think the Government has just said that they are not going to be the insurers for private individuals, and on that basis it is a reasonable policy decision. On the other hand, you get some hardship where it is impossible to insure property for 100 per cent coverage.

The Chairman: Which section is that?

Senator Flynn: Suppose you make a gain out of the proceeds of the insurance? Suppose you have insurance for the increased value of the asset?

Mr. Scace: That can be a capital gain.

Senator Flynn: It could be a capital gain?

Mr. Scace: Yes, sir.

Senator Flynn: The other way it would not be a capital loss.

Mr. Scace: That is right.

Senator Flynn: That seems unreasonable.

Mr. Scace: You gentlemen are more experienced than I am about insurance. I am not wholly familiar with it. I think the problem usually is that you cannot get 100 per cent insurance.

Senator Flynn: Oh yes.

Mr. Scace: It is rarely that you get insurance in excess of 100 per cent.

Senator Flynn: Oh yes, you can certainly get insurance for more than your costs.

Senator Connolly: Yes.

Senator Walker: Not your loss.

Senator Flynn: If I pay $25,000 for a house and it is worth $50,000, I can get, if not $50,000, certainly $40,000 insurance on it.

Senator Lang: I think what Mr. Scace is referring to is the case where the insurer requires that the owner act as a co-insurer.

Senator Flynn: Let us forget about that. It seems unreasonable, if I get the proceeds of an insurance policy after a fire, that there is a capital gain, because there is a deemed realization I suppose in such a case, but if I lose by the same token, because I have not enough insurance or no insurance at all, I will not be able to deduct that as a loss.

Mr. Scace: Let me just make two comments. First, if you receive more than the cost of the property—in other words, it is a capital gain—you do get an exempt roll-over if the insurance is used to buy another property. I agree with you in wondering, looking at it from the taxpayer's point of view, why there should be a capital gain with no loss. I guess it has to be looked at from the government's point of view, because they would in effect, from the tax point of view, become the insurer on every property where people fail to take out adequate insurance. I think that is what they are trying to avoid.

Senator Lang: I would think that is wrong. I do not think they become an insurer. They should have to ride with the success and with the failures of each one of us.

Senator Flynn: If I use the proceeds of the insurance policy to build a new house, am I still taxed on the increased value?

Mr. Scace: I was going to come later to the question of re-investing it, but I can do it now if you wish. If it is re-invested, you will not get taxed at that time.

Senator Flynn: But the cost of my new house will be the cost of my old house.

Mr. Scace: That is right, which is also pretty fair, I think. I seem to be defending the bill here, and I am not sure I want to be in that position.

Finally on the specific rules, you cannot get a deduction where the loss arose from the disposition of personal use property. We will tell you what personal use property is in a moment.

Now we come to specific definitions. I start off with the definition of "Proceeds of disposition". That is to be found in section 54(*h*). It is a very extensive definition. This answers one of the previous questions. It starts off as including the sale price of property that has been sold, and goes on to enumerate a number of other specific items. I think the one interesting feature of this, from a taxpayer's point of view, is that it is not an exhaustive definition. You find this throughout the bill. It uses the words "'proceeds of disposition' of property includes", and there are eight enumerated proceeds. There could be others that they have not thought about, which could still constitute proceeds of disposition. It becomes somewhat difficult in practice at times to figure out just what else might be included, apart from the enumerated items. There are some reasonably good battles over what is or is not included.

Senator Walker: I did not realize you were coming to that. Would a judgment for damages, for instance, in a tort action still be free of capital gains tax, supposing a person got a judgment of $100,000? It has been free of tax to date.

Mr. Scace: That is right. That is a good example. I had not thought about it. If you go back to my original rationale, if it is a capital gain now it will be taxed as a capital gain under the new bill if there is a disposition. If you look at the definition of "disposition"—

Senator Walker: It is very difficult to determine.

Mr. Scace: I do not know.

Senator Walker: Usually a return in a damage action is supposed to be in any event, depending on the lawyer, equal return for equal loss.

Senator Flynn: Material loss. If a house is destroyed by fire, for instance, in the case you just mentioned, through the fault of a third party, I get judgment against the third party for the appraisal value of the house. In accordance with what you said before, this would be taxable. It could be a different story if I got an amount for bodily injuries, for instance. That would not be taxable.

Senator Walker: It has always been free so far.

Mr. Scace: I think that is a fascinating question; it is an item we have not thought about at all. I think you are right and it is an exempt item.

Senator Walker: Perhaps it would be a good idea to forget about it!

The Chairman: To be subject to tax you have to read on in the definition of "Proceeds of disposition".

Mr. Scace: That is right, of disposition.

Senator Walker: It is not covered here.

Mr. Scace: Not specifically. Again it says "includes", and I do not know what that means.

Senator Beaubien: It does not exclude.

Mr. Scace: It is not exhaustive.

Senator Lang: I do not think the ordinary meaning of the words "Proceeds of disposition" would include that sort of receipt.

The Chairman: You mean, to bring it in you would have to say the damages were the proceeds of the disposition, and that is the causing of the injury to you?

Senator Lang: Yes, it is going pretty far.

Mr. E. Russell Hopkins (Law Clerk and Parliamentary Counsel): What about 54(*h*)(iii), "compensation for property destroyed"?

Senator Lang: That is the one Senator Flynn mentioned.

Mr. Scace: Senator Flynn mentioned a personal injury action, in which you would be the property destroyed, if you want to say you are property.

Senator Connolly: Your arm or leg perhaps.

Senator Walker: That would be ridiculous. You are supposed to get a damage judgment according to the damage that you personally have suffered. When you are compensated for injuries to yourself, to have to take from yourself and pay a capital gains tax on only having yourself restored to normal does not seem right, does it?

Mr. Scace: It does not seem right.

Senator Walker: Perhaps that is why it is not included. It would be unjust to include it.

Senator Flynn: Especially if any human is depreciated.

The Chairman: I think we have dealt with that now.

Mr. Scace: We have taken a look at the definition of "Proceeds of disposition". There is then a very extensive definition of a disposition. Again the word "includes" is used. The opening item says that:

> any transaction or event entitling a taxpayer to proceeds of disposition

is a disposition. They have you chasing your tail on that one. There are also a great many other things which in general would cover most commercial transactions.

There are a number of exclusions from the definition of a disposition, which are well set out in section 54(c). It does not include, for instance, the transfer of property as security for a loan. It does not include any transfer where there is no real change in the beneficial ownership. It does not include the issue of a bond, debenture by a corporation, or the issue of a share from the Treasury. All those things are excluded. But, generally, most others are caught.

While we are talking about dispositions, as defined, there are also certain deemed dispositions or deemed realizations. I referred to them very briefly in the summary.

The first one is what we call a departure tax. You find that in section 48 of the bill. Essentially, what that says is that a taxpayer, when he ceases to be a resident of Canada, is deemed to have disposed of his capital property at fair market value. In other words, the tax is imposed at that time. There is an exclusion for taxable capital gains, up to $2,500. That means you can have a total capital gain of $5,000. I will give you an example. If a man has assets worth $100,000 and the value had gone up to $200,000, and he is a resident of Canada, and decides to move to Bermuda or the Bahamas, when he gives up his Canadian residency there is a deemed realization fair market value. The difference between the $200,000 and the $100,000 would be brought into income. He can subtract $5,000 from that and gets a total capital gain of $95,000, and a taxable capital gain of $47,500.

There is also a provision, which we will talk about later on. He need not pay tax on certain assets which are called taxable Canadian property. These are specifically defined in the bill; they are more or less permanent assets in Canada. Non-residents are subject to tax on such assets. So, even though he goes to another country, he will still remain liable for Canadian capital gains tax on those assets.

Senator Walker: Supposing he decides to come back from the West Indies, as some people are hoping to do, how will he be taxed for capital gains tax? Supposing that most of the money is raised while he is in the West Indies?

Mr. Scace: When he comes in, when a person becomes a resident, there is a deemed acquisition at fair market value . . .

Senator Walker: As of that date?

Senator Burchill: To qualify, would a man have to renounce his Canadian citizenship?

Mr. Scace: No. Residency is not dependent on citizenship.

The Chairman: It is residence.

Mr. Scace: You can retain your Canadian citizenship, sir.

Senator Aird: How would they police this?

Mr. Scace: That is a real problem. What we are really talking about in policing is something other than that which is attached to Canadian properties. If you have real estate in Canada or something like that, you can get a lien on the real estate. For instance, on portfolio investments, you can have millions of dollars in portfolio investments and accrued gains, and I do not think there is any way we can police it, if somebody wants to be fraudulent or dishonest.

Senator Flynn: They would have to apprehend you were leaving the country.

Mr. Scace: That is right.

The Chairman: I think there is one way, if the transfer offices were in Canada, on your investments, and they learned about them.

Senator Flynn: You could have arranged for the transfer before leaving.

Senator Walker: You could have it in certificates.

Mr. Scace: It would be very difficult.

The Chairman: It would be very difficult, yes.

Senator Lang: It would be a question of giving up the residency.

The Chairman: You could mail the letter in Toronto, Montreal or Ottawa, and it might take that long to reach its destination.

Mr. Scace: I think this assumes that somebody wants to be honest. If anybody wants to go to the length of committing fraud, there is very little the government can do. For instance, as a resident, you could sell shares and realize a capital gain of a million dollars, and you do not have to report that until the following year. You then go out. If you want to be dishonest about it, you put the money in your pocket and leave.

Senator Flynn: There is a penalty of imprisonment for that?

Mr. Scace: There is a penalty of imprisonment, if you are in Canada.

Senator Flynn: I was thinking of when you would come back for a short visit. Can they arrest you then?

Mr. Scace: If you are going to do this kind of thing, I strongly suggest you do not come back.

Senator Walker: But you could not be extradited for that?

Mr. Scace: Other jurisdictions—and this is true of our own law—will not enforce the revenue statutes of another country. So really, under the current or existing law, you can do that with impunity.

Senator Lang: This concept must involve the imposition of some duty on a resident. For instance, if I were buying a house, would I have to find out that the person from whom I am buying it is still a resident of Canada, or something like that?

Mr. Scace: Yes, sir. This is a very difficult problem. I do not know whether we plan to touch on this. I think it is serious, but I do not know whether you want to deal with it now or later. For me, this would be quite a convenient point at which to stop.

The Chairman: If we postpone that question until we resume, this would be a good point at which to break. We will come back at 2.15 p.m., full of vim and vigour.

The committee adjourned.

Upon resuming at 2.15 p.m.

The Chairman: The hearing is resumed.

Mr. Scace: Before the adjournment we were talking about the departure tax under section 48. Two questions were raised, one before we adjourned, and then another one just before we recommenced.

I will deal with the latter one first. If I can draw your attention to section 48(2), the question was whether there was any provision for employees of multinational companies who get amoved in and out of the country? A person may be a resident in Canada for awhile and may be transferred to another country for a short period of years and then return to Canada. I gather some of the briefs on the White Paper were concerned about that.

Section 48(2) is designed to cover that situation. It provides that if a taxpayer who is an individual so elects in a prescribed manner and within a prescribed time, and if he furnishes the minister with security of some sort or a charge on property, or somebody guarantees the potential tax, the departure tax will not apply to him. It goes on to say that he is really deemed to be a resident throughout his period of absence. I think that aspect of it is covered.

Senator Haig: If a bank, a trust company or a multinational company sends a man away for a period of three to five years, they would arrange his tax position with the department.

The Chairman: He is the one who has to make the election under this section.

Senator Beaubien: What happens if he changes his mind?

The Chairman: Well, the security is there for that purpose. He has to furnish the security.

Mr. Scace: There is a provision that says that you can do it by way of guarantee from another person. The company could guarantee it. Mr. Smith whispered in my ear, "What happens if the employee leaves the company when he is a non-resident? How does the company go after him?" You would probably have a law suit.

Senator Beaubien: The company would put up the guarantee.

The Chairman: They would have a problem in trying to pursue him in another jurisdiction.

Mr. Scace: The other question was on non-residence and capital gains tax. The taxing or the charging section is section 2(3). It says that a non-resident person who has disposed of taxable Canadian property is liable for capital gains tax.

Taxable Canadian properties are then defined in section 115(1)(*b*). There is a long list. It includes real property situated in Canada, or an interest therein. It refers to any other capital property used in carrying on a business in Canada, one share of capital stock in a private corporation and more than a 25 per cent interest in any other kind of company.

There are certain other things too. The way this is to be enforced creates a problem. If you assume that you have a non-resident vendor who is selling taxable Canadian property, section 116 is designed to enforce that.

If I can paraphrase almost two pages of the bill, as we understand them, firstly it is envisaged that a non-resident vendor intending to sell taxable Canadian property, say real estate, will write to the department giving a description of the property, the intended proceeds, the date of disposition, the cost of the property, and the amount of the gain, and put up either the tax or some security for the tax. If he does that, the department will issue a piece of paper called a "certificate limit." Any time a certificate limit has been issued the parties may go ahead and close their deal and there will be no problem.

Senator Haig: That applies to personal plus corporation?

Mr. Scace: That is right, it would.

Senator Sullivan: And real estate?

Mr. Scace: It would certainly apply to real estate and to shares of private corporations. If he does not tell about the intended sale, a subsequent provision says that once a sale has taken place within 10 days, he must give them some kind of information and pay the tax.

We then come down to the last subsection which is section 116(5). Essentially it says that where a certificate limit has not been issued the Canadian purchaser resident is liable for 15 per cent of the amount of the proceeds in excess of the certificate limit.

Senator Haig: Where does he get the certificate limit?

Mr. Scace: For example, say a non-resident has a property which cost him $100 and he proposes to sell it to a Canadian purchaser for $200. He would write into the department and they would issue him a certificate limit with respect to the $100 gain. If as the transaction eventually went through the sale price turned out to be $250

instead of $200 as in our example, there would be a gain of $150 with $100 cost, and section 116(5) says that the Canadian purchaser is liable for 15 per cent of the excess, which, in our example, is $50.

But as we read section 116(5) it seems to say that if the non-resident does not obtain the certificate limit, in other words, if he does not come forward and nothing is done, then the Canadian purchaser could be liable to pay tax equal to 15 per cent of the total purchase price, namely, $250 as in our example.

Senator Connolly: You mean just the excess?

Mr. Scace: I think it is possible to read it—

Senator Beaubien: You can read it either way.

Mr. Scace: You can read it that if no certificate limit is obtained, then section 116(5) does not apply. However, we have talked about this matter on many occasions with a number of people, and a good many of them agree with the interpretation I am giving you.

Senator Connolly: What do you think the intention is? Is the intention merely to tax the $150 as in the example?

Mr. Scace: When they set up this section 116(5) I do not think they ever thought that it could apply to the whole purchase price. I think it is one of those inadvertent situations.

Senator Walker: That is a terrible penalty for an innocent person to pay.

Mr. Scace: Yes, it is. The real problem is, if you are acting for a Canadian purchaser of real estate or shares, how do you determine the residence of the vendor? You could take an affidavit or receive representations, warranties and covenants, but if the man is fraudulent those things are not worth the paper they are printed on. Alternatively, you could escrow the funds. I am not a real estate lawyer, but it seems to me that if you were to go to the registry office and say that you were going to close but were intending to withhold 15 per cent of the purchase price in case the vendor was a non-resident, then you just would not have a deal.

Senator Connolly: No, they would not give you the deed.

Mr. Scace: It would seem that you would almost have to go to the Department of National Revenue on almost every transaction, unless you are sure.

Senator Connolly: In other words, anybody closing a real estate transaction has an additional search with the Department of National Revenue before he can advise his client that he can close. The client on his part may very well be liable for 15 per cent of the whole purchase price under the interpretation we have here.

Senator Haig: Unless, of course, the vendor has asked for a certificate limit.

Mr. Scace: If you have an honest vendor, or one who is going to comply with the act and has either got a certificate or, on that second branch, has gone and paid the tax, then there is no problem. Supposedly, in most situations, that is what will happen. However, if you are looking at the bad situation, it could be very serious. Naturally, from the point of view of practice you obviously have to guard against the bad situations.

The Chairman: I think there would be another requisition on title, and that requisition would ask for evidence that the vendor is a resident of Canada.

Senator Flynn: You know, this may be pushing quite far into the province of civil rights. I realize this is ancilliary, but this is getting mixed up into the problem of property rights.

Senator Connolly: That is right.

Senator Walker: This is really rough.

Senator Flynn: It is very serious.

Senator Connolly: It is just as much a factor as a sheriff's seizure. When you get a sheriff's certificate to the effect that a man has no executions against him you have to have one drawn from the registry.

The Chairman: What is it that you may accept as satisfying you, reasonably, that this man is a resident? What do you accept?

Mr. Scace: I think they could amend the section to make it clear so that it exempted a Canadian purchaser who exercised due care and diligence. It would then become a question of fact that he had. I expect representations, warranties, affidavits and whatever you want would suffice. If you have been careful about it, that should suffice.

Senator Connolly: Your success would depend very largely on where the onus lay. If the onus lay on the department to prove that the vendor was non-resident, that would be one thing, but if the onus were on the purchaser to prove that the vendor was a resident, then he might be up against a difficulty.

The Chairman: What you are interested in knowing, really, is whether the vendor is a resident. If he is a resident there are no penalties and no complications.

Senator Molson: Mr. Chairman, I find this very depressing. The number of transactions that can occur in any given period in this country will be reduced enormously. I am not sure whether any advantage will go to the public or to the government or to anybody as a result of this legislation. It just seems to me that everything we run into is so complex that the ordinary man with a camp in the country or something of that sort, who tries to sell it to somebody, will find it exceedingly difficult. By the time he finishes getting his certificate and getting in touch with the department, finding out this and finding out that, it will just have made his life extraordinarly difficult.

Senator Benidickson: He will probably just burn his camp for the insurance money.

Senator Molson: He might just do that.

Senator Walker: There would seem to be no relief at all from this. It is an enormous penalty.

The Chairman: The answer might be if he is able to satisfy himself.

Senator Walker: But he cannot satisfy himself.

The Chairman: On what Mr. Scace has suggested, he can.

Senator Walker: If you meet a vendor you do not necessarily know what his situation is. He may assure you that he is a resident. He may give you affidavits and you may get affidavits from his bank and he may still turn out to be a non-resident. If that happens you are it. It does not matter what steps you have taken.

The Chairman: That is right, and that is why I put the question earlier: what can you get that will satisfy this problem and upon which you can properly act.

Senator Walker: That is right. I thought that was a good question and that it should be incorporated.

The Chairman: I have made a note here and it will also be in the record of today's proceedings.

Senator Lang: Mr. Chairman, I assume that a non-resident who gets a certificate limit pays the tax in order to get that certificate limit.

The Chairman: Or he puts out a security for the tax.

Senator Lang: In other words, he has to put out this tax before his deal is closed.

The Chairman: No, he can put out the security. He does not have to pay.

Senator Beaubien: He gets the bank to guarantee that, if it is sold, he will pay it.

The Chairman: If the deal does not go through, then there is nothing.

Senator Beaubien: He pays the Receiver General of Canada, it says.

Senator Haig: The question I should like to raise is what is a resident or a non-resident? For example, what is the category of the chap who goes out to work for a multinational corporation for three or five years? Is he a permanent non-resident? And then if a real estate transaction goes through, what are you going to do with respect to him?

Senator Lang: If I may come back to my point, Mr. Chairman, as I see the mechanics of it, the non-resident would pay to the Receiver General of Canada the tax or the security for the tax. If the transaction thereafter does not close, that non-resident would have to go back to the department to get his money. In my experience it would be about one year later that he would get it.

Senator Haig: Two years.

Senator Flynn: You are an optimist.

Senator Beaubien: Is there any way we could put the onus on the department whereby the purchaser could go to the department and indicate that he is ready to buy and ask them to inform him whether the vendor is a resident or a non-resident.

Senator Flynn: This morning we were speaking about the difficulties of enforcing the payment of the tax on the Canadian who decides to live elsewhere. The Government has not provided any remedy for that situation. But in this case they have found some kind of remedy by saying that the purchaser will be liable. To me that is nonsensical. It is penalizing someone who has nothing to do with the problem of payment of the tax. If they have not been able to find a way to enforce another provision, that does not justify trying to enforce it by forcing someone who is not responsible. You cannot find a reasonable solution that way. It seems to me completely unethical.

The Chairman: But it is taking the easy course.

Senator Flynn: I agree that it is. Of course it is. Nevertheless, I think we should object strongly to that.

The Chairman: Non-residence here, in this case, includes just what it says—a non-resident. It does not include only a person who decides to depart from Canada. It covers a person who may at all times have been a non-resident.

Senator Lang: Is it not an underlying concept of withholding tax that the imposition of liability to withhold is placed on the person who has control over the money flow? I think of the employer or the company paying dividends. In this case you are imposing a liability on an entirely different class of person to withhold a tax.

Senator Beaubien: The fellow who pays the money out.

The Chairman: The theory behind it is to impose a liability on somebody who is within the jurisdiction.

Senator Lang: Yes, but it is a withholding tax, really.

Senator Flynn: Would it be constitutional to provide that in any case the purchaser would be entitled to withhold 15 per cent of the price for, say, three years in order to give time to the department to find out whether the vendor is a resident or not?

The Chairman: The answer to that question is that we can make any suggestions to remedy that situation that we think are feasible.

Senator Flynn: We could make it even if it is absurd to show the absurdity of the solution provided herein.

Senator Aird: Mr. Chairman, I should like to ask the witnesses on this specific point if there has been any discussion in the seminars or have they heard any suggestions that would relate to the situation of companies inserting themselves into the middle of such a transaction and you could have an indemnification coming forward? It seems to me that this is perhaps one of the ways that this might be cured. It might be costing a little more money and might be creating a whole new area of business but it is a way of protecting the purchaser.

The Chairman: You are speaking of something in the nature of a company that might guarantee title?

Senator Laird: That is right.

The Chairman: Then you might find a company that would guarantee residence.

Senator Flynn: But that is in favour of the Government. That is entirely a new concept.

The Chairman: That is right.

Senator Flynn: And I do not agree with it at all. I think the Government should take its own risk and settle its own problems, and not ask a purchaser for a guarantee to pay the tax of a third party who might commit fraud.

The Chairman: This arises where you have a capital gains tax and everybody who makes a capital gain, with certain exceptions, is subject to pay tax no matter where he may live.

Senator Flynn: I know, but let them run after him if they want to do it. It is their own business and should not be the problem of the purchaser.

Mr. Scace: There is an interesting twist to this, Mr. Chairman, and to put it into perspective, most of our tax treaties now exempt capital gains, so what we are talking about right at this moment would only apply to non-residents of most countries with whom we do not have treaties. Of course, that is not entirely true because I do not think the Japan-Canada Convention exempts capital gains. I suppose Mr. Benson is going to ammend all of our treaties so that they will permit taxation of capital gains.

But to take a situation which you might have now—and I give you this more or less tongue in cheek—say you have a resident of the United States selling taxable Canadian property to a Canadian purchaser. Under the present treaty there is no capital gains tax on the US vendor but it is conceivable that you might be able to read section 116 as saying that there is an additional tax on the Canadian purchaser even though the vendor was not liable for tax. It seems to me that is possible.

Senator Walker: But there would be no object in that.

Mr. Scace: Well, I cannot see it happening, but technically it is possible.

The Chairman: Well, I think we have it ticked.

Mr. Scace: If we have the same amount of trouble with the other deemed realizations as we had with that one, we will be here for quite some time.

The next one is the deemed realization on gifts. Basically when you make a gift *inter vivos* there is a deemed realization at fair market value. Let me give you an example; if I own a property which I bought for $100 and it is now worth $200 and I give it to my son, there is a realization of $100 capital gain and a $50 taxable capital gain.

Senator Benidickson: Payable by you?

Senator Flynn: Or by your son if you are a non-resident.

Mr. Scace: This is section 69. Similarly there is a deemed realization on death. With the abolition of estate tax, the substitution for that is a deemed realization on death under section 70 (5). Now basically so far as that deemed realization is concerned, if you are dealing with non-depreciable capital property, the deemed realization is at fair market value. If you are dealing with depreciable capital property, the deemed realization is at what has come to be called the midway point. That is the undepreciated capital cost plus one-half of the difference between fair market value and undepreciated capital cost. Let me give you two quick examples.

If I have non-depreciable capital property and I have a cost of $100 and at my death it is worth $200, it is deemed to be realized at the fair market value of $200 and there will be a $100 capital gain and a $50 taxable capital gain. In the case of depreciable capital property, say I bought for $100 and I depreciated it down to $50 and on my death it is worth $200, the midway point rule says that the deemed proceeds are undepreciated capital cost, which is $50 here, plus one-half of the difference between fair market value at death which is $200 and the $50. That differential is $150, and one-half of that is $75. So the deemed realization price is $125. Now in this example, if we can just take it out, we have $100 plus $50 UCC and a deemed realization price of $125, we get a recapture of $50 plus a capital gain of $25 and half of that of course would be $12.50. It becomes a little more complicated where you have a number of different assets in a class, but essentially that is the rule.

Senator Benidickson: Is this under the present law?

Mr. Scace: No, sir, this is under the proposed bill.

The Chairman: You have two elements of taxation there.

Senator Flynn: Would the $50 be taxable in its entirety here?

Mr. Scace: That is right.

Senator Flynn: As if the law were not changed?

Mr. Scace: So then we have the situation that this $50 recapture is fully included in income while this $25 is a capital gain and therefore you only recognize one-half, so therefore it is half an income.

Senator Beaubien: Let us take the case of a man who died a few days after the value date, whenever that might be, then they would only recapture part of the captured depreciation. Would that not be the case?

Mr. Scace: We are going to get complicated here.

Senator Haig: What have we been doing all afternoon?

Mr. Scace: For example, take an item of non-depreciable capital property with a valuation day value of $100. Who knows when valuation day is? If it is December 31 and the owner died on January 1, it is unlikely that the fair market value would be much more than $100, so he has no problem.

Unfortunately, you get a different situation. Over here we have a cost of $100 over a undepreciated capital cost of $50; the asset has not gone up in value. In that case the midway point rule would say redeemed realization $50, plus the difference between fair market value and undepreciated capital cost, which is $100 minus $50, or $50. Half of that is $25, so your realization price would be $75, which would result in $25 of recapture.

The interesting feature of this is, if you look at section 20(6)(*d*) of the current act, on death there is no recapture of capital cost allowance. The depreciable property goes to the beneficiary, if passed by will, at fair market value. He acquires at the fair market value and there is no recapture to the testator.

Senator Benidickson: That is why I asked the question as to the difference between the two.

Mr. Scace: You can say we are going to change the rules for the future; that would be fine, but I have given what could be a concrete example, what you are getting is retroactive recapture that you would not have had if you died before the system came in. If you died on December 31 you have estate tax, but you have no recapture. However, if you died on January 1, assuming those are the relevant dates, you would have retroactive recapture.

Senator Benidickson: Plus the fact that you may have provincial taxes by that time.

Mr. Scace: We have them in Ontario now. For those people who receive tax advice, there are ways of avoiding this retroactive recapture, but it is still there.

Senator Beaubien: Everybody would just have cash and when they die it would not have gone up or down.

The Chairman: Have you any suggestions?

Mr. Scace: I can tell you how to avoid it.

The Chairman: I know how to avoid it; you just do not have any property. That is a simple way of avoiding it, but the idea of this complication is because they want to get at two taxes, bring in recapture at full marginal rates and bring in capital gain and the capital gains tax.

Senator Walker: That is a double tax.

The Chairman: There are two taxes; we had this this morning with some other items. Perhaps they should draw a line on a time basis and recapture to the extent that depreciation has been taken before the date of death should remain where it is now; that is, it is nowhere. If I am disposing of property after this law comes in they should only deal with whatever depreciation has been taken in that period and against whatever my income might be. That would be subject to recapture and could well enter into this calculation. They should draw a line, and not go back into what I have accumulated in the way of write-offs quite innocently and subsequently find the position where they are taxable, which they are not at

Senator Benidickson: That is to avoid this retroactivity?

The Chairman: Yes; at least, that is my feeling at the moment.

Senator Walker: And that goes back indefinitely.

Mr. Scace: Let me try to put it into perspective. It has reference only to depreciable property, and I can only guess that most of it will have come down in value. Therefore perhaps the example is a little unrealistic, in that if you have an undepreciated capital cost of $50, that may come pretty close to the fair market value, in which case there is no problem. Certainly to the extent you are in the position suggested by Senator Connolly this morning, where the asset may have gone up in value—and I guess there may be quite a few examples—you would encounter this retroactive recapture.

Senator Benidickson: Perhaps the property has gone down in real market value at the time of the death but, on the other hand, it may not have done so, because of the inevitable inflation that we have been experiencing over such a long period. A property that normally would have gone into disrepair, or become not as attractive as a new property, has a market value due only to inflation, so you are taxing inflation.

The Chairman: You are arguing two ways. If there is not much of this occuring then it is certainly scraping the bottom of the barrel to try to deal specifically with it; if there is much of this, then the question is whether it is fair and equitable to deal with it in this manner.

I think perhaps we would have to take the latter course in deciding if there is anything we can do to catch that situation, but it does appear to be something that we should have a good look at. We are accumulating a few already.

Senator Macnaughton: The thing to do is not die.

The Chairman: I do not suppose you can do as is done here, where a deemed realization is made; you cannot be deemed to be still alive.

Senator Walker: Do it ahead of time, and get it settled up.

Senator Carter: Do you have to furnish proof?

Mr. Scace: The other side of the deemed realizations for gifts and death is that the transferee, or the person acquiring, obtains a cost base equal to the realization price. With non-depreciable property, if the cost was $100 to the deceased, and the fair market value at death is $200, then that is the deemed realization price and that $200 becomes the cost base to the beneficiary.

Similarly with the midway point rule, it is the calculated proceeds. I might say, if you have a situation with depreciable capital property where the fair market value is less than undepreciated capital cost, then the rule is reversed. Fair market value is the base plus one-half of the difference between undepreciated capital cost and fair market value. However, that really does not cure the problem.

The Chairman: Is there an allowable capital loss for that circumstance?

Mr. Scace: You should get a terminal loss, sir, yes.

Going on to something that really gets extremely complex, and I do not know how extensively we can deal with it, we start off by saying that when you calculate a capital gain essentially it is the difference between your proceeds and your adjusted cost base. The adjusted cost base is a defined term, and it is found in section 54(a)(i) wherein it states:

> where the property is depreciable property of the taxpayer, the capital cost to him of the property as of that time, and in any other case, the cost to the taxpayer of the property adjusted, as of that time, in accordance with section 53,—

So that with depreciable property there is no problem. With none depreciable property it is the cost as adjusted by section 53. If we just go on to the concluding words in the definition:

—except that in no case shall the adjusted cost base of any property at the time of its disposition by the taxpayer be less than nil;—

We will come back to those words in a minute. That is adjusted cost base, and the problems come with the adjustments to it, and you have to then turn to section 53. Section 53(1) contains a number of additions to the cost base. They go on for two and one-half pages with the subtractions. I only want to give you a few of the additions and subtractions, and I will try to do it briefly, if I can.

To understand the first one we have to go to section 40(3). Section 40(3) says that where you have a cost of property, and by section 53(2) if the subtractions from the cost take you below zero the amount that you go below zero is a gain. It might be better if I showed you that one on the board. Let us say you have a cost of property of $100. Section 53(2) states that you have to adjust that cost by subtracting $150 which results in a negative amount of $50, and that minus $50 is itself a capital gain.

The most likely way that this could result is where corporations have distributed dividends out of their 1971 surplus. As you probably know, the tax treatment of surplus in existence in a company at the time of implementation of the bill gets reasonably favourable tax treatment. It can be taken out at a minimal tax cost, but it comes out in the form of a non-taxable dividend, so that when the shareholder receives it he pays no tax on it, but he must reduce the cost base of his shares by the amount of the dividend. In other words, you could own shares in a company and receive $150 in non-taxable dividends out of the 1971 surplus, or the surplus in existence upon implementation day, which would reduce you to a negative and that will become a capital gain.

Senator Lang: I have to go home. I have to get a company out of existence pretty quickly.

Mr. Scace: The first addition to the cost base is the amount of that gain. It states in section 53(1)(*a*) that you add that negative as a plus to the cost base. I am not sure what you add the negative to. Do you add it to the minus $50 to come out at zero, or do you start at zero to come out at a plus $50 as your cost base?

In the definition of adjusted cost base it states that in no case can the adjusted cost base at the time of disposition be less than nil. On the other hand, at this point in time you really do not have a disposition, so I think the correct result is that you add the $50 to the minus $50 and you come out at zero.

Senator Benidickson: Certainly that should be marked as something we should inquire about when we get the minister or his representative here.

Senator Sullivan: The trouble is he will not know.

Senator Beaubien: And he may change his mind afterwards.

Mr. Scace: There are a number of other additions which you must make to the cost base. These are generally beneficial to the taxpayer. These are certain types of dividends, and certain capital contributions made to a company. Mr. Smith will be talking about two areas of the law—partnerships and international income—at some time. Very briefly, foreign accrual property income must be added to the cost base and similarly all partnership income must be added to the cost base, but you get a corresponding reduction when the income of the partnership is actually distributed.

Another aspect of this which we dealt with this morning is the superficial loss question. You will recall that when you get a superficial loss the transferee can add the amount of the superficial loss to the cost base, but I suggest we still have that gap that we mentioned this morning.

Still another aspect that becomes quite important, and I suspect you are going to get some briefs on it so you might want to take a serious look at it, arises from section 18(2). Section 18(2) disallows the deduction of interest of property taxes from other income with respect to vacant land.

To the extent that interest and property taxes on vacant land are disallowed they can be added to the cost base of the land, so you get a deferral of those taxes until you sell the property. On the other hand, a deferral of a deduction is a tax loss. You are paying taxes sooner rather than later and that is a disadvantage. I might say right here that where I think you are going to get a lot of queries in the briefs in relation to the exclusions under section 18(2).

That section does not apply apparently where land is included in the inventory of a business carried on by the taxpayer, or where it is otherwise used in or held in the course of carrying on a business, or held primarily for the purpose of gaining or producing income from the land. I can read those exclusions any number of times, and they do not become any clearer on subsequent readings. I have seen some correspondence with the department in which they come up with interpretations of the exclusions that I would not have made, and I think you are going to get a lot of discussion over the particular operation of section 18. In any event, for present purposes the only reason for mentioning it is that to the extent that the deduction is deferred you add it to the cost base of the property.

You then go on to section 53(2) deductions from the cost base, and I have already mentioned what is perhaps the main one, namely, dividends in the form of non-taxable dividends out of the 1971 corporate surplus.

Senator Benidickson: That means accumulated surplus up to 1971?

Mr. Scace: That is right, sir. It is technically defined, and we will get into it tomorrow. Currently under the existing act dividends between two Canadian companies are tax free. Inter-corporate dividends are tax free. However, if one Canadian company acquires the shares of another Canadian company the surplus on hand as of the end of the prior fiscal year is designated, and if a dividend is paid out of a designated surplus the inter-corporate exemption is lost. Essentially the law will be the same under the new bill. However, instead of losing the inter-corporate exemption, what you get is a penalty tax of 25 per cent of the amount of the dividend. As far as a deduction from the cost base is concerned, section 53(2) states that where a dividend is paid out of a designated surplus you must deduct from the cost base the amount of the dividend less the tax paid.

If there is a dividend out of designated surplus from company A going to company B in the amount of $100, there would be a $25 tax payable by company B, and $100 minus the tax—the dividend minus the tax—or $75, would be deducted from the tax base. There is a similar provision in the case of non-resident takeovers.

One very important provision, which I know was inadvertent on the part of the Department of Finance and which I think they will cure,—if they do not I hope somebody will—is section 80, which deals with an outstanding debt between two taxpayers being settled or extinguished, or in some way reduced without payment, or for a lesser amount than the principal amount. If there is a dept between A and B of $100, A being the father and B the son, and the father says, "I forgive that debt of $100", section 80 provides that one of several things can happen. First, the amount of the foregiveness must be applied against certain losses, to reduce various types of losses that B might have. If that is not the case, if B does not have any losses, then the $100 must be used to reduce the cost base of certain of B's assets.

Senator Beaubien: And if he has none?

Mr. Scace: If he has none he is in good shape! Let us say he owns two shares of Bell Telephone that are worth $100.

Senator Haig: No, call it the ABC Company.

Mr. Scace: Suppose he owns two shares of ABC Company worth $100. It is conceivable that the forgiveness of that liability is a subtraction from the cost base and the ends up with a cost base of zero, so if he ever sells the shares for $100 there will be $100 capital gain.

Senator Molson: What has his debt got to do with his owning some shares in the ABC Company? What is the relationship? That is what puzzles me.

The Chairman: If you forgive a debt there are certain consequences.

Senator Molson: How does he pick out what it applies to? That is what I really mean. Just anything?

The Chairman: Whatever he has, in a certain order.

Mr. Scace: Talking about losses first, the section says:

> to the extent that the excess exceeds the portion thereof required to be applied as provided in paragraph (*a*)—

Which is the application to reduce losses.

> —to reduce in prescribed manner the capital cost to the taxpayer of any depreciable property and the adjusted cost base to him of any capital property.

It would appear that the minister could take any property of B's that he wanted, and reduce the cost basis.

Senator Beaubien: If B had a house and that was the only asset he had, would that affect the house, or is the house exempt anyway?

Mr. Scace: If it is a principal residence it is exempt, so it would not really matter.

Mr. Smith: What they are obviously thinking of is the debt that arose on the purchase of the shares from the father, but the section is drafted in a broader fashion than that.

Mr. Scace: The Department of Finance did not intend that it should cover the normal situation, the most common of which would be if you had an estate freeze from father to son, where he transferred assets over to the son at fair market value and took back a note, which has been a common estate planning device. The normal thing was to forgive the note over a period of years. However, if you forgive the note you will get this result. It is fairly easily avoided if people have tax advice, because if gift tax is in fact abolished, which may not be the case, the father can give his son $100 in cash, and then the son pays off the note and you are out of section 80. But if there is still gift tax there is still a penalty.

Senator Cook: Would it not be covered by saying "forgive a debt which was incurred in respect of"?

Mr. Scace: In certain transactions, yes, you could do it. Do not get me wrong here. The Department of Finance was not aware of it. It has been brought to their attention. I do not think they intended it should have this kind of application.

The Chairman: You are now talking about the Department of Finance in relation to section 80?

Mr. Scace: That is right.

Senator Walker: There is a lot they did not mean.

The Chairman: Well, this is what happens when you start rushing a job like this, and even taking a year is rushing it.

Senator Haig: Let us get down to the complicated sections!

The Chairman: We are coming to them.

Senator Walker: We have to get conditioned to them.

Mr. Scace: If you will give me one more moment, I will then get to the principal residence provisions, which will be a welcome relief.

Senator Haig: If a person lives in an apartment and has a summer cottage, or an estate, can he declare that summer cottage as his principal residence?

Senator Beaubien: He can declare anything. He has the choice.

Mr. Scace: I say no. I will answer that specifically when I go through the principal residence provisions. I think there is an easy answer to that, and I think it is no. Let me give you two slight complications and then I will get to the question of principal residences. Section 53(2)(*k*) provides for the deduction from the cost base of:

> any grant, subsidy, or other assistance from a government, municipality or other public authority.

This is a fair provision. If you buy a property for $100 and you have a $50 governmental grant, your cost base will be the difference of $50. The only reason I draw it to your attention is that we have had a comparable provision in the act for a number of years in relation to depreciable

property in the form of section 20(6)(*h*). That section has been carried forward into the present bill, but in addition to the things I have just read off it states that an amount paid under an appropriation act need not be deducted from the capital cost of depreciable property. We can only question why there is a divergence between the treatment of non-depreciable capital property and depreciable capital property.

One question I think you should ask the officials who appear before you is on section 53(2)(*m*), which provides for the deduction from the cost base of such part of the cost to the taxpayer of the property as was deductible—in computing the taxpayer's income for any taxation year commencing before that time. I have yet to meet anybody who knows what that means, or why it is there. One of our partners suggested it was there as a filler between section 53(2)(*l*) and section 53(2)(*o*), but unfortunately there is no section 53(2)(*o*), so that answer failed. We have no idea what it means.

Senator Walker: It could go back 30 years.

Mr. Scace: We now come to principal residences. Basically, principal residences will be exempt. There will be a pro-ration if the residence has not been used during all of your ownership of it as a principal residence. In other words, if you bought it initially for rental and you had it as a rental property for ten years, and then you moved into it yourself for ten years, and then you sold it, one-half the gain would be exempt.

There is a difficulty with the bill in the way it is drafted now, that in setting up this pro-ration, they are going to take into account years prior to 1972. This was not intended and I gather there is going to be an amendment to it. The pro-ration will only be based on years after 1971. This can be beneficial or harmful to a taxpayer, depending on what the use was in the relevant years, so I do not know what the exact result will be.

Senator Beaubien: Mr. Scace, if you had only one property and it happened to be in the country, and you lived there part of the time but not all of the time, could you say that that was your principal place of residence?

The Chairman: I would say that if there you carry on a way of living that indicates that this is your chief residence—you have maintained it, furnished it, and it looks like a house—

Senator Haig: Mr. Chairman, let us get at an uncomplicated situation. I have a summer cottage which I use during May, June, July, August and September. And I live in an apartment. Can I declare that summer cottage as my principal place of residence?

Mr. Scace: The definition of principal residence is that it must be a housing unit "ordinarily inhabited" by you, the taxpayer. I do not know what "ordinarily inhabited" means. All I can suggest is that if for ten months of the year you live in an apartment, then that is the housing unit you ordinarily inhabit, not your summer cottage.

Senator Haig: Now you complicate it again. Some people have a residence in Toronto, Montreal, or one of the big cities, and they go away for six to eight months, to Florida or the Bahamas. They have a principal place of residence in the city. Is that considered their principal place of residence?

Mr. Scace: Senator, I cannot tell you. It depends on what the meaning of "ordinarily inhabited" is. I suspect that, in that situation, probably they would be able to claim for the house in Canada that they have for four or five months a year.

Senator Haig: Rank discrimination.

Mr. Scace: Very good. I think all you can say is that there is going to be an immense amount of litigation on this particular subject.

Senator Molson: Actually, if the other house we are talking about, the secondary place, is outside of the country, it might be rather easier that if it were just a camp up in the country within Canada, because if it is outside the country at least his residence would have to be established. So there would be some indication, if he is a person who can have a house in Toronto and go to Florida for eight months, that it would have to be known whether he is a resident of Canada or Florida.

The Chairman: No, you can have a number of residences for tax purposes, but this must be the principal place of residence.

Senator Haig: I want to get the principal residence. I am thinking of an apartment dweller who has no real property except a summer cottage in Canada. Can he declare that as his principal residence?

The Chairman: Principal residence does not necessarily need to be real property. If he lives in an apartment, that can be his principal place of residence.

Senator Haig: It is capital gains I am talking about.

Mr. Scace: I do not know what the alternative is. I agree with you that there may be inequities. If the alternative is to try to set up specific rules, they may lead to even greater unfairness. I suspect that what is going to happen is that we will have lots of litigation and certain rough ground rules will get established. I cannot really give you any help on it. I do not know.

Senator Molson: Was there this complication in the background of previous legislation, showing a difficult situation in regard to residence and so on, or is this more or less a new one?

Mr. Scace: I think this is a new one for Canada, sir.

Senator Beaubien: What about the Americans? What do they do?

Mr. Scace: I am not sure how they deal with principal houses. Can you say, Mr. Smith?

Mr. Smith: No.

Mr. Scace: This is more in line with the U.K. Perhaps we could have a search done of the U.K. jurisprudence, to see what they came up with. I cannot answer that question offhand.

Senator Beaubien: It would be interesting to know about that.

Senator Walker: And what a socialist government does.

Mr. Scace: On the definition of principal residence, there appears to be a gap—which may be remedied. If the deceased person has set up a house trust, a trust holding a house for his spouse, that may not qualify within the definition of a principal residence. I understand that the Department of Finance is aware of that and it may be remedied.

Apart from that, the definition seems to be reasonably comprehensive. Some briefs have gone in concerning leasehold land. Apparently, that problem is very troublesome out in British Columbia, though not so much so in our part of the country.

Senator Benidickson: Are you thinking of resort land in Ontario?

Mr. Scace: Not so much. I gather that there are many properties in British Columbia which are more on the U.K. system where you enter into a lease for 99 years.

Senator Haig: Why are we turning so much to farmers' places?

Senator Molson: Why blame the farmers?

Senator Beaubien: If you have a property in the country which is not your principal residence and which cost you $50,000, and you were to sell it for $25,000, can you show a capital loss of $25,000?

Mr. Scace: That is recreational property. Recreational property, if you want to call it that, is personal-use property, and one of the rules I read this morning was that there can be no loss on personal-use property.

Senator Beaubien: That is where most of us join hands.

The Chairman: The law is clear on that.

Mr. Scace: It is defined in section 54(*f*):

> (*f*) "personal-use property" of a taxpayer includes
>
> (i) property owned by him that is used primarily for the personal use or enjoyment of the taxpayer or for the personal use or enjoyment of one or more individuals each of whom is either the taxpayer or a person related to him—

And there are other items as well.

In the case of a principal residence, a farmer is also entitled to principal residence treatment. He gets an option of either pro-rating the part of the farm on which his principal residence is—he takes his principal residence plus one acre and pro-rates his proceeds over the total disposition price and gets that exemption—or, alternatively, he can take $1,000 a year over the number of years over which the property was occupied as a principal residence, whichever gives him the better treatment.

Senator Haig: That is a deduction.

Mr. Scace: It is an exemption. It means it is exempt and not subject to tax.

Senator Benidickson: This would apply to a gentleman farmer who may reside on some very valuable land, adjoining a very large city. He can only use one acre of that land, plus his residence. Is that so?

Mr. Scace: If he is a farmer, that is correct. Anybody, though, can get an exemption on up to one acre of land on which his principal residence is situated. He can get an additional amount, if it was necessary in some fashion for the use and enjoyment of the taxpayer. It is hard to see situations which would fall under that, unless the extra land were needed for access, or unless municipal legislation required the additional land. Those would be two possibilities.

Senator Beaubien: If you had a property that you were using as a farm, and you sold it at a loss, would you use that as a capital loss?

Mr. Scace: Yes, I think that would be a capital loss.

The Chairman: I suppose the other situation is at the discretion of the minister, where you may have an area of more than one acre. I can conceive of a situation, certainly in some zoning provisions and in some real estate subdivisions, where the requirement is, say, one-half to three or five acres of land. There is a provision in the bill under which you could apply in the discretion of the minister, to have a larger area as part of the principal residence.

Senator Benidickson: Because he could not have less under the zoning law?

The Chairman: Yes, that is right.

Mr. Scace: The way it reads is that any excess over one acre shall be deemed not to have contributed to the individual's use and enjoyment of the housing unit as a residence unless the taxpayer establishes that it was necessary for such use and enjoyment.

The Chairman: You could not have it if there were that zoning provision. He could not have the residence without the acreage.

Mr. Scace: The next item is personal-use property. We have gone through the definition, which includes most things in your house, such as automobiles, recreational property, and so on.

Basically the rule is that there is no capital gain unless you sell the property for an amount in excess of $1,000. If you sell it for less than $1,000 there is no tax. If you go above $1,000 your cost is the greater of $1,000 or your actual cost.

Senator Benidickson: This is on an individual item, and not on a class as a whole?

Mr. Scace: Yes, it is on an individual basis. Suppose you have a piano which you bought for $500 and you sell it for $450. There would be no tax consequences.

Senator Benidickson: And in the case of pictures, it applies to each individual picture if its costs is not over $1,000?

Mr. Scace: Within limits. There are certain rules in relation to sets of things. If you have an item which costs you

$500 and you sell it for $1,500, your cost is the lesser or the greater of your actual cost of $500 or $1,000. So you bring in a gain of $500, and so on.

The Chairman: Senator Benidickson, you could not break up a set of, say, 12 cups and saucers and sell one of each and have that limitation on each.

Senator Benidickson: But the cups and saucers might be worth $500 each.

Mr. Scace: The provision in relation to sets is found in 46(3). It states that where you have personal-use property which would ordinarly be disposed of as a set, and they are disposed of by more than one disposition and are acquired either by one person or a group of persons not dealing at arm's length, you then prorate the cost and the proceeds. So, in effect, you do not get the advantage of the $1,000 exemption on each item. You prorate it down and you will be taxed as though you sold the whole group as a set.

There is perhaps a gap here. If you sell it to a group of persons, say, dealers, all of whom are dealing at arm's length, it seems that you can avoid this set rule. If you were selling your china, and you went to separate dealers in downtown Ottawa who were unrelated, and who dealt at arm's length, you could avoid it.

Senator Walker: You spoke about a car. Would that apply to airplanes and boats?

Mr. Scace: I think so, if they are for personal use. You then get another concept called listed personal property. If you will recall, when we started off we looked at section 3(*b*), which said that you brought in taxable capital gains other than from listed personal property, plus the taxable net gain from listed personal property.

Listed personal property is defined by section 54(*e*) as including prints, etchings, drawings, paintings, sculpture or other similar works of art, jewellery, rare folios, rare manuscripts, or rare books, stamps or coins.

Listed personal property is set out as receiving special treatment. It is a category, though, of personal-use property, and consequently the $1,000 exemption or limitation would be equally applicable.

The term that has been used throughout is taxable net gain from dispositions of listed personal property, and you take one-half of that amount. To obtain the net gain, you take your gains in a year from selling listed personal property and you subtract any losses from selling listed personal property in a given year, and you can carry back and forward losses from listed personal property incurred in prior or subsequent years.

Senator Haig: What do you do about gifts that you receive? Senator Hayden has received many gifts of trays, and so on. That is personal-use property. What happens if he disposes of them? Does he place a value on them?

Mr. Scace: Firstly, if you receive a gift, under section 69 your acquisition cost is the fair market value.

Senator Haig: But suppose you cannot ascertain that fair market value.

Mr. Scace: Let us say it is zero. If it is zero, and subsequently you sell that tray or whatever it is for $2,000 then, as it is personal-use property, you apply the rules and there will be a $1,000 gain. You subtract $1,000. It might behoove a person who felt the tray was worth more than $1,000 when he received it, to go out and get a valuation on it.

Senator Beaubien: That would apply only if you could prove that it had gone up from the valuation day, would it not? This is all in the future. If you have a tray and the valuation day is in December and you sell it in June of the next year, you cannot prove there is any difference in the value of it.

Senator Haig: I was referring to a tray bearing an inscription that it is given in appreciation of services. That is of no value to any other person except the family who owns it. What do you do with that? You cannot sell it.

Mr. Scace: If there is no value, there is no problem.

The Chairman: If you cannot sell it, you cannot make a gain.

Senator Haig: Thank you.

Mr. Scace: That basically concludes the special cases. The only comment I would make on listed personal property is that it seems that they have gone to great lengths to provide special rates for these specific types of assets. One wonders whether it is all worth it; why they do not say it is all personal-use property.

The Chairman: Except that they are distinguishing between the two. On listed personal-use property you can have a loss; is that not right?

Mr. Scace: You can have a loss, senator, but historically—this may not be true in the future—the kinds of things that are listed as listed personal property have generally appreciated. I refer to such things as stamp collections, jewellery, and paintings, et cetera.

Senator Molson: Not necessarily paintings.

Senator Lang: Do you treat the listed personal properties as a class?

The Chairman: That is right.

Senator Benidickson: Where is that found?

Senator Haig: It is on page 84. It is section 54(*e*).

Senator Burchill: You mentioned stamp collections. How do you put a fair market value on a stamp collection? It is something you have built up over the years. How do you figure out a profit on that?

The Chairman: You establish a value on valuation day.

Senator Beaubien: The value would be the value you would get for it. If you value it at the end of this month and then sell it next year, it would be hard to say that the value had changed in that length of time.

Senator Walker: Until this matter is clarified, the best thing for the taxpayer to do is to ignore it.

Mr. Scace: We will be coming to valuation day later, but you have the choice. We do not know when valuation day will be. You can try to get a value some time between now and the end of the year or shortly thereafter. Alternatively, if you do not get a valuation done, it really will not become a problem until you subsequently sell or dispose of the property. Then you will be fighting about what the value was when you got it. That may be helpful, if you have a large appreciation. It might indicate that perhaps the value on V-day was greater than somebody told you he thought it was on V-day. You have to make this judgment and I think everybody is his own best judge of that, if he knows what assets he has.

Senator Haig: Are you going to deal with shares in personal corporations or non-public corporations or private corporations?

Mr. Scace: Yes, sir. We are dealing with corporations tomorrow. Shares make no difference. Shares are just capital property and are subject to capital gains tax.

Senator Haig: I am talking about valuations.

Mr. Scace: We will come to that, if you like.

Senator Lang: In the future, Mr. Chairman, amateur stamp collectors will have an incredible job of bookkeeping. I doubt if they will do it.

The Chairman: For those who have the flair for collecting stamps—and those people who think little of the art of stamp collecting might use other expressions than "flair"—there are well-recognized markets all over the world for stamps. There are books published offering stamps of various types and ages.

Senator Lang: People who indulge in hobbies such as stamp collecting or collecting paintings, and so on, are not generally prone to maintaining a set of books to ascertain their capital cost.

Mr. Scace: Just continuing on, there are a number of special rules set out in the act and I will deal with them very briefly. For instance, if you sell property on which you have to give a warranty or covenant with respect to certain things in relation to that property and later on you have to honour that warranty and pay out some money, that pay-out will be a capital loss and it is deductible against capital gains in the year the property was disposed of, in any of the six immediately following years from the date you gave the warranty.

Senator Haig: It is not against income; it is just against capital loss?

Mr. Scace: It is a capital loss, sir. Therefore, the allowable capital loss portion, basically, is deductible against capital gains plus $1,000 if you are an individual. I suppose the problem with that is that you may not have taxable capital gains in the year you have to honour the warranty. It might be fairer if you could re-file for the year that you gave it or the disposition took place.

The Chairman: I think the option would be a very thoughtful thing to have, because in the year in which this occurred you might have other capital gains or losses that you could bring in.

Senator Haig: What the witness says is that you can push it forward.

The Chairman: You might not have anything to push it against, except the $1,000 of general income.

Senator Haig: That is your tough luck.

The Chairman: The point is that in the year in which you dispose of it you may have had something left there that you could write this off against.

Senator Haig: Mr. Scace said you could take it in that year or carry it forward.

Mr. Scace: If you are required to realize on a warranty you can take the loss. You can get the allowable capital loss. If that occurred in the year of the original disposition or any of the six immediately following years, then all right. There are also special rules in relation to part dispositions.

The Chairman: What was that section you were referring to?

Mr. Scace: Section 42. The special rule in relation to part dispositions is found in section 43, and section 45 contains special rules where you have changed the use of property. For example, if you start off with one use, say, a personal use, and change it to a business use, you are allowed to acquire it at the fair market value at that time and so on. I think the rules are generally fair.

The Chairman: If you are allowed to acquire it at the fair market value at that time, you may incur a capital gain.

Mr. Scace: It depends which way it is going, yes, sir, but I think that is fair.

The Chairman: Yes.

Mr. Scace: We have a problem with section 47, if you would take a look at that. It contains the rules in relation to identical properties. What section 47 is trying to do is to say that where a person owns identical properties that had different costs, what he should do is average the costs. That is the intention. For example, if I bought one share at $20 and another share at $30, then when I wanted to sell one of those shares I should use the average cost, which would be $25. Let me take you through it. The most common situation with identical properties would be shares and bonds. For example, you own a group of properties, and if you wanted to dipose of part of the group and retain the other part, then subsection (*a*) says that the adjusted cost base of the part disposed of is the proportion of the total adjusted cost base averaged out. In other words, if in my example I sell the one share for $50, then using my average cost as $25, I have a gain of $25 and there is then no fight about whether I am selling my $20 share or the $30 share.

The difficulty arises when one comes to subparagraph (*b*), which says that the taxpayer is deemed to have disposed of the part of the group retained at that average cost, which in my example is $25, and to have reacquired it at that same average cost of $25, thus giving the taxpayer a new base of the average of the part retained. The difficulty with it is that, although you have this deemed disposition,

it does not say what your cost was of the group retained prior to this deemed disposition. Paragraph (*a*) only refers to the average cost of the part disposed of and that works all right, but I think you can get a problem with subparagraph (*b*) in that you are deemed to have disposed of the part so retained, at the average cost but nobody really tells you at the time of that deemed disposition what your cost is. It may be historical cost rather than average cost. But the intention is clear and I think that this is just a drafting technicality which I hope will be cured.

The Chairman: I think you could argue pretty strongly that it is the average for all purposes rather than the historical cost.

Mr. Scace: That is clearly what you would argue, but whether you could be successful in court or not, I do not know.

Senator Connolly: Mr. Chairman, just on this one point there seems to be a gap in the draftsmanship. Now I understand there are a great many amendments coming to this first reading draft which we have before us now, and it may very well be that some of these are to be picked up and clarified when the amendments are made in the House of Commons.

The Chairman: But that will take place in the committee of the whole.

Senator Benidickson: On this point, under the new rules—and I am not as familiar with them as I should be having been out of the House of Commons for five years—is it after second reading itself and before going to committee of the whole that the legislation goes to the House of Commons committee?

The Chairman: This legislation will not be going to a House of Commons committee at all. It is to be dealt with in committee of the whole.

Senator Connolly: Having arrived at that point, I understand that the normal practice in the House of Commons is to deal with the amendments as the sections are reached in discussion. On a complicated bill like this I wonder whether despite the fact that it might be a departure from parliamentary practice, we might get some agreement that all of the amendments, or at least all of them that are known before consideration in committee of the whole begins, will be made known to us so that we might have a chance of looking at them here. We would then know the kind of legislation we might actually have to deal with when the bill comes.

The Chairman: We do not have any position on that. The usual practice is to move amendments when they are dealing with a particular section. I would doubt very much if the Minister would want to embark upon the course of introducing them all at the very beginning. That is the only way we might get the list of the amendments in the beginning, because certainly the amendments would have to be presented in the House of Commons before they could be made available to us.

Senator Benidickson: Then, Mr. Chairman, are we not in a unique position, and I might add a favourable position, in view of the complicated nature of this legislation, in that the House of Commons will not have the opportunity to examine outside witnesses such as we will have?

The Chairman: That is what we will be doing.

Senator Flynn: We may be in a fortunate position, and the House of Commons in an unfortunate position.

Senator Walker: Is that not the idea behind our hearings now?

Senator Benidickson: Therefore, the responsibility on us, as far as the public is concerned, is unusually heavy.

The Chairman: That is right. You can also be sure that the staff we will have in committee will keep up from day to day with whatever may be suggested by way of amendments in the other place.

Senator Benidickson: This is rather anomalous in that the history is that the Senate plays a secondary role in matters of finances and taxation. But by this practice we shall be playing a very important role.

The Chairman: We found procedures for moving ahead of that position.

Senator Flynn: It will be sober, second thought ahead of time.

Senator Macnaughton: Mr. Chairman, do you think we might have a short recess?

The Chairman: Yes.

A short recess.

Mr. Scace: I will hurry through a few items which I think are reasonably dealt with in the bill. There is provision for a tax-free roll-over when converting a bond into shares, or a bond into a bond. There is a gap in the act; there is no provision for conversion of shares into shares. The department is aware of that and, hopefully, that will be one of the amendments. Those items are contained in sections 51 and 77.

Senator Connolly: Is that roll-over dollar for dollar, so to speak?

Mr. Scace: Yes, sir.

Senator Connolly: And there is nothing as between shares?

Mr. Scace: I do not believe the conversion of shares into shares is covered.

Senator Connolly: Do you mean shares of one company and shares of another on a one-for-one basis, or at least a dollar-for-dollar basis?

Mr. Scace: I am really referring to a conversion.

Section 52 provides a number of rules for determining the cost of an asset where the amount has been included in the taxpayer's income. An example is to be found in the present act and its counterpart in the bill of section 8. Where there has been an appropriation to a shareholder and some property has been given to him. On an asset such as a car that amount will be included in the shareholder's income. He then obtains a cost base equal to the

fair market value at that time. There are a number of rules such as that.

There are also specific rules dealing with options and, so far as we can tell, the option rules work reasonably well. They are contained in section 49.

A very brief description of the option rules is that when an option is granted it is deemed to be a disposition of property and the consideration for the option is a gain. Therefore, if I own property and I give Mr. Smith an option to acquire it for $10, that is a disposition, and the $10 is a capital gain of mine. If Mr. Smith subsequently exercises the option, what happened previously, the inclusion of $10 as a capital gain, is wiped out and is included in calculating the proceeds. For instance, if the acquisition price was $100 I add the amount of the option, $10, for total proceeds of $110. Conversely, he obtains a cost of $110. If it is an option to dispose of property there is a deduction rather than addition. It seems to work out reasonably well.

Senator Connolly: Does that apply to share warrants entitling one to buy a certain number of shares on a number of warrants presently held?

Mr. Scace: I do not really know; I am trying to think of it. If you had the warrants on the original acquisition in some fashion, I suppose you would have the cost of the warrants and the cost of the shares you acquired by exercising the warrants. This would be the original cost of the warrants, plus whatever number of dollars you have to pay for the shares. I think that would be the treatment, which is similar, but I am not aware of any particular provision.

Senator Haig: The warrants are sold at a certain price; you buy a bond for a certain number of warrants and their value is there. It may go up or down, but that is the cost of the warrant to you.

The Chairman: Plus the cost of whatever is paid when the warrant is exercised.

Senator Haig: Correct; you have the cost of that stock.

Senator Connolly: There are two problems: first of all, if you sold the warrants you might be taking a gain—

Mr. Scace: It would be property.

Senator Connolly: I suppose it would; it would be something in addition to your shareholding.

The Chairman: You would be dealing in property.

Senator Connolly: Yes, but if you did not sell the warrants but used them to buy additional shares, the money you paid for the shares plus your warrant is the cost.

The chairman: That is right. It might be variable, I take it, Mr. Scace? It might be either the cost at the time of acquisition of the warrants or, if they have a market that is higher at valuation day, that might be taken. I do not see any difficulty in that.

Senator Beaubien: Do you have the option: either cost to you, or valuation day?

The Chairman: Yes.

Mr. Scace: That is right; we will spend some time on that in a moment. It is one of the key considerations to understand.

The next major area that you might wish to consider is that of the carry forward and carry back of capital losses. I have outlined the situation in general terms. The act provides that in the event of an excess of allowable capital losses over taxable capital gains in a particular year, that becomes the net capital loss position for that year less, for an individual, $1,000. The definition of net capital loss is found in section 111(8). That net capital loss position can be carried back one year, or forward, indefinitely against taxable capital gains or, if you are an individual, it can also be applied against $1,000 of other income. That provision is contained in section 111(1)(*b*). I have calculations available, if you would like to see the operation of this provision. I think that for the most part it works reasonably well.

There are also restrictions, much as in the present act under section 27(1)(*e*), concerning how business losses must be used up and so forth. For the most part they are a direct reading on the present act and I do not think they create any problem; everyone knows how they operate.

There is one interesting situation where a corporation has a net capital loss position. In other words, it has incurred more capital losses than it has been able to set off against capital gains and when control of that corporation changes, which is 50 per cent plus one, the net capital loss position is eradicated. So there can be no dealing in capital losses where there is a change in corporate control.

Senator Connolly: Just because of the change in control?

Mr. Scace: The mere change in control; that is provided in section 111(4).

The Chairman: Oh, yes; this has been quite a stunt over the years.

Mr. Scace: It blocks it completely.

Senator Connolly: Over the years we have not had capital gains tax.

Mr. Scace: I am referring to business losses; the rules have been tightened up over the years in the form of section 27(5)(*a*) of the existing act and they have been carried over into the bill. However, there still is an opening in the case of business losses. If you have a change of control the loss carry forward position will still exist if the same business is carried on in which the losses were incurred. So you have a chance of maintaining the carry forward; you have no chance in the case of a net capital loss position.

Senator Connolly: Operating losses as against capital losses incurred?

Mr. Scace: That is right.

The Chairman: Are you saying that where there is a net capital loss position in a company, that goes on forever, so long as the company remains in that business operation?

Mr. Scace: Are you referring to capital losses, sir?

The Chairman: Yes.

Mr. Scace: No, sir; there is no restriction on its staying in that particular operation, so long as there is no change of control.

The Chairman: That is right.

Mr. Scace: I can perhaps make it more clear with a quick diagram. Let us assume you have business losses of $100 and a net capital loss position of $100 in a company. We have Company A and Company B, and Company A acquires control of Company B. Immediately that net capital loss carry-forward position is eradicated. You do not know what happens to the business loss because it is deductible if the same business is carried on, but if the same business is not carried on you lose it. If it is carried on you will get the carry-forward position.

Senator Connolly: No doubt there are grey areas where it is a question of whether it is fully carried on.

Mr. Scace: It is a question of fact as to whether that has happened.

Senator Flynn: Not grey; dark.

Senator Connolly: If it is dark you know what your position is. If it is grey you are not clear.

Mr. Scace: The next area concerns the basic tax-free roll-overs. There are a number of instances where you do not have a disposition within the definition of a disposition in section 54 (c), so they would be one form of tax free roll-over. Another form is where you have a disposition and receive compensation for property destroyed under a policy of insurance or compensation for property taken under statutory authority. In that case you get a roll-over to the extent that you re-invest the proceeds in new property.

This was Senator Flynn's point this morning. To the extent that you do not re-invest the proceeds there will be a gain. I can show you that one on the board.

If you have property costing $100 and you receive compensation in the amount of $150, say, under a policy of insurance, and you then use $140 of the compensation to acquire a new property equivalent to the one that was destroyed, your gain will be $10 and the cost of the new property for capital gains purposes will be $100. You are put back for capital gains tax purposes into exactly the same position that you were in before and you only get a gain on the amount that you did not re-invest.

Senator Haig: You pay tax on the $10.

Mr. Scace: The $10 would be a capital gain, so $5 would be the taxable capital gain.

The other major roll-over is in the case of transfers between spouses. In both the case of death and when a gift is made, it is exempt if the transfer goes to the spouse absolutely or if it goes to a trust for the spouse and the trust complies with the following conditions: First, the spouse must be entitled to receive all of the income of the trust other than taxable capital gains that arose before the spouse's death, and, second, no person except the spouse may obtain any part of the capital of the trust. Essentially, this is the same type of qualifying trust that you have under the Estate Tax Act.

There is one slight imperfection or lack of clarity in the definition. As I said, the spouse must be entitled to all of the income other than the taxable capital gains. I think what it means is that so long as your trust document states that all of the income goes to the spouse, she does not necessarily have to get the capital gains. However, you can interpret it to mean that she is not entitled to capital gains at all. I do not think the latter interpretation will hold, but it is possible.

The qualifying trust is set out in section 70(6). Where property is transferred to a qualifying trust if it is non-depreciable capital property the property moves over at the adjusted cost base, and if it is depreciable capital property it goes over at undepreciated capital cost. In other words, if I own non-depreciable capital property costing $100, and if at the time I die or make a gift of the property to my wife it is worth $200, there is no capital gains tax, but my wife acquires that property at $100.

Senator Walker: So they pick it up when she dies.

Mr. Scace: That is right, but you get the exemption between spouses.

Senator Connolly: Or when she sells it.

Mr. Scace: Or when she sells it, yes, sir.

You can also get a tax-free roll-over where you transfer property to a corporation in which immediately after the transfer you own 80 per cent or more of the shares. This exemption would cover the situation where you are incorporating a sole proprietorship, and it would also cover the situation where you transfer from a parent company to a subsidiary where you had 100 per cent ownership. It would not cover the reverse situation where you have a transfer from a subsidiary to the parent company.

There are very complicated election rules. These are set out in section 85 of the bill. They get extremely complicated, but they do appear to work. You also get a roll-over, as I have said, where there is a transfer by a partnership to a corporation or a transfer into a partnership. Mr. Smith will be talking about that. You can also get a roll-over where there are certain re-organizations of capital, and also with amalgamations. In the case of amalgamations the rules get quite complicated, but essentially if it is a straightforward transaction without undue complication there is no problem. For example, if there are two predecessor corporations coming together there will be no capital gains tax on their assets. They just come into the new company at the adjusted cost base. If you are looking at the shareholders and they are getting shares in a new amalgamated company they will get those shares at the adjusted cost base of the old shares.

The Chairman: That is section 86, is it?

Mr. Scace: Section 87, sir.

The Chairman: Yes, section 86 is the re-organization.

Mr. Scace: Section 88 provides for a tax-free roll-over in the case of a wind-up from a subsidiary to a parent. There may be problems in that particular roll-over, but they are extremely technical and I think it is probably better to avoid them at the present time.

Before we get into the valuation day and the transitional provisions there is a general tax avoidance provision in section 55 which applies specifically to capital gains, and basically it states that where you have done something by any one or more transactions in a way that may be considered to have artificially or unduly reduced the amount of the gain or created a loss or increased the amount of the loss, the gain or the loss, as the case may be, shall be computed in the normal fashion as if this artificial creation had not occurred. This was obviously put there to cover those situations which they have not thought of, and in case there is a glaring loop-hole in the capital gains provisions.

We come now to the transition rules. This has been a very hot topic of debate in the papers. I am sure you saw Mr. Benson's letter in reply to Mr. Asper's column. I think Mr. Benson was correct. The transitional provisions are found in the transitional rules and the first one is rule 24 which anticipates that there may be two valuation days.

The Chairman: What part was that again?

Mr. Scace: The transitional rules occur after the main sections of the act.

Senator Beaubien: What page?

Mr. Scace: I am looking at rules 24 and 25 at page 421. These are the income tax application rules, 1971. I think we will get two valuation days, which will be fixed by proclamation. If anybody has any inside knowledge, I think you gentlemen will have it far sooner than Mr. Smith or I. I do not think anybody on the outside knows. Rule 25 goes on to state that each of such days must be after June 18, 1971, and that either or both of them may be before or after the coming into force of the act. It is anticipated that the act will come in January 1, 1972, so valuation day would conceivably be before that, although it might be after. I think most people think it will be close to the end of the year, but again we do not know.

Senator Beaubien: Why would there be two, and how could you use two?

Mr. Scace: I am not sure of the rationale for the two. Maybe with publicly traded securities they are a little concerned about people driving the market up in an unreasonable fashion. I do not know.

Senator Lang: There is not much hope of that today.

Mr. Scace: I would like to see it go up for one day.

Senator Connolly: I had not thought about this before, but it just occurs to me that if valuation day is prescribed by the new legislation, and you say it might be proclaimed before the end of the year or after, if it is before the end of the year it would still have to be after the passage of the legislation would it not? Valuation day only becomes effective as a result of the implementation of the legislation in Parliament.

Mr. Scace: Say valuation day was on December 15 and the legislation became effective on January 1—

Senator Connolly: I am not talking about it being effective. I am talking about the passage through Parliament with Royal Assent. You would have to have Royal Assent before decreeing what would be valuation day, would you not?

The Chairman: If it did not there would certainly have to be considerable re-drafting to try to make a valuation day prior to the date of coming into force, trying to make it the effective date.

Senator Flynn: They might announce that it will be decided valuation day will be such a date, even before the passage of the act.

Senator Connolly: Would such an announcement prior to Royal Assent to the bill have any validity?

Senator Flynn: It would not, but it would be binding on the good faith of the government.

Senator Beaubien: We have often had changes in tariffs that have been announced when the minister has got up and said, "This is effective today".

Senator Cook: Valuation day in the past.

Senator Beaubien: This is going to be like a budget speech. We have had that in many cases, where the government has said, "This is effective today."

The Chairman: For all practical purposes, if you said, "It is not law yet so I will not pay it", you would have a lot of problems by the time it became law.

Senator Beaubien: We are talking about the effective date. Whether you want to pay it or not is another thing. If the government says that today is valuation day through the minister saying so in the House of Commons, I think there are lots of precedents for that.

Senator McNaughton: I do not think so, not with a taxing bill.

Senator Flynn: It is a conditional decision that the minister makes on budget day, because if it is not ratified by Parliament it lapses, as we have seen with the two per cent tax; it was valid up to the date when Parliament defeated the bill.

Senator Cook: The same thing has happend to wheat payments now, although I know it is scandalous.

Mr. Hopkins: It has to be validated retroactively by the legislation coming into force or it is ineffective. It is really a declaration of intention until ratified by Parliament.

Senator Beaubien: Still, it would be valuation day, if the minister said that for evaluating stocks today is the date.

Mr. Hopkins: If the act so reads it could be so, but not until the act comes into force.

Senator Connolly: It will depend on the wording of the section when valuation day is.

Mr. Hopkins: That is right.

Senator McNaughton: If eventually the bill is never passed, all the valuation days in kingdom come will not apply.

Senator Beaubien: If the bill is never passed we will never have a capital gains tax, so it would not matter to us whether there were a valuation day or not.

Senator Flynn: That is wishful thinking.

The Chairman: We are doing a lot of speculating.

Senator Lang: I assume rule 26(3) overcomes the problem of the cost of the property as opposed to valuation day value.

Mr. Scace: That is right. We are just coming to that. In any event, if the Government has a problem on how it gets valuation day into effect, from valuation day on, if the legislation goes in, that is the base, apart from what I am just going to say, for measuring capital gains.

How do we get into the system? Rule 26(3) is possibly the most ingenious piece of drafting you will find. It covers property other than depreciable property, and I urge you to read it. I think it can be simplified. It talks about an amount that is neither the greater nor the least of the following three—cost, market value on V-day and proceeds of disposition. The way this will work out can be simplified diagramatically. In one we show cost and V-day value in a situation where you go into the system with a winning asset; in the other you have a loser. In both cases there is a tax-free zone. I think every example you go through would fit rule 26(3). For instance, if there is a cost of $100 with a V-day value of $200 and you sell for $300, you are taxable only on the difference between $300 and $200.

Senator Haig: At half rates.

Mr. Scace: At half rates, or half inclusions. If the cost was $100 and V-day value $200, if you sell for $150 nothing happens; it is in the tax-free zone and is a neutral transaction, if I may put it that way. With a cost of $100, if you sell for $50, the difference between $100 and $50 will be a capital loss, and half of that will be the allowable capital loss. The same can be done in the other case, depending what the proceeds are; whether they fall below the line, above the line or in the middle, the gains, losses or neutrality can be measured.

Senator Beaubien: If you elect to take the value of a stock and it is above the cost and you sell it below the value of the stock, if it is above your cost you cannot take it as a deduction. It that what you mean?

Mr. Scace: I think I understand your question. These tax-free zone rules apply automatically. As an alternative to the tax-free zone rules, under rule 26(7) an individual has the option of electing to value all his assets at fair market value on V-day. If you owned two assets, represented by these diagramatic charts, you could take both assets and, as opposed to the tax-free zone rules, you could elect to have them start at V-day value. So on this one you take that value, and on this one you take that one (*indicating on blackboard*). If that happens, you take V-day value, you get your inclusions if it goes above V-day value, and you get a deduction if it goes below. Here you will get an inclusion if it goes above and a deduction if it goes below.

May I say one more word? This may become more clear. If you look at the tax-free zone, the tax-free zone is not very beneficial to a taxpayer, where he has a winner. The reason for that obviously is that if the price goes up he immediately becomes taxable, while if it goes down he does not start getting an allowable loss in any form until it gets below his original cost. On the other hand, when you have a loser, the tax-free zone rules are very advantageous. You start off with your V-day value down here. If it begins to drop, you immediately start getting deductions, but you are not going to become taxable until you get back to your original cost. So the tax-free zones are disadvantageous for winning assets; they are advantageous for losers.

As I said, they apply automatically unless you are an individual and you elect to have all of your assets valued at fair market value on V-day.

In the debate between Mr. Benson and Mr. Asper the confusion arose because rule 26(7) refers to "each" asset, and you have to read it carefully. I think the meaning that comes out of it is that it means "all" assets, or "3ach and every" asset—that you take all your assets in the tax-free zone or you are allowed to take all your assets at market value.

Senator Beaubien: You cannot pick and choose?

Mr. Scace: No.

Mr. Beaubien: The minister told us definitely you could pick and choose.

An Hon. Senator: Does that refer to some assets or to all assets?

Mr. Scace: To all assets. These are all non-depreciable assets that we are talking about here.

Mr. Smith: If he wanted you to be able to pick and choose, it would be very easy to amend the rule to state that.

Senator Beaubien: Mr. Chairman, do you not remember the minister's answer? We asked him directly if it applied to each and every asset, and he said yes, you can take either valuation date or cost, on each and every separate asset.

The Chairman: We were talking about the White Paper provisions then. The minister may have said that somewhere. He was not before us on the White Paper.

Mr. Scace: I think the confusion arises on rule 26(7), which gives an election for fair market value. It says:

> Where, but for this subsection, the cost to an individual of any property actually owned by him on December 31, 1971 would be determined under subsection (3) or (4)—

Which is the tax free zone rule.

> —and the individual has so elected, in prescribed manner . . . in which the disposition of any such property occurs, the cost to him of each capital property . . . actually owned by him on December 31, 1971 shall be deemed to be its fair market value on valuation day.

Certainly, on an initial reading, many of us thought that that referred to a specific asset, but from Mr. Benson's letter in the *Globe and Mail*—and certainly the Department of Finance intends this—it seems that you cannot

pick and choose. You must take either the tax free zone or the fair market value. It is a case of "eitheror". I think they have used the wrong word. It may be that the correct word is "each", and it may be grammatically correct and produce the result, but it is a little unclear and I think they should put in "each and every" or "all" property, and then it would be absolutely certain that what they are saying in rule 26(7) will give the intended result, and I am telling you what is the intended result here.

Senator Cook: Assuming that it applied to each class of persons it seems rather stupid to say "all" classes.

Mr. Scace: I do not know what the classes would be.

Senator Cook: I mean shares, and then real estate.

Mr. Scace: There is no suggestion of that.

Mr. Smith: There is one further point on the tax-free zone rules that I might mention. In order to have them apply, it appears that you have to know three amounts. You have to know the original starting cost, the V-day value, and the proceeds of disposition. The last two are fairly easy to arrive at, but many taxpayers may not be able to come up with the cost of assets that they may have bought a long time ago or that they may have traded in in the meantime.

Mr. Scace: This is another problem and I think it is a very serious problem. There is some dispute about this. We think, on our interpretation of the bill, that if you have received assets by inheritance or by gift, whether they are depreciable or non-depreciable, your cost is zero.

Senator Beaubien: When you sell them there would then be 100 per cent tax?

Mr. Scace: In the tax-free zone rule, if this is zero then what you are talking about is that you can never get a loss, because you are coming down to nil and you will never get a loss if the value falls. Then you are very wise to take the fair market value election, because then you establish a base, and whether you go up or down you would be all right.

Senator Cook: May I interrupt you there? If you take fair market value of something inherited, and that has not depreciated, does that mean the fair market value for shares?

Mr. Scace: You have to have fair market value for everything. This comes to a situation, when you take the fair market value election. You would have fair market value election in one situation, where you were in the very fortunate position that all your assets were winners.

The Chairman: Or if you had entirely inherited or gifted property.

Mr. Scace: If the preponderance of your assets were winners, then you take it. I do not want to come out too strongly on this inherited property having no cost base. We are firm on our conclusion on it. I gather there is a split in the Department of Finance, as to which way it goes.

I see that some honourable senators have the Clarkson, Gordon brief in front of them. I see that they say it is fair market value. I am sure I am not telling stories out of school if I add that they had a split about it in their firm. They came down on that side. We think they are wrong, but they could be right.

The Chairman: What do you suggest? That it be done by way of clarification?

Mr. Scace: I think they could put in a very simple provision, that the cost of assets inherited was the fair market value at the time of the bequest of the gift. That would solve it.

Senator Cook: It was a question 25 years ago.

Mr. Scace: That is right. That would not be too difficult, senator, because probably there would have been estate tax, succession duty, or a return filed of some sort, and you might have the values there. If they were lower, you might be in the peculiar position of arguing that they should have been higher.

Senator Flynn: You are not speaking of taking the value at the time the transfer of the property was made 25 years ago, are you?

Mr. Scace: Suppose you inherited one share of the XYZ Company 25 years ago which was worth $50 at that time, and that amount was entered in the succession duty return and you have a value up here of $100. Surely, you are better to take that $50 25 years ago as your cost rather than taking zero, if our interpretation of the law is correct.

Senator Flynn: If the share is on the market today, you know what the value is on valuation day.

Mr. Scace: You can elect to take the fair market value option. In our example, if you inherited this $50 share 25 years ago and it is now worth $100, in that case you are probably better to take the fair market value election, because if it goes up you are taxable and if it goes down it is deductible.

The Chairman: That applies to all others.

Senator Flynn: It is difficult to imagine that assets that were valued 25 years ago, whatever they were, would be higher than the fair market value of today on valuation day, with inflation and everything.

Mr. Scace: One of the difficulties with this no cost on inherited or gifted assets is that it discriminates between two people, both of whom inherited wealth of some kind, but one inherited it in specie or kind, and the other received cash and then bought the identical asset.

The Chairman: Is it not the situation that there are certain options here. If there are not enough options, perhaps we will write some more.

Senator Cook: It certainly wants to be looked at.

Mr. Scace: 50 per cent of your assets may be winners and 50 per cent losers. If you want to keep one tax free zone rules for your losers you might say' "How can I get out of it?" and you say, "Well, perhaps somehow I can roll over my winner by selling it to my wife". Let us take an example. We know that the cost of the asset in the example is $50. If you sell it to your wife at $100, then within the

family you have a new high value of $100, so the tax-free zone rules might apply. However, by Rule 26(5), if there is a non-arm's-length transfer, the transferee gets the old cost of the transferor, and such a rollover is impossible.

Senator Flynn: It is a problem of valuation between the winners and the losers.

Senator Haig: Assuming that your gift of 10 shares is at zero and they are then divided or subdivided and get to 50, what happens then?

The Chairman: They are still zero.

Mr. Scace: I do not think that would make any difference. There is another possibility that you might think about to avoid the rules. Let us say that this was a share of the ABC Company which was a listed public company, and you decided to sell your shares in the market and buy them back and establish a new base. Rule 26(6) intended to say that if you re-acquire within a 30-day period you are back in the same position that you would have been in if it had been a non-arm's length transaction. Originally I read the section as being all right, that it worked; but it has been brought to my attention that it does not work.

If you follow it through very closely it is trying to relate it back to 26(5), but it does not have all the connecting links.

As it now stands, rule 26(6) does not do what it says; but I think it is fair to assume that before this goes through we will have something that does work, which will prevent people rolling over to get a new high value within a 30-day period.

There are all kinds of complicated things going on. If you owned Canadian bank stock A and you wanted to stay in banks but you did not care whether you were in bank stock A or bank stock B, you could sell bank stock A and buy bank stock B, and obtain a new cost; and that is not caught by any of these rules. Some very complicated swaps are going on.

There are two more points. There are also special rules during the transition to distinguish between assets acquired before the implementation date. Basically you get a first-in first-out method of disposition, and that also applies where some assets are acquired before and some are acquired after.

The Chairman: Which number is that?

Mr. Scace: That is found in rule 26(8). Lastly, with depreciable property you get specific rules. I think it is sufficient to say that they seem to work, so that any appreciation over cost up to the V-day value will not be subject to capital gains tax. They have very complicated provisions where you have non-arm's length transfers. I think they are basically sound. Some of the drafting may be a little tough to deal with, but they appear to work.

The Chairman: Which one is that?

Mr. Scace: You find those in transitional rules 20 and following. They start at rule 20(1). However, you still have the problem with depreciables in that you can get the retroactive recapture. We spoke about that at great length.

Gentlemen, I think those are the capital gains provisions.

The Chairman: Before we adjourn until tomorrow morning at 9.30, it might be of interest to the committee to note the order of business for the next few days. We propose to proceed with the third item tomorrow, that is, corporations and distributions to shareholders. Mr. Scace will deal with that rather big item. Mr. Smith will then deal with partnerships and professional income. That will certainly take the morning. There are other items as well, but we will have only a short time in the afternoon, as I see it—up to perhaps three o'clock—in which to deal with them. That is something we can decide at the time.

On Wednesday, October 6, the people who want another bank will be coming back with certain information they had not been able to give us before, which should not take too long, and after them we will have the Canadian Chamber of Commerce to deal with on the subject of taxation. That should take us through the morning.

We are open in the afternoon on Wednesday, and I understand Thursday is also an open day. If Mr. Smith and Mr. Scace can manage it, perhaps they will come back next week. They can let us know.

Senator Connolly: Are there any bills from the House of Commons that are likely to be referred to this committee, Mr. Chairman?

The Chairman: I have been spoken to about the $80 million bill, and I understand that it will come to this committee. I am not sure just when it will get here, however.

Senator Connolly: Will it interfere with the planned sittings on the tax measures?

The Chairman: Senator, somehow or other we are going to manage to keep Wednesdays and Thursdays available for this work.

Senator Haig: Mr. Chairman, I move we adjourn until 9.30 tomorrow morning.

The Chairman: Shall we adjourn?

Hon. Senators: Agreed.

The committee adjourned.

Ottawa, Thursday, September 30, 1971

Upon resuming at 9.30 a.m.

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

The Chairman: Honourable senators, we will resume our hearing this morning with Mr. Smith and Mr. Scace. Our first subject matter will be partnerships and professional income. Stephen Smith is going to deal with that. Then we are going to consider corporations and distributions to shareholders, which is quite an important and heavy item. We hope to complete both of these items by lunch time, but do not feel any restraint so far as questions are concerned.

Senator Beaubien: Very good, Mr. Chairman.

Senator Connolly: You mean that, do you?

The Chairman: Yes. The word "restraint" I meant in relation to questions.

Mr. Smith: There are really two quite separate topics that I am going to talk about this morning, Mr. Chairman. One is the new method by which taxpayers in the professions are to compute their incomes and the second is the computation of partnership income. The only connecting link between these two topics in that many professional businesses are carried on by partnerships. First I will deal with taxpayers in the professions.

You will recall that the White Paper caused a fair amount of consternation among professional taxpayers, particularly accountants and lawyers, and more so the lawyers, in my opinion, by suggesting that taxpayers in the professions generally should no longer be able to compute their incomes on the cash basis of accounting for tax purposes but rather should go on to a full accrual basis which would require them to account for work in progress. That was a particular problem for lawyers because many lawyers have inadequate records of what their work in progress consists of, and they have a real problem when it comes to valuing it.

Perhaps I could read to you two short paragraphs from the White Paper which put the whole subject into context. I refer to paragraphs 5.46 and 5.47 of the White Paper:

> 5.46 Generally, taxpayers who are in business must compute their taxable income on what is known as the accrual basis. This means that a merchant must take into account the inventory of goods he has on hand, the amounts due to him from his customers, and the amounts he owes to his suppliers. An exception to this general rule has for many years been made for taxpayers in the professions (doctors, dentists, lawyers, chartered accountants, professional engineers, etc.). These taxpayers have been permitted to choose to report their income either on the accrual basis or on the cash basis—that is, they could omit the amounts due them from their clients and their "inventory" of unbilled time. Once a taxpayer chooses one basis he cannot switch to the other without the consent of the Minister. The government believes that the tax postponement permitted by this concession has given professionals an unwarranted advantage by comparison to the rest of Canadians, and it therefore proposes that professionals be required to use the accrual basis.
>
> 5.47 A problem would exist in switching professional taxpayers now on the cash basis over to the new system. This problem relates to their receivables and inventories at the date of the change over. For example, if 1971 is the first year of the new system, the problem would relate to the receivables and inventories as at the end of 1970. These amounts would not have been included in the taxpayer's 1970 income because they would not have been collected at that time. They would not be included in the 1971 income because they were earned before that time. To require that the entire amount be brought into 1971 income would impose an abnormal tax liability in that year. As a consequence, the government proposes that these taxpayers be entitled to bring these amounts into income over a number of years. Specifically, they would bring them into income as their total outstanding receivables and inventories are reduced. This amount would of course be in addition to the amount of their income computed on the accrual basis and would mean that they would be taxed on the greater of a cash-basis income or an accrual-basis income until they catch up to other Canadian businessmen.

Now the representations made by various professional groups resulted in the Government's putting in the bill what is essentially a compromise between the Government's position of full accrual and the representations made that professional taxpayers should be entitled to remain on a cash basis. Now this compromise is set out in section 34 of the bill which sets out rules for computing the income of a taxpayer, that is any taxpayer be he an individual, a corporation or a partnership from a business that is a profession.

Now there is one thing to note and that is that there is no definition of "profession" in the Act, so presumably the Courts will have recourse to dictionaries, and perhaps there is some jurisprudence on the subject but the definition of "profession" may end up being somewhat broader than the traditional professions that the Government obviously has in mind.

Now the rules set out in section 34 are first of all in subsection (*a*) that sections 12(1)(*b*) and 21(*m*) of the bill do not apply. Section 12(1)(*b*) is the section that requires the inclusion of accounts receivable in income unless the taxpayer is already on a cash basis accounting. So they are taking that section out. Section 21(*m*) is the reserve for goods and services, rent, etcetera, not yet delivered or earned against the inclusion of the amounts received by the taxpayer on that account.

Now subsection (*b*) says that every amount that becomes receivable by the taxpayer in the year in respect of property sold or services rendered in the course of the business must be included in income. So as soon as you have billed, if you are a professional, the amount of your account comes into your income. Subsection (*c*), however, is intended to prevent what some people have referred to as the ice-cream scoop theory of law office management—the professional who goes along working month after month and getting in minor accounts until he runs out of money and then he looks around to see what accounts he can bill. He may be very tardy in rendering his accounts.

Subsection (*c*) says that you are going to be deemed to have billed or to have obtained an account receivable on the earliest of the day on which you actually billed it, the day on which it would have been billed if you had not delayed unduly in billing it or the day on which you actually collected it. That would be the day on which you were paid for your services if you were paid in advance. They do not define "undue delay" but obviously it is intended to give the department some power over the professional who just will not get around to billing.

The Chairman: This is really a bit childish, isn't it?

Senator Walker: Why are they so fussy and meticulous in a matter like that? It seems unnecessary.

Mr. Smith: I think you would have to see in the books of a number of professionals to know whether they have a point or not. The suggestion is that some people keep

building up their work in progress and not billing and keep deferring it from year to year and that deferral is worth something to them in the sense that they have postponed the taxation of it, but at the same time they have not had the use of the money themselves.

Senator Lang: I think some firms are putting it into their trust account and just taking in their fees. This is under the old system. However, that has been eliminated now. I think we are stewing about nothing.

Senator Connolly: Either a professional has to bill because he wants to eat, or he is going to defer his billing and then get a great glob of income in one year that would put him into a bad tax bracket.

The Chairman: And in these times you cannot gamble on taxes going down.

Senator Beaubien: The real effect of this thing would be to give the government more money in the year it comes in.

Mr. Smith: It speeds up the collection of tax.

Senator Beaubien: If over the years you paid on every dollar that came in, then all of a sudden you have to pay on an amount which you would only have paid in the next year because you deemed it to be owed and it would be an asset to the income.

The Chairman: Next year if it becomes a bad debt, you charge it off against the income of that year.

Senator Beaubien: So all you do is give the Government more income in one year.

Mr. Smith: I shall get to it in a moment, but there are transitional rules to cover the change-over.

Senator Connolly: If subsection (*c*) were removed, then you would be on a billing basis.

Mr. Smith: Yes, (*c*) is not essential to the scheme.

Senator Connolly: It gives the department some discretion?

Mr. Smith: That is right, but ultimately the court would have to decide whether there had been undue delay.

The Chairman: Then the rather extraordinary position is that you will have a layman making a determination as to when an account is in shape to be billed. Very often there are delays in sending out accounts because the client is not in a good position to deal with it right away and, rather than have an outstanding account, you just defer billing it.

Senator Molson: I have just one question which will probably show my ignorance. This is all detailed by section, and yet when we come to section 34(1)(*a*) it refers to paragraph 12 and so on. Then in dealing with it Mr. Smith says that section 12(1)(*b*) does not apply.

Mr. Smith: I have always referred in the old act to section numbers but I guess they have changed the nomenclature somewhat, but I do not think it is significant.

Senator Molson: But they are described as sections here. At the head of these things for section, can we read paragraph? Are they really interchangeable?

The Chairman: When you go back to what they refer to as 12, you can call it section.

Mr. Smith: Well, referring to a part of the section—I think when they refer to part of a section—in other words to a subsection—they call it paragraph.

The Chairman: When you look at the original place in the bill, they refer to it as a section.

Mr. Smith: Yes, but I think if they were referring to all of section 12, they would refer to it as section 12. But if they are only referring to subparagraph (*b*) of subsection (1) of section 12, it is a different matter.

The Chairman: When I look at the bill on that I see it is entitled section 12(1)(*b*).

Senator Molson: I am not really nit-picking but when I read this first I wondered where paragraph 12 would be because we are dealing with sections. Maybe this is sheer ignorance on my part.

Senator Beaubien: Well, Mr. Smith answered it very clearly. It is a subparagraph of the section.

Senator Lang: For the purpose of the record, I want to object to the considering of a business as a profession. There is no such thing as a business that is a profession or a profession that is a business.

The Chairman: They are contradictory terms.

Mr. Smith: If you go along you will see that subsection (*d*) of section 34 says that where a taxpayer elects in his tax return he is not required to account for work in progress. Now the important point to note for any professional taxpayer here is that in his first tax return, presumably, he must make this election or he will be required to account for his work in progress. One might have expected that it would be the other way around, that he wouldn't have to account for it unless he specifically elected to account for it. This is something each professional taxpayer will have to look out for in his first return under the new system. Once you have elected in the first year, that applies to all subsequent years unless you are permitted to revoke your election with the Minister's consent.

Now from section 34 you move to Rule 23 of the transitional rules. That is the section which deals with the change-over from the cash basis to this form of accrual. It is at page 419 of the CCH edition. Rule 23(1) says that in computing income for the 1972 taxation year the accounts payable which were outstanding at the end of the 1971 year may be deducted. That is to make sure that they are in fact accounted for in the 1972 year. Otherwise they would not be taken into account in the 1971 year because they had not been paid and specific treatment is required to obtain the deduction in 1972.

Senator Connolly: I am sorry, Mr. Smith; but I did not follow you.

Mr. Smith: In 1971 you have been on the cash basis, so you have deducted the accounts that you have actually

paid, but you have not deducted those that are merely outstanding at the end of the year in computing your income, so this section 23(1)—

Senator Connolly: What do you mean by "deducted in 1971, including the accounts that you have billed and have paid?"

Mr. Smith: I am referring to your expenses, the liabilities side of your balance sheet.

Senator Connolly: Oh, I am sorry.

Mr. Smith: The amounts that you owe other people.

The Chairman: These are deductions.

Mr. Smith: So you have only deducted those that you have actually paid in 1971. Therefore in 1972 this gives you the deduction of the outstanding balance of those.

Rule 23(2) provides that where an election has not been made not to account for work in progress, the work in progress at the beginning of the 1972 year is to be taken on the same basis of valuation as at the end of the 1971 year. That section has no application to taxpayers who decide that they are not going to account for work in progress and so elect.

Rule 23(3) deals with the accounts receivable which were outstanding at the end of the 1971 year. To make any sense of subsection 3, you have to turn to the definitions in subsection 5. The first one is "investment interest" and the definition of that term depends on whether it be an individual taxpayer, a partnership or a corporation that may be carrying on a profession.

The investment interest of a sole proprietor is just his accounts receivable at the end of the fiscal period under consideration. In the case of a partnership, it is the adjusted cost base of the partner's interest in the partnership. I will discuss the computing of that later, but basically it is the partners' capital account, with all assets being taken at their tax values. It is not only receivables; other assets are also taken into account. Basically it is the partner's equity in the partnership.

In the case of a corporation, the investment interest is defined as either the accounts receivable, or a portion of them, depending on how many years have elapsed after 1971. The idea in the case of the corporation is that the accounts receivable at the end of 1971 will be brought into income gradually over a 10-year period.

"1971 receivables" is also a defined term in subsection (5). It is basically what you would expect it to be, the accounts receivable outstanding at the end of the 1971 year, less debts that became bad before the end of the year. These are the accounts which were not previously included in income because the taxpayer was on a cash basis.

Going back to subsection (3), this is intended to bring into income the 1971 receivables and at the same time allow a reserve. This will avoid taxpayers who are making this transition being suddenly faced in 1972 with all their income on an accrual basis, plus their 1971 receivables, which would obviously throw up a much larger amount of income.

The Chairman: You would really have a balloon there.

Mr. Smith: That is right. So subsection (3)(*a*) provides that an amount not exceeding the lesser of the amount deducted the year before may be deducted. That is to bring in this rolling reserve or your investment interest in the business at the end of the year in question.

For the 1972 year the amount that is deemed to have been deducted under that provision for the previous year is taken as the amount of the 1971 receivables. In other words, for the 1972 year the deduction is of the lesser of 1971 receivables or the investment interest in the firm at the end of the 1972 year.

For taxation years after 1972 the deduction is of the lesser of the amount that was deducted the previous year, on your investment interest at the end of the year.

Subparagraph (*c*) provides for the inclusion in income of the amount deducted under subparagraph (*a*) for the previous year.

Subparagraph (*d*) merely picks up bad debts which may have accumulated subsequent to 1971.

I have placed on the blackboard a rather oversimplified example of a professional firm to illustrate these rules. Not being an accountant, this may be a rather simple-minded example; I am sure any accountant would say that the figures from year to year do not follow. However, I have just assumed some hypothetical numbers and I have allowed the profit of the firm to fluctuate. The example assumes a four-man partnership which is reasonably profitable. I have allowed it a profit as a firm across the top.

Senator Connolly: Mr. Chairman, before Mr. Smith starts explaining the table on the blackboard, could we at this stage instruct the reporters to leave a space in order to have that table inserted in the record?

The Chairman: Yes. They have already copied the table from the board. It will be incorporated in the record.

Senator Connolly: At this point?

The Chairman: Yes. It will not go in as an appendix.

TABLE II

	1971	1972	1973	1974
Profit for year	200,000	220,000	160,000	240,000
Net Receivables	50,000	55,000	40,000	60,000
Other Assets	10,000	10,000	10,000	10,000
Total Assets	60,000	65,000	50,000	70,000
Payables	10,000	11,000	8,000	12,000
Partners' Equity	50,000	54,000	42,000	58,000
Adjusted Cost Base of each partner's interest	12,500	13,500	10,500	14,500

Mr. Smith: Across the top of the chart I have four taxation years; the numbers are all with the thousands omitted. The headings are down the left-hand side. The first heading is the profit of the firm. The second heading is the account receivable outstanding at the end of the year. The next heading is the fixed assets or other assets, making a total asset which is the fourth heading down. The next heading is the accounts payable at the end of the year.

"Equity" means the equity of all of the partners in the firm—the total of all of the partners' capital accounts. The final figure across the bottom is the adjusted cost base of each partner's interest. This assumes that the four partners each have a 25 per cent interest, so I have just divided the equity of the firm by four. I have let the profit fluctuate from year to year starting out with a base in 1971 that rises in 1972 and then falls below the 1971 figure in 1973 and then recovers to a greater number in 1974, and I have allowed the various financial assets to fluctuate in proportion to it. That is why I say most accountants would take the position that this does not follow, but it serves my purpose.

Senator Beaubien: How would the assets be taxable?

Mr. Smith: These are all balance sheet items from the end of the year.

Senator Beaubien: Yes, but you do not pay income tax on the assets.

Mr. Smith: This is just setting out a typical balance sheet which I will use for some examples. If you take a particular partner of the firm in 1972 having a 25 per cent interest in the profits and the capital of the firm, his share of the profits will be $55,000; 25 per cent of the top figure. Now, section 23(1) gives him a deduction of the accounts payable that were outstanding at the end of 1971. Taking 1972 as an example, his interest in the profits would be $55,000, so what we are looking at is his 1972 adjustment to income under Rule 23. He has income of $55,000 as his share of the profits. Under Section 23(1) he can deduct his share of the accounts payable that were outstanding at the end of the previous year.

Senator Connolly: The second-last line is his interest in the profits?

Mr. Smith: No, this is the profits. These are the accounts receivable; these are the other assets; this is the total assets; this is the accounts payable; and this is the total partners' equity and the adjusted cost base. His share of the equity, if he has a 25 per cent interest—

Senator Connolly: The accounts receivable just happen to coincide with the equity?

Mr. Smith: Yes, that is right.

Mr. Smith: Now, in 1972 you start off with the partner's income of $55,000. Section 23(1) gives him a deduction for his portion of the accounts payable which are outstanding at the end of the previous year. That is this figure. His share of that would be one quarter on $2,500, so he can deduct that when computing his income for the year 1972. You then move over to section 23(3)(*a*) under which he is entitled to deduct the lesser of his share of the 1971 accounts receivable which is this figure here and which amounts to $12,500 or the adjusted cost base of his interest in the partnership at the end of the taxation year 1972; this is this figure over here. That gives him a deduction of the lesser of the two figures.

The Chairman: Would you mention the figures?

Mr. Smith: The lesser of $13,500 or one quarter of the 1971 accounts receivable, which is $12,500, so he would be allowed to deduct $12,500. Moving over to subparagraph (*c*) of Section 23(3) it says to add the amount that you deducted the previous year. Well, you did not deduct anything the previous year under that subsection so subsection (*c*) says that you add instead your share of the 1971 accounts receivable which is the figure of $50,000 and 25 per cent of that is $12,500, so you add $12,500. You have deducted $12,500 and you have added $12,500 which results in you having no adjustment to income.

Senator Molson: You still deduct the $2,500.

Mr. Smith: Yes, the two $12,500 washed themselves out, but you have a deduction for the $2,500 for the payables. Your net adjustment in 1972, then, would be $2,500.

In 1973, however, the activity of the firm has fallen and the partners' equity has been reduced. In other words, they have taken out a portion of the financial assets; they have not maintained their equity at $54,000. They have let it drop to $42,000.

Mr. Smith: I have allowed it to fluctuate with the level of income, but there is no necessary connection between the two. The key to this is how much you draw out of the firm. If you maintain the investment interest or equity that you had in 1972, you will not have to make any adjustment to income. It is only when you pull out capital, as it were, that you run into an adjustment. If you run through the examples for 1973 your have income of $40,000 which is 14 of $160,000. You have no adjustment to make for the accounts payable, 1971, because that has been taken care of in 1972. It is just a one-year provision. You then go to section 23(3)(*a*) and you deduct the lesser amount that you deducted for 1972, which you will recall was $12,500 or the adjusted cost base of your partnership. The interest of all of the partners has fallen off and one-quarter of the interest is now only worth $10,500, so what you deduct as being the lesser is the $10,500. You then come to section 23(3)(*c*) and you find you have to add the amount you deducted the year before, which was $12,500. Now, you have deducted $10,500 and you have added $12,500, so you have an adjustment to income of plus $2,000. The reason for that is that you have allowed your investment interest to drop, and the Government says that by allowing your investment interest to drop you are pulling out some of the accounts receivable which were outstanding in 1971, and because the Government deems you to be pulling out that money it requires you to include a portion of it as income.

I do not need to run through the example for 1974 because you will see that the investment interest has risen again to a greater number than it was back here, and the effect of that is that there will be no adjustment in 1974, no inclusion of income as a result of section 23(3).

Senator Connolly: Mr. Chairman, if other methods of preparing income tax returns for other groups in the economy are as complicated as these in this act are, I do not know where we are getting to. We have many lawyers in this committee, and we have two very brilliant young men giving us an explanation of this section, yet we are having the greatest difficulty trying to understand it, much less say that we are able to operate it. Now we are asked, in other words, to foist this on the public of Canada and say, "Here, this is the way that you should run your affairs and make up your tax returns." We have all complained

through the years about the complications of the Income Tax Act, but it seems to me that this is beyond the bounds.

The Chairman: Well, Senator Connolly, perhaps what we need at this time is a reincarnation of the Gilbert and Sullivan era so that we could really put this to music.

Senator Sullivan: Only you should give it a name other than Sullivan!

The Chairman: Perhaps in that way the public would get some understanding of the complications.

Senator Molson: It might be a bit of a dirge.

The Chairman: The way to deal with this one is to lampoon it.

Mr. Smith: I have heard Arthur Scace attempt to sing. I think you would need to get a new cast, if you were going to do that.

The Chairman: Perhaps you could take the tenor lead yourself.

Senator Molson: Mr. Smith, this establishes the income of the partner in the partnership. Is this correct? What happens when he moves that into his own tax return?

Mr. Smith: I will come to how you account for partnership income, but the point of this, first of all, is to bring it into the 1971 receivables and then allow a reserve. The effect of the reserve is that so long as you have a professional practice that is increasing in volume and you keep your capital account up to not less than what it was in 1972—in other words, you are not pulling your capital out of the firm—you will never have to bring this reserve into income until such time as you decide to retire or such time as your practice declines in volume and, hence, there are fewer financial assets invested in it.

Senator Molson: You see in 1973, for example, the accounts payable are down and therefore pull more out of the business and the individual has a bigger income.

Mr. Smith: Yes.

Senator Molson: And that is the year when the partnership's receipts are down.

Mr. Smith: I said that these numbers do not necessarily add up from year to year, but are just hypothetical examples.

Senator Molson: But that point is still valid. If the receivables are down $15,000 and the accounts payable are only down $3,000, then the money has gone out.

Mr. Smith: Yes, it has gone into the hands of the partners. Whtat the Government is trying to do is only tax the 1971 receivables as that money is, in fact, withdrawn from the business by the partners—or it could be a sole proprietor or corporation.

The Chairman: If you leave it there as a sort of permanent capital, there is no tax problem.

Mr. Smith: That is right.

The Chairman: At that time.

Senator Connolly: What we are trying to get at, Mr. Chairman, is the fact that some professional groups do not render accounts, or they wait for a long period of time before they do. Is this the thing that these sections are trying to correct?

The Chairman: I think in the course of the White Paper hearings there was the suggestion that there were long delays in billing and you would have money on account that you just kept.

Senator Connolly: And you would draw on it in the bad years.

The Chairman: Yes.

Senator Connolly: Perhaps I am being simple-minded about this, but suppose for the sake of argument we use the example that I am one of the partners and that in 1971 I am entitled to $55,000 from the firm, that in 1972 I am entitled to $55,000, and that in 1973, when I have been living at the rate of $50,000-$55,000, I am down to $40,000. If we have in this firm money that would give me another $10,000, representing accounts which have not been billed, and if I bill them in 1973, what is wrong about billing them in 1973 and paying at the rate of $50,000 in 1973?

The Chairman: If you bill them in 1973, then of course they are income in 1973.

Senator Connolly: That is right, and presumably you would pay at the rate of $50,000.

The Chairman: We are talking about the accounts receivable with which you come into this taxation period. In other words, we are talking about the 1971 receivables.

Mr. Smith: Say your income in 1973 is only $40,000 for that year, but they assume that because you have allowed your investment interest to drop below what it was in 1972 you have withdrawn some of this float in 1971 accounts receivable at the end of 1971. If you were on a cash basis in 1971 you would not have accounted for the $50,000 of accounts receivable. If you just went on to this accrual method you would never account for it. You would have that money to pull out in cash and never pay tax on it. So Rule 23 says that we are going to make you account for this $50,000 which would otherwise be ignored in the transition from cash to accrual, but we are only going to make you account for it when, in fact, you withdraw it from the firm and you do that when you allow your investment interest to drop, that is your capital account, to drop below what it was in 1972.

That is really all that they are trying to get at. Otherwise you would get your share of the accounts receivable free of tax.

The Honourable Lazarus Phillips (Chief Counsel to the Committee): Had you covered the point previously made by Senator Connolly, if a bill is capable of being billed in the sense that the work is completed and, if you deliberately postpone it, it must come into income even though not billed?

Mr. Smith: Yes.

Hon. Mr. Phillips: You covered that?

Senator Connolly: And the department has the discretion to tell you that.

Senator Lang: This has been dealt with in other contexts in the act merely by taking the average rate of taxation over the preceding three or five years. I do not see why the same problem could not be dealt with in the same way here. It would not be quite as advantageous. I am sure that any professional firm would rather pay an average rate on the $50,000 over the succeeding five years than to go through this ridiculous computation every year for the lifetime of the partnership.

Mr. Smith: It enables you to defer it until such time as you do withdraw it.

Senator Lang: Indefinitely, in other words.

Mr. Smith: So it is more generous than requiring you to include it in a three-year period.

Senator Lang: I recognize that it is more generous than what I am suggesting, but I am saying that a recognized technique in this sort of case where you get a ballon effect might be better.

Mr. Smith: That is, in fact, what they did for corporations. They defined the investment interest, if you had a corporation carrying on the profession, as being a proportion of the 1971 receivables which declines by one-tenth for each year for the next ten years so that a corporation could bring in one-tenth of it every year.

Senator Lang: I think that would be much better than what is contemplated here.

The Chairman: It is an alternative we can look at, senator, when we get to that stage.

Mr. Smith: The problem really arises when you have people withdrawing from partnerships and not getting their full share of all the financial assets of the partnership. Really, what it is going to force partnerships to do is to revise their partnership agreements in the light of these rules and the new methods of accounting, which might be a good thing. I think many legal partnerships have been giving too little attention to their own partnership agreements and to their own accounting.

Senator Lang: I agree. I think the ordinary accrual method of accounting is far superior to the cash basis method. I am in favour of that proposition, but we have some complicated roll-over on receivables which is an unduly burdensome technique and is going to complicate partnership agreements tremendously, especially when a partner withdraws and so on. You are going to have infinite calculations, which any sound person would want to avoid even if it meant a little more tax.

The Chairman: On the point of dealing with a partnership when a partner retires or dies, that partner would still have an interest in the accounts receivable of 1971 that had not been drawn down.

Senator Lang: He is going to get the balloon effect then.

Mr. Scace: You would have to amend most partnership agreements so that when a man dies or leaves he is given enough cash to pay his tax on his share of the receivables and other amounts. When there is a withdrawal of one partner, there should be a provision that the partnership is not dissolved at that time. I think most partnership agreements in existence now have in effect a dissolution of the partnership when one partner withdraws or dies.

The Chairman: I think with respect to many partnerships nowadays, on the pay-out which it becomes necessary to make following retirement or death, there is a provision for the instalment liquidation of his interest over a period of years so that it does not come out.

Mr. Smith: The other technique is that forward averaging by purchase of an income averaging annuity will be available, and also Rule 47 of the Transitional Rules perpetuates the present averaging provisions that are in section 70, so that a partner who dies could average over 5 years the accounts receivable that would come into income at death. Or there is the option of filing a separate return as if that year those receivables had been received in separate years. You would get another crack at the rates.

The Chairman: And his marginal rate on that amount would only be whatever that amount attracted.

Mr. Smith: Yes.

The Chairman: That is the value of a separate return?

Mr. Smith: Yes.

If there are no further questions, I will try to give a brief survey of how partnerships are to account for tax purposes.

Senator Walker: I saw you smiling when you said that and I think it should be on the record.

Mr. Smith: I said "brief" because there are only two ways of doing this, either as a quick survey or getting bogged down in some of the detailed provisions. I do not think we have time to do the latter.

Senator Burchill: In comparing the two methods, we had representations made during our hearings on the White Paper from the professional groups who wanted to retain the cash method. That seemed to be the general view. Now I am not quite clear as to why the Government wants to make the change. Is there much money involved in it?

Mr. Smith: There may be. It is really a question of the timing of the income, and a cash method of accounting gives most taxpayers who are on it a deferral. They don't bring money into income as fast as they may be earning it, but only as fast as they are getting paid for it. It comes in eventually, but at any time you can defer tax you have the use of the money that would otherwise have gone in taxes. So it is of some benefit to you, and I guess the government thought the benefit was not justified in these cases. But I think the point that most of the professions were upset about was the fact that they would have to account for work in progress, and I say the provisions in the bill are a compromise in that it gives the professional the option not to account for work in progress. That was the key point. Sure, any professional would like to stay on a cash basis of accounting, but he is in a sort of midway position if he is on accrual method for his receivables but does not have to

account for work in progress unless he wants to do so. And that compromise is a real benefit at least to lawyers.

Senator Benidickson: I am glad to hear of that compromise because practising in a small town, without an expert accountant such as you might have in a large office, it is practically impossible to get your bills out, if you are rushed. Your billing is rather a personal affair. Therefore it is not a matter of having the use of any money and not paying taxes promptly on the use of that money, because you do not get paid until you bill. But the average small office of a professional man only gets paid after he bills. He does not get what is on his books as a receivable.

Mr. Smith: Perhaps I could quickly go through partnership accounting. The basic change made is to require the computation of income—and I do not mean taxable income; I mean the profit or income of the partnership—at the partnership level instead of partner by partner. The theory at present is that you compute the income of each partner, but from a practical point of view I think most accountants have been doing it at the partnership level anyway, and then coming down to the partners' share of it. I think the act is just catching up with the accounting practice in this case. If you look at section 3 of the act you will find that the income of a taxpayer includes among other things his income from each business or property. You will remember that that was the charging section we were looking at yesterday.

Now section 12(1)(L) provides that there is to be included in computing the income of a taxpayer for the taxation year as income from a business or property any amount that by virtue of subdivision (*j*) of the bill, is his income for the year from a business or property. So you then go to subdivision (*j*) which comprises sections 96 to 103 and you find the rules for computing the income of a partnership.

If you just look at section 96 for a moment you will find it is the key section and what it says is to compute the income of a partner as if (*a*) the partnership was a separate person resident in Canada, (*b*) as if the partnership had a tax year the same as its fiscal year and (*c*) as if each partnership activity was carried on by a separate person, and you made a source by source computation of each taxable capital gain—that is the one-half you have to include in income—and each allowable capital loss, that is, the half of the capital loss that you can deduct—and each income from the business and each loss from the business for each year. (*d*) says you compute all these things as if there was no deduction for exploration and development or depletion and (*e*) says that you compute it as if each gain from certain farming land was computed without capitalizing interest and property taxes. But that is of minor significance, I think, in the usual professional context I have been talking about.

Now subsection (*f*) and subsection (*g*) say that you compute the income of a partner as if the income or loss of the partnership from each source for a taxation year was the income or loss of the partner from that source to the extent of his interest. The reason for this source-by-source computation is that it is not the partnership which gets certain deductions in computing taxable income but rather the partner. So in order to give the partner his dividend tax credit, his depletion, his exploration and development expenses and so on, you have to be able to source the income of the partnership.

Now the partnership takes all the deductions permitted under division (*c*) of the act but those are usually the deductions to compute income. But those deductions do not include certain things such as charitable donations, prior years' business losses, dividend tax credits and so on. The biggest effect of this change requiring the computation of income at the partnership level is that capital cost allowances will now be taken at that level instead of partner by partner. And that requires you to transfer the depreciation base of each partner at the start of the new system to the partnership. That is done with a series of detailed rules, which appear to work, and they are complex only because up to now it was up to each partner to decide how much capital cost allowance he actually claimed. One partner could claim it faster than another, if he wished, up to the maximums provided by the act. So there could be situations in which some partners had claimed more than others. The bill requires the transfer of the base that the partner who has claimed the most would have in the assets, as if he had the whole interest. You just multiply by 100 over his percentage interest in the firm to arrive at the firm's total depreciation base. A partner that had not claimed as much would be left with some balance that had not been deducted. So the solution is to allow him to write it off as he pleases.

Senator Connolly: Up to now you have been referring to professional partners?

Mr. Smith: All partnerships.

Senator Connolly: But, generally speaking, professional partners have no depreciable assets.

The Chairman: They have some.

Senator Connolly: Well, equipment and furniture; it is relatively minor when compared to business partnerships dealing in land and so on.

Mr. Smith: That would be true of a professional partnership. However, I am now referring to all partnerships, no matter what business they carry on. As you know, it is relatively rare for most businesses to be carried on as partnerships unless there is some impediment to their incorporation.

Senator Connolly: Perhaps professional partnerships should be allowed to incorporate.

The Chairman: You would have to talk to the Law Society.

Senator Connolly: I know.

Mr. Smith: The non-professional side of a professional business can be incorporated. Any large professional partnership will have the clerical help it requires, space, stationery and services of that type. It is always open to the professional partnership to incorporate that side of it and have the corporation charge it for services. That would simplify the accounting of most partnerships.

The Chairman: I am formulating a phrasing for the deductions you are explaining as between partnerships

and the individual partners. I suppose the real description would be that there are partnership deductions and there are personal deductions?

Mr. Smith: That is right. I do not wish to discuss the detailed ways in which the depreciation base of the partnership would be transferred. They are set out in Rule 20 and are rather complex, to say the least, but they appear to work.

Senator Molson: They ask for clarification of Rule 96(1)(*b*), which provides:

> . . . as if . . .
>
> (*b*) the taxation year of the partnership were its fiscal period.

Mr. Smith: They are not taxing the partnership, but computing the income of the partnership as if it were an individual taxpayer. So they must give it a taxation year. It does not have one if it is not taxable, so they pretend its taxation year is its fiscal period and compute its income for that period as if it were the taxpayer. When you come right down to it, it is the partner who is taxed, not the partnership. However, they are computing the income of the firm at the partnership level and then attributing it to the partners.

Senator Molson: The expressions taxation year and fiscal period trouble me, because the fiscal period may contain different rates because of different taxation years.

Mr. Smith: It means basically that the partner includes in his income this computation of income at the partnership level for any fiscal period of the partnership which ends in his own taxation year. In the case of a partnership with a January 31 year end, the individual partner has a calandar year end. For calendar year 1972, the partner's income would include his share of the income of the partnership for the 12 months ended January 31, 1972.

Senator Molson: Then why does it not say so?

Mr. Smith: That is what it is attempting to say.

Senator Molson: Oh, I am sorry; I am a little dense.

The Chairman: Let us have a look at where the attempt is, Mr. Smith.

Mr. Smith: It is section 96.

The Chairman: Do you mean in paragraph (*b*)?

Mr. Smith: To tie it all together, in starting I went through the relationship between these various charging sections, 3, 12(1)(*l*) and 96. You have to look at all three of those; it pulls into the individual partner's income his share for the fiscal period of the partnership that ends in his own taxation year. Many of these provisions really have to be set out and puzzled over to see what they say.

Senator Molson: Either you are adjusting the fiscal period to meet the taxation year, or you are changing the taxation year to agree with the fiscal period to make this work. I am not quite clear what you are doing.

If the fiscal period of the partnership ends at April 30, is the taxation period of the partnership the year ending April 30?

Mr. Smith: Yes; it says computing the income of the partnership as if it were a taxapayer having that year-end. Once that is done and an income figure emerges which is attributed to the partners. They include it in their calendar year in which the fiscal year of the partnership happens to end.

The Chairman: In the case of a partner on a calendar year and a partnership on any month in that year, that partnership income would be included in the partner's income in his fiscal period of the calendar year if the partnership fiscal period terminated within that year.

Hon. Mr. Phillips: The individual files on a calendar basis and the partnership income at the close of its fiscal year, as if it were a taxpayer, is included in the individual calendar year.

The Chairman: It could mean that with a fiscal year ending April 30, 1972, and the partner having to account for that income in his 1972 calendar year, the partnership period would start in 1971.

Senator Molson: That is right.

Mr. Smith: To go on to another topic, obviously there are two ways of obtaining a capital gain. The partnership can sell an asset and realize a capital gain, or the partner may sell his interest in the partnership and realize it that way. The bill attempts to provide a variety of roll-overs or tax-free transfers where no capital gain or loss is recognized, to permit people to come into, retire from and incorporate partnerships, and so on. There are a number of types of transactions; transfers of property to a partnership by either a partner or someone who becomes a partner at that time; transfer to a partner from a partnership; transfer to a corporation from a partnership, where the partnership business is being incorporated; sale of an interest in a partnership; and sales of property by the partnership itself to third parties.

Generally, the partnership is treated as if it were a person for the purpose of computing gains or losses, half of either then being attributed to the partners themselves. I think it is probably sufficient to say that there are these various types of roll-overs. They are quite technical. The first one is a roll-over to the partnership from a partner or someone who is becoming a partner by transferring property.

The Chairman: What section is that?

Mr. Smith: Section 97. It is a roll-over if all of the partners concur, and it is a Canadian partnership. There are limitations on the election and it does get rather technical.

Section 98 has in it roll-overs where there is a disposition by the partnership of property to a partner. Section 98(3) is the roll-over you get on dissolution.

Senator Walker: How does that work?

Mr. Smith: You do not really want to know, do you, Senator?

Senator Walker: I know it is complicated.

The Chairman: Section 98(3) has a lot of words in it and there it is.

Mr. Smith: Section 98(6) allows you to dissolve a partnership and yet not be deemed to have realized capital gains provided all of the partners form a new partnership. If that takes place they deem the old partnership to have continued. In section 85(2) there is a roll-over on the transfer of property to a corporation; this is similar to the roll-over that a sole proprietor would have. There is also a roll-over where a partnership chooses to incorporate a subsidiary; that is in section 85(3).

Generally speaking, I think they have been reasonably generous with the roll-overs, and the limitations which they have imposed on them are really intended to prevent tax avoidance by the use of the roll-overs.

A rather technical subject is the computation of the adjusted cost-base of a partner's interest in a partnership. Mr. Scace was mentioning how you compute various kinds of adjusted cost bases under section 53, and there are special rules for partnerships under that section.

There are also some transitional rules in Rule 26(9) to get your starting adjusted cost base where you have a partnership in existence, and again those rules are very technical. I think with the amount of time we have left we really should not get into them. I just mention it because they are there, and basically they look at all the tax values of the various assets of the partnership and give each partner his share of them as a starting point.

The Chairman: Would you say the rules work reasonably fairly?

Mr. Smith: If they mean what I think they mean, they work reasonably fairly, yes.

The Chairman: Is there any doubt about the meaning you have described?

Mr. Smith: I find if you stare at them long enough, Mr. Chairman, the meaning starts to come through. There may be some amendments which will make them easier to read.

The Chairman: I suppose you should assign reading time limits and realize then that if you read for that amount of time you are guaranteed to understand them.

Mr. Scace: Do you want a time limit on that? Mr. Smith is one of the few people in the country, I think, who compeltely understands the partnership provisions. It took a reading time of approximately one month.

Mr. Smith: That was partly because I had my feet off the edge of a dock while I was doing it. It always takes longer that way.

The Chairman: You had to dealy while the fish came on the line.

Mr. Smith: Yes. I would like to turn this over to Mr. Scace now because he is going to go through corporations, which is a very complicated subject and it would be something of a whirlwind tour if he finished before lunch.

The Chairman: There are no other questions on the partnership aspect? There is some reading we have to do, but that is to be expected. At least we know where it is now and we have the particular references.

Mr. Arthur Scace is now going to move into the area of corporations and distributions to shareholders.

Mr. Scace: This is a fairly lengthy topic. I think we can only do a gloss on it, but we will try to run through it and I will try to do it in a way that will make some sense. It is hard to know with corporations just where to start. To begin with, I just want to give you two or three definitions of the various types of companies and perhaps you will keep them in mind as we go along.

The first definition is of a public corporation. You will find that definition in section 89(1)(*g*). Essentially it is a corporation resident in Canada whose shares are listed on a prescribed stock exchange or, alternatively, a corporation may elect to be a public corporation if it complies with certain conditions relating to ownership, shares, and market distribution.

The Chairman: The minister has a discretion, then, does he not?

Mr. Scace: That is right. The minister may designate a corporation to be a public corporation if it complies with certain conditions. At this point in time we really do not know what the conditions are; we just know the general range that will be considered. They will come out in the regulations.

The next definition is that of a private corporation. It is defined in section 89(1)(*f*):

> "private corporation" at any particular time means a corporation that, at the particular time, was resident in Canada, was not a public corporation, and was not controlled, directly or indirectly in any manner whatever, by one or more public corporations;

A subsidiary of a public corporation, therefore, could not be a private corporation. It does not get any particular name under the bill; I guess you can just call it an ordinary corporation.

There is also no real significance to being a public corporation. You just get the general tax treatment, but it is necessary to have the definition in order to determine whether a company is a private corporation.

A third important type of company is called a Canadian-controlled private corporation. You will find the definition for that in section 125(6)(*a*). It means:

> a private corporation that is a Canadian corporation other than a corporation controlled, directly or indirectly in any manner whatever, by one or more non-resident persons, by one or more public corporations or by any combination thereof;

In other words, if you have control by non-residents or control by a public corporation you will not qualify as a Canadian-controlled private company. The significance of being a Canadian-controlled private company is that you are entitled to the small business reduction under section 125. We will talk about that in a moment.

The Chairman: Mr. Scace, your reference there with respect to special tax treatment refers to the small business reduction, does it?

Mr. Scace: Yes. A Canadian-controlled private corporation is entitled to a reduction in tax. We will deal with that specifically in a moment.

The Chairman: I just thought we should label it.

Mr. Scace: Yes. The next thing I would like to go on to is the dividend tax credit. The dividend tax credit has been changed under the new bill. As you know, we now have a 20 per cent dividend tax credit on dividends received from taxable Canadian companies. Under the present system, if you receive a $100 dividend from a Canadian company your rate of tax is 50 per cent which means your tax is $50 and you can subtract 20 per cent of the dividend so that the deduction of 20 per cent gives you a net tax on that dividend of $30. I think we are all familiar with that. It really gives you a reduction of 20 percentage points on any dividend that you receive. This is going to be changed under the new bill by a grossing-up of dividend tax credit. The authority for doing that is section 82.

How this will operate is really fairly simple in concept. I will give you the simple way of doing it and then I will show you how it actually operates.

You take a dividend of $300, and because of the dividend tax credit being one-third—it is now one-third rather than 20 per cent because it is easier to deal with either $75 or $300—the dividend tax credit under section 82 is one-third of the dividend, which would be $100. But you take the $100 and you add it to the dividend. That gives you $400, which is the amount upon which you will calculate your tax. If we still have the 50 per cent tax rate, then at 50 per cent we will get $200 in tax. But we are then entitled to deduct the amount of the gross-up or the amount of the credit so that we will get minus $100 and your tax will therefore be $100.

The actual mechanics of the dividend tax credit are a little more complicated than that. Essentially, what you would get on a straight dividend where there is no interest expense, is that, if you are a 40 per cent taxpayer or under, the new credit is more beneficial; if you are 40 per cent, it is exactly the same as under the present system; if you are over 40 per cent, it is less advantageous.

The Chairman: Just to get an idea of the application of this, the 40 per cent rate would be in relation to about $11,000 in taxable income.

Mr. Scace: Yes, the 40 per cent rate would be on a taxable income between $11,000 and $14,000.

Senator Beaubien: Mr. Scace, what is the reference for taking the grossing-up amount off the tax you would otherwise pay?

Mr. Scace: I will come to that, senator. It is a little more complicated. The reference is section 121.

The way this operates, if we take our $300 dividend, we gross-up the one-third dividend tax credit. That gives us $400.

Senator Connolly: Would it throw everybody off, Mr. Chairman, if I asked why that $100 gross-up is added? Is it because of a credit?

Mr. Scace: You get the credit later on.

Senator Connolly: I realize that, but what is the antecedent of this?

Mr. Scace: I do not know whether I can answer that question. A simple answer is that it is because they tell you to do it. But I think the real answer is that if you want to get integration, well, the dividend tax credit is really partial integration. You will see when we come to the investment income of private companies that it is completely integrated under the bill. I think without the gross-up you would not get the integration.

The Chairman: Is there not another suggestion that might be made, that a credit is a form of income?

Mr. Scace: I suppose that is right.

Hon. Mr. Phillips: I think the real answer, Senator Connolly, is that this method is a lingering curse of partial integration that the other chamber allowed to go in. We recommended the complete annihilation. This partial integration has given us two problems: this being one of them, and the other being one which this speaker will come to later, namely, the 33 13 per cent tax on the private companies. Those are the two bequests of partial integration that the other house has given us.

Senator Connolly: I think Hon. Mr. Phillips is right about that. With respect to the 33 13 per cent tax credit, I think there is some harking back to the fact that so many Canadian companies being resource industries you are dealing with a wasting asset and it was a 33 13 per cent tax credit because it is a Canadian company. What is the genesis of the tax credit?

Senator Beaubien: Let us deal with this thing first.

Senator Connolly: Senator Beaubien, the point that bothers me in this is the background. I think that in order to understand it thoroughly we have to know the background of the whole thing.

Mr. Scace: The genesis of the tax is obviously an incentive to buy Canadian shares. The amount of the incentive could be anything from 1 per cent to 100 per cent, depending on how good you want to make it. The mechanics of it could be anything as well.

One interesting feature you referred to inferentially is that you get the dividend tax credit on any dividend from a taxable Canadian company, and there is nothing in the bill comparable to the White Paper where the Canadian company had to have paid tax. So the shareholders of resource companies or companies with large capital cost allowance deductions will get the dividend tax credit, whereas under the White Paper integration they would not have received any entitlement.

Senator Connolly: I think I have enough now.

Mr. Scace: If you look at the tax rates in the act, the specific federal rates are set out and you must add 30 per cent of the federal rate for the province. If we take a 40 per cent federal rate for this calculation, in addition to that there will be a provincial tax of 30 per cent of the 40 per cent which will be 12 per cent. Then we are really looking at a total of 52 per cent. You have your grossed-up amount of $400. You apply 40 per cent to that and it is $160. Section 121 says that you do not deduct the $100, the full amount of the gross-up. Rather you deduct four-fifths of that amount,

which would be $80. That would give you a federal tax of $80. To get your total tax you then have to add the provincial tax, which is 30 per cent of $80, or $24. This gives you a total tax of $104 for a 52 per cent rate taxpayer.

The reason they picked four-fifths was, according to my understanding, that it was the closest whole number or easy fraction that was beneficial to the taxpayer in every case. Also, if they did it any other way the provinces would have to legislate a dividend tax credit. So this was the easy way. I can show you how it comes out with a better result doing it this way. If you take your $300 dividend and gross it up with the $100 tax credit and then apply the 52 per cent rate to the $400, that will produce $208. If you then deduct the $100 credit you will end up owing $108 in tax as opposed to the $104 in tax arrived at by the way I showed you previously. That indicates that with the four-fifths, and the slight complication it involves, taxpayers are in fact better off.

One last thing on the dividend tax credit under the current Act is this. If you had borrowed money to buy shares and you received dividends on the shares, in calculating your dividend tax credit, you must deduct the interest from the dividend. So, if you received a $100 dividend and you had a $50 interest expense, the amount on which you could take the dividend tax credit would be $50 so that rather than getting a $20 dividend tax credit you would only get a $10 dividend tax credit. This has been changed under the bill in that the interest expense does not have to be deducted for the purpose of calculating the credit. Where there is an interest expense involved, the dividend tax credit is much more advantageous for all levels of taxpayers under the present bill.

Senator Lang: If you borrow money.

Mr. Scace: If you borrow money. Now coming back to companies, there will be a flat rate of tax for companies. You will find this in section 123. For 1972 it is going to be 50 per cent. It will then decline by 1 per cent per year until 1976 when it reaches 46 per cent. You will of course have your provincial credits and your provincial taxes as well.

Senator Connolly: The 30 per cent provincial tax remains stationary, does it?

Mr. Scace: Well, 30 per cent provincial tax for individuals is what the federal Government would like the provincial governments to impose.

Senator Connolly: Subject to what the provinces might do, the 30 per cent remains despite the decrease in the amount of federal taxes.

Mr. Scace: Right. Now you have this flat maximum rate of tax, but you also have what they call the small business reduction which is supposed to be the counterpart of the split rate of tax we now have, that is 21 per cent of the first $35,000. The small business reduction will be 25 per cent in 1972, and it will reduce with the reduction in the top rate until it reaches 21 per cent in 1976. So a company entitled to the small business reduction will pay a tax of 25 per cent on its eligible income.

Senator Lang: We are back to pre-1949 now.

Mr. Scace: Was that the rate at that time, senator?

The Chairman: But that is limited.

Mr. Scace: That is right, and I want to tell you about the limitations. It is very complex, but section 125 provides for the small business reduction starting off at 25 per cent. As I said, the only kind of company entitled to a small business reduction is a Canadian controlled private corporation. The reduction is limited to income earned from an active business, and we cannot really tell you what an active business is. There probably will be some litigation on that. In addition there is an annual limit of $50,000 per year and there is also a total limit of $400,000. Now one thing I do not think is particularly clear in the red book, the summary, and there seems to be some confusion among business people is that if you at any time in a Canadian controlled private company earn $400,000 of active business income you lose the small business reduction. If you have a company that in 1972 is fortunate enough to earn $400,000 you will get the small business reduction in 1972, but never after that because it has hit the total business limit. On the other hand if it only makes $50,000 each year, it will take eight years before it gets up to the $400,000 limit.

Senator Connolly: Once it reaches that, is there a change?

Mr. Scace: Once it reaches the $400,000, it is finished, subject to this: the maximum can be reduced by paying dividends to the shareholders and for every $3 in dividends paid to a shareholder, the maximum is reduced by $4. Let us take an example. If I have a company that has reached the $400,000 limit and there is cash in the company and the company pays the shareholders a $75,000 dividend, the maximum amount will be reduced by four-thirds of that which is $100,000, and when you deduct that $100,000 you end up with $300,000 and so you have recouped $100,000 which is available for the small business reduction.

The Chairman: That is the only way to be reincarnated?

Mr. Scace: It is really the only way, that is correct.

Senator Molson: This limit that is defined here, does it mean net profit?

Mr. Scace: The maximum is $400,000 minus a thing called the cumulative deduction account, and you will find that in section 125(b)(i). You will find it is the corporation's taxable income for the year from an active business. So what you have then is the maximum of $400,000 minus the cumulative deduction account which among other things says you add your taxable income from an active business. That would be your income after adding deductions to compute your taxable income.

The Chairman: One of the points put forward to us by representatives of small business when they were here was that they cannot go out and borrow money in the usual way as larger operations can do. They have to generate the money themselves. Now this new method of calculating your entitlement to the lower rate of tax would appear to defeat that, because if you want to stay in the ball park and enjoy for a period of time that lower rate, you must keep paying out dividends to reduce the impact of the cumulative effect which will build you up to $400,000. Of

course, the shareholders could take it and accomplish that and then, I suppose, lend it back to the small business.

Senator Lang: After tax—that is the whole problem.

Senator Carter: It also defines a small business.

The Chairman: Yes. We wrestled a long time with that, if you remember; we had a great deal of evidence.

Senator Carter: It ceases to be a small business when it has over $400,000 of capital.

Mr. Scace: There are several complicating features to the small business reduction. The availability can be lost if the tax saving or the tax reduction is not used in the active business. A penalty tax is imposed under Part V of the act, which starts at section 188. Basically it provides that if the business had been entitled to the small business reduction and the saving was taken and put into what is termed a non-qualified, or ineligible investment, which is defined, a tax of 25 per cent on two times the amount of the ineligible investment will be levied. So the tax saving cannot be taken and put into most normal types of portfolio investments. Otherwise this penalty tax must be paid.

In addition, under Part VI there is another penalty tax. This starts at section 191. When a Canadian-controlled private company, that is the one entitled to the small business reduction, is taken over by a non-resident, the amount of the tax will be the tax saving that the acquired company had been entitled to, or has taken under the small business reduction. This tax will not be fully on stream until eight years from now. For instance, a company making $50,000 a year would take eight years before it reached the $400,000. The tax saving on that would be $100,000, which would be the penalty tax on a non-resident acquisition.

The interesting thing with this particular tax is that if it is intended to discourage non-resident take-overs, it possibly does it, but I think it does it in a funny way, because it will not really be a tax on a non-resident. I think its effect will be that the price that the Canadian shareholder can demand will be reduced, so that the effect will be a tax on the Canadian vendor, which will discourage him from selling to a non-resident.

Hon. Mr. Phillips: Any resemblance to a banana republic in our country is coincidental.

The Chairman: Mr. Scace, may I just attempt to get the effect of that: if a small business has not reached its cumulative limit of $400,000 and it is decided to sell out to a non-resident, the penalty tax is on the small company and its shareholders. If they waited until they reached their cumulative limit, after which time they would no longer be entitled to the lower rate of tax, then this penalty tax in sections 190 and 199 would not apply, would it?

Mr. Scace: The tax will apply in the case of a non-resident take-over of a Canadian-controlled private company, even if it has gone above the limit and that happened some years previously.

However, there is an interesting wrinkle to your question, in that there is no penalty tax when a Canadian-controlled private corporation which has taken the reduction goes public. If it could comply with the conditions prescribed for a public company, it might be able to qualify. There would be no tax or recapture of the small business reduction and then it could sell out. It would probably avoid the Part VI tax on a non-resident take-over.

The Chairman: You mean it might get the minister to exercise his discretion.

Mr. Scace: If he knew what was going to be done I doubt if he would, but that is a possibility.

Also, similar to the low rate of tax we have now, there are rules with respect to associated companies. However, they have been loosened up a little. The basic rules are contained in section 256(1); that is the equivalent of section 39(4) of the present act. For instance, in a situation of a husband owning one company and a wife owning another, under the present act if either one of them owns one share in the other's company they are associated. That has been relaxed to a 10 per cent limitation.

We also have the deemed association rules under the new bill, section 138A(2) of the present act, section 247(2) of the bill. As a result of the association, a Canadian-controlled private corporation that has taken a small business reduction on $200,000 will lose the reduction if it is acquired by another Canadian-controlled private corporation which has also taken a small business reduction on $200,000. The two are combined to come up to the $400,000.

As I have said, in the case of a public take-over of a Canadian-controlled private company it ceases to qualify as a private company, let alone a Canadian-controlled private company, and the reduction will be no longer available, although there is no recapture.

The next topic is intercorporate dividends. Basically under the present act and the bill, intercorporate dividends between Canadian companies pass tax-free. There is a qualification in the case of private companies receiving portfolio dividends, which we will come to shortly. Intercorporate dividends are essentially the same, the reference being section 112.

However, the designated surplus provisions have been altered. Surplus, as we said yesterday, becomes designated when one company acquires the shares of another company and the surplus on hand as at the end of the preceding taxation year is then designated. A dividend cannot be paid out of a designated surplus to the acquired or acquiror company without paying tax; the exemption is lost.

The Chairman: You said acquires the shares; you mean acquires—

Mr. Scace: Control; excuse me, senator.

The method of taxing dividends out of designated surplus will change. A tax of 25 per cent will be imposed under Part VII, starting at section 192. If a dividend is paid from Company B to Company A out of designated surplus, Company A will pay a tax of 25 per cent of the amount of dividend which came out of designated surplus. As I said yesterday, the dividend less the tax will reduce the cost base of the shares.

The Chairman: That is, the paying company gets the special tax.

Mr. Scace: The receiving company.

Senator Beaubien: What is the system now?

Mr. Scace: Take the example of a dividend of $100 going up; Company A brings it into income and is entitled under section 28(1)(*a*) to subtract the amount of the dividend, so it really shows no dividend. If it is out of designated surplus, he loses the deduction, so he has $100-worth of income, on which he pays tax at normal rates.

Senator Beaubien: That is today?

Mr. Scace: Yes. The rules of designated surplus have also been tightened. The definitions of designated surplus and control period earnings under the present act had a few gaps, which have generally been filled.

There is also one interesting provision containing very ingenious drafting if it works. For instance, if Company B has $10,000 surplus and Company C, which is Company B's subsidiary, has $20,000 of surplus and Company A acquires the shares of Company B it becomes the ultimate parent company. Under the present act, when Company A acquires Company B, this $10,000 of surplus will be designated and it will lose the inter-corporate deduction.

However, under the present act nothing happens to the surplus in Company C, so it is not designated. It can pass tax-free up to Company B. It will be deductible to Company B and, similarly, when it gets to Company B it forms part of B's control period earnings and can be paid to Company A tax free.

They changed this under the bill. The change is very complex and it is in section 192(10). Essentially, what it says—and it is imported into the various definitions—is that when Company A acquires Company B and you have Company C down here, the surplus in Company C is notionally designated. It may pass tax-free up through the chain until it gets to the top company or the acquiring company, in which case it becomes taxable. So the net result of the new bill will be as before, the $10,000 surplus in Company B will be designated and there will be a tax if it is paid to Company A. the $20,000 surplus in Company C is notionally designated, and by that I mean it can go up to Company B, tax-free, but in B's hands it becomes designated surplus and so it cannot be paid up to A without having the tax become exigible. If you want to see ingenious drafting, I suggest you take a look at section 192(10).

There is another problem with this too. The definition of control in section 192(4) has been altered a little. It is possible that the effect is that when Company A acquires B, not only is B's surplus designated but so is C's. So it could not move within the chain. But that is not what they intend, and they are going to take a look at it and try to satisfy themselves that that is not the result. They would not have gone through this lengthy exercise of enacting an assumption, if that was to be the result, so it is just a technical drafting matter.

The Chairman: This is something we should follow, to see whether the change is made to reflect that?

Mr. Scace: Yes, sir. I am moving along much more quickly than I had thought I would, and I may get through early.

The next point we come to is investment income of private companies. I think this has to be explained graphically.

Senator Connolly: Before we get to that, would you mind my asking an elementary question? In a corporate dividend, between Canadian companies, tax-free, what is the rationale behind the establishment of the concept of a designated surplus? Why, simply because a company takes over another company, in which it always had shares, should it have to pay tax because it has taken over the company, to take out those dividends?

Mr. Scace: It was designed to deal with a form of dividend stripping. Without designated surplus, Company A could acquire Company B by using Company B's money. I will show you how this would work. Let us say that Company B has $1 million cash surplus.

Senator Connolly: Available for dividends.

Mr. Scace: Yes. Now, Scace comes along. He has no money whatever, but he incorporates a shell Company A. Then this shell Company A enters into an agreement with Company B to purchase the shares for $1 million. Company A borrows $1 million from the bank and the $1 million is paid to B's shareholders. The transaction is closed. Company A owns Company B. The $1 million, without the designated surplus provisions, would be paid as a dividend to Company A which would use it to pay off the bank. You would have stripped B and Company A would have acquired a company without using any of its own funds.

Hon. Mr. Phillips: I think it might be pointed out that that was in a period when we had no capital gains, so that it would create non-taxable income to the vendor of the shares.

Mr. Scace: There is a thought, that perhaps designated surplus is not necessary under the bill. Under the present act, the top rate of tax is 80 per cent. A dividend to a shareholder whose marginal rate is 80 per cent would result in a tax of 60 per cent after the dividend tax credit. As opposed to that, if you sell your shares, there is no tax.

Under the bill, the top rate is 61.1, I believe, including the provincial tax. After you have subtracted the dividend tax credit it comes out to approximately 47 per cent. Your top rate on capital gains, is approximately 60 per cent. If only half of the gain is recognized you can look at it as being only the half rate of tax. Half of 60 is 30, so we have reduced the differential from 60 to 17. For 17 points of tax I think there is some question as to whether we need designated surplus.

The Chairman: Now we come to investment income of private companies.

Mr. Scace: As the Honourable Mr. Phillips said, we do have complete integration for investment income of private compagnies. We also have integration of active business income of a Canadian controlled private company that gets the low rate. Once it gets over the maximums, there is no integration. I can show you a number of examples, possibly. We start with a portfolio dividend from a Canadian company to a private Canadian company. Let us say the dividend was $300. The recipient company must

pay a special tax of $100, it is a third of the dividend. This is the dividend, this is the corporate tax. But that corporate tax is refundable. The company will then have $300 available to pay out to those shareholders as a dividend. It will have the $200, which is the net after paying the refundable tax, plus the $100 in refundable tax which it will eventually get back from the Government.

Senator Connolly: This is, as between what companies?

Mr. Scace: This is a portfolio dividend to a private corporation.

The Chairman: From a public company.

Mr. Smith: Would you make clear what you mean by portfolio dividend?

Mr. Scace: For the most part, it is a dividend from a non-controlled company.

Senator Connolly: It is the ordinary meaning of a portfolio?

Mr. Scace: That is right. If you have control here, it will not be a portfolio dividend; it will just be an exempt intercorporate dividend. Apart from certain complications, it will apply where there is no control.

Coming back, we have $300 which is available to be paid out to the shareholder. So we get a $300 dividend to the shareholder. You treat it as a normal dividend. You gross it up by one-third, which gets you to $400. Assume that the shareholder is at a 50 per cent rate of tax. The tax on $400 would be $200, minus, the dividend tax credit of $100—here I am simplifying the tax credit calculation—which comes out to $100. The total tax is $100.

That is total integration. If the shareholder of the private corporation had received that portfolio dividend directly, he would have ended up with the same result. You gross up to $400, the 50 per cent rate of tax is $200 minus the dividend tax credit, which gives you $100. They have allowed the dividend to pass right through the company, and it is treated in the hands of the shareholder exactly as if he had received it directly.

Senator Lang: It is the same as a personal corporation.

Mr. Scace: Really it is, except that with a personal corporation the income for a year was deemed to be attributed at the end of the taxation year.

That does not happen here. The corporation receiving this dividend can keep it and there is no tax effect to a shareholder until it is actually paid out.

To qualify that, there is a tax effect, because this one-third tax on portfolio dividends for private companies is equal to the tax that would be paid by a 50 per cent shareholder. If the shareholder has a marginal rate of less than 50 per cent, the ultimate tax, if received directly, would be below $100. So more tax is being paid initially than if it had gone to him directly. So there is a slight penalty there.

On the other hand, if the shareholder's marginal rate is over 50 per cent, there is a benefit and a deferral because the immediate tax is less than it would have been.

The Chairman: This is the reverse of the new feature they have been stressing on the new form of dividend tax credit, where the higher your rate the lesser the benefit.

Mr. Scace: That is right. This is really the only kind of deferral that is available.

Senator Connolly: Could they possibly have made it more complicated?

The Chairman: I do not know what "more complicated" means, senator. Either a thing is complicated or it is not.

Senator Connolly: I think they have reached the ultimate.

Mr. Scace: Mr. Smith and I, and others, have worked long enough on it, and although we may not understand it completely, we at least can follow it through.

The one interesting feature is that much of the complexity is found in the integration of private company investment income and the small business reduction. Generally this will apply to small companies and small incorporated businesses. Those are the people who will really have a tough time figuring the whole thing out and who will need professional advice.

Mr. Smith: And they are the people who are least able to cope with the complexities.

Senator Connolly: They must plan the activities of their company so that they will know whether they are afloat or not. A lot of the genius, evil or otherwise, behind some of these rules is that they have not thought about the problems of the businessman. This is just the taxing. He has problems of sales, of overhead, labour and public relations. Perhaps I am a "nut" about this, but it seems to me that we have reached the point where we do not dare to go into business.

The Chairman: I think it might be of some advantage, for the purpose of the record, if Mr. Scace would state in a very summary way the adverse effect of these complexities in relation to small businesses or to those who can least afford to take on a deal with these complexities.

Senator MacNaughton: The final solution is a 100 per cent tax.

Mr. Scace: The difficulty is that they have tried to provide incentives in various ways for small businesses and private companies. Those incentives are in the form of a small business reduction, basically, and the integration feature on investment income. There is no possible way that they could provide these things without it being as complicated as they are. It is a very complicated subject. As the senator said, they have been ingenious and have done an extremely good job on it.

Senator Connolly: I did not say that. I said the opposite. However, I think you are quite right in drawing the other conclusion.

Mr. Scace: The problem is—and I think Mr. Smith stated it very bluntly—that the kind of companies who would be entitled to these particular benefits are not the large companies, but the small incorporated businesses. I do not think that a man who is concerned about carrying on his

business will ever understand the complexities of the statute. He will have to rely on expert advice, and hopefully he will get it.

Senator Burchill: But the expert advice, in a lot of our towns and communities across Canada, has come from lawyers. People go to lawyers to make out their income tax forms. The office of Senator Aseltine made out the income tax forms for hundreds of people. But those offices could never follow the intricate explanation that we have received this morning.

Mr. Scace: I am not sure that I am doing what Senator Hayden wanted me to do, but, if I could put in a word in defence, my initial reaction to the bill was like everybody else's in that I was staggered by it. It has required an immense amount of work for those of us in the accounting and legal professions who do tax work. Initially, we made the comment to the Department of Finance that it was just too complex and nobody would understand it.

Part of the problem is that we are starting from a dead stop, from zero. For the first time ever—perhaps the only other occasion was 1917 when the Income War Tax Act was introduced—there are no real guidelines.

But things are coming out. We have the Clarkson book. We have this one from the Law Society. A lot of people are publishing. Once the documentation and the information is out, I think that people will develop a fairly reasonable understanding of what it is all about, much as we have now; but it will take time. I think that may happen. That is a possibility, sir.

Senator Connolly: When I seconded the motion for these hearings, one of the things I said was that generally I thought the new tax act, compared with the White Paper, was an improvement and generally applied it. However, when I listened to the complexities of the bill, I thought I was wrong. Now, when I hear about the results, perhaps there is an element of my being right, because it may be that the small taxpayer, and perhaps all taxpayers, will get some benefit from this over what the situation might have been had the provisions of the White Paper found their way into the legislation.

Really, the thing comes down to the use of experts upon whom we have to rely. I think Senator Burchill had a point when he said that perhaps we can get these experts in the bigger centres, but in the smaller centres they will be very hard to find.

Mr. Smith: Perhaps I could just add a word. The complexities come in large measure from the incentives that many taxpayers argued should be preserved, the small business reduction being the most important of them, I suppose. The complexities come from the limits that have been put on it. As you know, the present split rate was a very inefficient incentive, because it was a subsidy to those who did not lack capital necessarily, those whose businesses were not necessarily expanding, as well as those who were, so the limits that have been put on it are designed to make it an incentive for those people who do lack capital in fact, and who are starting out from scratch, the theory being that once they have derived a benefit, a tax reduction that is worth $100,000 to them, that should be it. The government subsidize them to the extent of $100,000, they have got it, so long as they really need it to carry out their active business they can have it, but once they start putting it into portfolio investments, why should they have it? The complexities come from circumscribing the incentives in that way to make it efficient as an incentive.

Senator Lang: I object to Mr. Smith saying the government subsidizes anybody by taking less blood out of them.

Mr. Smith: Compared to another taxpayer, where the circumstances are similar.

Senator Beaubien: The torture is a little less.

Senator Lang: I have had some experience of the average assessor in the Department of National Revenue, and I do not know how the department will recruit or train enough assessors with sufficient expertise to do even a normal assessment job.

The Chairman: They will educate the computers!

Senator Connolly: To condition the computer they have to have experts too. I think this is right. We are talking now about the problems that are created for the businessman as a result of this complex legislation. We should have some concern too for the problem of administering a bill as difficult as this. I would think the tax people in the Department of National Revenue must be scratching their heads very, very hard to try to figure out what the people in Finance have really intended with some of these sections.

The Chairman: I would think their interpretation service will be overworked, and bulletins may come out very slowly.

Senator Molson: We have not mentioned the increased work load that is being put on people, all working for the government, trying to understand what the tax is supposed to be and what is supposed to happen. As Senator Connolly said a little earlier, it probably means that a lot of them will not be selling anything or doing anything; they will merely be sitting scratching their heads and trying to get their lawyer and accountant to straighten out their tax problems.

The Chairman: When they get to the finality—

Senator Molson: They have not got the money.

The Chairman: —the calculation would be a hypothetical problem, "If I had the money".

Senator Molson: By that time.

The Chairman: This is what the answer might be.

Senator Connolly: It is purely academic; there is no money.

Senator Molson: The big companies will perhaps have less difficulty in coping, but that does not mean there will not be more people and more time spent on this non-productive business of trying to figure out how much they owe the government.

The Chairman: This is not in aid of unemployment, is it?

Senator Beaubien: It will employ a lot of people.

Senator McNaughton: Surely it amounts to this. We will have to pay much higher fees for the expert advice andor you will have to hire another 20,000 experts for the Department of National Revenue to explain what they are trying to get from you.

The Chairman: I do not know why you put an "or" in there. I do not think it is disjunctive; I think both things will have to happen. The department would have to acquire an educated staff and business would have to acquire it, because very often they have different views and end up in law suits.

Senator Lang: I think also that among the unsophisticated high complexity tends to encourage evasion.

Senator Beaubien: It is bound to.

Senator Lang: I think this will flow from this type of legislation.

Senator Connolly: Maybe we have reached a kind of society that is so complex that to regulate it we have to have incomprehensible laws at times.

Senator Walker: Are not a lot of these complicated features due to the fact that companies have done their best to circumvent the law?

The Chairman: No, I do not think so. I think that would be an unfair conclusion. The law is there and you are supposed to be your own assessor. You interpret it, and very often you have disagreements with the assessor.

Senator Connolly: Following what Senator Walker just said, I think it is a perfectly legitimate exercise for a taxpayer to minimize his tax.

The Chairman: I do not think that was Senator Walker's problem.

Senator Connolly: If that is evasion—

The Chairman: No.

Senator Walker: That is not what I meant. It is plugging the loop-holes.

The Chairman: That is a different problem.

Senator Walker: Is that not the problem?

The Chairman: Why do they call them loop-holes?

Senator Walker: Because the public finds ways of getting around them.

The Chairman: Start at the beginning. The beginning is that Parliament devises a scheme of taxation and the words they use produce certain results. In those words certain situations are not covered. Therefore there is no law and no taxation feature applicable to the situations they have to cover. When business people discover that situation they avail themselves of it. This is why they talk about amendments plugging loop-holes. I think "loop-hole" is a misnomer. It is just that the scope of the legislation at the beginning was not expanded as broadly as they subsequently realized they should have done.

Senator Walker: It has been now.

The Chairman: The scope is now being enlarged.

Senator Connolly: This is the first grab. We still have not got the amendments that are going to come in the next five years.

The Chairman: That is quite true. I would think the immediate amendments would be for clarification, and also to make sure that what is in the bill is what they mean.

Senator Walker: Is it a fact that the draftsmen of our statutes now are not as well trained as they used to be? Honestly, in the last few years things have been getting awfully complicated.

The Chairman: You made it difficult for me to answer that question when you said, "Is it a fact". I do not know as a fact.

Senator Connolly: I would think the draftsmen are perhaps more ingenious and better trained now, but the things they are required to put into the statutes are so complicated that they cannot possibly write it in terms of one syllable.

Senator Burchill: They invent new words.

The Chairman: You must underline too the speed with which they are expected to produce. That is a very important factor. With bills like this tax bill speed would be a very difficult thing to apply if you wanted to have the bill completely intelligible.

Senator Lang: I believe the United States' revenue code has some sort of explanatory paragraph attached to each section in lay language, setting out the general purposes of the section. Although they do not have legislative effect, they sometimes have an interpretative effect. Certainly they aid in finding the right places to go for the answers. I am wondering if we should not be thinking of a similar sort of device to attach to this piece of legislation.

The Chairman: Maybe the summary of the legislation with the raspberry-coloured cover was intended to be an indication of the purposes.

Senator Lang: Perhaps that summary should be put in the bill.

The Chairman: What good would it serve? There is no correlation between the two, so that just printing the summary as part of the bill for its persuasive and interpretive effect would not prevent our having to wade through the whole of the bill.

Senator Lang: That is not what I meant. I meant to follow the U.S. procedure. As I understand it, each section of the U.S. act has an explanatory paragraph preceding it, dealing with the very section. It seemed to me it would be of great assistance to the lay person and lawyer if such explanatory sections were inserted in this bill.

The Chairman: That is on record now and when we come to think about this in summation we can see about that.

Do you wish to continue now, Mr. Scace?

Mr. Scace: I hesitate to become more complex, but if you would like to see it, I can show you how interest income and capital gains income in a private corporation are integrated.

The Chairman: Have you the sections there?

Mr. Scace: Yes. All these things are a combination, but, basically, for interest you look at section 129.

Now, to take an example, let us say you have $100 of interest income. The corporation will have a flat rate of tax of 50 per cent. So $50 is the flat rate of tax in this amount.

Senator Connolly: What do you mean by interest?

Mr. Scace: On a bond or debenture. Anything like that.

Senator Connolly: I see.

Mr. Scace: Twenty-five percentage points of the tax, in this case $25, is potentially refundable. So $25 of the $50 is refundable to the corporation. As with the portfolio dividend, this means that the corporation has $75 available to pay out as dividend to a shareholder. It has the net between the $100 and the $50, which is $50 plus the $25 of the $50 which is potentially available as a refund.

So if the dividend is $75 and it is paid to the shareholder, we then go through the normal grossing-up procedure. One-third is $100. Let us say the shareholder is a 50 per cent rate taxpayer. There is a $50 tax. You subtract from this the amount of the gross-up or the dividend tax credit, which produces $25 in tax. The total tax is $25 to the shareholder plus $25 up here, because $25 of the original $50 got refunded.

Similarly, if the interest was received directly by the shareholder of the private company without the intervention of the private company, there would be $100 of interest income. He is a 50 per cent taxpayer. Therefore, there would be $50 in tax for a net of $50, which is exactly the same.

With capital gains it is a little more complicated. Let us say the corporate capital gain is $200. One-half of that is taxable. So you get a taxable capital gain of $100. The non-taxable portion of the gain, this other $100, goes into a thing called a capital dividend account. We will come back to that in a moment.

Looking at the taxable portion, the corporate tax is 50 per cent, or $50. But as in the case of interest income, one-half of the corporate tax is potentially refundable. So $25 of the $50 can get refunded to the corporation. Just looking at the taxable half of the dividend, we have the $50 still available plus the $25 refund. So we can pay a dividend to the shareholder of $75, gross it up to $100 and he is at the 50 per cent rate so his tax is $50 minus the gross-up which produces $25 tax. So at that point of time the tax which has been paid is $25 by the shareholder and $25 by the corporation, the original $50 less the $25 refund.

The non-taxable half, the $100, as I said before, goes into the capital dividend account persuaded under section 83(2).

Senator Connolly: That is segregated on the company's books.

Mr. Scace: That is right. It is a sort of notional account.

Senator Lang: Can you borrow money against it?

Mr. Scace: I do not think it is a real asset. The real asset is $100 in cash. It goes into this notional capital dividend account and you may pay dividends out of the capital dividend account tax-free to the shareholder. So that you have $100 going over to the capital dividend account and it comes out as a tax-free dividend to the shareholder. So the total or net result is that the tax that has been paid is $25 plus $25, which is $50, and the total tax is $50. The net to the taxpayer is $150.

Now, if he had done that directly, the taxpayer would have realized the $200 capital gain. One-half of that would have been the taxable capital gain. If he is a 50 per cent rate taxpayer as in our example, then that is 50 per cent of $100 and it is $50 tax so that it is exactly the same tax and the same net. That is how it goes through. The only wrinkle with respect to the capital dividend account is that it does not come into play until you have taken out the 1971 surplus in the company. That is the next topic.

In those three calculations you see how the total integration of private company investment income is achieved.

Senator Lang: So we are now going up from the present 15 per cent to 25 per cent. When you extract tax-free capital gain from the corporation now you are going to have to pay 15 per cent tax before the undistributed income goes out.

Mr. Scace: That is right. For example, let us say a corporation realizes a $200 capital gain now, there is no tax in the company. So you have zero tax. But that gain gets locked in behind the undistributed income in the company, and, you are right, to get at it you cannot distribute it tax-free until you have paid out all your undistributed income, which means the 15 per cent tax under section 105 of the existing act. That really results in an approximate 37 per cent tax rate, because on the dividend out you do not have your dividend tax credit. So it is better, if you are under 37 per cent, to pay it out as a straight dividend. If you are over the 37 per cent, it is better to go with section 105 of the present act.

We then come to the 1971 surplus. This is really what we touched on yesterday. At the end of 1971, companies if they are not in a deficit position will have a surplus, and this surplus will be made up of three things. It will be made up of tax paid undistributed income on hand; that is income or surplus that the company has earned and upon which it has paid the 15 per cent tax under existing section 105. Let us take an example of this; if in 1970 the company has $100 surplus or undistributed income and it paid the 15 per cent tax, then it has $85 left. But if it does not use it or distribute it, then that $85 is in a notional account called tax paid undistributed income going into the system. There will also be straight undistributed income, and that is roughly the same undistributed income as we have now with one major change. Undistributed income under the present act starts from 1917 and is calculated up to the present time. Undistributed income for the purpose of 1971 surplus only covers from the year 1950 to 1971. So for companies which were in existence prior to 1950 their pre-1950 surplus is no longer considered to be undistributed income.

Senator Connolly: But in both those cases the corporate rate has been paid on the profits, and in case No. 1, in addition to that the income that they are holding there as undistributed has already been subjected to the 15 per cent tax and that is why it is not tax free.

Mr. Scace: That is right.

Senator Connolly: And then in case No. 2 the 15 per cent tax has not been paid on the undistributed income.

Mr. Scace: No. We will come to that in a minute and we will see what happens to it.

The third item is capital surplus. Capital surplus is a very lengthy definition. It is in section 89. Capital surplus is going to be made up of a number of things. Probably included in it will be pre-1950 undistributed income, and this is one of the great advantages to the method of distributing 1971 surpluses. So you will have pre-1950 undistributed income in there, and you will also have accrued capital gains up until implementation of the system. If the company has an asset which it bought at $100, and on V-day it is worth $200, that $100 is notionally included and it will fall into capital surplus if it is ever sold.

Taking the 1971 surplus out of the company, the tax paid undistributed income can just be paid out as a straight dividend, not taxable to the shareholder. On the undistributed income, under section 96 you may pay 15 per cent and it can be paid out to the shareholders after the 15 per cent tax has been paid. With capital surplus nothing need be done. It can go out, after these amounts, tax free to the shareholder and no additional tax has to be paid. Now you can see that one great benefit of these distribution rules is that without the new bill companies which had say $1 million of undistributed income earned prior to 1950, the tax cost of getting that out under section 105, the immediate cost, would be 15 per cent or $150,000. Basically that pre-1950 undistributed income goes into capital surplus and can got out tax free. This caught some people who were trying to preplan for what the bill might do. I do not think anybody ever expected this would be the result, and some people were taking out their pre-1950 surpluses and paying the tax and I suspect that they will not be very happy when they find out that the tax need not have been paid.

The other feature of these non-taxable dividends out of the 1971 surplus—as we mentioned yesterday—is that the amount of the dividend must be deducted from the cost base and you reduce the cost base of your share by the amount of the dividend. So if the shares are ever sold for an amount in excess of the cost base, you may get taxed on the capital gain.

Senator Connolly: What is the rationale behind paying out the capital surplus tax free? Here I am on the other side and I am being the devil's advocate. Simply because a company before 1950 did not bother to distribute surplus which it had earned, in 1971 it is able to distribute it to its shareholders without any corporate tax of any kind. Presumably they paid the going corporate rate before 1950. I suppose that would be all right. Then when it gets into the hands of the shareholder, he pays at his own rate.

Mr. Scace: No, he has no tax on that.

Senator Connolly: Why should he not have tax on it?

Mr. Scace: I do not know whether I can answer that, but we have double taxation and will continue to have to a certain extent under the new system. There is corporate tax and then again there is taxation when it is distributed to the shareholders. The dividend tax credit is a method of trying to reduce the element of double taxation, and the whole business of section 105 was an effort to allow people to take out the surplus at a lesser tax cost and thereby minimize the double taxation. I do not know if you can rationalize this as anything but a policy to benefit the taxpayer in these particular circumstances. The really important one is the one concerning the pre-1950 surplus. But it is hard to assess what the benefit will be.

Senator Lang: You still have to pay 15 per cent to get out the pre-1950 surplus.

Mr. Scace: No, sir. That is capital surplus. Formerly you would have had to pay 15 per cent, but now you do not.

Senator Lang: But the pre-1970 surplus?

Mr. Scace: Between 1950 and 1971, yes.

Senator Carter: Are there any circumstances where it would be beneficial to move No. 2 up to No. 1?

Mr. Scace: You mean to pay the tax on it?

Senator Carter: Yes.

Mr. Scace: To get it out as a tax-free dividend, what you could do is to pay it out as a straight dividend and then you would be into the normal rules. This is a cheaper way of doing it—by paying the 15 per cent. Take the situation of a company which owns investments and the value of the shares in the company is directly proportionate or commensurate or related to the value of the assets in the company, I think in that case this would be very beneficial. You would pay your 15 per cent tax on the 1971 undistributed income and you would move it up to No. 1 and you would pay it out as a non-taxable dividend and it will reduce the cost base of your shares in the company. But since they are completely related to the assets inside the company, there is really no penalty to it at all. It is very beneficial.

Mr. Smith: There is a penalty where an operating business is valued by capitalizing its earnings. Ordinarily a payment of a dividend by that kind of company would not necessarily reduce the price at which it could sell its shares, unless it were a very large dividend which impaired the working capital and its ability to produce profits. This reduction in the cost base does not really reflect the good will inherent in any capitalization of earnings.

Mr. Scace: Our last point is with respect to section 184, under Part III, headed "Additional Tax on Excessive Election". In order to obtain the special treatment on the 1971 surplus, a company must elect and say it is paying a dividend out of tax-paid undistributed income or capital surplus. Section 184 provides that if that election amount is in excess of the actual amount of tax-paid undistributed income or capital surplus, there is a penalty tax of 100 per

cent of the excess. This could be a disaster and I think it has to change.

Assume that by a calculation it is determined that the 1971 surplus is $1 million and an election is made to have it paid out as a tax-free or a non-taxable dividend. It is later discovered that the 1971 surplus is only $500,000 so the tax or, penalty will be $500,000. It is completely unfair that there should be that type of penalty tax on something against which it is almost impossible to guard. Many of you, I am sure, have had dealings in which it was necessary to calculate the undistributed income of a company. It is generally an accounting matter. They are going back a great many years and might be accurate, but might not, and by pure inadvertence could be out by a substantial amount.

I think a provision should be added that if a mistake were made the additional tax may be paid to bring it on side without a terrible penalty such as this. However, the Department of Finance has been informed of this and it may be in the amendments.

Senator Lang: Is the definition of undistributed income in this bill the same as under the old act?

Mr. Scace: Yes, it is essentially the same. However, one major difference is contained in section 196(4). It specifically inserts the year 1950 as being the starting point for the calculation.

The Chairman: Will any problems be presented by the fact that over the years many companies have maintained one surplus account, into which they have added not only income, but capital gains?

Mr. Scace: I think all companies generally have kept one surplus account and probably have not kept a running calculation or account of undistributed income, or anything else. They only considered that when it became necessary to make a calculation for the current tax. Most companies will be in the situation of having it all lumped.

The Chairman: This emphasizes more than ever the disastrous effect of paying an amount in excess of undistributed income and how easily it might develop. I know there has been a great problem in trying to analyze surplus accounts going back over a period of years and identifying capital gains and income items.

Senator Burchill: Should there not be an item on reserve?

The Chairman: No; reserve is something else.

Senator Burchill: What is the difference? I often wondered.

The Chairman: The analysis can be most careful and honest, but the penalty for an error of one dollar, or I suppose even one cent, is pretty severe.

Where does that leave us now, Mr. Scace?

Mr. Scace: Senator, that completes what we were going to do today. If you wish to continue, we can discuss estates.

The Chairman: We have had quite a strenuous morning. There are several items left. We have appointments for hearings for next Wednesday, but so far we have kept Thursday open. On Thursday we might finish the other headings.

I regard the heading of International Taxation as very important, then generally the law relating to estates, real estate and corporate acquisitions. Lastly, we have resource industries.

Certainly, later the following week and thereafter, judging by the number who now have dates for hearings, the presentations will involve international taxation, corporations and distributions to shareholders. I think it would be a good idea if we were educated a little before we start hearing those.

Senator Carter: Do we resume hearings on this bank bill next week?

The Chairman: Yes, on Wednesday; that will not take more than half an hour. They have material which they wish to submit regarding the standing of the people who made the feasibility studies for them.

Senator Walker: Could Mr. Scace start discussing estates this morning?

The Chairman: It is almost ten after twelve now.

Senator Lang: Is it necessary to qualify again by paying out the equivalent in dividends in order to acquire status to elect on the payment out of tax-paid undistributed income?

Mr. Scace: No, the necessity of a dividend record is abolished, which is a great advantage.

Senator Lang: That is quite a change in the ball park.

Mr. Scace: There is no doubt that the Department of Finance has been very, very generous with regard to the distribution provisions. I cannot say as a fact, but I have heard rumours that the Department of National Revenue is not particularly happy with the generosity of the Department of Finance.

The Chairman: There are one or two other things I would like to say. This committee may be sitting tomorrow. I am not at all sure it will be, but it may be sitting earlier than Wednesday of next week. It all depends on Bill C-262 and when it is referred to committee.

Senator Beaubien: The Senate is sitting at 8 o'clock on Monday.

The Chairman: This, I do not know yet.

Senator Burchill: Yes, at 8 o'clock Monday.

The Chairman: It may be that they do not want to wait until Wednesday. It may be that the debate on the bill may go on into Tuesday, in which event it would not come to us until Wednesday. For all these reasons I do not think there would be any time on Wednesday that we could count on having available to continue our study. I think Thursday is a more convenient date for Mr. Scace and Mr. Smith.

Senator Walker: Next Thursday?

The Chairman: Yes, I think perhaps we will deal with that on Thursday.

Senator Beaubien: Thursday morning?

The Chairman: Yes. I would like to make a statement of "instalment credit" and appreciation to both Mr. Scace and Mr. Smith for what they have done to date.

Hon. Senators: Hear, hear.

The Chairman: I would also like to express the appreciation of the committee to our Chief Counsel who is sitting right beside me. I think he might like to say a few words to the committee before we adjourn.

Hon. Mr. Phillips: Thank you very much, Mr. Chairman. Firstly, I wish to thank the honourable senators for allowing me to be here to deliberate with them on this bill. Naturally, I will have more to say as we continue our study of the bill.

There is only one observation that I would like to make at this time, and that is that we are considering the draft bill without having the benefit of studying the proposed amendments or the regulations, neither of which have come down as yet. I am not speaking of the regulations that have come down to date, of course, but the ones that we are expecting. I think the Chairman is being skilful in getting a so-called money bill before the Senate committee for consideration while it is still being deliberated on in the other house. We are, however, paying a price, in the sense that we are dealing with a draft bill only rather than a bill that has gone through the other house. We are not really dealing with the proposed bill in its final form.

I cannot understand the logic of the Government in having the Committee of the Whole consider the bill without the amendments being brought down in total. I am told, as I am sure other gentlemen have been told, that it is proposed to bring the amendments down as each new section of the bill is passed. It appears to me, and I put this to you gentlemen for consideration, that it would be desirable to have a message conveyed to the other place, through the Leader of the Government in the Senate, stating that this house through its committee is considering the bill and it expresses the view that it would be highly desirable that all of the proposed amendments to the bill be brought down in the other house immediately so that the public of Canada and the legislative body here can consider the entire bill in a little more intelligent fashion than we are able to do now.

The Chairman: There would be a benefit to the Commons members also.

Hon. Mr. Phillips: Yes, it would be a benefit to the House of Commons as well.

I think that we ought to crystalize that, if I may suggest, Mr. Chairman, and if honourable senators agree, in the form of a conclusion of this committee that the Leader of the Government be asked to convey that point of view to the Minister of Finance or, for that matter, to the Prime Minister himself, because I think it is a matter of vital importance in order that we can intelligently study this bill.

Before concluding, Mr. Chairman, I would only like to say that I realize I missed a great deal in not being here yesterday to listen to both Mr. Scace and Mr. Smith. However, they have presented it brilliantly thus far, and it is a promise of what is to come.

Generally speaking, tax lawyers studying a bill are frightened by it. Someone asked me what I thought of the bill and I said it was an avalanche of words juxtaposed to other words that produced unintelligible phrases which, juxtaposed to other unintelligible phrases, produced incomprehensible sentences, and I said only God himself could define its meaning, and, leaving blasphemy aside, I was not even sure about that. I will admit that that is a little bit of literary indulgence.

The Chairman: Hyperbole.

Hon. Mr. Phillips: Yes. It is true, however, that if you study the bill carefully, broadly speaking, there is considerable merit in some of it.

The Chairman: And benefit.

Hon. Mr. Phillips: But you have to go back and attack it and attack it and attack it, until the words begin to have some meaning. In the early stages only the younger men seemed to have the physical and mental fortitude to keep on reading and re-reading it. Those of us of an older generation find it a little harder to go back to the attack, but I suppose what we lose in fortitude we gain in experience and we will catch up with them in understanding the bill.

I look forward, Mr. Chairman and honourable senators, to working with you on this bill.

Senator Macnaughton: Mr. Chairman, before we adjourn, should we not have a motion from the floor to instruct you, the chairman of this committee, to advise the Leader of the Government in the Senate along the lines outlined by the Honourable Mr. Phillips?

The Chairman: If there is such a motion, I will be glad to act on it.

Senator Macnaughton: It is so moved.

Senator Beaubien: I second it.

Hon. Senators: Agreed.

Senator Connolly: We discussed this yesterday, Mr. Chairman, and, of course, it is unusual for us to be sitting here in this fashion, according to parliamentary practice. Now this is a further departure from parliamentary practice. I think it is a desirable one, though, from the point of view not only of this committee but, indeed, of the people who have to consider this bill in the Committee of the Whole in the other place.

The Chairman: Yes, but a request is never out of order, senator.

Senator Connolly: That is right.

The Chairman: And whether the request comes from the Senate to the Government or from another source, it is a part of the function of the Government to deal with requests relating to the laws of the country and certain requests relating to the convenience of the general public. It is not just a matter of convenience to the Senate or to

the members of this committee, but it is also a matter of convenience to the general public in order for them to know what the whole thing is going to encompass and what the interpretations are going to be as reflected in the amendments. It will also be beneficial to the members of the other place in their deliberations. I am not embarrassed by the fact that a Senate committee would request that consideration be given to this. We are not passing an order or anything like that.

Senator Connolly: On top of that, I think too that we have used a parliamentary process here that does not stick to the dead letter of the law. In other words, we did not wait until the bill came to us from the other place. The dead letter of the law states that we cannot have these amendments, but if you are going to stick to the dead letter of the law all the time you are not going to have Parliament operating as efficiently as it should.

The Chairman: I do not think there is any dead letter of the law involved here. Parliament makes the rules and it can change the rules and procedures. Certainly the practice in the past may have been that when there are amendments they are usually proposed when you are considering the particular section in the committee as a whole, but I am sure if you went back and analyzed you might find situations where, for various purposes, some indication of the nature of amendments to be proposed has come forth. This has even occurred on second reading.

Senator Macnaughton: Mr. Chairman, we are simply asking that the ordinary parliamentary procedure or precedent be followed. It is as simple as that. There is a tendency now to get away from past parliamentary procedure, and I am not at all sure that it is a wise thing. It is certainly not in the interest of and for the protection of the ordinary taxpayer or the ordinary citizen.

The Chairman: It is not in the interest of the public, and that is whom we are here to serve.

The committee adjourned.

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